ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016864
Case Name	Curt McCloughan v. Ameren
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0314
Number of Pages of Decision	23
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	John Kafoury

DATE FILED: 7/1/2024

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CURT McCLOUGHAN,

Petitioner,

vs. NO: 19 WC 016864

AMEREN,

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 vocational rehabilitation and maintenance, 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 only writes to provide additional analysis. 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 (1980).

On February 9, 2022, Dr. Greatting placed Petitioner at MMI and issued permanent restrictions. Respondent then disclosed the report of its Section 12 IME physician, Dr. Crandall, to Petitioner's attorney on February 18, 2022. As stipulated by the parties, Respondent refused to provide vocational rehabilitation based on Dr. Crandall's opinion that Petitioner could return to work full duty without restrictions. Within days of receiving that IME report, Petitioner's attorney retained David Patsavas to perform a vocational assessment. Mr. Patsavas interviewed Petitioner on March 1, 2022, and prepared a vocational rehabilitation plan which he completed on May 5, 2022. David Patsavas did not meet with Petitioner until September 6, 2022, at which time Petitioner received his initial training on using a computer at a local public library. David Patsavas advised Petitioner he was "responsible for documenting between 10-15 (due to geographic

location) employer contacts per week." Petitioner was also to provide copies of his employer contact log sheets to his office on a weekly basis. Mr. Patsavas assigned a job development coordinator to meet with and help Petitioner complete online job applications at the library.

Prior to the first computer training meeting on September 6, 2022, Petitioner did not conduct a job search. Following that first training session, Petitioner put forth minimal effort in finding employment as he primarily relied on the vocational counselors to apply for jobs on his behalf. Petitioner failed to produce any job search logs and David Patsavas confirmed that no job search logs existed. Petitioner was also advised that the job search process required a full-time effort; however, he rarely visited the library on his own to use a computer. His job searching activity was essentially confined to intermittent library visits when scheduled to meet with a vocational counselor. Not surprisingly, the attempted job search program instituted by David Patsavas failed to produce any job offers.

Respondent had also provided alternative options to Petitioner which included potential re-employment. Upon receiving the permanent restrictions, Respondent initiated a labor relations meeting with Petitioner to discuss those options. That meeting took place on March 3, 2022. Respondent agreed that the permanent restrictions precluded Petitioner from performing the essential functions of his job as a Journeyman Gas Service worker. Respondent provided Petitioner with five options and outlined those options in a confirming letter to Petitioner on March 8, 2022. The options included the following:

1. If Petitioner's condition changed and he could perform the essential functions of the Journeyman Gas Service Position, with or without reasonable accommodation, Petitioner could submit medical documentation and potentially return to his position.

2. Apply for Ameren's Long Term Disability Benefits.

3. Retirement.

4. Bid/transfer or apply for a new position within the permanent restrictions with or without reasonable accommodation.

5. Canvassing Option. This included alerting Petitioner to job vacancies in which he met the minimum qualifications and which he could perform with or without reasonable accommodation, in line with his preferred work location/area. The duration for this option was 90 days.

During the labor relations meeting, the Respondent's representatives were purportedly unaware of Dr. Crandall's IME report or that Dr. Crandall had opined that Petitioner could work full duty.

Petitioner elected to apply for long-term disability benefits. While collecting his benefits, Petitioner retained the option to bid or apply for a different position within his restrictions. Petitioner agreed that as far as he knew, the option to bid or transfer within the company was still

available at the time of trial. Petitioner did not, however, avail himself of those options. Petitioner testified he was prevented from using Respondent's computer center due to its closure during the Covid pandemic; however, as noted by the Arbitrator, Petitioner failed to discuss these options with David Patsavas. Mr. Patsavas and his assisting vocational counselor arranged for online job searching at the public library since Petitioner did not own a computer and Petitioner could have utilized the bid/transfer option as well as the Respondent's canvassing option with their help and training had he been motivated to do so.

Petitioner also testified he intended to retire when he reaches age 66-1/2. Petitioner testified to the significance of that age when he referenced receipt of a letter from Social Security. As Petitioner was born in 1957, he will be entitled to his full Social Security retirement benefit at age 66-1/2. At the time of the hearing on December 7, 2022, Petitioner was only twelve days away from his 65th birthday on December 19, 2022. As such, Petitioner's request for vocational rehabilitation essentially sought to have Respondent underwrite the expense of vocational rehabilitation knowing he will be retiring in in June 2024.

The Commission finds Petitioner failed to conduct a job search between February 9, 2022, the date Dr. Greatting issued permanent restrictions, and September 6, 2022, the date Petitioner received his first computer training session. This represents a period of 30 weeks with no job search effort. In his Statement of Exceptions, Petitioner's attorney conceded that Petitioner could only collect maintenance, if awarded, for the period he was actually participating in a job search program. As such, Petitioner seeks maintenance commencing with the first computer training session on September 6, 2022. The Commission finds, however, that Petitioner failed to put forth a good faith job search effort after his initial computer training session. The Commission thus finds Petitioner failed to prove entitlement to maintenance benefits.

The Commission further finds that Petitioner failed to prove entitlement to vocational rehabilitation. Petitioner's failure to utilize Respondent's internal employment search options, coupled with his failure to put forth a good faith job search effort, amounted to a voluntary removal from the workforce following the labor relations meeting on March 3, 2022. In *Schoon vs. Industrial Comm'n*, 259 Ill. App. 3d 587, 630 N.E.2d 1341 (1994), the Court expressed the following pertinent to this issue:

> It is widely accepted that the primary goal of rehabilitation is to return the injured employee to work. (citation omitted) Simply stated, the evidence shows that the claimant did not want to return to work. Effort to rehabilitate the claimant is not logical. *Schoon*, 259 Ill. App. 3rd at 594.

Additionally, when determining whether vocational rehabilitation is appropriate, the Commission must consider the "relative costs and benefits to be derived from a vocational rehabilitation program." Another factor is work-life expectancy. Given Petitioner's age and planned retirement, these two factors combined weigh heavily against vocational rehabilitation in this matter. *National Tea Co. v. Industrial Comm'n*., 97 Ill. 2d 424, 432-433, 454 N.E.2d 672, 676 (1983). The Commission agrees with the Arbitrator's denial of vocational rehabilitation.

IT IS THEREFORE ORDERED BY THE COMMISSION Petitioner is not entitled to maintenance as a result of the accident of February 11, 2018 for the period claimed by Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner has not proved he is entitled to vocational rehabilitation as a result of his injuries incurred in the accident of February 11, 2018. 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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 1, 2024

KAD/swj
O 5/7/24
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

DISSENT

I respectfully dissent from the opinion of the majority and would partially reverse the Decision of the Arbitrator. While I agree with the majority's conclusion that additional vocational rehabilitation is not warranted in this case, I disagree with the majority's denial of maintenance benefits. After carefully considering the totality of the evidence, I believe Petitioner met his burden

of an entitlement to maintenance benefits from February 15, 2022, through December 7, 2022, the date of hearing.

Prior to the work accident, Petitioner worked for Respondent as a journeyman pipefitter for 27 years. On February 14, 2022, Dr. Greatting prescribed Petitioner extensive permanent work restrictions. PX3. It is clear that these permanent restrictions prevented Petitioner from performing many of his job duties as a pipefitter. On March 8, 2022, Respondent wrote a letter to Petitioner stating, "There is no dispute that your restrictions prohibit you from performing the essential functions of the Journeyman Gas Serv position and that no reasonable accommodation exists that would allow you to do so." RX3. Furthermore, on May 30, 2022, Dr. O'Hara, Respondent's Section 12 Examiner, opined that Petitioner could no longer perform the essential functions of his job as a journeyman pipefitter. PX5.

Pursuant to Section 9110.10(a) of the IWCC Administrative Rules, a vocational rehabilitation assessment is required when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of the injury. *See CDW Corp. v. Ill. Workers' Comp. Comm'n*, 2021 IL App (2d) 200562WC-U. Respondent never provided this required vocational assessment. However, on May 5, 2022, Mr. Patsavas provided a vocational assessment pursuant to Petitioner's request. As the vocational assessment is required and Mr. Patsavas provided the only assessment, I believe Respondent should be liable for the payment of any expenses related to Mr. Patsavas' vocational assessment.

Finally, an employer must pay maintenance benefits while a claimant engages in vocational rehabilitation. *See, e.g., W.B. Olson, Inc. v. Ill. Workers' Comp. Comm'n*, 2012 IL App (1st) 113129WC. The credible evidence shows that Petitioner engaged in vocational rehabilitation for approximately 10 months. Mr. Patsavas testified credibly that Petitioner was fully compliant with the vocational rehabilitation plan. T. 71. As such, the Commission should have awarded maintenance benefits from February 15, 2022, through December 7, 2022, a period of 42-2/7 weeks.

For the forgoing reasons, I would partially reverse the Decision of the Arbitrator. The credible evidence proves Petitioner met his burden of proving an entitlement to maintenance benefits.

/s/ Amylee H. Simonovich
Amylee H. Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

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Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	John Kafoury

DATE FILED: 2/15/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 15, 2023 4.84%

/s/ Dennis OBrien, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF)

☐ 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)

Curt McCloughan
Employee/Petitioner

v.

Ameren
Employer/Respondent

Case # **19** WC **016864**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Quincy**, on **December 7, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 11, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**75,816.00**; the average weekly wage was $**1,458.00**.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**$23,735.00 (self-funded LTD benefits), $742.91 (representing 2/3 of $1,114.37 wages paid) and $7,698.13 (representing 2/3 of vacation paid)** for other benefits, for a total credit of $**32,176.04**.

Respondent is entitled to a credit of $**32,176.04** under Section 8(j) of the Act.

ORDER

Petitioner has not proved he is entitled to vocational rehabilitation as a result of his injuries incurred in the accident of February 11, 2018.

Petitioner is not entitled to maintenance as a result of the accident of February 11, 2018 for the period claimed by Petitioner.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for 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 15, 2023

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT

TESTIMONY AT ARBITRATION

PETITIONER

Petitioner testified that at the time of Arbitration, he was 64 years of age, and he was not, as of the date of arbitration employed. He had previously been employed by Respondent as a journeyman pipefitter, responding to gas leaks, carbon monoxide call, replacing meters, turning the gas on and lighting appliances after customers paid their bills, and responding to hit gas services and mains. He said he was an employee of Respondent for 27 years. Petitioner testified that he is currently on long-term disability through the Respondent's long-term disability plan.

Petitioner testified that subsequent to a previous arbitration hearing in this case he underwent surgeries for left cubital tunnel, left carpal tunnel, and left carpometacarpal joint arthritis. Petitioner testified that a few days later he underwent surgeries on his right side. Petitioner testified that his treating physician was Dr. Greatting. He said he did well on the right side after the surgeries, but he had problems with his left arm, he had a second EMG resulting in a recurrent left cubital tunnel surgery on August 17, 2021. He said that did not resolve his issues with the arm. Petitioner testified he also underwent physical therapy and work hardening, but those treatments also did not resolve his issues. He said he continues to have numbness on the back of his left hand and a constant ache in his left elbow, that he cannot set it on a hard surface without it feeling like he had hit his funny bone. He said he had not improved since February 9, 2022, when he last saw Dr. Greatting.

Petitioner testified that in his opinion he is not able to do his prior job as a pipefitter.

Petitioner testified going for an examination with Dr. Crandall in the St. Louis area at the request of the Respondent. Petitioner testified that he was also seen by Dr. O'Hara, an occupational health doctor, through the Respondent's long-term disability program on May 30, 2022.

Petitioner testified that he started vocational rehabilitation on or about May 5, 2022, with Mr. Patsavas, at the request of his attorney. He testified that he is looking for work through vocational rehabilitation, doing everything Mr. Pasavas asked him to do. Petitioner testified that he is not "computer savvy," he had one in his work truck and he knew how to do his job, but he has no computer at his home. He said all job searches and applications are now done online, that Mr. Patsavas had helped him with that activity and they would go to the library to use the computers there.

Petitioner testified that in March 2022 he had a labor relations teleconference with his employer, and at that meeting he was given the options of applying for long-term disability or finding another job with Respondent within 90 days. He said that involved searching their website, and while he could normally use the computers in the lobby of the service center and get assistance there to do it, this occurred during Covid and he was not allowed to use the service center. HE said employment was not guaranteed if he applied, and Petitioner testified that he chose the option of applying for long-term disability. Petitioner testified that he could not go to the service center with Respondent to use a computer because of "COVID", and the service center being not

available. Petitioner testified that he knew of no jobs with Respondent that would have paid him his regular pay scale in his region. Petitioner did testify that present at the conference call labor relations meeting were Respondent's Labor Relations Supervisor, an HR person from the Respondent, Petitioner's direct supervisor, Petitioner's Union representative, and himself. He said his attorney attempted to take part in the call but was not allowed to do so. He said no actual job offer was made to him at this meeting, he was just given the option to apply for a new job on the company's website.

Petitioner testified that as part of the long-term disability application, he was seen by Dr. O'Hara, an occupational health doctor, for an independent medical exam. Petitioner testified that eventually he received long-term disability. Petitioner said long-term disability lasted for a maximum of two years. Petitioner testified that during this time period, he may apply for other jobs with Respondent but there is no guarantee of acceptance. Petitioner testified that to date, he has not been offered any other jobs by Respondent.

Petitioner said that he worked with Mr. Patsavas or his assistant to look for jobs, but he had not gotten any interviews.

Petitioner testified that as of the date of arbitration his right arm was doing fine, but he was left-handed, and his left arm, while better than it was prior to surgery, still had problems. He said it was unchanged since the last time he was seen by Dr. Greatting.

On cross-examination, Petitioner testified that before the work incident, he was making $36.45 per hour. Petitioner testified that his position was gas journeyman / pipefitter. Petitioner testified that he is currently 64 years of age and in a few days will be 65 years of age. Petitioner testified that he has a high school degree. Petitioner also testified that he was one semester away from receiving a college degree in electrical technology. Petitioner also testified that he served in the Navy and received electrical technology training.

Petitioner noted that Dr. Greatting had to do a redo of one of his surgeries and had kept him off work for approximately one year, from February 2021 to February 2022, at which time he gave him permanent restrictions.

Petitioner testified that he was seen by Dr. Crandall for a Section 12 Exam at the request of the Respondent on February 1, 2022. The parties stipulated during the hearing that Dr. Crandall's report was provided to the Petitioner's attorney on February 18, 2022. The parties also stipulated during the hearing that Petitioner was aware that vocational rehabilitation was being denied by Respondent upon receiving Dr. Crandall's report. Petitioner also testified that he was not aware that Dr. Crandall had given him a full duty work release as of February 1, 2022.

Petitioner agreed that he participated in a virtual / phone labor relations meeting on March 3, 2022. Petitioner testified that present during the meeting were Theresa Koshinski, Labor Relations Supervisor for Respondent, Laura Miller, HR representative for Respondent, Mike Pawelczak, Petitioner's direct supervisor, Tony Cook, Petitioner's Union representative, and himself. Petitioner advised that the only medical report that he provided for the labor relations meeting was the permanent restrictions report of Dr. Greatting. Petitioner testified that he did not provide the labor relations participants with a copy of Dr. Crandall's full duty report, he said they had everything. Petitioner agreed that Dr. Greatting's restrictions prohibited him from performing the essential functions of a journeyman / gas service position. Petitioner testified and agreed that he was provided

with five options during the labor relations meeting, including if his condition changed that he could provide medical documentation to show that he could perform the essential functions of his prior job and potentially return to his position, applying for Respondent's long-term disability benefit, electing to retire from the company, bid / transfer or apply for a position with essential functions that were within his permanent restrictions, and a job "canvassing option" through the Respondent which would alert Petitioner to possible job vacancies which would be in line with his work restrictions. The canvassing option would be over a period of 90 days, and Petitioner would receive the assistance and joint efforts of the Respondent while participating in the canvassing process.

Petitioner testified that he chose the long-term disability option. He said his boss was indicating that the might be able to find him another job in the company, but that it would have been nonunion, and that if he took a company job, it would effect his pension. He said he never called the company and said he would like to reconsider the option that would have allowed him to bid on other positions within Respondent.

On redirect examination, Petitioner testified that he was always planning on retiring at the age of 66.5 years of age. He said if he took a company position it would change how his pension was structured, that instead of getting monthly checks until he died he would get a lump sum payment based on his years with the company. He thought the monthly check would be more beneficial to him. He said he understood that if he took a job with the company his long term disability would stop.

Petitioner said the skills he learned in college in the early 1980s would not qualify him to do electronic work based on the lapse in time, that he barely remembered any of it, and electronic technology had changed in 37 years. Petitioner testified that he has a flip phone and not a smartphone.

On recross-examination, Petitioner testified that he was 64 years of age on the arbitration date but would be 65 years of age in less than two weeks, and that it was his intention, "no matter what," to retire at 66 ½ years of age. Petitioner was not aware that throughout 2022 vocational rehabilitation had been denied by Respondent. Respondent's counsel stipulated it had been so denied, based on Dr. Crandall's opinion that Petitioner could return to work full duty, which had been received by Petitioner's attorney on February 18, 2022.

DAVID PATSAVAS

Mr. Patsavas was called as a witness for Petitioner. He testified that he was a certified rehabilitation counselor. He said he first met with Petitioner on March 1, 2022 with an initial report of May 5, 2022, and seven additional meeting between either Mr. Patsavas or another vocational counselor of the company and Petitioner thereafter. He described Petitioner's ability to find new work as "in the bottom of the food chain," as he had no computer skills and a work history as a pipefitter for the past 35 years. He said Petitioner had very limited transferable skills. He said an analysis of Petitioner's job description revealed Petitioner could not perform his old job with the restrictions placed on him by Dr. Greatting.

Mr. Patsavas testified that he really did not start working with Petitioner doing a formal job search until September of 2022, as that was when Petitioner's counsel's office gave them authorization to do so. He said he or someone from his office then met with Petitioner on seven occasions, each meeting being at a public library, to utilize the library computers. His office applied for everything online for Petitioner as well as any

correspondence which was required, and developing a resume. He felt Petitioner had been compliant in their work. Mr. Patsavas said Petitioner's limited computer skills definitely had an impact on his ability to find new employment, his keyboarding is "hunt and peck." He said if Petitioner were younger they might have searched at Parkland Community College for basic computer training. He said Petitioner's electronics training and college electronics training in the 1980s did not constitute transferable job skills, as training ten or fifteen years earlier was considered obsolete.

Mr. Patsavas said Petitioner met the qualifications for vocational rehabilitation as he had lost access to his normal, customary duties, but that his prognosis for finding work was guarded because of his age and lack of transferrable job skills. For earning capacity he said Petitioner as of January 1, 2023 would be between $13.00 and $16.00 per hour, if he found employment.

On cross-examination, Mr. Patsavas said he was aware of the National Tea case including consideration of relative costs and benefits to be derived, evidence that vocational rehabilitation would increase earning capacity, and whether the employee is trainable due to his age. He agreed that he was first contacted by Petitioner's attorney on February 24, 2022, and that ten months later, on the date of arbitration, Petitioner had not had any job offers. He agreed that Petitioner did not have a stack of job search logs, done on a weekly basis, as the vocational counselors did all of the internet and website work due to Petitioner's lack of computer skills. He said he did tell Petitioner in March 2022 that he was expected to put forth a full-time effort in job seeking to obtain full-time employment, and he told him at that time to document all of his job search activities on employer log sheets, but as of the date of arbitration there were no such log sheets. He said he was aware Petitioner was about to turn 65 years of age, but he was not aware Petitioner intended to retire at the age of 66 ½.

He testified that he helped Petitioner put together a resume, and that in that resume, it was noted that Petitioner had "excellent technical and decision-making abilities…ability to assess complex situations and problem-solve for efficient resolution…adept at juggling multiple tasks simultaneously, prioritizing with sense of urgency and meeting times / sensitive deadlines…comfortable working within precise limits or standards of accuracy, including direct experience working under pressure and responding to critical situations." Mr. Patsavas also testified that Petitioner had experience in "reviewing blueprints and plans in sequence to avoid obstructions." And had, in the past, been responsible for "maintaining safety standards and efficiency in solutions."

Mr. Patsavas testified that he met in person with Petitioner for the first time on March 1, 2022, but it took two months to render his first report of May 5, 2022, and when asked why it took so long, he said, "(w)ell, sometimes I have trouble getting records, so probably requesting records" could be the reason. Mr. Patsavas testified that through the date of arbitration, he had not received any reports from Dr. Crandall, was not aware of any reports from or opinions rendered by Dr. Crandall, and had not known physician had performed an examination of Petitioner. He said he therefore was not aware that on February 1, 2022 Dr. Crandall had opined that Petitioner could return to work full time, full duties, with no restrictions, that he had only been aware of the restrictions of Dr. Greatting dated February 9, 2022. Mr. Patsavas said he was aware that Petitioner had not undergone a functional capacity evaluation. Mr. Patsavas testified that in his professional opinion Petitioner was not a candidate for any additional education or training. Mr. Patsavas testified that Petitioner advised him

on November 15, 2022, that Petitioner did not want to go forward with an application for a job opening with Sangamon County Sheriff's Office, citing an incident in which Petitioner was involved with local police that resulted in a lawsuit being filed against the police by Petitioner.

Mr. Patsavas testified that he was not aware that there was a labor relations meeting on March 3, 2022, in which Petitioner was provided with five options for employment which included Respondent assisted job canvassing and the potential to bid / transfer for other jobs within his restrictions. Mr. Patsavas was also unaware that one of the options was applying for long-term disability in which Petitioner would remain an employee of Respondent, receive long-term disability benefits, and Petitioner could still seek other jobs within his restrictions with Respondent.

On redirect examination Mr. Patsavas said that had he had Dr. Crandall's opinions, the method of his vocational rehabilitation program would not have changed. He said that he would not object to Petitioner searching for jobs within Ameren if postings were available, though during his searing for jobs he had not seen any available postings with Respondent within Petitioner's restrictions. He said it was still his opinion that Petitioner was a candidate for vocational rehabilitation.

THERESA KOSHINSKI

Ms. Koshinski was called as a witness for Respondent. She testified that she is Labor Relations Supervisor for Respondent, having been employed by Respondent for 26 years. Ms. Koshinski specifically testified that Ameren is a large corporation with many different departments. Ms. Koshinski testified that she is not in the workers' compensation department, not in the long-term disability department, and not in the human resources department. Ms. Koshinski testified that her job duties deal with labor relations. In this circumstance Ms. Koshinski was involved as part of the labor relations meeting with the Petitioner on March 3, 2022. Ms. Koshinski testified that the entire labor relations process started as a result of Petitioner bringing forth a permanent work restriction note from Dr. Greatting. The permanent restriction note brought by Petitioner to Respondent initiated a labor relations meeting pursuant to the collective bargaining agreement set between the Union and the Respondent. Ms. Koshinski testified that there was a virtual meeting conducted on March 3, 2022. Ms. Koshinski also confirmed that those in attendance were Laura Miller, HR representative from Ameren, Mike Pawelczak, Petitioner's direct supervisor, Tony Cook, Petitioner's Union representative, Petitioner, and herself. Ms. Koshinski testified that the permanent restrictions of Dr. Greatting were discussed at the meeting. Ms. Koshinski agreed that there was no dispute that those restrictions prohibited the Petitioner from performing the essential functions of his journeyman / gas service position. Ms. Koshinski testified that at no point during the virtual meeting, nor before or after close, did Petitioner provide her or anyone at the meeting with a copy of Dr. Crandall's return to work full duty report from February 1, 2022. Ms. Koshinski testified that the meeting was necessitated solely by Petitioner bringing forth permanent medical restrictions. Ms. Koshinski testified that if Petitioner had brought forth the opinion of Dr. Crandall, that there would have been no need for a meeting, and the Petitioner would have returned to his regular job duties. Ms. Koshinski testified that because they were presented solely with restrictions from Dr. Greatting that the Petitioner still had five options available to him regarding his employment with Respondent. Ms. Koshinski then went into detail regarding the five employment options that were discussed with Petitioner during the meeting. These options as

discussed above during Petitioner's testimony included presenting medical documentation to show that essential functions of the prior job could be performed, applying for long-term disability, electing to retire from the Respondent, bidding and / or transferring to apply for another position with the Respondent within Petitioner's restrictions, and a 90-day canvassing option with the assistance of the Respondent in which to find open jobs within his restrictions with the Respondent. Petitioner was advised to let them know by March 14 if he wished to elect the canvassing option, and he turned down that option.

Ms. Koshinski testified that ultimately the Petitioner chose the option of long-term disability. Ms. Koshinski testified that as part of the long-term disability application process, Petitioner was seen by Dr. O'Hara. Ms. Koshinski testified that ultimately Petitioner was approved for long-term disability. Ms. Koshinski testified that as part of the long-term disability program with Respondent, that Petitioner remains an employee of Respondent, and that the Petitioner will receive long-term disability benefits for two years. Ms. Koshinski also testified that during the period of long-term disability benefits, the Petitioner may still apply and potentially receive jobs within the bidding / transfer process with the Respondent. She said no one from Labor Relations or from Respondent ever stopped or prohibited Petitioner from doing a bid or transfer option, it was still open to him as of the date of arbitration, even though he was on long-term disability, he would just have to apply and fit the essential functions of the job.

On cross-examination, Ms. Koshinski testified that if at the labor relations meeting Petitioner would have put forth the opinions of Dr. Greatting and the opinions of Dr. Crandall, that Respondent's HR department likely would have had to have further discussions into the employment process. She noted that while job postings are on the internet, there are internal postings as well as external postings of jobs. Ms. Koshinski said she was not aware of Petitioner being offered any jobs by Respondent, but that would have been through the canvassing option which was the HR department, not her department.

CHRISTOPHER NELSON

Mr. Nelson was called as a witness for Respondent. He testified that he was a private investigator with Photofax Inc., with job duties of performing surveillance and taking films of claimants. He said he was assigned to investigate Petitioner, was given his age, height, and address and while performing his work only one person he observed matched that description. He identified Petitioner as that person. He identified Respondent's Exhibit 4, as reports of Photofax surveillance of Petitioner's physical activity for the dates of October 13, 14, 15, 27, 28 and 29, 2022 and of November 3, 4, 6 and 11, 2022, and Respondent's Exhibit 5, a DVD of video of Petitioner's physical activity as documented in those reports. He testified the video showed Petitioner as he Petitioner walked to and from his vehicle, carrying packages of beer, and on one occasion, with the assistance of another man, carrying a large, backyard-type trampoline, which, in his opinion, exceeded Petitioner's 30 pound lifting restriction.

On cross examination Mr. Nelson stated that the video showed Petitioner carrying a case of beer in his right arm in the October 13 through 15 videos. He said he did not believe a case of beer exceeded 30 pounds. He said he did not see Petitioner blatantly breaking his restrictions on those dates. He said he did see Petitioner looking for jobs and filling out applications in what was shown on those videos.

Mr. Nelson said that during his observing of Petitioner from October 27 through 29, he saw him again carry beer, again with his right hand, get mail from his mailbox, and work on the computer at the library. He said he did not observe him breaking his restrictions on those dates.

Mr. Nelson said that while observing Petitioner from November 3 through 11 he saw him filling out applications and carrying beer with his right hand again. He also saw him carrying what appeared to be a large metal framed trampoline with two other gentlemen, for a short distance, perhaps a few feet. He said that would have been the only time he saw Petitioner exceed his restrictions. He said he understood the restrictions to be 30 pounds, he did not know if they were in fact 45 pounds from floor to waist, or if the restriction was for doing it on a regular basis.

MEDICAL EVIDENCE

A previous hearing was held in this case on September 30, 2020, and the December 2, 2020 19(b) Decision of Arbitrator Lee included a summary of medical testing and treatment through that date and ordered Respondent to authorize and pay for perspective medical treatment, including but not limited to, bilateral carpal tunnel syndrome, bilateral cubital tunnel, bilateral CMC joint injections, as proposed by Dr. Greatting. (PX 1). The previous medical testing and treatment summary of Arbitrator Lee is incorporated herein by reference.

Subsequent to the September 30, 2020 hearing, Petitioner was seen by Dr. Greatting on February 4, 2021, with continued bilateral hand and arm complaints, and it was decided on that date to proceed with surgeries. Dr. Greatting on February 19, 2021 performed a surgical release of the ulnar nerve left elbow, a surgical release left carpal tunnel syndrome, and injection to the left thumb carpometacarpal joint. When seen on March 3, 2021 Petitioner advised Nurse Practitioner (NP) Naughton that his left hand numbness and tingling was resolving. It was noted that Petitioner would not be able to work until April 1, 2021. On March 19, 2021, Dr. Greatting performed right cubital tunnel release, right carpal tunnel release, and an injection right thumb carpometacarpal joint. Petitioner saw Dr. Greatting on April 1, 2021 and while he had good strength bilaterally in his hands, a new condition was noted, Dupuytren's nodules in the palm of his left hand at the base of the middle and ring fingers. Dr. Greatting advised Petitioner that while Petitioner had not noticed the Dupuytren's nodules until after his surgery, it would be very unlikely that they had developed in the four weeks since his left hand surgery, and they would just be observed. Petitioner was advised to remain off work until reevaluated in a month. A more specific work restriction form was filled out that day noting Petitioner was not to lift over 10 pounds with either arm and do no forceful or repetitive gripping, pushing or pulling with either arm. (PX 2 p.19,23-25,28-31,34)

On May 24, 2021 Petitioner complained to Dr. Greatting of recurrent ulnar nerve symptoms on the left, and was found to have a markedly positive Tinel's over the ulnar nerve at the left elbow. Dr. Greatting was of the opinion Petitioner had a subluxing ulnar nerve at that elbow and might require a transposition of the nerve. He noted Petitioner was unable to work at that time. EMG/NCV testing was performed by Dr. Gelber on June 17, 2021 and found mild left carpal and cubital tunnels. Dr. Greatting thereafter scheduled the left ulnar nerve transposition, continued to restrict Petitioner from work, and, on August 17, 2022, he performed that surgery for recurrent left cubital tunnel syndrome. Petitioner advised Dr. Greatting on August 30, 2021 that his numbness and tingling had improved, but Dr. Greatting continued to restrict his work while he was recovering from the

surgery. When next seen on October 6, 2021 Petitioner was noting significant pain in his left elbow, saying it was difficult to lay his elbow on a hard surface. He was again complaining of some numbness and tingling on the ulnar side of his left hand and in the ring and small fingers of that hand. He was found to have a positive Tinel's over the transposed ulnar nerve and diminished sensation to light touch on the dorsal ulnar side of the hand, though he had excellent motor strength in the ulnar nerve distribution. He continued to keep Petitioner off work and he was to get occupational therapy for range of motion and strength. He was to wear an elbow pad to prevent symptoms from pressure on the area. Petitioner was found to have a continuing positive Tinel's over the ulnar nerve in the area of the transposition when seen by Dr. Greatting on November 3, 2021. The doctor told Petitioner at that time that he wa likely to have some permanent ongoing symptoms in the left arm that were not going to resolve. Dr. Greatting kept him off work and scheduled work hardening for four to six weeks. Petitioner's complaints and physical examinations were essentially the same when he saw Dr. Greatting on December 22, 2021, but he was also complaining of left shoulder pain. He again was restricted from work. (PX 2 p.35,39,41,42,46-49,52,60,64)

On February 9, 2022, Dr. Greatting indicated that Petitioner had reached maximum medical improvement, and he felt Petitioner would not be able to return to his previous activities as a journeyman pipe fitter. Dr. Greatting released Petitioner from his care at that time with permanent work restrictions of no lifting more than 45 lbs. below the waist and 25 lbs. from waist to overhead (using both of his upper extremities) on a regular basis, not carrying more than 30 lbs. using both of his upper extremities on a regular basis, permanently restricted from any significant vibration exposure with use of his left upper extremity, and a permanent restriction from doing forceful and repetitive gripping, grasping, pushing and pulling activities with his left upper extremity. (PX 2 p.69)

As part of the labor relations options provided to Petitioner and, in particular, as part of the option of long-term disability option chosen by Petitioner during the labor relations process, Petitioner was examined by Dr. O'Hara on May 30, 2022, and rendered a report. A review of this report indicates Dr. O'Hara was only provided with Dr. Greatting's permanent work restrictions and Petitioner's job description. Dr. O'Hara concluded that Petitioner could not perform the essential functions of Petitioner's prior job. (PX 5 p.1,2)

DEPOSITION TESTIMONY OF DR. MARK GREATTING

Dr. Greatting testified by deposition on June 9, 2022 on behalf of Petitioner. He testified he is a board certified orthopedic surgeon with subspecialty certification in hand surgery. He testified Petitioner's February 19, 2021 surgery on the left side was straightforward, as was the March 19, 2021 surgery on the right side. Post-operatively he was doing well on both until May 24, 2021, when the right side was doing well but Petitioner had complaints about the left side. Dr. Greatting's description of post-operative complaints, testing, and treatment, including a second left elbow nerve transposition surgery, was consistent with the medical summary, above. He noted he kept Petitioner off work during that period of treatment. He said the treatment plan followed helped with range of motion and strength, but did not help much with pain complaints, sensitivity, numbness, and tingling. At two and a half months post-surgery Petitioner's symptoms had not improved, so he felt Petitioner was going to have permanent issues which might not get better. (PX 4 p.7-9,14,15)

Dr. Greatting said he last saw Petitioner on February 9, 2022, at which time Petitioner was still complaining of pain and sensitivity in the left elbow and persistent numbness in the ring and small fingers of the left hand. At that time, he felt Petitioner would require permanent restrictions and would not be able to return to his previous work as a journeyman pipefitter. The restrictions he put on Petitioner were no lifting of greater than 45 pounds from floor to waist, of greater than 25 pounds from waist to overhead, using both arms, no carrying more than 30 pounds using both of his arms, no significant vibration exposure for the left arm, and no forceful repetitive gripping, grasping, pushing or pulling with the left arm. He said these limitations were based upon the work hardening/conditioning facility. He said that while he had not seen Petitioner in four months, he suspected his condition was the same. (PX 4 p.17-20)

On cross examination Dr. Greatting said he had never seen Dr. Crandall's report. He agreed Petitioner had walked in when last seen on February 9, 2022, saying he did not feel he would be able to resume his work activities, and at that time he had good range of motion of the left arm, elbow, wrist and hand, good strength in the ulnar distribution of the left hand, and the therapy note that day noted Petitioner had reached maximum medical improvement. He said he agreed, and he released Petitioner from care that day. He said no functional capacity evaluation had been performed of Petitioner, and he had never seen a job description for Petitioner. (PX 4 p.20-22,25,26)

On redirect examination Dr. Greatting said neither a functional capacity evaluation nor a job description would probably have changed his opinions on restrictions. Upon being shown Dr. Crandall's reports, Dr. Greatting said they did not change his opinions in regard to restrictions. (PX 4 p.27-29)

DEPOSITION TESTIMONY OF DR. RICHARD CRANDALL

Dr. Crandall testified by deposition on July 26, 2022 on behalf of Respondent. Having previously examined Petitioner prior to the earlier hearing, Dr. Crandall testified he initially examined Petitioner on February 6, 2019, and he saw Petitioner again on February 21, 2022, at which time he recorded Petitioner's history and physical examination findings, which were summarized in his report of that dates, subsequently reviewing EMG/NCV results and operative reports received from Respondent's counsel, and issuing supplemental reports reference those records, all of which were attached to his deposition transcript as Exhibit 2. He said it takes a year for nerves to regenerate from the elbow to the fingertips. As of the date he examined Petitioner, Dr. Crandall felt all of the medical treatment Petitioner had received was appropriate, but that he did not require additional surgeries, and he felt Petitioner could return to work, without restrictions, saying Petitioner had normal sensation, good ulnar nerve flexion, strength and motion, and 89 pounds of grip strength, which was sufficient to perform his job duties. (RX 2 p.5-9)

On cross examination Dr. Crandall said he had knowledge of what a pipefitter did, he had reviewed videotape ergonomic analysis of pipefitters for Respondent in the past, had seen the tools they use and the objects they put together. He said his specialized in upper extremity surgery since 1992, from the fingertips to the elbow, he did not do shoulders. He is a board certified plastic surgeon, as plastic surgeons do the hardest cases, as he does microvascular reconstructions, as well as amputations with free flap, cases usually only done by plastic surgeons. He said he currently performs about 400 ulnar nerve and carpal tunnel surgeries a year. He said he has performed re-dos of ulnar transpositions, but they were pretty rare, but he has never imposed

permanent restrictions on an individual with this kind of job for these types of surgical procedures, he did not believe they needed restrictions. He said the recurrence rate for people who return to doing their work following surgery is one percent, they are more likely to develop a new problem than have a recurrence of their prior problem. He said he had never seen a person need a third surgery. (RX 2 p.10,11,15-18 Dep. Exh.1)

Dr. Cantrall said Petitioner did not need restrictions as he had great results from his surgeries, from an excellent surgeon. He said he had done over 10,000 of these surgeries in his career and "virtually all go back to work." He said he could not verify if Petitioner was fully candid and honest about his condition when seen. (RX 2 p.20,21,24)

DOCUMENTARY EVIDENCE

Mr. Patsavas's Rehabilitation Plan was introduced. It's stated goal was to have Petitioner return to full-time, gainful employment within his overall physical capabilities and transferable skills. Mr. Patsavas in that report noted Petitioner was not, in his professional opinion, a candidate of any additional education or training. In that same report it was noted that Petitioner would be requested to document his job search activities by completing employer log sheets. Numerous meetings were held with Petitioner by Mr. Patsavas or members of his company, and numerous job leads are documented as having been given to Petitioner. It appears most of the applications filed were done by the rehabilitation personnel, and several negative results are documented. It does not appear Petitioner ever performed a non-computer-based job search of local businesses, nor is any employer log sheet included in any of the materials introduced into evidence. (PX 6)

Ms. Koshinski's two page letter to Petitioner dated March 8, 2022 outlining the five options being offered by Respondent to Petitioner as a result of their March 3, 2022 virtual meeting was introduced. (RX 3)

Respondent introduced written reports for surveillance performed on ten days from October 13, 2022 through November 11, 2022. A DVD of surveillance video taken on those ten days was introduced. A total of approximately 83 minutes of video is contained on that DVD. A review of the videos on those dates reveals very little physical activity, Petitioner is principally seen standing and talking to other people, walking to and from his car, driving to and from his home and local businesses and library, and meeting with a vocational rehabilitation consultant at the library. He is seen shopping in at least two stores, loading grocery style bags from a cart into his vehicle and unloading his vehicle, taking several trips at times to carry bags into his home. The heaviest objects purchased appeared to be boxes of canned beer, perhaps as large as a case. He used his left hand on numerous occasions to carry items below his waist, including the boxes of beer. On one occasion there is less than 30 seconds of video of Petitioner aiding two other men move a full size trampoline across a yard. Petitioner was holding the trampoline at or slightly above waist level. His portion of the load would appear to exceed 50 pounds. (RX 4; RX 5)

ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner appeared to answer all questions asked of him by both attorneys in a straightforward manner. He appeared to be minimizing his abilities more than seemed accurate, in what appeared to be an attempt to make himself appear incapable of being employed. He did not appear to be motivated to obtain employment,

but seemed to do what was asked of him, no more. While Mr. Patsavas testified he had told Petitioner that looking for a job was his full time job, Petitioner's sole apparent effort to obtain employment was the time he spent at the library, and it did not appear he spent very much time pursuing employment when the vocational consultants were not present and actually doing most of the work themselves. Ten days of video surveillance did not show Petitioner very active at all, including a near-total lack of activity in applying for work. Petitioner did not accept any of the options offered to him by Respondent which would have resulted in his determining if work was available with Respondent, consistent with his testimony that he did not want a non-union job as he preferred weekly retirement checks rather than a lump sum, which is what he would receive had he obtained other employment with Respondent. The Arbitrator finds Petitioner to be a credible witness, albeit one who was interested in receiving long-term disability benefits, not employment.

Both Dr. Greatting and Dr. Crandall appeared to be cooperative witnesses, both answering all questions put to them by the attorneys. While their opinions differed, they both appeared to believe what they said to be true. The Arbitrator finds both Dr. Greatting and Dr. Crandall to be credible witnesses.

CONCLUSIONS OF LAW

In his 19(b) Decision of December 2, 2020 Arbitrator Lee found Petitioner to have suffered an accident which arose out of his employment with Respondent, found that Petitioner's bilateral cubital and carpal tunnel conditions and CMC joint arthritis were contributed to by his employment with Respondent, awarded medical bills, and awarded prospective medical, including bilateral carpal and cubital tunnel surgeries and CMC joint injections.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to vocational rehabilitation and maintenance as a result of the accident of February 11, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, documentary evidence, and deposition testimony, above, are incorporated herein.

The previous findings of fact contained in the December 2, 2020 Decision of Arbitrator, with its findings in regard to accident, causal connection, medical, and prospective medical care, above, are incorporated herein.

Dr. Greatting indicated that the Petitioner reached maximum medical improvement on February 9, 2022. Dr. Greatting provided permanent work restrictions of no lifting more than 45 lbs. floor to waist and 25 lbs. waist overhead using both of his upper extremities on a regular basis, Petitioner should not carry more than 30 lbs. using both of his upper extremities on a regular basis, Petitioner should be permanently restricted from any significant vibration exposure with use of his left upper extremity and that he be permanently restricted from doing forceful and repetitive gripping, grasping, pushing and pulling activities with his left upper extremity. On February 1, 2022, Dr. Crandall provided an opinion that no further treatment was needed, and that Petitioner could return to his work full-time full duty without restrictions.

The parties stipulated that all temporary total disability benefits which were owed had been paid by Respondent. There was no request for additional temporary total disability benefits. Petitioner, however, is making a request for vocational rehabilitation and maintenance benefits to commence as of February 13, 2022.

The Illinois Supreme Court in National Tea Co. vs. Industrial Commission, 97 Ill.2d 424 (1983) set out factors which were to be considered in determining whether vocational rehabilitation was appropriate.

> Generally, a claimant has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. (Citation omitted) Related factors concern a claimant's potential loss of job security due to a compensable injury (citation omitted), and the likelihood that he will be able to obtain employment upon completion of his training. (citation omitted) In contrast, rehabilitation awards have been deemed inappropriate where the claimant unsuccessfully underwent similar treatment in the past (citation omitted); where he received training under a prior rehabilitation program which would enable him to resume employment (citation omitted); where he is not "trainable" due to age, education, training and occupation (citation omitted); and where claimant has sufficient skills to obtain employment without further training or education. (Citation omitted)
>
> Other factors which we consider appropriate are "the relative costs and benefits to be derived from the program, the employee's work-life expectancy, and his ability and motivation to undertake the program, [and] his prospects for recovering work capacity through medical rehabilitation or other means." (Citation omitted) Whether a rehabilitation program should be designed to restore claimant to his pre-injury earning capacity depends upon the particular circumstances. However, as this court suggested in *Hunter*, such a standard should not be inflexibly applied.
>
> We do not mean to imply, by the foregoing discussion, that the Commission should consider only the interests of the employee in determining an appropriate rehabilitation program. Because the employer is required to "underwrite" the expenses attendant to rehabilitation, it is essential that any program selected be reasonable and realistic. Consequently, where rehabilitation is ordered, the Commission should establish boundaries which reasonably confine the employer's responsibility. National Tea Co. vs. Industrial Commission, 97 Ill.2d 424, at 432 (1983)

Petitioner underwent basic and customary surgical procedures for bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome and injections to each thumb. The vocational rehabilitation process in this case was started unilaterally by the Petitioner on February 24, 2022. Petitioner's first meeting with the vocational expert was on March 1, 2022. Nearly ten months later, the vocational rehabilitation process has not brought forth a single job offer, one alleged job interview, and no success whatsoever regarding the progress of the unilateral vocational rehabilitation program. The parties stipulated that Petitioner agreed that vocational rehabilitation was denied as far back as when Petitioner's attorney received the report of Dr. Crandall on February 18, 2022. In addition, no weekly job search logs were presented into evidence by the Petitioner nor by Petitioner's vocational expert, though some responses from prospective employers were summarized in the vocational reports. The unilateral vocational rehabilitation process has gone on for approximately ten months with no positive results or movement forward, despite professional vocational assistance. Petitioner's vocational expert was not aware that another physician, Dr. Crandall, had indicated that the Petitioner could work full-time full duty. The only other evidence of a physician commenting on Petitioner's ability to return to former employment was that of the long-term disability examiner, Dr. O'Hara, and her only finding was that Petitioner was not fit to perform his prior job, not commenting on what, if any, restrictions he should have on an ongoing basis. Petitioner's vocational expert was unaware that Petitioner had a labor relations meeting on March 3, 2022, which detailed several employment options for the Petitioner which included bidding / transferring to another position within his restrictions, the job "canvassing option" assisted by the Respondent for 90 days or submitting medical documentation that would show that the Petitioner could perform the essential functions of his prior job duties. Petitioner's vocational expert therefore made no attempt to assist Petitioner in the canvassing option set out in Respondent's letter to Petitioner, or in searching for available jobs using Respondent's own internal listing of available positions, positions where Petitioner may well have had an advantage in obtaining interviews. Since Petitioner's vocational expert was not aware of the options Petitioner had made available to him by Respondent, he may have been unaware that Petitioner was on long-term disability, and that the long-term disability program includes the fact that the Petitioner is still an employee of the Respondent and is free during the period of long-term disability to bid / transfer to other positions with Respondent. Respondent's video surveillance evidence does not document Petitioner doing anything in violation of Dr. Greatting's restrictions, with the exception of approximately 30 seconds of assistance he provided to two other men moving a trampoline across a yard, an activity which appeared to involve lifting more than 45 pounds at about the waist level, but not at chest level or above the shoulders or head. The restrictions of Dr. Greatting appear to be reasonable, but would be given greater weight if a functional capacity evaluation had been performed to properly quantify Petitioner's capabilities.

Given the fact that unilateral vocational rehabilitation efforts have been going on for ten months with no progress, there appears to be no likelihood of Petitioner obtaining employment upon completion of the program. Petitioner's vocational expert's testimony questions whether the Petitioner is "trainable" due to his age, distance of his past education, training, and occupation. Mr. Patsavas described Petitioner's ability to find new work as "in the bottom of the food chain," as he had no computer skills and a work history only as a pipefitter for the past 35 years. He said Petitioner had very limited transferable skills. Petitioner's involvement in his own job search appears to be minimal, Mr. Patsavas or someone from his office actually applied on Petitioner's behalf for every job sought by Petitioner as well as any correspondence which was required, as well as developed his resume. No job search logs were introduced, despite that requirement being set out in the initial vocational

rehabilitation report. Petitioner is still employed by Respondent and is receiving long-term disability and still can bid / transfer on other positions within his restrictions with Respondent.

Petitioner has made it clear that he intends to retire when he is 66 ½ years of age, so any job he obtained would be for only one-and-a-half years or less duration, making him an even poorer candidate for hire.

The Arbitrator finds that Petitioner is not entitled to vocational rehabilitation or maintenance. This finding is based upon an application of the standards set out in National Tea Co. vs. Industrial Commission, 97 Ill.2d 424, at 432 (1983). Mr. Patsavas's own testimony that Petitioner's ability to find new work is "in the bottom of the food chain," as he had no computer skills and a work history only as a pipefitter for the past 35 years and has very limited transferable skills. There is very little likelihood that Petitioner will be able to obtain employment upon completion of training, or in this case, job search, with Mr. Patsavas testifying that Petitioner's prognosis for finding work was "guarded." Mr. Patsavas also testified that Petitioner was not, in his opinion, a candidate for any additional education or training. Mr. Patsavas did tell Petitioner in March 2022 that he was expected to put forth a full-time effort in job seeking to obtain full-time employment, and he told Petitioner at that time to document all of his job search activities on employer log sheets, but as of the date of arbitration there were no such log sheets. Petitioner chose not to pursue possible work with Respondent despite that option being offered to him, because he did not want the pension method that would have required, had he been successful. Petitioner does not appear to be motivated to succeed at a job search, perhaps because he continues to receive long-term disability benefits from Respondent and because it is his intention to retire approximately one-and-a-half years following the arbitration hearing. Given the self-limited duration of any employment Petitioner might actually obtain, and the high cost of ten fruitless months of what appears to be half-hearted job searching, the relative cost of a job search does not justify the unlikely benefit to be derived from vocational rehabilitation in this case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC032935
Case Name	Abdelouahed Ezzairi v. Sun Financial Services, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0315
Number of Pages of Decision	24
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Taylor Matichak
Respondent Attorney	Deborah Schaefer

DATE FILED: 7/1/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ABDELOUAHED EZZAIRI,

Petitioner,

vs. NO: 14 WC 32935

SUN FINANCIAL SERVICES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following changes incorporated as stated herein.

While the Commission affirms and adopts the Decision of the Arbitrator in its entirety, it emphasizes that, as to the issue of Petitioner's wages, it is standing on the stipulations made on the Request for Hearing form as executed by the parties. Petitioner worked for Respondent for a period of less than 52 weeks before the accident. In such circumstances, §10 of the Illinois Workers' Compensation Act dictates in relevant part: "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.

Respondent's Exhibit 9, a print out of Petitioner's credit card transactions, indicated that Petitioner worked for Respondent from August 5, 2014 through September 16, 2014, which equated to six weeks, and earned a total of $5,855.98 during that time period. Respondent's Exhibit 10, Petitioner's 1099-K from Respondent, also indicated that Petitioner's gross earnings from Respondent for 2014 were $5,855.98. Applying §10's calculation method to the information in Respondent's Exhibits 9 and 10, Petitioner's average weekly wage would be $975.99 ($5,855.98 divided by 6 weeks). However, as the Arbitrator correctly noted, Petitioner stipulated on the Request for Hearing form that his average weekly wage was $794.73.

Pursuant to *Walker v. Industrial Comm'n*, the Request for Hearing form is binding on the parties as to the claims made therein. 345 Ill.App.3d 1084, 1087-1088 (4th Dist. 2004). As such, the Commission stands on and is bound by the stipulation made by Petitioner on the Request for

Hearing from that his average weekly wage was $794.73. The Commission thus affirms and adopts the Arbitrator's finding as to Petitioner's average weekly wage accordingly.

The Commission incorporates its reasoning as stated herein into the Decision of the Arbitrator, and in all other respects, affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that in the year preceding the injury, Petitioner had an average weekly wage of $794.73, as stipulated to by Petitioner on the Request for Hearing form. The Commission otherwise affirms and adopts the Decision of the Arbitrator filed on September 14, 2023.

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,000.00. 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.

July 1, 2024

DLS/mek
O- 5/8/24
46

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC032935
Case Name	Abdelouahed Ezzairi v. Sun Financial Services, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Taylor Matichak
Respondent Attorney	Deborah Schaefer

DATE FILED: 9/14/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 12, 2023 5.30%

/s/ Ana Vazquez, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Abdelouahed Ezzairi
Employee/Petitioner

v.

Sun Financial Services, Inc.
Employer/Respondent

Case # **14** WC **032935**

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **March 14, 2019** and by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the City of Chicago, on **April 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **September 16, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**5,563.17**; the average weekly wage was $**794.73**.

On the date of accident, Petitioner was **30** 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 $**6,888.89** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,888.89**.

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

ORDER

The Arbitrator finds causal connection for Petitioner's neck, low back, and bilateral shoulder conditions of ill-being through February 12, 2015.

Respondent is liable for and shall pay only bills for (1) Petitioner's initial evaluation with Dr. Abdellatif on September 23, 2014 and (2) six weeks of additional physical therapy, as recommended by Dr. Primus on November 21, 2014, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. The Arbitrator finds that all other treatment was excessive and unnecessary, and bills for same are **denied**.

Respondent shall pay to Petitioner temporary total disability benefits of **$529.82/week** for **21 2/7 weeks**, commencing September 17, 2014 through February 12, 2015, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$6,888.89** for TTD benefits paid to Petitioner by Respondent.

Respondent shall pay Petitioner permanent partial disability benefits of **$476.84/week** for **25 weeks**, because the injuries sustained caused **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.

Ana Vazquez

SEPTEMBER 14, 2023

Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to arbitration on March 14, 2019 before Arbitrator Brian Cronin in Chicago, Illinois. Arbitrator's Exhibit ("Ax") 3. The matter was bifurcated, and proofs were closed before Arbitrator Ana Vazquez in Chicago, Illinois on April 4, 2023. The issues in dispute are (1) accident, (2) causal connection, (3) earnings and AWW, (4) liability for unpaid medical bills, (5) temporary total disability ("TTD") benefits, and (6) the nature and extent of the injury. Ax1. All other issues were stipulated. Ax1; Transcript of Proceedings on Arbitration, April 4, 2023 ("Tr.") at 7-8.

FINDINGS OF FACT

Petitioner testified via an interpreter on March 14, 2019. Ax3. Petitioner, however, testified that he understood the questions being asked to him in English and that he communicated with all his treating physicians, except with Dr. Ossama Abdellatif, in English. Ax3 at 47-53.

Duties/Earnings

Petitioner testified that he began leasing a taxicab from Respondent in August 2014. Ax3 at 12. Petitioner testified that he would drive to O'Hare Airport daily, pick up clients, and drive them to downtown Chicago. Ax3 at 13. Petitioner testified that he would have to carry the passengers' luggage and put the luggage in the trunk of the taxicab. Ax3 at 14. Petitioner testified that he would work from 3 a.m. until 8 a.m. and that he earned $300 to $400 dollars. Ax3 at 13. On cross examination, Petitioner testified that he worked from 4 a.m. until 9 a.m., and that he worked five hours a day and would go to XSport gym, exercise, or play soccer with his friends for the rest of the day. Ax3 at 56, 57.

Petitioner testified that he was paid by credit card or cash and that he kept a log of rides and payments. Ax3 at 15-16. Petitioner testified that he would pay for the taxicab lease, the gas, and for car washes. Ax3 at 16. On cross examination, Petitioner testified that he did not keep his own log, that he got printouts from Respondent as a log, and that he only had receipts from the meter. Ax3at 105. Petitioner testified that he received a 1099 form from Respondent, that in 2014 he reported a net income of $2,819.00, and that he did not have any other income from any other source in 2014. Ax3 at 105. Petitioner testified that his lease expense was $651 per week, his insurance expense was $31.50 per week, and that his gas expense was more than $100 per week. Ax3 at 106.

Accident

Petitioner testified that on September 16, 2014, he began his shift at 4 a.m. Ax3 at 16. Petitioner testified that he was driving from O'Hare Airport towards downtown Chicago with a client in the taxicab and that from O'Hare to the Cumberland exit, the road was open, and everyone was driving fast. Ax3 at 17, 58. Petitioner testified that once he was between Cumberland and Harlem, the traffic jam started, and people started slowing down. Ax3 at 17, 58. Petitioner testified that "[a]nd that makes you reduce your speed because the traffic is stopping ahead of you. All of a sudden, I felt the impact from the back. And to avoid hitting the car ahead of me, I swerved towards extreme right to avoid it." Ax3 at 17. Petitioner described the impact as "[a]ctually, the impact was pretty strong because my whole body shifted forward and backward twice." Ax3 at 18. Petitioner testified that his passenger was seated in the middle of the back seat. Ax3 at 19.

Petitioner testified that his arms were on the steering wheel at the time of impact. Ax3 at 19. Petitioner testified that prior to impact, he was traveling 25 to 30 miles per hour. Ax3 at 19. Petitioner did not see the vehicle that hit his vehicle prior to impact. Ax3 at 20. Petitioner testified that the back of his upper neck came into contact with parts inside the vehicle and that his "back, from the bounce, actually hit the back seat and quite extensive

strength, power." Ax3 at 20. When asked if he observed what the passenger's body did during the impact, Petitioner testified "[d]ue to the impact, it was so powerful, the passenger actually almost jumped to the front of the vehicle. All his coffee spilled on me as a driver. And his iPad was found on the floor actually in the front of the vehicle." Ax3 at 21. Petitioner testified that he felt pain in his neck immediately after the accident. Ax3 at 21-22. Petitioner testified that he did not feel pain in other parts of his body immediately after the accident. Ax3 at 22. Petitioner testified that after the accident, they called the police, the police arrived, and that he was taken to the hospital in an ambulance. Ax3 at 21. Petitioner testified that he felt pain in both of his shoulders and his back right after he arrived at the hospital. Ax3 at 22.

Petitioner testified that prior to the September 16, 2014 accident, he did not have any pain or treatment for his back, neck or cervical spine, or left shoulder. Ax3 at 25. Petitioner testified that he had right shoulder surgery in 2012. Ax3 at 26. Petitioner testified that he was not experiencing any pain in the right shoulder prior to the September 16, 2014 accident. Ax3 at 26.

On cross examination, Petitioner testified that it was the beginning of morning rush hour when the accident occurred. Ax3 at 58. Petitioner testified that when they got to the Cumberland exit, traffic was almost at a halt. Ax3 at 59. Petitioner testified that he was traveling between 35 and 45 miles per hour when he left O'Hare Airport until he got to Cumberland. Ax3 at 60. Petitioner testified that he was in the right lane just prior to the accident and that all lanes of traffic were almost stopped. Ax3 at 60. Petitioner testified that he remained in his vehicle after the accident and that he did not get out to look at either vehicle's front or back bumpers because he was in pain. Ax3 at 66. Petitioner testified that he was wearing his seat belt, and that "[t]he air bag was not completely out of its place, but I could see it. A little bit was swelled, about to come out." Ax3 at 67. Petitioner testified that his vehicle did not strike the vehicle in front of his. Ax3 at 67.

Prior Right Shoulder Injury

On cross examination, Petitioner testified that he had a prior workers' compensation injury on May 21, 2012 relative to repetitive lifting of a fuel hose while working at Total Airport Services, Inc. Ax3 at 69-70. Petitioner claimed a permanent restriction to his right arm after that injury. Ax3 at 70. Petitioner recalled receiving treatment for his right shoulder, but did not recall receiving treatment for his neck or left shoulder. Ax3 at 73. Petitioner recalled "telling them that I cannot use my hands the way I was using them before" during treatment after the May 21, 2012 injury. Ax3 at 73. Petitioner testified that he had pain from overusing his left arm and left shoulder. Ax3 at 74. Petitioner testified that he saw Dr. Ahmed Elborno and Dr. Charles Mercier for treatment and that it was possible that he saw Dr. Guido Marra for an Independent Medical Examination ("IME"). Ax3 at 74-75. Petitioner testified that it was possible that he complained of his left arm and shoulder popping and clicking to Dr. Marra in September 2012. Ax3 at 75. Petitioner testified that after his surgery healed, he had no pain, and that he went back to his normal life. Ax3 at 77. Petitioner settled his claim in February 2014. Ax3 at 72-73.

Petitioner testified that the pain he had in his shoulders after the September 16, 2014 accident was not the same pain that he had after the May 21, 2012 injury, and that it was a different type of pain. Ax3 at 75-76.

Pre-accident Medical Records Summary

On June 22, 2012, Petitioner underwent an MRI of the right shoulder, which demonstrated (1) tendinosis of the distal supraspinatus tendon, (2) partial-thickness tears of the supraspinatus tendon at the musculotendinous junction, and (3) no evidence of a complete rotator cuff tear. Respondent's Exhibit ("Rx") 20.

Petitioner underwent an MRI of the left shoulder on July 25, 2012, which demonstrated (1) tendinosis of the distal supraspinatus tendon, (2) partial thickness interstitial tear of the proximal tendon, and (3) no evidence of a complete rotator cuff tear. Rx20.

Petitioner underwent a right shoulder MRI on January 17, 2013, which demonstrated (1) postsurgical changes of a rotator cuff repair and acromioplasty and (2) repaired tendon intact without evidence of recurrent tear. Rx20.

Medical Records Summary

Petitioner testified that he was taken via ambulance to Community First Medical Center on September 16, 2014. Ax3 at 21.[1] Petitioner testified that he did not follow up with the doctor referred to him at Community First Hospital, and that he instead went online and searched for a doctor that spoke Arabic. Ax3 at 23-24. Petitioner followed up with Dr. Ossama Abdellatif. Ax3 at 24.

Petitioner presented at Pro Clinics Pain Management and was seen by Dr. Ossama Abdellatif on September 23, 2014.[2] Petitioner's Exhibit ("Px") 3 at 105-106. Petitioner complained of lumbar spine pain, bilateral shoulder pain, and cervical pain due to a work-related injury on September 16, 2014. Petitioner reported that he was "working as a taxi driver while driving on [the] freeway as he was coming to a stop due to traffic he was rear ended at major impact causing whiplash and discomfort throughout body as it jerked violently back and forth multiple times he went to hospital where he was examined and given medications and instructed to rest he attempted to return to work but was unable to complete a shift as any position for long period of time only increased pain." Px3 at 105. Dr. Abdellatif noted that Petitioner complained primarily of cervical pain radiating to the bilateral upper extremities causing tingling and numbness in the bilateral shoulder blades and bilateral shoulders. Petitioner reported a previous right shoulder surgery and that the September 16, 2014 accident aggravated the previously existent pain on the right shoulder. Petitioner also reported low back pain radiating to the bilateral lower extremities causing numbness and occasional tingling, stiffness, and discomfort when standing, walking, or sitting for long periods. Dr. Abdellatif noted that Petitioner's cervical pain was greater than his lumbar pain. Dr. Abdellatif's diagnoses were cervical radiculopathy, cervical facet syndrome, lumbar radiculopathy, lumbar facet syndrome, myofascial pain, and bilateral shoulder pain. Dr. Abdellatif ordered a cervical MRI, a lumbar MRI, bilateral shoulder MRIs, and an EMG of the upper and lower extremities. Dr. Abdellatif recommended that Petitioner continue physical therapy. Petitioner was kept off work. On cross examination, Petitioner agreed that he told Dr. Abdellatif that he was rear-ended at a major impact, that it caused whiplash and discomfort through his body, and that his body jerked violently back and forth multiple times. Ax3 at 85.

Petitioner underwent MRIs of the bilateral shoulders on September 26, 2014. Px1 at 27-28. The right shoulder MRI demonstrated an intact rotator cuff and rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon. Px1 at 27. The left shoulder MRI demonstrated an intact rotator cuff and mild rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon. Px1 at 28. No arthritic changes or impingement were noted in either shoulder.

Petitioner underwent a cervical MRI on September 26, 2014, which demonstrated (1) some straightening and reversal of the usual cervical curvature, probably representing posttraumatic muscular spasm and (2) a 2 mm posterior annular disk bulge at C5-C6, indenting the ventral surface of the thecal sac without significant spinal stenosis or neuroforaminal narrowing. Px3 at 115.

[1] EMT records and Community First Hospital records were not offered.
[2] The Arbitrator notes that Dr. Abdellatif's records are mostly of a "copy and paste" nature.

Petitioner followed up with Dr. Abdellatif on September 30, 2014. Px3 at 102-103. Dr. Abdellatif noted that Petitioner's lumbar pain was greater than his cervical pain at that time. Dr. Abdellatif recommended a series of lumbar procedures for further improvement and that Petitioner continue with physical therapy to maximize treatment. Petitioner was kept off work.

Petitioner underwent an EMG at Midwest Neurodiagnostic Specialists on September 30, 2014. Px1 at 25-26. The findings revealed mild radiculopathy affecting the C5-T1 and L4-S1 bilaterally.

On October 10, 2014, Petitioner underwent thoracic trigger point injections at the spinalus thoracis and longissimus thoracis muscles, lumbar trigger point injections at the external abdominal oblique and gluteus medius, lumbar/sacral medial branch blocks at L5 and bilaterally at L3-4, lumbar/sacral medial facet injections bilaterally at L4-5, L5-S1, and S1, and a lumbar steroid injection at L4-5. Px3 at 96-102.

Petitioner saw Dr. Abdellatif on October 14, 2014, at which time Dr. Abdellatif noted that Petitioner reported that he felt thirty percent improvement after the first set of lumbar injections. Px3 at 91-92. Dr. Abdellatif noted that Petitioner's lumbar pain was greater than his cervical pain. Dr. Abdellatif recommended that Petitioner continue with the series of lumbar procedures for further improvement and continue physical therapy to help maximize treatment. Petitioner was kept off work.

Petitioner presented at Marian Orthopedic and Rehabilitation Centers, S.C. on October 22, 2014 and was seen by Dr. John O'Keefe. Px1 at 21-22. Dr. O'Keefe noted Petitioner's history as "Patient is a cab driver working up to 15-hour days and 5-7 days a week. He was driving on 09/16/14, moving about 30 mph, when he was struck from behind by a car moving 45 mph. He was seat belted. He was hurt." Px1 at 21. Dr. O'Keefe noted that Petitioner had been transported by ambulance to Our Lady of Resurrection Hospital, where x-rays of the spine and bilateral shoulders were taken and were normal. Dr. O'Keefe noted that Petitioner had been assessed by Dr. Abdellatif who referred him for orthopedic assessment for his bilateral shoulder pain, and that Petitioner had worse pain on the right than the left. Dr. O'Keefe further noted Petitioner's right shoulder injury two years prior, with Petitioner returning to full duty within six to nine months following that injury, and not having had problems with his right shoulder after right shoulder surgery until the September 16, 2014 accident. Dr. O'Keefe opined that the accident of September 16, 2014 sprained both of Petitioner's shoulders, the right worse than the left, and that Petitioner's debility, symptoms, and inability to work were because of the September 16, 2014 injury. Dr. O'Keefe's impression was work-related motor vehicle accident spraining both shoulders, more symptomatic on the right than the left. Dr. O'Keefe recommended aggressive therapy and kept Petitioner off work. On cross examination, Petitioner agreed that the conversation between him and Dr. O'Keefe regarding that he was driving about 30 miles per hour and that he was struck from behind by a car moving 45 miles per hour took place, and that those numbers were estimated. Ax3 at 89.

Petitioner underwent thoracic trigger point injections at the spinalis thoracis and longissimus thoracis muscles, lumbar trigger point injections at the external abdominal oblique and gluteus medius, lumbar/sacral medial branch blocks at L3-4 and L5, lumbar/sacral medial branch facet injections bilaterally at L4-5, L5-S1, and S1, and a lumbar epidural steroid injection at L4-5 on October 24, 2014. Px3 at 85-90.

Petitioner returned to Dr. Abdellatif on October 30, 2014, at which time Dr. Abdellatif noted that Petitioner reported overall improvement in pain and range of motion by sixty percent following the second lumbar procedure. Px3 at 80-81. Dr. Abdellatif noted that Petitioner's cervical pain was greater than his lumbar spine pain following the two lumbar procedures. Dr. Abdellatif recommended a series of cervical procedures for further improvement and that Petitioner begin work conditioning followed by an FCE. Petitioner was kept off work. Petitioner underwent cervical trigger injections at the trapezius and rhomboid muscles, a cervical epidural

steroid injection at C7-T1, cervical medial branch block at C7 and bilaterally at C3-4, and cervical facet injections to the bilateral sides at C4-5, C5-6, and C6-7 levels on October 31, 2014. Px3 at 74-79.

Petitioner returned to Dr. O'Keefe on November 6, 2014. Px1 at 17-18. Dr. O'Keefe noted Petitioner's history as "Patient is a cab driver struck by another cab driver at 40-45 mph on 09/16/2014". Px1 at 17. Dr. O'Keefe noted that Petitioner had an injury in October 2012 that required right shoulder surgery, and that Petitioner had fully recovered from that injury and had no medical treatment or debility for one year prior to the September 16, 2014 injury. Dr. O'Keefe noted that Petitioner reported intense pain, popping, and weakness in both shoulders since the September 16, 2014 injury, with the left shoulder worse than the right shoulder. Dr. O'Keefe's impressions were (1) rotator cuff tear, left shoulder, with anterior capsule tear and possible disruption of biceps origin (SLAP lesion); abnormal MRI showing tear from September 26, 2014 at Midwest MRI and (2) aggravation of previously good functioning right shoulder, with abnormal MRI showing increased signal on the anterolateral cuff. Dr. O'Keefe recommended Petitioner continue on medications per Dr. Abdellatif. Dr. O'Keefe noted that he thought that Petitioner had a tear in the left shoulder which would steadily deteriorate with work conditioning efforts and that at the very least, Petitioner had a moderate sprain of the right shoulder. Dr. O'Keefe further noted his right shoulder MRI impressions as (1) abnormal MRI with partial tearing of the rotator cuff with no obvious disruption of biceps origin or anterior capsule seen and (2) abnormal traumatic effusion present. Px1 at 19. Dr. O'Keefe noted his left shoulder MRI impressions as (1) abnormal MRI demonstrating increased signal and changes consistent with tearing of the rotator cuff and anterior capsule, with long head of the biceps origin having a suspicious sprain also and (2) no fracture or neoplasm. Px1 at 20.

Petitioner followed up with Dr. Abdellatif on November 6, 2014, at which time Dr. Abdellatif noted that Petitioner reported overall improvement in pain and range of motion by sixty percent after the first cervical procedure. Px3 at 69-70. Dr. Abdellatif recommended a third series of lumbar procedures for further improvement and that Petitioner begin work conditioning followed by an FCE. Petitioner was kept off work. Petitioner underwent lumbar/sacral facet neurolysis and radiofrequency at the bilateral L4-5, L5-S1, and S1 levels, as well as a lumbar epidural steroid injection at L4-5 and lumbar trigger point injections at the external abdominal oblique and gluteus medius muscle on November 12, 2014. Px3 at 64-68.

Petitioner saw Dr. Abdellatif on November 18, 2014, at which time Dr. Abdellatif noted that Petitioner reported overall improvement in pain and range of motion by sixty percent following the third lumbar procedure. Px3 at 59-60. Dr. Abdellatif recommended a second series of cervical procedures and that Petitioner continue with work conditioning followed by an FCE. Petitioner was kept off work.

Petitioner underwent a cervical epidural steroid injection at C7-T1, cervical facet neurolysis (RFA) at the bilateral C4-5, C5-6, and C6-7 levels, and cervical trigger point injections at the trapezius, rhomboid major, and splenius capitis on November 21, 2014. Px3 at 52-57. Petitioner also underwent a left shoulder joint injection on November 21, 2014. Px3 at 58.

Petitioner again saw Dr. Abdellatif on December 2, 2014, at which time Dr. Abdellatif noted that Petitioner reported overall improvement in pain and range of motion by sixty percent following the second cervical procedure. Px3 at 47-48. Dr. Abdellatif recommended a third series of cervical procedures for further improvement and that Petitioner continue with work conditioning followed by an FCE. Petitioner was kept off work.

Petitioner underwent cervical trigger point injections at the trapezius and rhomboid minor muscles, cervical facet blocks at the bilateral sides at C4-5, C5-6, and C6-7, a cervical facet block at C7, and a cervical epidural steroid injection at C7-T1 on December 6, 2014. Px3 at 41, 44-45, 46.

Petitioner followed up with Dr. O'Keefe on December 8, 2014. Px1 at 15-16. Dr. O'Keefe noted Petitioner's history as "Patient is a taxi driver who was hit by another taxi driver 09/14. He was moving 20-30 mph and the cab behind him was moving 45 mph. There was a double impact. He's miserable with nek pain and bilateral shoulder mechanical symptoms." Px1 at 15. Dr. O'Keefe noted Petitioner had right radicular symptoms from the neck into the arm. Dr. O'Keefe noted that he felt that Petitioner had a discal injury and recommended electrical testing if Dr. Abdellatif felt it was appropriate. Dr. O'Keefe noted that Petitioner was having mechanical popping, weakness, and poor stamina in both shoulders, with the right worse than left. Dr. O'Keefe noted that while Petitioner had undergone right shoulder surgery in October 2012, Petitioner had functioned well without medical treatment, medications, or therapy for almost two years prior to the September 16, 2014 accident. Dr. O'Keefe opined that Petitioner sprained both shoulders with the work-related motor vehicle accident of September 16, 2014. He noted that the left shoulder MRI was positive for capsular tear and that his interpretation of the right shoulder MRI was that it showed a partial tearing of the rotator cuff with traumatic effusion, which was "borne out with exercise." Px1 at 15. Dr. O'Keefe noted that Petitioner was not able to work as a cab driver with 25-60 lb. loads occurring. Dr. O'Keefe's impressions were (1) work-related sprain of both shoulders with mechanical symptoms and persistent weakness; abnormal MRIs showing cuff tears and (2) neck sprain with discal symptoms being managed by Dr. Abdellatif. Dr. O'Keefe recommended that Petitioner be pre-cert for bilateral shoulder surgery, as well as postoperative physical therapy at Marian Orthopedic & Rehabilitation Centers and narcotic pain medication.

Petitioner followed up with Dr. Abdellatif on December 11, 2014, at which time Dr. Abdellatif noted that Petitioner reported overall improvement in pain and range of motion by seventy percent after the third cervical procedure. Px3 at 36-37. Dr. Abdellatif recommended a surgical consult for further evaluation and treatment recommendations and that Petitioner continue in the work conditioning program followed by an FCE. Petitioner was kept off work.

Petitioner presented at Orthopedic Specialists of the North Shore, LLC and was seen by Dr. Ronald Silver on December 24, 2014. Px2 at 22-23. Dr. Silver noted Petitioner's history as "This gentleman was driving his cab on September 16, 2014 when he was struck from behind totally destroying his cab. He flew forward, hands on the steering wheel and wrenched both shoulders. His left shoulder is worse than his right. His past medical history is significant for right shoulder surgery two years ago from which he had fully recovered and was working full time without restrictions prior to this accident." Px2 at 22. On exam, Dr. Silver noted Petitioner was tender over the rotator cuff insertions bilaterally, and that impingement, Hawkins, and drop arm tests were positive bilaterally. Dr. Silver noted that Petitioner's left shoulder MRI scan demonstrated inflammation of the rotator cuff consistent with Petitioner's clinical signs of rotator cuff impingement. Dr. Silver's impression was bilateral rotator cuff impingement due to the work injury. Petitioner was to continue with physical therapy. Dr. Silver noted that Petitioner would require arthroscopic surgery of the left shoulder. Dr. Silver administered an injection to the right shoulder. Petitioner was kept off work. Px2 at 82.

Petitioner again saw Dr. Abdellatif on January 22, 2015, at which time Dr. Abdellatif recommended a lumbar discogram and CT scan. Px3 at 33-34. Petitioner was kept off work.

Petitioner returned to Dr. Silver on January 28, 2015, at which time Dr. Silver noted that he was awaiting approval of right shoulder arthroscopic surgery. Px2 at 20-21. Petitioner was kept off work. Px2 at 81.

Petitioner underwent a lumbar discography on January 30, 2015 with four diskography injections, one at each of the following levels: L3, L4, L5, and S1. Px3 at 26- 28. Dr. Abdellatif's summary noted that pain was concordant with L5-S1 discogenic pain, and he recommended a percutaneous disc decompression at L5-S1 and continued physical therapy. Petitioner underwent lumbar trigger point injections at the external abdominal oblique and gluteus medius muscle and lumbar epidural steroid injections at L4-5 and L5 on January 30, 2015.

Px3 at 29, 31, 32. Petitioner also underwent a post-discogram CT scan of the lumbar spine on January 30, 2015, which demonstrated a 3-4 mm broad-based posterior disk herniation at L3-4 indenting the thecal sac with mild stenosis and mild bilateral neuroforaminal narrowing seen, slightly greater on the right and a 4-5 mm broad-based posterior disk herniation at L4-5 indenting the thecal sac with mild spinal stenosis and mild bilateral neuroforaminal narrowing, slightly greater on the right. Px4 at 176-177. The overall impression was no significant cervical posterior disk herniations, bulges, or protrusions, spinal stenosis, or significant neuroforaminal narrowing seen. Px4 at 177.

Petitioner followed up with Dr. Abdellatif on February 2, 2015. Px3 at 21-22. Petitioner was kept off work.

Petitioner followed up with Dr. Silver on March 11, 2015 and April 22, 2015, with Dr. Silver noting that the right shoulder steroid injection helped Petitioner's pain temporarily, confirming his diagnosis of rotator cuff impingement. Px2 at 16-17, 18-19. Petitioner was kept off work. Px2 at 79-80.

Petitioner followed up with Dr. Abdellatif on March 5, 2015 and April 23, 2015. Px3 at 15-16, 18-19. Dr. Abdellatif recommended surgical consult of the lumbar and cervical spines. Petitioner was kept off work.

On May 1, 2015, Petitioner underwent (1) left arthroscopic subacromial decompression with partial anterior acromioplasty and coracoacromial ligament transection, (2) arthroscopic lysis of adhesions, (3) arthroscopic distal clavicle resection greater than 1 cm, (4) arthroscopic synovectomy, extensive, and (5) arthroscopic debridement, extensive. Px2 at 40-41. Petitioner's postoperative diagnosis was post-traumatic left rotator cuff impingement.

Petitioner returned to Dr. Abdellatif on June 11, 2015, at which time Dr. Abdellatif noted Petitioner's chief complaint was cervical pain causing tingling and numbness focused on the bilateral shoulder blades and bilateral shoulders, as well as bilateral shoulder pain, more on the left, and low back pain radiating to the bilateral lower extremities focused on the right buttocks' region causing numbness, occasional tingling, stiffness, and discomfort. Px3 at 12-13. Petitioner's diagnoses were lumbar radiculopathy, lumbar facet syndrome, cervical radiculopathy, cervical facet syndrome, myofascial pain, and bilateral shoulder pain. Petitioner was recommended a surgical consult for his lumbar and cervical spine. Dr. Abdellatif noted that Petitioner had reached maximum medical improvement ("MMI") and that Petitioner was discharged from his care.

Petitioner followed up with Dr. Silver on May 8, 2015, June 6, 2015, June 24, 2015, and July 29, 2015, Px2 at 9, 10, 14, 15. Petitioner was kept off work. Px2 at 9, 10, 15, 75-78.

Petitioner underwent a cervical MRI on July 17, 2015, which was ordered by Dr. Sokolowski.[3] Px4 at 174. The cervical MRI demonstrated some straightening and reversal of the usual cervical curvature, probably representing posttraumatic muscular spasm, and was otherwise unremarkable. Px4 at 174. Petitioner also underwent a lumbar MRI on July 17, 2015, also ordered by Dr. Sokolowski. Px4 at 175. The lumbar MRI demonstrated a 2 mm posterior annular disk bulge indenting the thecal sac and was otherwise unremarkable.

On July 31, 2015, Petitioner underwent (1) right arthroscopic subacromial decompression with partial anterior acromioplasty and coracoacromial ligament transection, (2) arthroscopic lysis of adhesions, extensive, (3) arthroscopic distal clavicle resection greater than 1 cm, (4) arthroscopic synovectomy, extensive, and (5) arthroscopic debridement, extensive. Px2 at 36-37. Petitioner's postoperative diagnosis was rotator cuff impingement of the right shoulder.

On August 7, 2015, Dr. Silver released Petitioner to normal work activities as of August 31, 2015. Px2 at 8, 73.

[3] Dr. Sokolowski's records were not offered.

On September 2, 2015, Dr. Silver released Petitioner to work with a 20-pound lifting restriction. Px2 at 7, 72.

On October 21, 2015, Dr. Silver released Petitioner to normal work activities as of October 22, 2015. Px2 at 6, 71. Petitioner testified that he last saw Dr. Silver on October 22, 2015. Ax3 at 30.

Petitioner attended physical therapy at La Clinica, S.C. between January 16, 2015 and October 23, 2015, at which time he was discharged and MMI was noted. Px4 at 79.

On December 2, 2015, Dr. Silver noted that Petitioner had some reoccurrence of discomfort in his right shoulder with his return-to-work activities. Px2 at 4. Dr. Silver prescribed Petitioner Meloxicam, Protonix, Hydrocodone, and Ultram. Petitioner was to continue with his normal work activities. Px2 at 70.

Post-accident Employment

Petitioner testified that at the time of arbitration, he was working at Commercial Plastic as a process injection molding technician in Kenosha. Ax3 at 9, 108. Petitioner testified that his duties consisted of jumping on the machine and carrying stuff down and that heavy lifting was involved. Ax3 at 9. He was working daily eight-hour shifts. Ax3 at 9. On cross examination, Petitioner testified that he drives one hour and fifteen minutes to his job in Kenosha every day and that he works from 11 p.m. to 7 a.m. Ax3 at 108. Petitioner earns $26.00 per hour. Ax3 at 109. On redirect examination, Petitioner testified that he needs a few hours to recover after driving to his job in Kenosha. Ax3 at 118.

Prior to working at Commercial Plastic, Petitioner was a plant manager at a plastics company, International Precision Components Corporation, in Lake Forest. Ax3 at 10, 109. He worked 14 hours a day and his job duties consisted of observing employees on a monitor. Ax3 at 10-11. Petitioner worked as a plant manager for almost a year and a half. Ax3 at 11. Petitioner earned $16,000.00 per year. Ax3 at 109.

Prior to working as a plant manager at International Precision Components Corporation, Petitioner worked as a driver for Taxi Dispatching for three or four months. Ax3 at 11. Petitioner, however, also testified that he leased a cab from Taxi Dispatching, drove the cab to his job at International Precision Components Corporation, did his work there, and then went back to Taxi Dispatching. Ax3 at 12. Petitioner testified that his job with Taxi Dispatching was comparable to his job at Respondent. Ax3 at 12. On cross examination, Petitioner testified that he would take fares while leasing the cab from Taxi Dispatching if he had a chance. Ax3 at 55. Petitioner began working at Taxi Dispatching in September 2015. Ax3 at 97.

Petitioner testified that he attempted to return to work at Respondent after the accident. Ax3 at 78-79. Petitioner then testified that he did not work after September 16, 2014 until September 1, 2015. Ax3 at 101.

Current Condition

Petitioner testified that at the time of arbitration, he did not have any symptomology or pain in his left shoulder. Ax3 at 31. Regarding his right shoulder, Petitioner testified that he still had pain in his right shoulder and that the pain traveled down the right side of his body, and right lateral thigh and also into the right side of his face. Ax3 at 31. Petitioner testified that he takes cold showers to alleviate the pain and that he has medication, but he does not take medication because it caused psychological issues. Ax3 at 32. Petitioner testified that prior to the accident he was active in sports, including gymnastics, soccer, and handball, and that after the accident he could not participate in those sports anymore. Ax3 at 33. Regarding his ability to work, Petitioner testified that he cannot carry stuff at all and that he has to ask colleagues and friends for help carrying stuff. Ax3 at 33.

Petitioner testified that after the injury, he cannot carry more than 10 pounds. Ax3 at 10. Petitioner testified that his job at the time of arbitration was causing him severe pain or discomfort in his right shoulder. Ax3 at 33-34. Petitioner testified that the main excruciating pain was his back, from top to bottom. Ax3 at 45. Petitioner rated his right shoulder pain a four out of 10. Ax3 at 45. Petitioner rated his back pain an eight out of 10. Ax3 at 45. Petitioner testified that he still experienced numbness and tingling in his feet. Ax3 at 45.

On cross examination, Petitioner testified that he has not worked out at XSport gym or any other gym since the accident. Ax3 at 57. Petitioner testified that he was a gymnast while in high school. Ax3 at 107. Petitioner testified that he does not do any household chores. Ax3 at 107.

Respondent's Section 12 Examination Reports by Dr. Gregory L. Primus

Dr. Gregory Primus performed an IME of Petitioner on November 10, 2014 and prepared a report regarding same on November 21, 2014. Respondent's Exhibit ("Rx") 13. Dr. Primus did not review records of Community First Hospital, and reviewed records beginning with Petitioner's September 23, 2014 visit with Dr. Abdellatif. Following his review of Petitioner's treatment records and physical examination, Dr. Primus opined that due to the history of a motor vehicle accident, it was plausible for significant neck and back strains to occur, as well as bilateral shoulder pain due to either direct blows and contusions, or the jolt during the collision. Dr. Primus noted that Petitioner's initial exam and documentation appeared within reason. He further noted that the recommendation to obtain MRI scans of the bilateral shoulders, lumbar spine, and cervical spine was inappropriate, given that the accident had occurred just one week prior, Petitioner had not undergone adequate care in the form of time with rest, protection, and gentle therapy, and Petitioner had not demonstrated a history or clinical exam to warrant MRI evaluations that soon after the accident. Dr. Primus also opined that the seven prescribed medications made at Petitioner's initial visit were atypical and excessive, especially the prescribed narcotic and topical cream. Dr. Primus further opined that the EMG study was also not medically indicated or necessary, as Petitioner did not present with worsening radicular changes, excessive nerve pain, loss of ability to walk or use his upper extremities, or bowel or bladder changes. Dr. Primus noted that without such symptoms, the MRI scans and EMG study were not medically indicated, and further noted that it could take weeks and months for acute nerve injuries to be detected on an EMG study. Dr. Primus further opined that the injection procedures Petitioner had undergone two weeks after his initial evaluation were not medically indicated at the time due to no clear worsening of radicular symptoms and no real time allowed for anti-inflammatories, rest and protection, and therapy. Dr. Primus noted that Petitioner's care should have included more time to allow the acute inflammation of the trauma to subside, which could be weeks or months, as well as therapy to address pain, range of motion, and initial functional activities. Dr. Primus further noted that without a clear traumatic injury that results in change of the anatomy, the vast majority of motor vehicle patients will improve with those measures over a period of several months without any invasive intervention or narcotic use. Dr. Primus recommended that Petitioner undergo therapy two or three times per week for six weeks to address his pain complaints and improve his functional activity and noted that a return to baseline and a return to work was expected to occur within six to 12 weeks.

Dr. Primus reevaluated Petitioner on March 23, 2015 and prepared a report regarding same on April 3, 2015. Rx14. Dr. Primus noted that based on his review of Petitioner's old medical records and the new records submitted for the reevaluation, his opinions were unchanged. Dr. Primus opined that Petitioner had no clear objective pathology of the bilateral shoulders according to x-rays and MRI findings. Regarding Petitioner's subjective complaints of the bilateral shoulders, Petitioner did not have restricted range of motion during exam, and he did not have positive impingement tests that would indicate rotator cuff pathology. Dr. Primus also noted that Petitioner was able to generate a crepitus or grinding sensation with certain rotational movements with his shoulders. Dr. Primus opined that he saw no evidence of traumatic injury to the bilateral shoulders on MRI, and there was no evidence of a rotator cuff tear, partial rotator cuff tear, or acute traumatic bursitis. Dr. Primus

further opined that there was no evidence of rotator cuff impingement on exam. Dr. Primus opined that he believed that Petitioner suffered an injury to the bilateral shoulders as a result of the September 16, 2014 accident, and that based on Petitioner's initial evaluations and his initial exam of Petitioner's shoulders, that Petitioner's diagnosis was persistent idiopathic pain from shoulder contusion/strain related to the accident. Dr. Primus noted that as a reminder, Petitioner's initial examination did not reveal any restricted motion, no rotator cuff loss of strength, and no positive impingement tests or signs straining the rotator cuff. Dr. Primus also noted that he understood that there were clear physical exam discrepancies in the medical record since his last IME opinion which he could not account for, but that such discrepancies are based on either misrepresentation of the record, symptom magnification on part of Petitioner, or increased pain that manifests at the time of Petitioner's other exams on unknown etiology. Dr. Primus opined that based on his entire assessment, he did not believe that Petitioner suffered impingement from the car accident. Dr. Primus further opined that repeat steroid injections were not indicated, and that he disagreed with the diagnosis of rotator cuff impingement and that there was not an objective or subjective indication to perform bilateral shoulder surgery at that time nor in the future. Dr. Primus opined that additional MRI scans or other diagnostic studies were not indicated at that time and that it was not reasonable to classify Petitioner as disabled and unable to work until April 9, 2015. Dr. Primus opined that Petitioner was at MMI for the diagnoses of neck, back, and bilateral shoulder strains and/or contusions that occurred as a result of the September 16, 2014 accident.

Testimony of Temirlan Chypyev

Temirlan Chypyev appeared at arbitration on subpoena issued by Respondent. Tr. at 16. Mr. Chypyev testified that in 2014, he was working as a taxicab driver and leased a taxicab from Yellow Cab. Tr. at 16-17. Mr. Chypyev recalled being involved in a rear-end motor vehicle accident while driving on I-90 on September 16, 2014 during morning rush hour. Tr. at 17. When asked if he recalled how fast he was driving prior to any impact, Mr. Chypyev responded "[b]umper to bumper. I can't tell you the exact speed limit, probably five miles per hour." Tr. at 18. Mr. Chypyev testified that his vehicle made contact with another taxicab, and that after making contact, both taxicabs pulled over to the side. Tr. at 18-19. Mr. Chypyev recalled getting out of his vehicle after pulling over to the side and going to the other driver and asking him if he was alright. Tr. at 23. Mr. Chypyev testified that the other driver did not respond. Tr. at 23. Mr. Chypyev testified that the other driver was inside his vehicle and was closing his eyes. Tr. at 23. Mr. Chypyev testified that he then went to look at the rear bumper and front bumper of the vehicles, and that he did not observe any damage to either vehicle. Tr. at 23-24.

Mr. Chypyev was shown Rx1-A, Rx1-B, Rx1-C, and Rx1-D. Tr. at 25. Mr. Chypyev identified Rx1-A as cab 386, the taxicab that he was driving on September 16, 2014. Tr. at 25. Mr. Chypyev testified that Rx1-B depicted the front bumper, that Rx1-C depicted the front bumper, and that Rx1-D depicted the side of his vehicle and rear bumper. Tr. at 25. Mr. Chypyev testified that the photographs were taken at the company's parking lot and were probably taken on the same day of the accident. Tr. at 26. When asked if he could describe the impact of his taxicab with the other taxicab, Mr. Chypyev responded "[y]es, I just touched and the car shake a little bit." Tr. at 26. Mr. Chypyev testified that he was able to leave the scene and drive his vehicle, and that he left before the other driver. Tr. at 27. Mr. Chypyev did not experience any injuries as a result of the accident. Tr. at 27.

On cross examination, Mr. Chypyev testified that he was issued a citation for "[r]educe speed and something else. It was like not only reduce speed, it's traffic condition or something like that" after the accident on September 16, 2014. Tr. at 28-29.

Testimony of Jeremy Tishler

Jeremy Tishler appeared at arbitration on subpoena issued by Respondent. Tr. at 32. Mr. Tishler is an attorney and lives in Warrenton, Virginia. Tr. at 30-31. Mr. Tishler agreed that on September 16, 2014 he traveled to Chicago for work. Tr. at 32. Mr. Tishler flew into O'Hare Airport and requested a taxicab after getting his luggage. Tr. at 32. Mr. Tishler recalled being in the taxicab while driving on the expressway around 8:30 a.m. Tr. at 33. Mr. Tishler was sitting in the rear passenger side of the taxicab and did not have his seatbelt on. Tr. at 33. Mr. Tishler testified that the traffic was heavy, and that "it seemed like it was rush hour traffic so we were in stop and go traffic on the highway, not moving quickly." Tr. at 33. Mr. Tishler testified that he had an opportunity to observe the driver of the taxicab and that he believed that the driver had his seatbelt on. Tr. at 34. Mr. Tishler testified that prior to any impact, he thought that they were either stopped or stopping for traffic. Tr. at 34. When asked about what he remembered about the impact, Mr. Tishler testified "I just remember that, again, we were either traffic had stopped in front of us, it was kind of stop and go. We were either stopped or coming to a stop, and then I felt an impact toward the rear of the taxi." Tr. at 34-35. Mr. Tishler described the impact as a minor impact, and testified that "it was sudden and it was enough to where the coffee I was holding spilled. But I didn't think it was anything, you know, apart from being kind of surprising, I didn't really think too much of it." Tr. at 35, 44. Mr. Tishler testified that he was not injured after the accident. Tr. at 35. Mr. Tishler testified that the vehicle he was riding in did not hit any other vehicles. Tr. at 35. Mr. Tishler testified that they pulled over to the side. Tr. at 36. When asked if he noticed anything about his driver after the accident, Mr. Tishler testified "No. I mean, after we got out he began rubbing his neck with complaining of I think some pain. He was making facial expressions that were consistent with that." Tr. at 36. Mr. Tishler thought that his driver said that his neck hurt. Tr. at 36. Mr. Tishler testified that he looked at both cabs after the accident and did not remember seeing any property damage to either of the taxicabs. Tr. at 36-37. Mr. Tishler testified that only his driver left in an ambulance. Tr. at 38.

Mr. Tishler was shown Rx4. Tr. at 40. Mr. Tishler testified that he completed the witness statement, his signature was at the bottom, and that the statement was true and accurate to his assessment of the accident in August 2015. Tr. at 40. When asked if the impact was so powerful that it caused him to jump in the front of the cab, Mr. Tishler testified that it was not. Tr. at 42. Mr. Tishler testified that he would not describe the impact as a major impact. Tr. at 44. Mr. Tishler testified that he did not observe his driver jerk violently back and forth multiple times after the impact. Tr. at 44. Mr. Tishler testified that he did not observe his driver's body striking the steering wheel or the door of the cab after impact. Tr. at 44. Mr. Tishler testified that he did not observe his driver whipping his neck back and forth after impact. Tr. at 44. Mr. Tishler testified that the following morning he received a phone call from the driver's attorney and that he was surprised by the phone call. Tr. at 45.

On cross examination, Mr. Tishler testified that immediately prior to the accident he was looking either up or down reading his kindle. Tr. at 46. Mr. Tishler agreed that he would not have been looking at Petitioner immediately prior to the accident. Tr. at 46. When asked if the impact caused his Kindle to fly out of his hands, Mr. Tishler testified "I think so. I don't remember. I know I – I was more concerned with getting doused by the coffee." Tr. at 46. Mr. Tishler testified that he believed that his coffee doused both him and Petitioner. Tr. at 46. Mr. Tishler testified that his body moved forward. Tr. at 47. Mr. Tishler testified that Petitioner was taken from the scene by ambulance at Petitioner's request. Tr. at 47. Mr. Tishler testified that he did not have any reason to believe that Petitioner was faking his injuries. Tr. at 47.

Testimony of Special Agent Michael Leathers

Special Agent Michael Leathers appeared at arbitration on subpoena issued by Respondent. Tr. at 50. Special Agent Leathers is employed with the Illinois State Police and at the time of arbitration, he had been employed with the Illinois State Police for nine and a half years. Tr. at 49.

Special Agent Leathers was working as a patrol officer in 2014. Tr. at 49. Special Agent Leathers was the reporting officer at the scene of the September 16, 2014 accident. Tr. at 50. Special Agent Leathers testified that he had an independent recollection of the accident. Tr. at 50. Special Agent Leathers recalled that "[t]here was two cabs, rear-end collision, very, very minor rear-end collision. There was no damage on unit 1, which is the striking vehicle. A small scratch on the bumper of unit 2. I recall it because I did not feel there would be any injuries. When I went to interview the driver of unit 2, he asked for an ambulance, and I was a bit taken back that somebody would have been hurt in such a minor, minor collision." Tr. at 50-51.

Special Agent Leathers was shown Rx5, which he identified as the traffic crash report that he prepared regarding the September 16, 2014 accident. Tr. at 51. Special Agent Leathers testified that he gave the driver of unit 1 a citation because "department policy states that if somebody goes to the hospital or is injured, that the at fault vehicle is issued a citation." Tr. at 53. Special Agent Leathers testified that no other individuals were hurt or complained of being hurt. Tr. at 55. Special Agent Leathers testified that the driver who requested the ambulance did not appear to be injured to him. Tr. at 57.

On cross examination, Special Agent Leathers testified that it was his personal belief that Petitioner was faking his injuries. Tr. at 61.

Testimony of Melissa Burgess

Melissa Burgess testified on behalf of Respondent. Tr. at 62. Ms. Burgess works at Respondent and at the time of arbitration, she had worked at Respondent for about 12 years. Tr. at 63. Ms. Burgess testified that her job duties consist of handling and maintaining insurance policies for the taxicab medallions in the affiliation, including workers' compensation claims. Tr. at 63-64.

Ms. Burgess was shown Rx6, which she identified as one of the documents that is used when processing workers' compensation claims that she completed. Tr. at 66. Ms. Burgess testified that the information reflected in Rx6 was provided to her by Petitioner. Tr. at 66-67. Ms. Burgess was shown Rx8, which she identified as a 24-hour weekly lease that is provided for the lease drivers and is the lease for cab 4267 pertaining to Petitioner that covered the lease period for the date of loss. Tr. at 69-70.

Ms. Burgess testified that drivers receive credit card payments. Tr. at 73. Ms. Burgess was shown Rx9, which she identified as a printout of the driver's receipts which indicates the credit card transactions the driver had between August 5, 2014 and September 16, 2014. Tr. at 73-74. Ms. Burgess testified that the period selected for the receipts request was from June 30, 2014 through October 27, 2014, and that the report came back with data for the period of August 5, 2014 through September 16, 2014. Tr. at 74-75. Ms. Burgess was shown Rx10, which she identified as a 1099-K form. Tr. at 75. Ms. Burgess testified that she was asked by a claims representative to provide information regarding property damage to cab 4267 for the date of loss of September 16, 2014, and that in her investigation there were no photos of the vehicle and there was no security camera footage or vehicle repair invoices. Tr. a.t 78-79. Ms. Burgess was shown Rx11, which she identified as email correspondence between herself and Cori Coghlan from First Chicago Insurance Company. Tr. at 79.

On cross examination, Ms. Burgess testified that her job responsibilities do not include payroll-related responsibilities. Tr. at 81-82. Ms. Burgess testified that Petitioner reported the incident to her on September 16, 2014. Tr. at 83. Ms. Burgess did not create the documents contained within Rx8, Rx9, or Rx10. Tr. at 83-85.

Testimony of Matthew Martucci

Matthew Martucci appeared at arbitration on subpoena issued by Respondent. Tr. at 90. Mr. Martucci is employed at Transit General Insurance as a claims appraiser. Tr. at 88. At the time of arbitration, Mr. Martucci had been employed at Transit General Insurance for a little over 11 years. Tr. at 89. His job duties consist of writing estimates on vehicles after they are involved in an accident. Tr. at 89.

Mr. Martucci testified that one of the taxicabs involved in the September 16, 2014 accident was insured by Transit General Insurance. Tr. at 91. Mr. Martucci testified that a claims file was opened on September 16, 2014 for driver Temirlan Chypyev and taxicab number 386. Tr. at 91-92. Mr. Martucci was shown Rx1-A, Rx1-B, Rx1-C, and Rx1-D, which he identified as photos of cab 386 taken on the date of loss. Tr. at 92-94. Mr. Martucci testified that he did not see any damage to cab 386. Tr. at 95. Mr. Martucci testified that there was no claim open for physical damage to cab 386. Tr. at 96.

On cross examination, Mr. Martucci testified that minor scratches and minor dents on cabs are not always repaired. Tr. at 97-98.

Evidence Deposition Testimony of Dr. Ernest P. Chiodo

Respondent offered Rx15, the evidence deposition testimony transcript of Dr. Ernest P. Chiodo. At arbitration, Petitioner objected to the admission of Rx15, and the Arbitrator reserved ruling. The Arbitrator now overrules Petitioner's objections, and Rx15 is admitted.

Dr. Chiodo testified on behalf of Respondent via evidence deposition taken on March 31, 2023. Rx15. Dr. Chiodo testified as to his education and credentials as a physician and biomedical engineer. Rx15 at 5-15. Dr. Chiodo was asked to review records and provide an opinion regarding the motor vehicle accident that occurred on September 16, 2014. Dr. Chiodo testified that his engineering background allowed him to determine vehicle forces involved in a collision and his medical background allowed him to determine whether an injury occurred. Rx15 at 5-15.

Dr. Chiodo prepared a report of his findings and opinions dated August 10, 2018. Rx15 at 14. Dr. Chiodo testified that based on his experience and training, the collision that occurred on September 16, 2014 was no more than five miles per hour, and most likely less than five miles per hour. Rx15 at 19, 32. Dr. Chiodo testified that the collision might have been less than one mile per hour, and that it was a "very, very minor low speed collision." Rx15 at 19. Dr. Chiodo testified that while he believed the collision occurred at less than five miles per hour, he used that speed to calculate force, overestimating the force. Rx15 at 20.

Dr. Chiodo testified that if the collision had occurred at 20 miles per hour or 25 miles per hour, the front of the rear-ending vehicle would have been "smashed in, crumpled in," and the rear of Petitioner's vehicle would have been crumpled in, and there would have been obvious significant damage. Rx15 at 21-23. Dr. Chiodo testified that he would quantify the forces of this collision at 2.3 g and that the only force on Petitioner was forces of acceleration, since the vehicle that he was in was hit by another vehicle. Rx15 at 31. Dr. Chiodo explained that 1 g is the force of gravity on earth, and that the forces horizontally along the seat if you plop down into a motor vehicle are about 5.5 g, the forces up and down are over 8.5 g, and the vector between the horizontal and vertical vector is over 10 g. Rx15 at 32. Dr. Chiodo testified that Petitioner had more force on his body getting into the motor vehicle before the accident. Rx15 at 32. Dr. Chiodo testified that when one is involved in a rear-end collision, the body movement is rearward and is thrown backward into the vehicle because of the inertia. Rx15 at 32-33. Dr. Chiodo testified that Petitioner would have been thrown backwards into the cushioning of the seat and then he would have had a minor rebound against his shoulder belt which would go over his left

clavicle. Rx15 at 33, 67. Dr. Chiodo testified that with a reasonable degree of medical and biomedical engineering certainty, Petitioner did not suffer any injury or illness in this matter nor aggravation of any preexisting condition. Rx15 at 34-36, 43.

Dr. Chiodo testified that airbags typically deploy between eight to 12 miles per hour in a collision, and so the fact that the airbags of the rear-ending vehicle did not deploy indicates that it was not a 20 miles per hour collision. Rx15 at 70. Dr. Chiodo testified that if Petitioner had an asymptomatic preexisting herniated disc in the cervical spine or asymptomatic shoulder injury, the accident could not have made either symptomatic. Rx15 at 78-83. Dr. Chiodo agreed that it was his opinion that the motor vehicle accident was not a cause or a contributing factor to Petitioner's bilateral shoulders, neck, and low back symptoms. Rx15 at 100-102.

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).

Arbitrator's Credibility Assessment

Credibility is the quality of a witness which renders his evidence worthy of belief. It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

In this case, the Arbitrator did not have the opportunity to observe Petitioner's testimony. After comparing Petitioner's testimony with the evidence submitted, the Arbitrator finds Petitioner not credible, where his testimony was inconsistent with and rebutted by the testimony of Respondent's witnesses and the medical evidence offered reflects inconsistent accident histories documented by Petitioner's treating physicians.

Petitioner testified that he was traveling between 25 and 30 miles per hour prior to impact, that the impact was so strong causing his whole body to shift forward and backward twice with extensive strength and power, and that the impact was so powerful causing the passenger to almost jump to the front of the vehicle.

Petitioner's testimony is inconsistent with and rebutted by the testimony of Respondent's witnesses. The Arbitrator notes that Mr. Tishler, Mr. Chypyev, Special Agent Leathers, and Mr. Martucci appeared for testimony on subpoena. The Arbitrator finds Respondent's witnesses credible.

Mr. Tishler, Petitioner's passenger at the time of the accident, testified that traffic was stopping or stopped at the time of impact, that the impact was minor, and that he did not observe any damage to either vehicle after the accident. Mr. Tishler disagreed that the impact of the accident was powerful enough to cause him to jump to the front of the taxicab and disagreed with the description that the impact was a major impact. Mr. Chypyev, the driver of the rear-ending vehicle, testified that at the time of the accident, traffic was bumper-to-bumper, that he

was traveling five miles per hour, and he described the impact as a "touch." Mr. Chypyev did not observe any damage to either vehicle after the accident. Special Agent Leathers had an independent recollection of the accident, and described the accident as a "very, very minor rear-end collision," where he did not feel that there would be any injuries. Special Agent Leathers did not observe damage on the rear-ending vehicle and observed only a small scratch on the rear bumper of Petitioner's vehicle. Special Agent Leathers testified that it was his personal belief that Petitioner was faking his injuries. While Petitioner testified that the air bag of his vehicle was "a little bit swelled, about to come out," and that he could see it, Petitioner and Mr. Tishler both testified that Petitioner's vehicle did not strike the vehicle in front of it, Ms. Burgess testified that there were not any vehicle repair invoices for Petitioner's taxicab, and Mr. Martucci testified that he did not observe any damage to the rear-ending vehicle and that no claim was opened for physical damage to said vehicle.

Moreover, the histories documented by Petitioner's treating physicians are wholly inconsistent with the overall evidence. The Arbitrator notes that the records of Community First Hospital were not offered, and therefore the accident history provided by Petitioner immediately after the accident is not known. On September 23, 2014, Dr. Abdellatif noted that Petitioner reported that he was "working as a taxi driver while driving on [the] freeway as he was coming to a stop due to traffic he was rear ended at major impact causing whiplash and discomfort through [his] body as it jerked violently back and forth multiple times…he attempted to return to work but was unable to complete a shift as any position for long period of time only increased pain." Px3 at 105. Petitioner agreed that he provided Dr. Abdellatif with this accident history. On October 22, 2014, Dr. O'Keefe noted Petitioner's accident history as "Patient is a cab driver working up to 15-hour days and 5-7 days a week. He was driving on 09/16/14, moving about 30 mph, when he was struck from behind by a car moving 45 mph [,]" and on December 8, 2014, Dr. O'Keefe included that there had been a "double impact" in Petitioner's accident history. Px1 at 21, 15. Petitioner agreed that the October 22, 2014 conversation with Dr O'Keefe regarding the accident history occurred and that the speeds he provided were estimates. While Dr. O'Keefe's history documents that Petitioner worked 15-hour days, Petitioner testified that he worked only five hours per day, either from 3 a.m. to 8 a.m. or 4 a.m. to 9 a.m., and that he spent the rest of the day working out at the gym or playing soccer with his friends. Petitioner further testified that he did not observe the rear-ending vehicle prior to impact, though he provided Dr. O'Keefe with an estimate of the speed that the rear-ending vehicle was traveling at prior to impact. The Arbitrator notes that the record does not support the documentation of a double impact occurring at the time of the accident. On December 24, 2014, Dr. Silver noted Petitioner's accident history as "This gentleman was driving his cab on September 16, 2014 when he was struck from behind totally destroying his cab. He flew forward, hand on the steering wheel and wrenched both shoulders." Px2 at 22. The evidence, however, demonstrates that the accident of September 16, 2014 was fairly minor and that at most, Petitioner's vehicle sustained a mere scratch on the rear bumper. Petitioner's vehicle was not totally destroyed. Overall, the inconsistent histories documented by Petitioner's treating physicians suggest a tendency by Petitioner to embellish and exaggerate, making his claims unreliable.

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

The Parties have stipulated to a compensable work accident. Ax1 at No. 2. Having considered all the evidence, the Arbitrator finds that Petitioner proved injuries to his neck, low back, and bilateral shoulders, but failed to prove that his current conditions of ill-being as to his neck, low back, and bilateral shoulders are causally related to the September 16, 2014 accident.

Noting the inconsistencies in the record, as well as the Arbitrator's prior finding that Petitioner is not credible, the Arbitrator finds that Petitioner's testimony is unreliable as to his claims of ongoing conditions of ill-being as to his neck, low back, and bilateral shoulders. The Arbitrator notes that Dr. Abdellatif, Dr. O'Keefe, and Dr. Silver relied on inconsistent accident histories and that the bilateral shoulder MRIs of September 26, 2014 did

not demonstrate any tears or impingement. Therefore, the Arbitrator gives greater weight to the opinions of Dr. Primus and finds his opinions more persuasive. Relying on the opinions of Dr. Primus, the Arbitrator finds that (1) Petitioner sustained neck, low back, and bilateral shoulder strains as result of the September 16, 2014 accident, (2) that the need for MRIs, seven prescription pain medications, an EMG, and injection procedures was abrupt, atypical, and excessive, (3) that the repeat injection procedures and bilateral shoulder surgeries were not medically indicated or necessary, and (4) that only an additional six weeks of physical therapy, two or three times per week, was necessary. The Arbitrator acknowledges that Petitioner had an initial physical therapy evaluation at Marian Orthopedic & Rehabilitation Center, S.C. on October 7, 2014 and was re-evaluated for further physical therapy on December 9, 2014. Px1 at 30-38. The December 9, 2014 physical therapy note indicated that Petitioner would be released from active intervention in at least four weeks, which is consistent with Dr. Primus's treatment recommendation.

The Arbitrator adopts the opinions of Dr. Primus that Petitioner's conditions related to the neck, low back, and bilateral shoulders stabilized and that Petitioner returned to a pre-injury baseline condition and could return to work in a full duty capacity as of February 12, 2015, or 12 weeks from the date of Dr. Primus's November 21, 2014 IME report. Accordingly, the Arbitrator finds that Petitioner was at MMI as to his neck, low back, and bilateral shoulder conditions of ill-being and that such conditions of ill-being ceased to be work-related as of February 12, 2015.

Issue G, as to what were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner claims that his earnings during the year preceding the injury were $5,563.17 and that his average weekly wage was $794.73. Arbitrator's Exhibit ("Ax") 1 at No. 5. Respondent disputes Petitioner's claims, and Respondent claims that Petitioner's average weekly wage was the minimum rate of $220.00. Ax1 at No. 5.

Petitioner testified that he began working at Respondent in August 2014 and that he did not return to work at Respondent after September 16, 2014. Petitioner testified that he earned $300 or $400, but did not specify if those earnings were hourly, daily, weekly, or monthly. Respondent offered Rx9 and Rx10 which demonstrate that Petitioner earned $5,855.98 between August 5, 2014 and September 16, 2014. The Arbitrator has considered Rx9 and Rx10 and calculated a different AWW than the AWW offered by Petitioner and Respondent. Petitioner, however, is bound by its stipulation that Petitioner's AWW is $794.73 under *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-1088 (2004).

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

Petitioner claims that Respondent is liable for the following unpaid medical bills: (1) Dr. John O'Keefe ($4,553.15), (2) Dr. Ronald Silver ($30,965.00), (3) Dr. Ossama Abdellatif ($65,871.99), (4) La Clinica, S.C. ($25,155.00), (5) Pacific Toxicology Laboratories ($7,014.00), (6) Vision Laboratories ($19,803.00), (7) Midwest Imaging & Diagnostic Center ($5,400.00), (8) Dr. Mark Sokolowski ($4,582.00), (9) Desai Virendra ($4,176.14), (10) Edgebrook Radiology ($8,619.00), (11) Community First Medical Center ($2,763.00), (12) Northwest Chicago Medical Center ($112,973.91), (13) Northside Medical Center ($2,506.00), (14) Volodymyr Manko ($11,242.00), (15) RX Development ($28,295.68), (16) Network Durable Medical Equipment ($76,000.00), (17) Prescription Partners, LLC ($3,615.51), (18) Windy City Anesthesia ($1,850.00), (19) Dr. Wieslaw Wojnarski ($790.00), (20) Infinite Strategic Innovations ($2,189.19), and (21) Summit Center for Health ($52,207.07). Ax1 at No. 7.

As the Arbitrator has found that Petitioner's initial examination with Dr. Abdellatif on September 23, 2014 and additional physical therapy, as recommended by Dr. Primus on November 21, 2014, was reasonable and necessary, the Arbitrator awards bills for only this specific treatment and finds Respondent is liable for payment of said bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. All other bills are denied, as the Arbitrator has found that all other treatment was excessive and unnecessary.

The Arbitrator notes that any bills claimed for medical services provided by Community First Hospital, Dr. Sokolowski, Dr. Wieslaw Wojnarski, or Associate Medical Centers of Illinois are not supported by any corroborating documentation, as records from those providers were not offered.

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 temporary total disability, the Arbitrator finds as follows:

Petitioner claims that he is entitled to TTD benefits from September 16, 2014 through September 1, 2015. Ax1 at No. 8. Respondent disputes Petitioner's claim for TTD benefits. Ax1 at No. 8.

Consistent with the Arbitrator's prior findings and having adopted the opinion of Dr. Primus that a return to full duty work was expected by February 12, 2015, the Arbitrator finds that Petitioner is entitled to TTD benefits from September 17, 2014 through February 12, 2015.

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 factors, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the factors to be considered include: (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 gives no weight to this factor.

With regard to subsections (ii) and (iii) of Section 8.1b(b), the Arbitrator notes that the evidence demonstrates that at the time of the accident, Petitioner was 30 years of age and was employed as a taxi driver with Respondent, and that Petitioner returned to comparable work at Dispatching Taxi, a different taxicab company, after the accident. The Arbitrator assigns some 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 Arbitrator notes that having adopted the opinions of Dr. Primus, Petitioner sustained neck, low back, and bilateral shoulder strains following the September 16, 2014 injury, and that along with his initial exam with Dr. Abdellatif, an additional six weeks of physical therapy was reasonable and necessary for the treatment of those injuries. The Arbitrator notes that following the September 16, 2014 accident, Petitioner returned to a comparable job at Dispatching Taxi, and that at the time of

arbitration, he was working as a process injection molding technician at Commercial Plastic, where his duties include heavy lifting. The Arbitrator assigns more weight to this factor.

Based upon the above factors and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of the person-as-a-whole, pursuant to Section 8(d)2 of the Act.

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010816
Case Name	Steven Galvan v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0316
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Frank Kress, Charles Romaker
Respondent Attorney	Daniela Roehm

DATE FILED: 7/2/2024

/s/Carolyn Doherty, Commissioner

Signature

24IWCC0316

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN GALVAN,

Petitioner,

vs. NO: 21WC010816

CHICAGO TRANSIT AUTHORITY,

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 wages and benefit rate, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

We agree with the Arbitrator's finding that Petitioner's overtime wages should not be included in his Average Weekly Wage (AWW) because they were not mandatory or regular. However, we clarify the legal rationale for denying the overtime wages and also increase the AWW to include the COVID sick leave hours.

Initially, we note that the Arbitrator wrote, "Judicial rulings, however, have modified the language of the Act to include overtime earnings only if overtime was mandatory and regular." *Dec. 7*. Later in the same paragraph, the Arbitrator found that "Petitioner's overtime was not mandatory or regular." *Id*. We clarify that the appropriate standard is mandatory *or* regular. As the appellate court has stated, at least one of three conditions need to exist for "overtime" wages to be included in AWW:

> In *Freesen, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 1035, 811 N.E.2d 322, 285 Ill. Dec. 81 (2004), although the claimant presented evidence that he worked some overtime in 22 of the 45 weeks in which he worked prior to his accident, there was no evidence that **1) he was required to work overtime as a condition of his employment, 2) he consistently worked a set number of hours of overtime each week, or 3) the overtime hours he worked were part of his regular hours of employment.** *Freesen, Inc.*, 348 Ill. App. 3d at 1042. We found, therefore, that the Commission had erred in including the claimant's

> overtime hours in calculating his average weekly wage. *Freesen, Inc.,* 348 Ill. App. 3d at 1042.
>
> This court has been consistent in its interpretation of the overtime exclusion in section 10 of the Act. 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. IWCC, 372 Ill. App. 3d 549, 554 (1st Dist. 2007) (Emphasis added).

Therefore, unless the hours are 1) mandatory as a condition of employment, or 2) a "set number of hours of overtime each week" or 3) "part of his regular hours of employment," then those hours are not included in AWW. As discussed below, we find that Petitioner has not proven any of these three conditions.

Mandatory

Petitioner testified that when his co-worker, Anthony Varga, was off work during the COVID-19 pandemic, Petitioner was "told to do both shifts." *T.27-29*. Petitioner testified that he "couldn't do" double shifts "like that for an unforeseen time" but he agreed to "come in at 5 a.m., I'll cover the morning rush and I'll stay until 6:30 p.m. and cover the p.m. rush. … I had no choice. I was the only guy. I had to do it." T.*29-30*.

However, Devenless Wiltz, the "Senior manager, rail maintenance" at Respondent, testified that employees are not required to take overtime and there are no repercussions for declining overtime. *T.45.* Anthony Varga was a "rail leader with K-580 qualifications" who took a sick leave in 2020 and retired in 2021 and Petitioner filled in at that position. *T.45-47.* However, when Petitioner did not want to work overtime, he had another employee, Alex Bailey, who was also K-580 qualified fill the position. *T.48*. Mr. Wiltz testified that Petitioner did decline some of the overtime that was available to him. *Id*. Although Petitioner and Mr. Bailey were offered overtime first, since they both worked on the Green Line, there were about 15 other qualified employees who could have taken the overtime. *T.48-49*.

Mr. Wiltz testified that covering Mr. Varga's shift was not an emergency, but Petitioner was offered the opportunity to switch his shift to the 5:00 a.m. to 1:30 p.m. shift (that had been Mr. Varga's) and Petitioner would have the opportunity to work overtime. *T.50*. Petitioner agreed to work that earlier shift and was offered overtime at 1:30 p.m. *Id.* However, there were many other employees who could have covered that overtime if Petitioner declined because overtime is "strictly voluntary, not mandatory." *T.50-53*. On cross-examination, Mr. Wiltz testified, "If we can't fill [a position], then we just can't fill it." *T.55*.

Overall, we find the evidence reflects that, although Petitioner may have felt a sense of obligation and desire to be a dependable employee, his overtime hours were not mandatory.

Regular (Set Number of Hours Each Week)

Petitioner argues, citing *Airborne Express*, that, "even if the Petitioner's excess hours were somehow considered voluntary in the face of a global pandemic, it remains abundantly clear that the hours that the Petitioner worked in excess of a 40-hour work week were consistent, and therefore must be included in the calculation of the average weekly wage." *P-brief at 13*.

Petitioner claims that his overtime was "consistent," but the evidence shows that his overtime varied by pay period. For example, for the period ending 11/7/20, Petitioner worked 1 hour of overtime but in others he worked up to 63.5 hours of overtime (e.g., 9/12/20 period). *Px4, Px5*. In the pay period ending 4/11/20, he only worked 16 hours total (for those 2 weeks) and no overtime. Therefore, since these overtime hours were "not part of a set number of hours consistently worked each week," these hours would not qualify to be included in AWW pursuant to *Airborne Express*. As the court stated, "If merely working overtime on a regular, voluntary basis were sufficient to include the overtime hours worked in the calculation of an employee's average weekly wage, the overtime exclusion in section 10 of the Act would be rendered meaningless." *Airborne Express at* 555.

Regular Hours of Employment

The next question is whether Petitioner's hours worked were his "regular hours of employment." Clearly, as discussed above, his overtime hours varied by pay period so they are not "regular hours of employment." We point out, however, that Petitioner testified:

41 Q. Counsel asked you a question regarding whether the end of what would have been Mr. Varga's shift was covered. Do you recall that?
A. Well, I covered his shift. I covered one hundred percent on his shift more or less and I covered half of mine.
Q. Okay. So that would be the end of your shift then?
A. Yes.
Q. Okay. So how many hours is that that you're working those days?
A. 16 and a half.
Q. Okay. And that's Monday through Friday?
A. Yes, Monday through Friday, some Saturdays and some Sundays. It depends if they had things going on, line cuts or anything like that I would work also.

Therefore, Petitioner claimed that his "regular schedule" was 16.5 hours per day, Monday through Friday and some weekend days, but his testimony is not supported by the wage records. Based on Petitioner's testimony, he would have been working and earning:

16.5 hours per day x 5 days per week (M – F) = 82.5 hours per week
x $39.89 straight time rate

$3,290.93 per week

However, this is much more than the $2,093.83 that Petitioner claims was his AWW. *P-brief at 14*. Put another way, if Petitioner's regular schedule was as he claimed, he would have been working 42.5 hours of overtime per week. Multiplied by 2, since there are 2 weeks per pay period, would mean that Petitioner was "regularly" scheduled to work 85 hours of overtime per pay period. According to the wage records, there are no pay periods that reflect that many overtime hours. The most overtime that Petitioner worked was 63.5 hours over the 2-week period ending 9/12/20 and the vast majority of the pay periods reflect *much* less overtime.

Therefore, we do not find Petitioner's testimony credible regarding his regular schedule and do not believe the overtime hours should be included in his AWW under this third "overtime" prong.

Having decided that Petitioner's overtime wages should not be included, we next turn to the calculation of his AWW. The parties' wage analysis spreadsheets (*Px4* and *Px5*) offer little assistance. The spreadsheets contain some columns of undefined numbers and other columns that are not relevant. The hours and rate are clearly labeled and the pay period and pay type are self-explanatory. Also, portions of the spreadsheets are very difficult to read because every other pay period has a dark background.

The Arbitrator used Respondent's AWW calculations, but we believe this amount is also incorrect because this analysis does not include "COVID-19 Sick 123" time or "COVID-19 CTA Leave" time. Both Petitioner and Respondent included vacation and holiday pay in the AWW calculation, which is correct pursuant to *General Rubber and Tire*, 221 Ill. App. 3d 641, 582 N.E.2d 744, 751 (5th Dist. 1991). Petitioner argues that the COVID-19 hours should also be included. *P-brief at 14.* The court in *General Rubber and Tire* wrote:

> As such, we find that vacation pay should be included as part of an employee's average weekly wage. While the Act does not exclude vacation pay, it does specifically exclude overtime pay. Therefore, it can be inferred that if the legislature intended to exclude vacation pay it would have specifically excluded it. In addition, we note there is no contention this case involves a duplication of pay inasmuch as the parties agree the employee did not work during his vacation period.
>
> Accordingly, we hold that the Commission's finding that vacation pay should be included was not erroneous. However, the Commission's calculation was erroneous since it included overtime pay.

Id. at 652; 751.

Applying the court's rationale, we find that Petitioner's COVID-19 hours should also be included in his AWW. *See Emberson v. Clifford-Jacobs Forging Co.*, 99 IIC 643, 1999 Ill. Wrk. Comp. LEXIS 62 (AWW includes holiday pay); *Contreras v. City of Chicago Heights*, 13 IWCC 347, 2013 Ill. Wrk. Comp. LEXIS 432 (AWW includes sick and longevity pay).

We note that Petitioner's calculations did not include any "Imputed Income" hours but Respondent's did. There is no testimony or evidence as to what this category means but, since Respondent included it in its calculation, we consider that an admission that the "imputed income" category should be included in AWW. In any event, the total amount in this category is almost negligible (only $3.50 in most periods and $6.55 in the more recent ones). *Px5*.

We also note that some of the paycheck dates list Petitioner's "Regular Time HR" as $39.89 (e.g., 1/30/21) while other dates list his "Regular Time HR" as $40.14 (e.g., 1/2/21) and on 12/19/20 it is $40.08. This discrepancy does not appear to be due to raises because the numbers go back and forth over time. This was not explained at the hearing, but both parties used the varying rates in their calculations even though Petitioner admitted, in his brief, that his regular rate was $39.89. *P-brief at 13*. Regardless, we accept the parties' inclusion of these varying pay rates as an agreement of the parties.

Finally, we point out that Petitioner calculates AWW using a period of 50-3/7 weeks while Respondent uses 50 weeks. The wage records (*Px4* and *Px5*) are for 50 weeks because they end on February 13, 2021, but Petitioner includes an additional 3/7 weeks because his accident

occurred three days later on February 16, 2021. The inclusion of these additional 3 days in the denominator actually results in a slightly lower AWW.

Based on the above, we find that the most accurate way to calculate AWW is to use Respondent's total pay calculation of $66,480.83 (*Px5*) but ADD:

4/24/20	"COVID-19 Sick 123"	56 hours	$2,233.84
5/23/20	"COVID-19 CTA Leave"	80 hours	$3,191.20

This results in a total earned of $71,905.87, which when divided by 50 weeks results in an AWW of $1,438.12.

We therefore modify the Decision to reflect an Average Weekly Wage of $1,438.12 and adjust all awards accordingly.

We also correct a clerical error in the Order section to reflect that the loss of use of 15% of the right leg equates to 32.25 (not 32.35) weeks of permanent partial disability benefits.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $958.75 per week for a period of 56-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $862.87 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that, per the Parties' stipulation, Respondent is entitled to a credit in the amount of $53,610.48 for temporary total disability benefits paid by Respondent to Petitioner.

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)(2) of the Act, Respondent is not required to file an appeal bond in this case. 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.

July 2, 2024

/s/ *Carolyn M. Doherty*

CMD/se

O: 6/11/24

045

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC010816
Case Name	Steven Galvan v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	Frank Kress
Respondent Attorney	Daniela Roehm

DATE FILED: 4/25/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 25, 2023 4.84%

/s/ Ana Vazquez, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steven Galvan
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **21** WC **010816**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ana Vazquez**, Arbitrator of the Commission, in the city of **Chicago**, on **September 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 16, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**66,480.83**; the average weekly wage was $**1,329.62**.

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 $**53,610.48** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**53,610.48**.

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

ORDER

Per the Parties' stipulation, Respondent shall pay Petitioner temporary total disability benefits of **$886.41/week** for **56 1/7** weeks, commencing **February 17, 2021** through **March 16, 2022**, as provided in Section 8(b) of the Act.

Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$53,610.48** for temporary total disability benefits paid by Respondent to Petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of **$797.77/week** for **32.35 weeks**, because the injury sustained caused the **15% loss of use of the right leg**, as provided in Section 8(e) of the Act.

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

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

Ana Vazquez

Signature of Arbitrator

APRIL 25, 2023

PROCEDURAL HISTORY

This matter proceeded to hearing on September 26, 2022 in Chicago, Illinois before Arbitrator Ana Vazquez. The issues in dispute are (1) causal connection, (2) earnings and average weekly wage ("AWW"), and (3) the nature and extent of Petitioner's claimed injuries. Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated. Ax1. The Parties stipulated that Petitioner is entitled to temporary total disability ("TTD") benefits from February 17, 2021 through March 16, 2022, representing 56 1/7 weeks. Ax1 at No. 7. The Parties also stipulated that Respondent is entitled to a credit in the amount of $53,610.48 for TTD benefits paid to Petitioner by Respondent. Ax1 at No. 9.

FINDINGS OF FACT

Petitioner testified that he was hired as a car repair by Respondent on August 17, 2009. Transcript of Proceedings on Arbitration ("Tr.") at 15. Petitioner testified that he was employed as a K-580 emergency response ("K-580") by Respondent on February 16, 2021 and that he was in that same position at the time of arbitration. Tr. at 11-12, 15, 16. Petitioner testified that as a K-580, he was still classified as a car repair, but that he was in the Excel program, which provides different training programs. Tr. at 15. Petitioner explained that he took numerous training programs and passed, and that his title is leader for K-580. Tr. at 15. Petitioner's duties as a K-580 consist of responding to and fixing all train-related emergencies, including door issues, motor issues, brake issues, uncoupling, trains that do not train the line, and derailments. Tr. at 12, 13. Petitioner uses hand tools, impact tools, wrenches, crow bars, dry bars, and sledgehammers and he also carries a bag with an impact drill and socket sets for other tools. Tr. at 12-13. Petitioner is assigned to the east side, which includes the train lines from Howard to 95th. Tr. at 13-14.

Accident

On February 16, 2021, there were only three K-580s working for Respondent. Tr. at 16. There were normally four K-580s. Tr. at 16. Petitioner testified that on February 16, 2021, there was a train that went into an emergency between Racine and Ashland, he parked his truck, and walked two and a half blocks to the train in 18-inches of snow. Tr. at 16-17. Petitioner testified that he stomped through the snow constantly to get to the train and that his gait was altered because of the snow. Tr. at 18. Petitioner testified that he took small steps all the way to get to the train, that he stopped a few times to catch his breath, and that he had to drag his legs through the snow. Tr. at 18. Petitioner testified that the snow was heavy. Tr. at 18. Petitioner testified that when he got back to his truck, he felt that his "right knee was warm and a little throbbing. It worsened throughout my drive to the shop. That's what I noticed. The only thing wrong was my right knee." Tr. at 18. Petitioner did not seek medical treatment immediately, however, he presented for medical treatment the following day. Tr. at 18.

Medical records summary

On February 17, 2021, Petitioner was seen by Gina T. Ciaccia, DO of Total Care Physicians, Ltd. via telehealth for complaints of right knee pain that began at work on February 16, 2021. Petitioner's Exhibit ("Px") 7 at 10-14. Petitioner's assessment was right knee pain, swelling of knee joint, and antalgic gait. X-rays were ordered and Petitioner was prescribed ibuprofen.

On February 18, 2021, Petitioner presented at Fox Valley Orthopaedic Institute and was seen by Dr. Timothy S. Petsche. Px1 at 101-104. The record reflects a consistent accident history. X-rays of Petitioner's bilateral knees were obtained and demonstrated (1) no evidence of fracture, dislocation, or

subluxation, (2) no acute bony pathology, (3) evidence of moderate medial compartment degenerative joint disease in the right knee, and (4) evidence of mild-to-moderate degenerative joint disease in the left knee. Dr. Petsche's assessment was "right knee following acute trauma (1) pain, suspected internal derangement." Dr. Petsche noted that Petitioner elected to proceed with an MRI. Petitioner followed up with Dr. Frazier on February 22, 2021. Px7 at 6-9.

Petitioner underwent a right knee MRI on March 1, 2021, which demonstrated (1) moderate medial compartment osteoarthritis with medial meniscal pathology, including complex tearing throughout the medial meniscal posterior horn, partial tearing of the posterior horn, and further free edge tearing of the body which demonstrated prominent peripheral extrusion, (2) mild patellofemoral compartment osteoarthritis, and (3) free edge tearing of the lateral meniscal body. Px1 at 206-207.

On March 4, 2021, Dr. Petsche noted that the MRI results demonstrated medial compartment degenerative joint disease with medial meniscal pathology, mild patellofemoral degenerative joint disease, and free edge tearing of the lateral meniscal body. Px1 at 92-94. Dr. Petsche's assessment was "right knee following acute trauma (1) post traumatic moderate medial compartment degenerative joint disease, (2) MM complex tearing, and (3) LM free edge tearing." Petitioner followed up with Dr. Petsche on April 22, 2021, June 3, 2021, and November 8, 2021. Px1 at 24-26, 79-82, 85-91. On June 3, 2021, Dr. Petsche noted that Petitioner had failed to improve with physical therapy, treatment options were discussed, and that Petitioner elected to proceed with arthroscopic surgery. Px1 at 79-82.

Petitioner participated in 12 sessions of physical therapy at ATI Physical Therapy from April 29, 2021 through June 7, 2021. Px2.

On December 10, 2021, Petitioner underwent a (1) right knee arthroscopy, (2) partial medial meniscectomy, (3) chondroplasty of the patellofemoral and medial compartments, (4) removal of loose bodies in the medial and lateral compartments, and (5) partial lateral meniscectomy. Px1 at 20-22. Petitioner's postoperative diagnoses were (1) diffuse grade 3 chondromalacia patellofemoral compartment, (2) diffuse grade 3 chondromalacia medial compartment, (3) unstable, complex tear of the medial meniscus posterior horn with radial component, (4) 8-10mm loose body medial compartment, (5) free edge tearing of the lateral meniscus posterior horn, body, anterior horn, and (6) multiple tiny loose, <5mm, lateral compartment. Petitioner followed up postoperatively with Dr. Petsche on December 20, 2021, January 1, 2022, and February 17, 2022. Px1 at 6-8, 9-13, 14-19. On January 20, 2022, a Durolane injection was administered into Petitioner's right knee. On February 17, 2022, Dr. Petsche recommended continued physical therapy with a full work release on March 3, 2022. Dr. Petsche's assessment on February 17, 2022 was localized primary osteoarthritis of the right knee.

Petitioner participated in 27 sessions of physical therapy at ATI Physical Therapy from December 14, 2021 through March 1, 2022. Px2.

Earnings

Petitioner is a member of ATU 308 and his work is governed by a Union Agreement between Respondent and ATU 308. Tr. at 25. There is an agreement that governs overtime wages. Tr. at 26. Petitioner was shown Px6, which he identified as the Excel Agreement. Tr. at 26. Petitioner testified that the agreement has provisions regarding overtime. Tr. at 26. The two provisions are that the parties understand that overtime is not guaranteed and that the parties agree that Respondent has the right to assign overtime in cases of emergency. Tr. at 26-27.

Petitioner testified that he had worked for Respondent for over 50 weeks prior to February 16, 2021 and that Respondent was operating under an emergency agreement during that time because of the COVID-19 pandemic. Tr. at 27.

Petitioner testified that there is an "a.m. guy" and a "p.m. guy" in the K-580 position for the east side, and that he was the "p.m. guy," Anthony Varga was the "a.m. guy," and that Anthony Varga had caught COVID-19 and was off work in February 2020. Tr. at 27. After Mr. Varga went off work, Petitioner was the only person in the K-580 position for the east side. Tr. at 28. Petitioner testified that "[i]f I had to go somewhere, if there was an emergency or whatever, they would have a guy fill in, qualified or not, I'm not sure, but they would have a guy fill in if I had an emergency, if I had to take a day off," when asked if there were any other coworkers that did his job. Tr. at 28. Petitioner testified that his work hours increased when Mr. Varga was unable to work due to his COVID-19 diagnosis. Tr. at 28-29. Petitioner explained that he was told to work both shifts, that he could not work both shifts, and that he was told by "Deven" that they needed Petitioner to cover the morning rush and the p.m. rush. Tr. at 29-30. Petitioner testified that he said "…how about if I come in at 5 a.m., I'll cover the morning rush and I'll stay until 6:30 p.m. and cover the p.m. rush." Tr. at 29-30.

Petitioner testified that Mr. Varga returned to work at Respondent in September 2020, however, he had to take six weeks of vacation time and some holiday time because he was retiring at the end of the year. Tr. at 30. Petitioner testified that he "picked up the slack again" when Mr. Varga was off work. Petitioner agreed that Respondent did not hire any other K-580s after Mr. Varga returned to work. Tr. at 30.

When asked if anyone at Respondent told Petitioner he could choose to work those hours, Petitioner responded, "…I was told to make them up. I was told, what can you do for me to fill it. Both had to be covered, so it had to be one way or the other. My shift was p.m. They adjusted it, so I would work the a.m. and the p.m. little time for the five, six hours, whatever it was, was overtime. So they adjusted my time, but it really wasn't a choice. I mean, it wasn't a choice really…I mean, I know what I got to do and I know my job, so I just – stepped up. I mean, it was an emergency. You know, COVID hit…" Tr. at 31.

On cross examination, Petitioner testified that he and Mr. Varga were leaders, which is an elected position, and that there are approximately 20 leaders. Tr. at 34. The other leaders were not able to cover Mr. Varga's time off "[b]ecause the K-580, you need to be trained and qualified." Tr. at 35. Petitioner testified that he covered Mr. Varga's whole shift and part of his own shift, and that he declined part of the overtime. Tr. at 36. Petitioner then testified, "[w]ell, not – not declined. I told them it was impossible for me to do, yeah." Tr. at 36. When asked if there were any repercussions for him declining to work both full shifts, Petitioner testified that he was not given PPE. Tr. at 36. Petitioner testified that he was also denied keys for the restrooms. Tr. at 36, 37. Petitioner then testified that he did not know if his declining both full shifts was the reason that he was denied those items, but that he suspected that was the reason. Tr. at 37. Petitioner testified that Devenless Wiltz denied him those items. Tr. at 37. Petitioner was given PPE by the GM. Tr. at 38. Petitioner testified that "half of the second half" of both shifts was not covered. Tr. at 38. Petitioner testified that he was a union representative and that at the time of arbitration, he was still a steward. Tr. at 39. As a union representative, Petitioner files grievances. Tr. at 39. Petitioner testified that he did not file a grievance regarding repercussions for declining overtime, because there are repercussions for filing grievances. Tr. at 39-40.

On redirect examination, Petitioner testified that he covered Mr. Vargas's full shift and that he covered half of his own shift. Tr. at 41. Petitioner testified that on the days that he covered Mr. Vargas's full shift and half of his own shift, he was working 16.5 hours a day, Monday through Friday, and some weekends. Tr. at 41. Petitioner was working as much as he could. Tr. at 41-42. Petitioner agreed that the second half of his shift was uncovered due to his physical limitations. Tr. at 42. Petitioner testified that completing Mr. Vargas's shift and then half of his was necessitated because there were only three people in his classification to do the job. Tr. at 42.

Current condition

Petitioner testified that at the time of arbitration, he has difficulty with walking for long periods, and that sitting, standing, and that washing dishes was a chore. Tr. at 24. Petitioner also testified that he had not yet kneeled and that he did not feel secure kneeling on his right knee. Tr. at 24. Petitioner testified that he has a problem with squatting and that he also has difficulty with ladders. Tr. at 24. Petitioner has been working dull duty since March 2022. Tr. at 24.

Petitioner testified that he had not injured his right leg prior to February 16, 2021. Tr. at 25. Petitioner also testified that he has not had any new injuries to his right leg since February 16, 2021. Tr. at 25.

Testimony of Devenless Wiltz

Respondent called Mr. Devenless Wiltz to testify on its behalf. Tr. at 43. Mr. Wiltz is employed at Respondent as the senior manager for rail maintenance. Tr. at 44. His duties include scheduling maintenance for the trains, creating a safe environment for employees to work in, and maintaining the facilities and training of employees. Tr. at 44-45.

Mr. Wiltz testified that in his role at Respondent, he has had to ask an employee to work overtime. Tr. at 45. Mr. Wiltz testified that an employee is not required to accept overtime and that there are not any repercussions for declining overtime. Tr. at 45.

Mr. Wiltz testified that he knows Mr. Varga and he agreed that Mr. Varga took sick leave in 2020 and retired in 2021. Tr. at 45-46. Mr. Varga's position was a rail leader with K-580 qualifications. Tr. at 46. Mr. Wiltz testified that a K-580 is an individual who is a car repair, and that they ride around in Respondent's vehicle with tools and are stationed at a particular route where they can intercept trains that have problems to try to get the train back in service. Tr. at 46.

Mr. Wiltz testified that Petitioner filled in Mr. Vargas's position. Tr. at 46-47. Mr. Wiltz testified that when Petitioner did not want to work overtime, they had another employee in the shop, Alex Bailey, who was K-580 qualified, that filled in that position when Petitioner did not want it. Tr. at 48. Mr. Wiltz testified that Petitioner sometimes declined some of the overtime offered to him during Mr. Varga's sick leave. Tr. at 48. Mr. Wiltz testified that if neither Petitioner nor Mr. Bailey wanted the overtime, "then we would reach out to other routes for other qualified K-580 individuals to work that overtime or see if they wanted to work it." Tr. at 49. Mr. Wiltz testified that there were 13 other individuals besides Petitioner and Mr. Bailey that were qualified to take the overtime. Tr. at 49. Mr. Wiltz testified that if none of the other 13 leaders could cover the overtime, a manager would be assigned to delegate to an employee what would need to be done if there was an emergency. Tr. at 50-51.

Mr. Wiltz testified that Petitioner and Mr. Bailey were the first two individuals offered the overtime because they worked on the Green Line and the K-580 position was assigned to the Green Line. Tr. at 48, 50.

Mr. Wiltz testified that covering Mr. Varga's shift was not an emergency. Tr. at 50. Mr. Wiltz further testified that Petitioner was offered the opportunity to switch his shift to cover Mr. Vargas's shift, and if Petitioner wanted to work overtime, he would be the first one asked because he was the person that picked K-580 on the Green Line. Tr. at 50. Mr. Varga's shift was from 5 a.m. to 1:30 p.m. and Petitioner's shift was from 1 p.m. to 9 p.m. Tr. at 50. Mr. Wiltz testified that Petitioner agreed to work Mr. Varga's shift, and at the end of Mr. Varga's shift, 1:30 p.m., Petitioner was offered overtime. Tr. at 50. When asked if Petitioner's shift was always covered, Mr. Wiltz responded that it was covered by Petitioner for four hours or covered by Mr. Bailey for eight hours. Tr. at 51. Mr. Wiltz testified that if Petitioner's p.m. shift was not covered for eight hours, "[w]e just asked the other K-580 who was on the other route to cover the whole route for the last four hours." Tr. at 51. Mr. Wiltz testified that a leader from another rail would already be out there and could cover. Tr. at 51.

Mr. Wiltz testified that Petitioner was not facing any repercussions for declining overtime, as overtime is strictly voluntary and not mandatory. Tr. at 52. There were not any unofficial repercussions, such as denying Petitioner PPE. Tr. at 52. Mr. Wiltz did not know if Petitioner was ever denied PPE. Tr. at 52. Mr. Wiltz testified that he did not personally deny Petitioner PPE. Tr. at 52. Mr. Wiltz was unaware that Petitioner did not have PPE. Tr. at 53.

Mr. Wiltz testified that during Mr. Varga's sick leave, Mr. Varga's and Petitioner's shifts were not an emergency that needed coverage, they were regular shifts that needed coverage. Tr. at 53. Mr. Wiltz explained that it was not an emergency to cover those shifts "[b]ecause they were scheduled on the pick to be covered. There were regular shifts scheduled on the pick to be covered." Tr. at 53. If Petitioner could not cover both shifts, it would not be an emergency, and "[w]e would just ask somebody else to do it." Tr. at 53.

On cross examination, Mr. Wiltz testified that Mr. Bailey is a rail technician, a leader, and has K-580 and all other Excel qualifications. Tr. at 54. Mr. Wiltz agreed that Mr. Bailey is not formally a K-580, but if a position has to be filled and he has the qualifications, Mr. Bailey is qualified to work it. Tr. at 54. Mr. Wiltz further explained that since Mr. Bailey works out of the Green Line, he would be the second or third person asked because the order of seniority would have been Mr. Varga, Mr. Bailey, then Petitioner. Tr. at 54-55. Mr. Wiltz testified that "[i]f we can't fill it, then we just can't fill it[,]" when asked if it was Respondent's policy that someone has to be in that position. Tr. at 55. Mr. Wiltz testified that in the event of an emergency and if no one can cover, they ask the other K-580 to cover the route. Tr. at 55. He explained that there have been situations where the other K-580 covered the whole route for eight hours, out of necessity, and not in an emergency. Tr. at 55. It is not an emergency to fill the position. Tr. at 56. Mr. Wiltz explained that the position would not be filled if no one else wants the job, and if no one wanted the slot then the position would not be filled. Tr. at 56-57. A manager would be asked to stay informed as to what is happening and respond to emergencies with employees with tools. Tr. at 57. Mr. Wiltz testified that there would not be repercussions if no one was in the role of a K-580 and a train accident occurred. Tr. at 57. Mr. Wiltz testified that he thinks that the entire leader pool would qualify for Petitioner's position, but he did not know. Tr. at 58-59.

On redirect examination, Mr. Wiltz testified that a leader from another rail line has been needed to cover the Green Line, and there were no issues with having it covered. Tr. at 60. Mr. Wiltz agreed that a K-580 is not the only person who responds to emergencies, and that the K-580 is the first to respond because they are located closer to the location of the emergency. Tr. at 62.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). 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 F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied if the claimant can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient to prove a causal connection between the accident and the claimant's injury. *International Harvester v. Industrial Com.*, 93 Ill. 2d 59, 63 (1982).

The Arbitrator finds that Petitioner's current condition of ill-being as to his right knee is causally related to the February 16, 2021 injury. The Arbitrator relies on the following in support of her findings: (1) the records of Total Care Physicians, Ltd, (2) the records of Fox Valley Orthopaedic Institute and Dr. Timothy S. Petsche, (3) the records of ATI Physical Therapy, (4) Petitioner's credible testimony that he had not injured his right leg prior to February 16, 2021, (5) Petitioner's credible testimony that he has

not had any new injuries to his right leg since February 16, 2021, and (6) the fact that none of the records in evidence reflect any right knee issues or treatment prior to February 16, 2021. The Arbitrator notes that the evidence demonstrates that Petitioner was in condition of good health and was able to work full duty and without restrictions immediately prior to the work accident.

Issue G, as to what were Petitioner's earnings, the Arbitrator finds as follows:

At arbitration, Petitioner claimed that his earnings during the year preceding the injury were $149,631.04 and that his average weekly wage ("AWW"), calculated pursuant to Section 10 of the Act, was $2,877.52. Ax1 at No. 5. Respondent disputes Petitioner's claim and Respondent claims that Petitioner's AWW was $1,329.61. Ax1 at No. 5.

The Arbitrator initially notes that at issue is whether Petitioner's overtime earnings should be included in Petitioner's AWW calculation. Section 10 of the Act specifically excludes overtime income in calculating average weekly wage. Judicial rulings, however, have modified the language of the Act to include overtime earnings only if overtime was mandatory and regular. Having considered all the evidence, the Arbitrator finds that Petitioner's overtime was not mandatory or regular. Accordingly, the Arbitrator finds that Petitioner's overtime earnings should not be included in the calculation of Petitioner's AWW and that Petitioner's AWW was $1,329.61.

Issue L, as to the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator notes that pursuant to Section 8.1(b) of the Act, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered includes: (i) the reported level of impairment pursuant to AMA; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

With regard to criterion (i), the Arbitrator notes that an AMA Impairment Rating was not offered, and therefore the Arbitrator assigns no weight to this factor.

With regard to criterion (ii) and criterion (iii), the Arbitrator notes that at the time of the accident, Petitioner was 55 years of age and was employed at Respondent as a K-580. Petitioner returned to work full duty as a K-580 at Respondent in March 2022 and was still employed in that position at the time of arbitration. The Arbitrator assigns less weight to these factors.

With regard to criterion (iv), 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 criterion (v), the medical records reflect that following the February 16, 2021 accident, Petitioner sustained an unstable, complex tear of the medial meniscus posterior horn and free edge tearing of the lateral meniscus posterior horn, body, and anterior horn. Petitioner's treatment consisted of (1) a right knee arthroscopy, which included a partial medial meniscectomy and partial lateral meniscectomy, performed on December 10, 2021, (2) preoperative and postoperative physical therapy, and (3) a postoperative Durolane injection administered into Petitioner's right knee on January 20, 2022. The Arbitrator notes that Dr. Petsche released Petitioner to full duty work in March 2022 and that Dr.

Petsche's diagnosis on February 17, 2022 was localized primary osteoarthritis of the right knee. The evidence demonstrates that Petitioner last sought treatment for his right knee with Dr. Petsche on February 17, 2022. The Arbitrator further notes that at arbitration, Petitioner testified that he has difficulty walking for long periods and that sitting, standing, and washing dishes are a chore. Petitioner also testified that at the time of arbitration, he did not feel secure with kneeling on his right knee and that he had difficulty with squatting and climbing ladders. The Arbitrator assigns more weight to this factor.

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

Ana Vazquez

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC023132
Case Name	Ahmad Omar Hassan Maslet (Son of Omar H. Maslet - Deceased) v. Super Sales Inc dba Food Mart & IWBF
Consolidated Cases	
Proceeding Type	Remand from the First District Appellate Court of Illinois
Decision Type	Commission Decision
Commission Decision Number	24IWCC0317
Number of Pages of Decision	7
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Kyle Kasmarick
Respondent Attorney	Kenneth Peters, Drew Dierkes

DATE FILED: 7/3/2024

/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

Nadia Maslat a/k/a Nadia Husein Ali Abu Seif
Maslat, widow of Omar H. Maslat,

Petitioner,

vs. No: 15 WC 23132

Super Sales Inc., and Illinois State Treasurer
as Ex Officio Custodian of the Injured Workers'
Benefit Fund,

Respondents.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the First District Appellate Court of Illinois, Workers' Compensation Division, which vacated the Circuit Court's order and the Commission's decision which denied §7(a) death benefits to Nadia Maslat. The Appellate Court remanded the matter to the Commission with directions to, "resolve the issues involved in a logical sequence." Specifically, the Appellate Court found that the Commission had conflated two issues: (1) whether Petitioner's motion to amend the application for adjustment of claim by substituting Nadia Maslat as Petitioner was properly granted by the Arbitrator, and (2) whether, if allowed, such amended application would relate back to the filing of the original application. The Appellate Court, other than agreeing with the Commission that it was not a misnomer to have named Ahmad Maslat as Petitioner in the original application, found it impossible to directly address the other dispositive issues raised on appeal.

PROCEDURAL BACKGROUND:

The claim at issue involves the death of Omar H. Maslat ("Decedent") who was fatally shot on April 1, 2014 while present in Super Sales' food mart. On July 28, 2015, an application for adjustment of claim was filed by Ahmad Omar Hassan Maslat, son of Omar H. Maslat, Deceased ("Ahmad Maslat"). The case proceeded to arbitration on April 8, 2019. The Decedent's widow, Nadia Maslat, appeared and testified on behalf of the Petitioner Ahmad Maslat, as did another of Decedent's adult sons, Ala Maslat. Ahmad Maslat did not appear at the hearing.

At the conclusion of the hearing, the Arbitrator granted Petitioner's counsel's oral motion to amend the application by substituting Nadia Maslat as Petitioner in place of Ahmad Maslat. Petitioner's counsel then amended the application on its face to name Nadia Maslat as Petitioner.

On June 27, 2019, the Arbitrator issued his decision, in which he denied Nadia Maslat's claim for multiple reasons. Petitioner sought Review by the Commission, and in our April 6, 2020 Decision and Opinion on Review, we affirmed the denial of Nadia Maslat's claim, albeit with changes.

Petitioner appealed the Commission's April 6, 2020 decision to the Circuit Court of Cook County. On November 30, 2021, the Circuit Court confirmed the Commission's decision in all respects. Petitioner appealed the Circuit Court's order to the Appellate Court. In their April 21, 2023 order, the Appellate Court vacated the Circuit Court's judgment and the Commission's decision, and remanded the case to the Commission.

In accordance with the Appellate Court's mandate, the Commission has again carefully reviewed and considered all of the evidence, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT:

In his application for adjustment of claim filed on July 28, 2015, Petitioner Ahmad Maslat alleged that the Decedent, Omar Maslat, was shot and killed while working for Respondent, Super Sales, on April 1, 2014. Ahmad Maslat's application for adjustment of claim alleged that the Decedent was 53 years old, married, and had no dependents under age 18.

At the April 8, 2019 arbitration hearing, Respondents placed all issues in dispute. Before any evidence was taken, the Arbitrator asked the parties if they had any preliminary matters to address. Counsel for Super Sales sought confirmation from the Arbitrator that the only claim being tried was Ahmad Maslat's claim. The Arbitrator acknowledged that to be accurate, but then offered Petitioner's counsel an opportunity to amend the application. Petitioner's counsel declined, the hearing proceeded, and evidence was taken on Ahmad Maslat's claim.

Nadia Maslat testified that she and the Decedent had been married in Jordan on August 22, 1980, and that she was his only wife. They had six children together, including sons Ahmad and Ala, who lived in the United States. Although Decedent and Nadia lived separately, he in Chicago and she in Jordan, they remained married and spoke frequently by phone. Her last trip to Chicago had been in 2008 or 2009. Nadia Maslat testified further that the Decedent regularly sent her money via Western Union. Regarding Decedent's employment, she testified the Decedent told her that in April 2014, he was employed and worked in a grocery store.

Ala Maslat testified that his parents were married at the time of his father's death, and that when his mother visited Chicago, she would stay with the Decedent. Ala Maslat visited the Decedent at the Super Sales' food mart on a few occasions, and observed the Decedent, "doing

security." Ala Maslat described his father's position there as being a clerk. Ala Maslat further testified that he saw his father wire money to his mother a few times.

A "First Call Sheet" was submitted into evidence, and indicated the shooting was reported by "staff" at the Food Mart. The Call Sheet stated, "[p]erson shot inside store." A case report from the Chicago Police Department indicated that the Decedent was a, "Clerk/security guard at the food mart when he was shot." The source of the officer's information, however, was not reflected in the report.

Over objection from Respondent's counsel, the Arbitrator also admitted into evidence excerpts from a transcript of the 2017 criminal trial of Decedent's alleged assailant, Joey Jones (*People v. Jones,* 14 CR 7806). During that criminal trial proceeding, a witness, Bahlal Abubakr, testified that he was the stepson of the owner of Super Sales; he had worked in the store as a clerk; and he was present on April 1, 2014 when Decedent was shot. Mr. Abubakr denied recollection of numerous statements he had previously made to a grand jury, but when his grand jury testimony was read back to him, he acknowledged he had described the Decedent as, "kind of like homeless." He also testified that the Decedent would sometimes perform odd jobs at the store like stocking shelves, which they tried to give him on occasion. Mr. Abubakr further testified that the Decedent was working on the day of the shooting, and that just before the Decedent was shot, Mr. Abubakr instructed him to, "get on security…close the gate."

The Arbitrator denied Nadia Maslat's claim in his June 27, 2019 decision. The Arbitrator found that naming Ahmad Maslat as Petitioner in the original application had not been a misnomer. The Arbitrator also found that Nadia Maslat's amended application did not relate back to the filing of the original application, and was barred by the statute of limitations set forth in §6(d) of the Act.

The Arbitrator made additional findings, including that Nadia Maslat failed to prove: an employer-employee relationship existed between the Decedent and Super Sales; that Decedent's accident arose out of and in the course of employment, and that the Decedent had earnings from Super Sales which could be used to calculate an average weekly wage.

In our April 6, 2020 decision, we found that Arbitrator erred by granting Petitioner's motion to amend the application by naming Nadia Maslat Petitioner – but we found that error to be "harmless" because we also found Ahmad Maslat's timely-filed claim for benefits failed on one or more of the elements required to be proven in order to recover under the Act.

CONCLUSIONS OF LAW:

After carefully reviewing all of the evidence and applicable law, the Commission again affirms the Arbitrator's denial of this claim.

In the Commission's April 6, 2020 decision, we found, as did the Arbitrator, that it was not a misnomer to have named Ahmad Maslat as Petitioner instead of Nadia Maslat. As the Appellate Court noted in its April 21, 2023 remand Order,

> Misnomer "does not encompass naming the wrong party but instead encompasses naming the right party by the wrong name." *Vaughn v. Speaker,* 126 Ill. 2d 150, 158 (1988)… The original application did not name Nadia by the wrong name; rather, it named the wrong party, Ahmad, as the Petitioner. The error in naming Ahmad as the Petitioner in the original application was not a misnomer.

We again find that naming Ahmad as Petitioner was not a misnomer.

The Arbitrator erred in granting Petitioner's Motion to Amend the Application at the conclusion of the hearing.

Commission Rule 9020.20 states, "[i]t shall be within the discretion of the Commission whether to allow any amendments to the application *after* the commencement of a hearing on the merits." 50 Ill. Adm. Code 9020.20 (2016) (emphasis added). Although the decision to allow an amendment after the commencement of a hearing is a matter of discretion before the Commission, amendments should be allowed unless the respondent would be prejudiced. *Illinois Institute of Technology Research Institute v. Industrial Comm'n,* 314 Ill. App. 3d 149 (2000).

The Arbitrator offered Petitioner's counsel the opportunity to amend his application at the beginning of the hearing, but that offer was declined. The hearing then proceeded on Ahmad's claim, and after all the evidence was presented, the Arbitrator granted Petitioner's last-minute motion to amend the application by substituting Nadia as Petitioner. We find the Arbitrator erred in granting the motion at that time. Doing so prejudiced Respondents, effectively denying them the opportunity to investigate and defend against the claim of a new Petitioner, Nadia Maslat. A core issue of her claim was whether she was married to the Decedent as of the date of accident. Instead, the defense Respondents presented was to the claim of a surviving child of the Decedent.

The right to amend an application for adjustment of claim is not absolute. *Lee v. Chicago Transit Authority,* 152 Ill. 2d 432 (1992). Prejudice and surprise are factors to be considered in determining whether or not a motion to amend pleadings should be allowed. *Spurgeon v. Alton Memorial Hospital,* 285 Ill. App. 3d 703 (1996). The Commission finds that Respondents were surprised and prejudiced by the Arbitrator's granting of that motion – a motion which effectively substituted a new party as Petitioner – after evidence had been presented. Accordingly, the Commission denies the motion to amend the application and strikes the amended application, filed on April 8, 2019, which named Nadia Maslat as Petitioner.

Ahmad Maslat did not prove his claim.

The Commission next considers the merits of the original claim filed by Ahmad Maslat on July 28, 2015. We first look at Ahmad Maslat's status as a claimant for death benefits under §7 of the Act.

Section 7(a) of the Act sets forth when children of a deceased employee may be entitled to death benefits:

> If the employee leaves surviving a widow, widower, child or children, the applicable weekly compensation … shall be payable during the life of the widow or widower and *if any surviving child or children shall not be physically or mentally incapacitated then until the death of the widow or widower or until the youngest child shall reach the age of 18, whichever shall come later; provided that if such child or children shall be enrolled as a full time student in any accredited educational institution, the payments shall continue until such child has attained the age of 25. In the event any surviving child or children shall be physically or mentally incapacitated, the payments shall continue for the duration of such incapacity. (Emphasis added.)*

Thus, under §7(a), a child of a deceased employee qualifies for death benefits if, at the time of the accident, the child is: (1) under 18 years of age; (2) under 25 years of age and a full-time student at an accredited educational institution; or (3) physically or mentally handicapped. *Drives, Inc. v. Industrial Comm'n,* 124 Ill. App. 3d 1014, 464 N.E.2d 1142 (4th Dist., 1984). Section 7(c) of the Act also allows for death benefits to surviving children who are over the age of 18 if they are, "in any manner dependent upon the earnings of the employee," at the time of the employee's accident.

In his application, Ahmad Maslat alleged that on April 1, 2014, he was the Decedent's son, and that the Decedent had no dependent children under 18 years of age. Notably, Ahmad Maslat did not appear at the arbitration hearing to provide any testimony. No evidence was presented which would prove that Ahmad Maslat was entitled to death benefits under §7(a) or §7(c) of the Act. There was no evidence that as of April 1, 2024, he was under age 18; was a full time student in an accredited educational institution; was physically or mentally incapacitated, or was dependent upon the Decedent's earnings. Absent such proof, the Commission finds Ahmad Maslat failed to establish entitlement to benefits under §7 of the Act as a result of the Decedent's death. The Commission therefore denies Ahmad Maslat's claim.

Given the Commission's above findings and conclusions, we find it unnecessary to address the other issues on Review.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's April 8, 2019 motion to amend the application to name Nadia Maslat as Petitioner is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the amended application for adjustment of claim naming Nadia Maslat as Petitioner is stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that the claim of Ahmad Maslat is denied.

No bond is required for the removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 3, 2024

MP/mcp
o-02/20/20
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/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031884
Case Name	Matthew Woodson v. State of Illinois - Graham Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0318
Number of Pages of Decision	9
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Joseph L. Moore

DATE FILED: 7/5/2024

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

24IWCC0318

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

Matthew Woodson,

Petitioner,

vs. NO: 21 WC 031884

State of Illinois- Graham Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical care, and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Factual Background

Petitioner testified at the time of hearing he was employed as a correctional Sergeant by IDOC ("Illinois Department of Corrections") at Graham Correctional Center. T.13. He began working with IDOC on February 28, 2011. *Id*. He had been a Correctional Officer for approximately ten (10) years prior to being promoted to Correctional Sergeant. T.14. He had been promoted in late 2019 or early 2020. *Id*.

During his time as a Correctional Officer, his duties included keying, cuffing/uncuffing, opening doors, performing shakedowns and searching property boxes. T.18. He testified that when acting as an officer he could not think of a part of his job that did not involve using his hands. *Id*.

He testified that when the pandemic hit in March of 2020, his workload increased exponentially. T.19. At that time, his job included needing to open doors, open lock boxes for the law books, deal with inmates that didn't want to be cooperative, cuff uncooperative inmates, and additional situations that arose from dealing with COVID. *Id*. Due to COVID he was also required to perform a lot of the tasks that the inmates would normally perform themselves, including cleaning up after passing out trays, making sure everything is picked up, and trash being taken out. T.20.

Petitioner testified that as a Correctional Sergeant in 2020 he worked in "X House", in the "Seg Unit", in the "Core", in the "Armory", and in the "Gatehouse". T.28. He was also a Cluster Sergeant, did fire safety and was a TAC member for the statewide TAC team. *Id*.

While working at "X house", he estimated he would lock and unlock a cell door more than fifty (50) times on a typical day. T.29.

While working at "Core" as a job assignment, Petitioner testified he was basically in control of every walkway that came from the clusters, from dietary, from the health care unit, from Seg, from the back door, from X house, or from the gym. T.30. He testified that "you have the whole area that you can control along with other staff members that are sitting in the core shack with you". *Id*. The amount of keying that would be done any given day would depend on the happenings of the day. *Id*.

While working in the "Armory", he testified the amount of keying necessary would depend upon how many times he had to open the door. T. 30-31. Petitioner testified that some of the doors were operated by buzzers and some by keys. T.31. The type and size of the key would vary on the door. *Id*.

While he worked at the "Gatehouse", his job duties included pressing a button, checking locks on weapons, dealing with visitors that came in, making sure that whenever people left they came back in, double checking their personal belongings, and going through the post description that was set forth in front of him to follow. *Id*.

Petitioner testified that in his role as a "Cluster Sergeant", the duties also varied from day-to-day. T.32. He indicated that sometimes there could be a disturbance in a house or an issue with an inmate. *Id*. Whatever the issue was he would be going down to it, or having the person involved come up to him, to deal with it face to face. *Id*. He testified it just depended on the day. *Id*.

Respondent's witness, Major Trevor Wright, also provided testimony as to Petitioner's job duties as a Sergeant in different assignments within Graham Correctional Center. Major Wright testified that the duties of a Zone Sergeant included making rounds through the five housing units in that cluster, assisting in shakedown of the cells, coordinating a cell, helping them feed, and supervising the staff in the cluster. *Id*. The amount of keying involved in that assignment just depended on what was going on that particular day. T.47. He indicated if there were cells that were quarantined, and they had to go in to feed during that time in 2020, there would be lockdown during that time. *Id*. If the Petitioner had been assisting in feeding, there would be keying performed. *Id*. He estimated a regular day would not contain a whole lot of keying, but some. *Id*. He also testified that the number of employees performing the feeding the prisoners would depend on the day and the staffing levels. *Id*.

Major Wright testified that the duties included with the assignment of Armory Sergeant included operating the Control Center of the institution, radio work, and passing out equipment. *Id*. That assignment would involve very minimal keying. *Id*.

The job duties involved in the Gatehouse Sergeant assignment included ensuring the employees were passing through the metal detector, conducting random shakedowns, seeing inmates out that were going out for court dates or medical furloughs, and processing visits. *Id*.

Major Wright testified that the Core Sergeant duties included monitoring all inmate movement, in lines moving to the different areas of the institution. T. 49. He testified there was not a lot of keying involved in that particular assignment. *Id*

He testified that HUD stood for the health care unit, and that the assignment included supervising the staff and inmates inside the health care unit, monitoring the movement coming in and out, assisting in the infirmary in the back of the health care unit. *Id*. He testified there was not a lot of keying involved in that assignment as there were three wards and three other single cells. T.49-50.

Major Wright testified that the R&C Sergeant was the receiving unit and was also referred to as "X house". T.50. He testified that the job duties involved in that assignment included supervising the staff and inmates in the building. *Id*. He noted there were up to 400 inmates in the building at a time. *Id*. He testified that all of the inmates were fed in the cells, so each cell would need to be keyed two times when performing feeding. *Id*. He testified it was a lot of keying involved in that position. *Id*.

Major Wright testified that Petitioner also worked in their Segregation Unit. *Id*. The Segregation Sergeant would supervise the staff in that building, which was one to two officers. T. 51. He noted that the inmates were fed in the cell, which involved taking a padlock off a chuckhole. *Id*. The position also meant running showers, wherein the employee would open a segregation cell by taking off the padlock and keying the door, cuffing the inmate before pulling them out, then again when he would put them in the shower and again when he would pull them out of the shower back into the cell, as well as performing regular wing checks. T.50-51.

During his time from 2011 to 2020, Petitioner noticed a variety of issues with his hands including having them go numb, or not being able to grip things. T.19. Petitioner testified he had tried splints, braces and medication, but continued to have symptoms. *Id*. After theses attempts failed, Petitioner went to see Dr. Matthew Bradley for treatment. *Id*. Petitioner gave a description of his job duties and underwent a physical examination. PX3, p. 1-3. Dr. Bradley recommended Petitioner undergo an EMG and a nerve conduction study. *Id*. Ultimately, Petitioner had release surgeries to his wrists and his elbows. PX3, p. 9-11. Petitioner testified that these surgeries helped his symptoms, with the exception of his left arm. T. 22. He still noticed numbness, stiffness, and his hand locking in his left arm. *Id*. Petitioner testified that as a result of these symptoms, Dr. Bradley wanted to perform another surgery. *Id*.

Dr. Bradley testified at deposition that he had reviewed a job site analysis for a Correctional Officer at Graham Correctional Center. PX11, p. 14. He also noted he had reviewed other materials over the years when treating other officers that had worked at Graham Correctional Center. PX 11, p. 14. He also testified Petitioner had informed him of his working for ten (10) years as a Correctional Officer and describing the repetitive activities he performed with his hands/elbows. PX11, p.14-16. Dr. Bradley diagnosed Petitioner with bilateral carpal tunnel and

cubital tunnel syndrome conditions and performed right and left hand/elbow surgeries on December 22, 2021, and January 12, 2022, respectively. p. 15-24.

Dr. Bradley opined there was a causal relationship between Petitioner's carpal tunnel and cubital tunnel syndrome conditions and Petitioner's repetitive work activities over his employment, a period of ten (10) years. PX 11, p. 30-31, 35. Dr. Bradley relied solely upon Petitioner's own description of his job duties over the years. PX 11, p. 42-45.

Petitioner was also seen by Dr. Patrick K. Stewart for a Section 12 examination at Respondent's request. He opined there was no causal relationship between Petitioner's work activities and the conditions of bilateral carpal and cubital tunnel syndromes. PX7, p. 7-8.

During his deposition, Dr. Stewart testified that he had been provided job descriptions by Respondent consistent with the Correctional Sergeant position at Graham Correctional Center. RX8, p.18-19. Dr. Stewart also testified he was allowed to tour the Graham Correctional Center. RX8, p.21. When he did so, Dr. Graham physically used keys to open doors, locks and chuckholes and testified he was able to do so without applying any significant force. *Id*.

Dr. Stewart opined Petitioner's work activities were essentially supervisory and did not subject Petitioner to an increased risk for development of compression neuropathies. He noted keying of cell doors was performed with a normal household door key/lock and required no more than one second. RX7, p. 7. He found there was not a significant amount of force required to unlock a chuck door padlock. *Id*. He also found Petitioner was not required to perform repetitive forceful grasping as part of his job duties. *Id*.

Legal Analysis and Conclusions

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must prove he suffered a disabling injury which arose out of and in the course of his employment. *Id*. The phrase "in the course of employment" refers to the time, place and circumstances surrounding the injury. *Id*. To satisfy the "arising out of" prong, Petitioner must show that the injury "…had its origin in some risk connected with, or incidental to, the employment." *Id*. Petitioner's claim is compensable only if he meets his burden of proving his bilateral wrist and elbow injuries arose out of and in the course of his employment as a Correctional Sergeant.

A claimant alleging an accidental injury due to repetitive trauma must show that the injury is work-related and not a result of the normal degenerative aging process. *See Peoria County Belwood Nursing Home v. Indus. Comm'n*, 15 Ill. 2d 524, 530 (1987).

The Commission may review the manner and method of a claimant's job to determine if such duties are sufficiently repetitive to establish a compensable accident under a repetitive trauma theory of recovery. See *Williams v. Industrial Commission*, 244 Ill. App. 3d 204,211, 614 N.E.2d 177 (1993) citing *Perkins Product Co. v. Industrial Commission*, 379 Ill 115, 120 (1942) ("the claimant's injury 'was directly connected with the manner and method in which she was required to do her work, and to use her arm in the discharge of her duties'"). Although medical testimony

as to causation is not necessarily required, "where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities caused the condition complained of." *Nunn v. Indus. Comm'n*, 157 Ill. App. 3d 470, 477, 478 (1987). After carefully considering the totality of the evidence, the Commission finds Petitioner did not meet his burden of proving he sustained a work-related injury as a result of repetitive trauma.

After closely reviewing the evidence, the Commission finds the opinions of Dr. Stewart, Respondent Section 12 examiner, to be most credible and thus relies upon his opinions in finding Petitioner's work activities did not cause Petitioner's bilateral carpal and cubital tunnel conditions. Prior to his examination of Petitioner, Dr. Stewart was provided with a job description for a Correctional Sergeant, which he reviewed with Petitioner at the time of his examination to ensure its accuracy. RX7, p.1-2. Petitioner had input as far as his primary job activities and job title, adding COVID lockdowns had caused a significant increase in his activities. *Id*. Dr. Stewart also personally toured the Graham Correctional Center and physically used the keys required to open doors, locks and chuckholes. RX8, p. 21. After consideration of the above, Dr. Stewart opined Petitioner's position was largely a supervisory role and the duties required in the performance of that supervisory role did not subject Petitioner to an increased risk for development of compression neuropathies. RX7, p. 7. He specifically did not find the duties met the criteria of a repetitive nature because of the limited exposure time in a given workday, as well as an overall lack of requisite force to cause an increased risk of compression neuropathies. *Id*. The Commission notes that only Dr. Stewart personally had the opportunity use the door, lock and chuckhole keys, putting him in the unique position to understand the force necessary to perform such tasks, providing his medical opinion as to causation with more weight.

At the time of hearing, Petitioner testified as to a number of activities performed in his various duties over the ten years he worked for Respondent. T.18-20, 28-33. Major Wright testified as to the duties required of a correctional officer and correctional sergeant. T. 46-52. Neither testified as to the force required in the performance of said duties. There was also no testimony or demonstration at the time of hearing as to the exact mechanism of the duties, which would help to determine whether Petitioner's job duties possessed the force or the required flexion and extension of the wrist and arms to put him at an increased risk for compression neuropathies. Likewise, the testimony did not demonstrate significant flexion/extension actions of the wrist or elbow to support causation for compression neuropathies at that level.

Petitioner relied upon the causation opinions of Dr. Bradley to support his position of a repetitive injury caused by his work activities. The Commission is not persuaded by Dr. Bradley's causation opinions, as he did not have the opportunity to experience the force required to perform the keying of doors, locks and chuckholes prior to rendering his opinions. Dr. Bradley's opinions were based solely upon the Petitioner's subjective description of his job duties and his testimony did not demonstrate an understanding of the mechanism or force involved to perform said duties.

After reviewing the evidence, the Commission finds that Petitioner failed to meet his burden of proof as to show he sustained an accident occurred arising out of and in the course of his employment, thereby causing his disabling conditions.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 15, 2023, is reversed in its entirety and all benefits are denied.

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

July 5, 2024
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/s/ *Maria E. Portela*
Maria E. Portela

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator. After carefully considering the totality of the evidence, I find that Petitioner has met his burden of proving he sustained a repetitive trauma of bilateral carpal and cubital tunnel as a result of his activities at work.

The long-established threshold for a compensable injury is that the work-related accident need not be the sole or principal causative factor, as long as it was **a** causative factor in the resulting condition of ill-being. (*Emphasis added*) *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003).

Petitioner credibly testified regarding his overall employment duties with the Respondent over the approximately ten (10) years of his employment, not just the last 1-2 years he spent as a Correctional Sergeant. The caselaw supports a contemplation of the whole of Petitioner's job duties with Respondent when assessing whether a claimant has sustained a work-related repetitive trauma injury. See *PPG Indus. V. IL. Workers' Comp. Comm'n*, 2014 IL App (4th) 130698 WC, ¶ 19, *Kishwaukee Community Hospital v. Industrial Comm'n,* 356 Ill.App.3d 915, 917–18, 293 Ill.Dec. 313, 828 N.E.2d 283, 287 (2005) (over 30 years); *Oscar Mayer,* 176 Ill.App.3d at 608, 126 Ill.Dec. 41, 531 N.E.2d at 174–75 (15 years); *City of Springfield, Illinois v. Illinois Workers' Compensation Comm'n,* 388 Ill.App.3d 297, 300–01, 327 Ill.Dec. 333, 901 N.E.2d 1066, 1069–70 (2009) (approximately 8 years); *Peoria County,* 115 Ill.2d at 527, 106 Ill.Dec. 235, 505 N.E.2d at 1027 (6 years). Petitioner testified that prior to his current role as Correctional Sergeant, he engaged in many work-related activities that required the forceful use of his bilateral hands, wrists, and arms, including repetitive keying, cuffing/uncuffing, opening doors, performing shakedowns and searching property boxes. T.18.

Petitioner also credibly testified with regard to the exponential increase in work activities during the time of COVID lockdowns. Despite his promotion to a more supervisory position of Correctional Sergeant, COVID forced changes to the operation of the facility. Petitioner also had to perform a lot of the tasks the inmates would normally perform themselves. T.20. In addition,

Petitioner was forced to perform some of the existing tasks on a more frequent basis due to the efforts to keep the prisoners quarantined in groups of ten. RX7, p. 2. It follows that those simple tasks such as feeding, bathing or moving a group of inmates, required more repetition of duties such as keying and cuffing. Petitioner's testimony was bolstered by Respondent's witness, Major Wright, who confirmed the increase in work and the staffing issues caused by the COVID pandemic. T.42. Major Wright also confirmed that a "conscientious correctional sergeant is doing the same duties as a conscientious correctional officer". T.53

Petitioner's descriptions of the activities provided an adequate picture of the duties involved not just in a Correctional Sergeant's position but the Correctional Officer position he held for ten (10) years. As he was able to describe these overall activities to his treating physician, Dr. Bradley, without limitation of a singular job title, I find Dr. Bradley's opinions regarding causation to carry more weight.

Dr. Bradley was most familiar with Petitioner overall and the development of his condition and is, therefore, best suited to provide a medical opinion as to the relation of Petitioner's compression neuropathies and his work duties. Whereas Dr. Stewart focused on Petitioner's role only as a Sergeant. Dr. Bradley opined that anything that required repetitive-type activities that cause microtraumas to the wrist and elbow could lead to swelling and inflammation, leading to carpal tunnel and cubital tunnel syndromes. PX11, p. 11-12, 33-34. While Dr. Bradley notes repetitive flexing or extending or forceful grasping of objects is a basis for stress on the cubital tunnel, he finds it is the repetitive nature of the activity, rather than the actual activity performed, which results a buildup of microtraumas causing the compression neuropathies. PX11, p. 11-12. Dr. Bradley noted that he had discussed with Petitioner the repetitive use of his hands during his work as a correctional officer for ten (10) years. PX11, p. 15. They discussed the cuffing and uncuffing of prisoners, the locking of cell doors, and the flipping of cells, all of which Dr. Bradley felt over the years had resulted in repetitive use of his hands and elbows. *Id*. He also found that the multiple repetitive activities that Petitioner had done for the ten or so years with Respondent had contributed to or aggravated his carpal and cubital tunnel syndromes. T. 30-31.

Notably, Dr. Bradley found Petitioner had no other significant co-morbidities that would put him at greater risk for carpal/cubital tunnel conditions. Even the technical finding of a higher BMI, which might otherwise be considered a risk factor, was explained by Dr. Bradley to be a function of a larger man, rather than an obese finding. PX11, p.58.

I agree with the Arbitrator and find that both the facts provided by Petitioner and Dr. Bradley's opinions are sufficient to show that Petitioner's employment with Respondent was at least **a** factor in the development of his bilateral carpal and cubital tunnel conditions.

While the majority relies upon the opinion of Dr. Stewart in his finding that Petitioner's job duties contained an absence of requisite forceful and forced flexion/extension repetitive activities. I find Dr. Stewart's opinions to be lacking a sufficient basis. Dr. Stewart's report and testimony both support a narrow consideration of Petitioner's overall job duties. He references Petitioner's job as "supervisory in nature". RX7, p. 7. However, he fails to consider the Petitioner's job duties included more than just a supervisory role for over eight years of his employment with Respondent.

He also fails to contemplate that during the periods of lockdown and during the months of COVID where there was a staffing shortage, Petitioner's duties would naturally take on more than what was written in the job description for Correctional Sergeant. Petitioner testified that his duties included more repetitive activities, and that his days were longer as staffing deficits during the pandemic required it. T.19. While Dr. Stewart points to small percentages of time spent on performing certain tasks, he fails to note that if there are generally more hours of work performed, as shown to have occurred during the COVID pandemic, the amount of actual time performing the tasks will increase in proportion. Further, while Dr. Stewart based his causation opinions on his personal experiences at the Respondent's work site, he did not demonstrate a full consideration of Petitioner's job duties.

For the foregoing reasons, I would affirm the Decision of the Arbitrator.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023554
Case Name	Tracy Baldridge v. Walgreens
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0319
Number of Pages of Decision	26
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Michael Karr

DATE FILED: 7/5/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY BALDRIDGE,

Petitioner,

vs. NO: 20 WC 023554

WALGREENS,

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

The Commission views the evidence differently than the Arbitrator and, therefore, modifies the Arbitrator's Conclusions of Law regarding Issues (F) and (K) as set forth below.

Regarding Issues (F) and (K), the Commission reverses the Arbitrator's award for prospective medical benefits in the form of a cervical disc arthroplasty at C5-C6 and C6-C7. The Commission finds the proposed surgery is premature as the correct diagnosis remains unconfirmed. Petitioner's treating surgeon, Dr. Reeves, and Respondent's Section 12 physician, Dr. Bernardi, both agree that Petitioner's neck and scapular pain is causally related to the work accident; however, Dr. Reeves believes the cervical discs at C5-C6 and C6-C7 are the pain

generators whereas Dr. Bernardi believes the neck and scapular pain is a muscular pain resulting from overcompensating for the undisputed right shoulder injury. The Commission further notes that Dr. Reeves twice recommended an epidural injection; however, he later recommended a two-level disc arthroplasty despite not knowing whether or not the injection he recommended had been completed. Dr. Reeves disregarded the diagnostic value, and focusing on the therapeutic benefits, rationalized away the need for the injection because the pain by that point in time had become chronic. Accordingly, the Commission awards prospective medical benefits in the form of diagnostic injections to help ascertain whether or not one or both discs are the pain generators.

Issue F: Is Petitioner's current condition of ill-being causally related to the injury?
Issue K: Is Petitioner entitled to any prospective medical care?

On April 27, 2020, Petitioner injured her right shoulder while stocking product overhead at Respondent's distribution center. Respondent does not dispute the accident. An MRI showed a subscapularis tendon tear along with AC joint osteoarthritis and spurring and mild glenohumeral osteoarthritis. On October 5, 2020, Petitioner underwent surgery with Dr. McIntosh for rotator cuff repair and acromioplasty. At her second post-operative evaluation on October 20, 2020, Petitioner reported she felt a sudden pop while performing pendulum exercises as part of a home exercise program. Petitioner participated in formal physical therapy for the next five months with no improvement and a new full-thickness supraspinatus tear was found after an MRI arthrogram was obtained on March 2, 2021. Petitioner transitioned her care to Dr. Paletta who performed another rotator cuff repair with subacromial decompression, bursectomy, acromioplasty, and distal clavicle resection on August 17, 2021. Petitioner resumed physical therapy and her right shoulder gradually improved over the next five months. Dr. Paletta discharged Petitioner at MMI with no restrictions on January 19, 2022.

Prior to releasing Petitioner, Dr. Paletta referred Petitioner to Dr. Reeves for a cervical spine evaluation. Petitioner first reported neck pain on October 27, 2020, when Petitioner was three weeks out from her first surgery and six months out from the work injury. Petitioner had not yet commenced formal post-operative physical therapy when her neck pain started. Respondent disputed causal connection. Dr. Reeves opined that Petitioner had aggravated pre-existing degenerative disc disease at a result of her April 27, 2020 work injury. Addressing the six-month gap between the work injury and the onset of neck pain, Dr. Reeves opined that the more severe shoulder pain "masked" the cervical spine injury until the shoulder condition improved. The Arbitrator observed it can be difficult to discern the sources of pain where there are overlapping shoulder and cervical spine conditions. We agree with the Arbitrator's finding that Petitioner's neck pain and scapular pain is causally related to the work injury of April 27, 2020. We view the medical evidence differently, however, regarding the source of that pain and find additional diagnostic workup is needed to validate the source of Petitioner's current pain complaints. While we believe the ongoing pain is causally related, we are unwilling to assign the cervical discs as the culprit at this time.

Confirming the correct diagnosis is crucial prior to undertaking spine surgery. While it is true that Petitioner's medical records (after October 2020) are replete with documented complaints for neck pain, the records are also replete with documented pain complaints originating from the trapezius and scapular regions with shoulder pain. On November 6, 2020, Petitioner complained of a very sore upper trapezius which when palpated felt like a "solid rock." On November 13, 2020, the physical therapist noted Petitioner responded better to cold and heat therapy applied to the "UT" (upper trapezius) and "intrascapular muscles." On November 25, 2020, Petitioner reported she went to move her arm and felt pain in the upper trapezius area. On November 30, 2020, the therapist noted Petitioner "still complains of the upper trap feeling tight." On January 20, 2021, the therapist indicated the presence of ongoing symptoms "along the right upper trap." On February 3, 2021, the therapist noted "patient continues to have tightness in the right upper trap but seems to be improving." On February 10, 2021, the therapist noted that Petitioner "continues to rub her upper trap consistently throughout the workout." After undergoing an MRI arthrogram on March 2, 2021, Petitioner returned for follow-up on March 9, 2021, at which time the physician assistant, Justin Northcutt, noted "she continues to have pain in her right *shoulder that radiates up* the right side of her neck."

On July 7, 2021, Petitioner presented to Dr. Paletta for a second opinion concerning her shoulder and the new MRI arthrogram showing a new rotator cuff tear. Dr. Paletta obtained a comprehensive history commencing with the initial work injury and attempted conservative treatment, the first MRI and surgery performed by Dr. McIntosh on October 5, 2020, followed by continued shoulder pain, and the new MRI arthrogram showing a new tear. Regarding her then-current complaints, Dr. Paletta noted that Petitioner continued to complain of pain in the shoulder particularly with elevation of the arm to the side and with use of the arm overhead. Petitioner further complained that reaching out suddenly would trigger shoulder pain. Dr. Paletta noted Petitioner denied any radiating pain or associated numbness, tingling or paresthesia. Dr. Paletta also noted that, "In addition to her shoulder pain, she complains of basicervical pain [base of the neck] and some pain along the trapezius. She stated the neck pain was not present until after the surgery." On examination, Dr. Paletta noted that the cervical spine had unrestricted and pain free full range of motion. Dr. Paletta diagnosed "failed rotator cuff repair" and recommended surgery. Dr. Paletta performed Petitioner's second shoulder surgery on August 17, 2021. During a post-operative therapy visit on September 14, 2021, the therapist noted that Petitioner reported "her right UT gives her the most trouble" with occasional clavicle pain and shoulder soreness. Dr. Paletta noted on October 12, 2021, that Petitioner continued to have pain at the "base of her neck and trapezius." On December 3, 2021, Dr. Paletta noted complaints for neck pain without numbness or tingling. X-rays of the cervical spine showed findings consistent for degenerative disc disease with foraminal narrowing. Dr. Paletta ordered an MRI of the cervical spine which was performed on January 25, 2022. Thereafter, Petitioner commenced treatment with Dr. Reeves.

During his initial evaluation on February 15, 2022, Dr. Reeves noted Petitioner's neck started to bother her after her first shoulder surgery. Addressing the timing of the delayed onset, Dr. Reeves indicated, "I imagine when the rotator cuff was fixed, then her cervical spine issue started unmasking." Notably, Dr. Reeves also documented pain complaints involving the collar

bone and pain between the shoulder blades. Dr. Reeves diagnosed C5-C6 and C6-C7 disc pathology leading to biforaminal stenosis and cervicalgia. He recommended therapy and a right-sided epidural steroid injection at C5-C6. On her return visit on March 22, 2022, Dr. Reeves documented ongoing complaints involving the posterior cervical spine and intrascapular region, levator scapula, and a lot of pain into the collarbone. Dr. Reeves recommended continued therapy and a cervical epidural injection. Dr. Reeves indicated that disc arthroplasty may be required. On May 3, 2022, Dr. Reeves formally recommended the two-level disc arthroplasty.

Relevant to the question of diagnosis, Dr. Reeves testified periscapular pain is typical for referred discogenic pain. Dr Reeves testified that Petitioner's pain pattern is very well-known to be associated with disc injury or discogenic pain. Describing her pain pattern, Dr. Reeves testified Petitioner had pain in the intrascapular region coming up to the levator scapula muscle (side of the neck) and going down to the medial scapular border. On the other hand, when presented with questions concerning Dr. Bernardi's IME opinions, Dr. Reeves agreed that Petitioner's "pain follows the muscle" but he nevertheless believed her pain was secondary to disc injury. (T. 568) On cross-examination, Dr. Reeves agreed that Petitioner's pain complaints were also consistent with a muscular problem. (T. 578) When asked whether Petitioner's pain in the collarbone, headaches, and pain between the shoulder blades can indicate a cervical spine problem or a muscular problem, Dr. Reeves admitted "They can be either." (T. 577-578)

Dr. Reeves further agreed Petitioner did not have myelopathy and she did not have radiculopathy or any radicular symptoms. (T. 578) Regarding the cervical MRI findings, Dr. Reeves agreed the disc height narrowing, disc desiccation, and diffuse spur disc complexes represent degenerative changes and he conceded it's possible that those degenerative changes could be *asymptomatic*. (T. 581-582) Dr. Reeves also agreed it was possible that the moderate central canal stenosis and severe bilateral foraminal stenosis could also be *asymptomatic*. (T. 582)

During his deposition, Dr. Reeves testified on direct examination that he was unable to say whether or not his recommended cervical epidural injections had been performed. Asked if an injection should be performed prior to surgery, Dr. Reeves testified that epidural injections rarely provide long-term relief once the pain becomes chronic. When questioned about the recommended epidural injections on cross-examination, Dr. Reeves again testified he had nothing in his records to confirm the injections had been performed. Dr. Reeves further testified that epidural injections have limited diagnostic value. Dr. Reeves failed to explain, however, why he twice recommended an epidural injection.

At Respondent's request, Dr. Bernardi performed a Section 12 examination on May 10, 2022. Per his report, Petitioner noticed neck and scapular pain during post-operative rehabilitation. Dr. Bernardi noted Petitioner developed pain and fullness over the top of her scapula that would extend up the right side of her neck. Petitioner reported she was told she was overcompensating for her shoulder by overusing the muscles in that area. It is unclear which provider apprised her of this assessment. She was also told her condition should improve but it did not. On examination, Dr. Bernardi found Petitioner neurologically intact and Petitioner demonstrated full cervical range

of motion and had no radiating pain. Dr. Bernardi noted Petitioner exhibited palpable tautness and spasm over the right rhomboids near the upper medial border of the shoulder blade. It was Dr. Bernardi's assessment that Petitioner's pain appeared to be muscular. Regarding causation, Dr. Bernardi indicated he would not be surprised if her pain had developed as a consequence of her overcompensating with her periscapular muscles due to her shoulder issues.

During his deposition, Dr. Bernardi testified consistently with his report that Petitioner had complained of pain and fullness over the top of the scapula extending to the right side of her neck. Dr. Bernardi further agreed the scapular pain could be considered the same region as the trapezius; however, it was his assessment that Petitioner's scapular pain seemed more consistent with the rhomboid region. Dr. Bernardi noted that all those muscles sort of overlap each other in that general area. Dr. Bernardi testified he found a palpable tautness or spasm over the right rhomboids near the upper medial border of the shoulder blades on examination. Dr. Bernardi conceded that Petitioner's pain pattern could be consistent with a cervical spine issue. Dr. Bernardi further testified, however, that Petitioner's persistent pain was of an uncertain etiology.

Dr. Bernardi ultimately opined that Petitioner's pain appeared to be muscular. He testified that Petitioner's overall presentation was most consistent with rhomboid spasm which is a common problem. Dr. Bernardi further testified that Petitioner's pain had lasted longer in duration than what would be expected from a muscular injury. For that reason, Dr. Bernardi indicated he would not be surprised if her muscular pain was a consequence of overcompensating with her periscapular muscles due to her shoulder injury. Asked whether he believed the neck symptoms were sequelae of her shoulder condition, Dr. Bernardi believed her symptoms stem from her shoulder injury; however, he went on to explain that Petitioner's symptoms were not neck symptoms per se; they were more of a problem with the muscles called the periscapular stabilizers. He further testified, "It's more of a shoulder problem than it is a spine problem." He further opined "it's a sequalae of the shoulder injury and surgery she had on her shoulder." Dr. Bernardi further testified that because Petitioner's shoulder was sore, she overcompensated with these other muscles around her shoulder blade which then fatigued them and caused spasm. Dr. Bernardi also testified that Petitioner's pain is most consistent with periscapular spasm. He further testified that it's possible she has a condition called subscapular bursitis which would be shoulder-related and not neck-related. Finally, Dr. Bernardi testified to the following:

> Ultimately, I don't know what's causing her symptoms. Her presentation is most consistent with periscapular muscle spasm, but that's – it's difficult to understand why it's been so persistent. I am confident that it's not related to her neck.

Based on the totality of the evidence presented, we conclude that diagnostic injections should be performed to help confirm whether the disc pathology at C5-C6 and C6-C7 are indeed the pain generators. As this Commission has previously awarded prospective medical in the form of cervical epidural injections for diagnostic purposes, we find Dr. Reeves' testimony minimizing the diagnostic benefits unpersuasive. See *Perez vs. The Malnati Organization*, 2017 Ill. Wrk.

Comp. LEXIS 283, 17 IWCC 222. Accordingly, we find that Dr. Reeves' recommended two-level disc arthroplasty is premature.

IT IS THEREFORE ORDERED BY THE COMMISSION that the arbitration award for prospective medical in the form of a cervical disc arthroplasty at C5-C6 ad C6-C7 and post-operative treatment is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical in the form of diagnostic cervical injections to help ascertain and confirm whether the disc pathology at C5-C6 and/or C6-C7 is the pain generator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $530.27 per week for a period of 126 weeks, for the period 4/28/20 through 9/26/22, that being the period of temporary total incapacity for work under §8(b), less any and all days Petitioner worked in a shoe store in August 2020 pursuant to the stipulation of the parties. Respondent shall also receive a credit for temporary total disability benefits paid in the amount of $47,875.80, representing 90-2/7 weeks, from 4/28/20 through 1/19/22, pursuant to the stipulation of the parties. 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 medical expenses contained in Petitioner's Group Exhibit #1, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for medical expense paid in the amount of $87,572.73, pursuant to the stipulation of the parties.

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.

JULY 5, 2024
KAD/swj
O 5/7/24
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023554
Case Name	Tracy Baldridge v. Walgreens
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Michael Karr

DATE FILED: 11/22/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 22, 2022 4.52%

/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
19(b)

TRACY BALDRIDGE
Employee/Petitioner

v.

WALGREENS
Employer/Respondent

Case # **20** WC **023554**

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 **9/26/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4/27/2020**, 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 in her cervical spine ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**28,634.26**; the average weekly wage was $**795.40**.

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

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

Respondent shall be given a credit of $**47,875.80** for TTD, $**0** for TPD, $**0** for maintenance, and $**87,572.73 for medical bills paid,** for a total credit of $**135,448.53**.

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

ORDER

Respondent shall pay the medical expenses contained in Petitioner's Group Exhibit 1, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Petitioner shall receive credit for medical expenses paid in the amount of $87,572.73, pursuant to the stipulation of the parties.

The Arbitrator finds Petitioner is entitled to receive the additional care recommended by Dr. Reeves as she has not reached maximum medical improvement. Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a cervical disc arthroplasty at C5-6 and C6-7 and post-operative treatment, until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**530.27**/week for **126** weeks, for the period **4/28/20 through 9/26/22**, as provided in Section 8(b) of the Act, less any and all days Petitioner worked in a shoe store in August 2020 pursuant to the stipulation of the parties. Respondent is entitled to a credit for temporary total disability benefits paid in the amount of $47,875.80, representing 90-2/7th weeks, from 4/28/20 through 1/19/22, pursuant to the stipulation of the parties.

Having found Petitioner has not reached maximum medical improvement and is entitled to prospective medical care, the Arbitrator makes no findings as to the nature and extent of Petitioner's injuries.

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 22, 2022

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TRACY BALDRIDGE,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	**Case No.: 20-WC-023554**
	)	
WALGREENS,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on September 26, 2022 pursuant to Section 19(b) of the Act. The parties stipulate that on April 27, 2020 Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent. The parties stipulate that Petitioner's right shoulder injury is causally connected to the work accident. Respondent disputes causal connection with regard to Petitioner's cervical spine which is the subject of this Section 19(b) proceeding. The parties stipulate that Respondent is entitled to a credit for medical expenses paid in the amount of $87,572.73 and temporary total disability benefits paid in the amount of $47,875.80, representing 90-2/7th weeks, from 4/28/20 through 1/19/22. The parties stipulate that all TTD benefits have been paid through 1/19/22. Respondent alleges Petitioner reached MMI on 1/19/22 and denies benefits thereafter.

The issues in dispute are causal connection, medical expenses, temporary total disability benefits, and prospective medical care related to Petitioner's cervical spine only. The nature and extent of Petitioner's injuries is in dispute if the Arbitrator finds Petitioner has reached maximum medical improvement. All other issues have been stipulated.

TESTIMONY

Petitioner was 55 years old, married, with no dependent children at the time of accident. Petitioner was hired by Respondent in March 2013 and was terminated on 11/1/21 for being off work too long. Petitioner testified that on 4/27/20 she was stocking product overhead and felt pain in her right shoulder radiating to her neck that would not go away. She reported her accident and came under the care of Dr. McIntosh for treatment.

Petitioner underwent right shoulder surgery by Dr. McIntosh that improved her condition until she started post-operative physical therapy. Her shoulder pain and decreased range of

motion returned, and she continued to have neck pain. She underwent a second shoulder surgery by Dr. Paletta and was referred to Dr. Reeves for continued neck pain. She continues to have neck pain and daily headaches and desires to undergo cervical spine surgery recommended by Dr. Reeves. Petitioner takes Ibuprofen intermittently. She testified she attempted to return to work in a shoe store last month and quit because the overhead work aggravated her neck and headaches. She worked four or five days and earned $13.00 per hour.

On cross-examination, Petitioner admitted she had a work-related bilateral carpal tunnel claim and underwent carpal tunnel releases in December 2019 and January 2020. She was off work until 4/21/20. When she returned to work on 4/22/20 she performed stocking duties on third shift. She testified she did not develop neck pain until after the first shoulder surgery performed by Dr. McIntosh in October 2020. She stated her pain started in the back of her right shoulder and went straight up her neck, which started while she was undergoing physical therapy. Petitioner testified she reported her neck pain to Dr. McIntosh who did not address her complaints until the end of her treatment with him. She stated she told Dr. McIntosh at every visit that her neck was very painful.

Petitioner recalled an event on 6/12/20 where she attempted to catch a bowl that fell out of her cabinet at home. She felt intense popping and pain in her right shoulder, and she was unable to lift her arm. Petitioner testified her symptoms subsided following that event. Petitioner recalled reporting on 1/11/22 that her right-sided neck and upper trapezius pain had increased for no apparent reason and was worse with right shoulder activity. She related the increase in symptoms to the physical therapy she was undergoing at the time.

Dr. Paletta released Petitioner at MMI without restrictions in January 2022 with regard to her right shoulder. Petitioner testified she still has pain in her shoulder that is not significant, and she has not returned for treatment. Petitioner testified she has never had neck symptoms or undergone treatment for her neck prior to 4/27/20.

Petitioner testified she bid out of the picking position in May or June 2019 to help her hand symptoms and began the utility position in July 2019.

MEDICAL HISTORY

On 4/28/20, Petitioner presented to Express Care of Mt. Vernon with complaints of right shoulder pain rated 7/10 since last night. (PX3) She had popping in her shoulder and pain with lifting her arm laterally. She reported her carpal tunnel releases on 12/9/19 and 1/20/20, and stated she returned to work on 4/22/20 and experienced pain in her shoulder. Her job duties involved stocking, lifting heavy boxes above her power zone and overhead, stocking and stacking heavy cases of product, and pulling heavy cases across the line. X-rays of the right shoulder were negative for acute findings. She was prescribed Prednisone, instructed to take Motrin, not to use her right arm, and to follow up in one week.

On 5/5/20, Petitioner returned to Express Care and reported no improvement. She was unable to lift her arm laterally without unbearable pain, which was accompanied by popping and cracking. She rated her pain 4/10 at rest. She reported Respondent would not accommodate one-

arm restrictions. Physical exam revealed Petitioner was unable to lift her arm laterally, tightness of the entire shoulder musculature and flinching upon palpation. Petitioner's restrictions of no use of her right arm were continued and she was referred to an orthopedic physician.

On 5/5/20, Petitioner presented to Dr. Jeffrey McIntosh who noted Petitioner returned for evaluation of her hands after undergoing bilateral carpal tunnel decompressions. (PX4) Dr. McIntosh noted Petitioner had only worked for about four days following her last visit on 4/21/20, and she experienced some swelling and discomfort in her long finger and an electric sensation in her right wrist. He refilled her anti-inflammatory medication. Dr. McIntosh noted Petitioner continued to have pain in her shoulder that he treated on 3/31/20 with a corticosteroid injection. He noted Petitioner had good relief; however, she was not working at that time. He noted Petitioner had pain in her shoulder for several months as mentioned in previous documentation and when she returned to work, the shoulder pain returned. He noted Petitioner was off work for her shoulder and instructed her to return to his office in three weeks.

On 6/9/20, Dr. McIntosh noted Petitioner was slightly better since being seen on 5/26/20. The Arbitrator notes there was no office note dated 5/26/20 admitted into evidence. Dr. McIntosh noted Petitioner's physical therapy had not yet been approved. Physical exam revealed increasing pain with significant difficulty with activities of daily living. Petitioner had cracking and popping in her sholder. Dr. McIntosh ordered a right shoulder MRI and placed Petitioner off work.

Petitioner underwent physical therapy at Crossroads Community Hospital from 6/12/20 through 6/25/20. (PX5)

On 6/26/20, Petitioner underwent a right shoulder MRI that revealed a full-thickness tear of the superior insertional subscapularis fibers along with associated subscapularis tendinopathy, supraspinatus atrophy, moderate myotendinous, insertional tendinopathy with probable partial thickness bursal surface tearing, and osteoarthritis of the acromioclavicular joint with spurring. (PX5)

On 7/1/20, Dr. McIntosh opined Petitioner's pathology was consistent with a rotator cuff tear and AC joint arthritis. (PX4) He noted Petitioner failed to improve with anti-inflammatory medication, physical therapy, and injections. Dr. McIntosh recommended surgery which was performed on 10/5/20 in the form of a right shoulder arthroscopy with debridement of rotator cuff and an open acromioplasty with open rotator cuff repair. (PX5) Intraoperatively, Dr. McIntosh found no evidence of glenohumeral arthritis. He debrided the tendinitis in the subscapularis and noted a very large tear in the rotator cuff that was repaired with an open decompression.

On 10/20/20, Petitioner returned to Dr. McIntosh's office with continued right shoulder pain. She reported she felt a pop in her shoulder while performing a pendulum swing during home exercises. Petitioner was instructed to continue home exercises and anti-inflammatory medication, wear her sling, and return in one week. She was continued off work.

On 10/27/20, Petitioner followed up with Dr. McIntosh's office and reported continued right shoulder pain with neck pain. (PX4) Petitioner was referred to formal physical therapy for her right shoulder and she was continued off work. Her prescription for Meloxicam was refilled.

On 11/4/20, Petitioner was evaluated for physical therapy at Crossroads Community Hospital. It was noted she had severely reduced range of motion in her right arm and shoulder, with tingling in her right palm. During the course of her treatment, Petitioner reported pain and tenderness in her neck that shot down her arm.

On 11/17/20, Petitioner returned to Dr. McIntosh's office with significant shoulder pain that radiated down her arm, with occasional numbness in her hand. She was prescribed a Medrol dose pack, Tramadol, Voltaren gel, and instructed to continue physical therapy.

Petitioner resumed physical therapy and it was noted she had continued soreness and stabbing pain in her right shoulder, throbbing pain in her biceps, pain in her left hand, pain and discomfort in her right upper trapezius, headaches brought on by neck pain, and constant neck pain that was radiating further down her shoulder and causing sleep disturbances. (PX5) Petitioner reported pain and difficulty with activities of daily living. The therapist noted Petitioner lacked strength in key rotator cuff and scapular muscles and was very tight during manual therapy.

On 12/8/20, Petitioner returned to Dr. McIntosh's office and reported difficulty holding things overhead such as her hairdryer, and difficulty sleeping due to discomfort. (PX5) She was instructed to continue physical therapy, use Aspercreme, and continue taking Meloxicam and Tylenol. At her appointment on 1/6/21, Petitioner's range of motion had improved; however, she continued to have constant pain in her right shoulder blade that radiated to her neck, occasional numbness in her fingers, and increased pain with daily activities. She was given a steroid injection into her right shoulder and instructed to continue physical therapy and Meloxicam. Petitioner was released to return to work with restrictions of no lifting above chest level and no lifting over 10 pounds.

Petitioner continued in physical therapy, where it was noted Respondent did not offer light duty and she remained off work. (PX5) Throughout January 2021, Petitioner reported tightness in her upper right trapezius area, constant headaches that increased with movement, neck pain, and radiating pain into her elbow. Activities of daily living such as reaching to the side, lifting two plates into a cabinet, or moving around increased her neck and shoulder pain.

On 1/27/21, Petitioner returned to Dr. McIntosh's office complaining of upper shoulder and neck pain. Her therapy was increased to three times per week and her anti-inflammatory medication was changed. She was instructed to take Tylenol and her light duty restrictions were continued. Petitioner continued physical therapy through 2/23/21 and reported right shoulder and neck pain, headaches, and numbness in her right arm.

On 2/19/21, Petitioner returned to Dr. McIntosh's office complaining of continued pain in her right shoulder and the right side of her neck, a constant burning sensation on the anterior part of her shoulder, and numbness and tingling in her right hand. (PX4) Physical exam revealed

good range of motion in her shoulder; however, she had pain with abduction and decreased strength compared to her left. Her cervical spine range of motion was within normal limits; however, she had pain with cervical twisting and lateral bending to the right. Her physical therapy was reduced to one or two sessions per week, with a focus on scapular stabilization and range of motion. Her work restrictions were continued, and an MRI arthrogram of her right shoulder was ordered.

On 3/2/21, a right shoulder MRI arthrogram revealed a full thickness tear of the supraspinatus tendon and possible labral tear. (PX5) Petitioner returned to Dr. McIntosh's office and reported her right shoulder pain radiating up into her neck progressively worsened throughout the day. A right rotator cuff repair was recommended.

On 7/7/21, Petitioner sought a second opinion with Dr. George Paletta. (PX6) Dr. Paletta noted Petitioner's history of injury in April 2020, when she was lifting heavy boxes overhead. He reviewed her prior records and noted continued shoulder pain, particularly with elevation of the arm to the side and overhead, cervical and trapezius pain. He noted Petitioner remained off work as light duty work was not available. Physical exam revealed tenderness along the anterolateral corner of the acromion, tenderness at the AC joints, pain with range of motion, limited abduction due to pain, positive Neer and Hawkins impingement signs, positive cross body adduction test, discomfort with O'Brien's testing, and pain and weakness with lift off and bear hug testing. Dr. Paletta reviewed Petitioner's MRI arthrogram and opined it demonstrated a tear of the subscapularis and a focal full-thickness tear of the supraspinatus, with hypertrophic degenerative changes at the AC joint and some edema of the distal clavicle. His impression was a failed rotator cuff repair and persistent AC joint pain in the setting of AC joint arthropathy.

Dr. Paletta advised that injections would likely only provide temporary relief. He recommended a repeat arthroscopy with distal clavicle excision and debridement or repair of the subscapularis and possible biceps tenodesis. He noted that the majority of the supraspinatus was healed and there was a focal recurrent tear or failure of the repair. He returned Petitioner to work with restrictions of lifting no more than five pounds above chest level and no repetitive overhead activities.

On 8/17/21, Dr. Paletta performed a right shoulder diagnostic arthroscopy, revision of rotator cuff repair, revision of subacromial decompression, bursectomy and acromioplasty, and distal clavicle excision. (PX7) Intraoperatively, Dr. Paletta found moderate scarring of the rotator interval consistent with Petitioner's previous procedure. There was a midsubstance intratendinous type tear of the rotator cuff, which appeared to be recurrent, moderate subacromial scarring, an anterolateral acromial spur, osteophytes at the AC joint, and erosion of the articular cartilage of the distal clavicle.

On 8/31/21, Petitioner was ordered to begin physical therapy and return to work with restrictions of no use of the right arm and no lifting. (PX6) Petitioner underwent physical therapy at Mulvaney Rehabilitation Services from 9/2/21 through 1/18/22. (PX8) Petitioner reported right shoulder pain that worsened with movement, right-sided neck pain and scapular pain that worsened when she turned her head to the right or extended her neck. Objective testing showed

tenderness over the right cervical paraspinals, surgical scars, and surrounding soft tissue. Her cervical range of motion was limited and caused increased pain.

On 10/12/21, Petitioner returned to Dr. Paletta and reported some discomfort in her shoulder that felt localized at the base of her neck and trapezius. (PX6) She complained of pain at the base of her left thumb and radial side of her left wrist which she related to increased use of her left hand following right shoulder surgery. Exam of her left wrist revealed a positive Finkelstein test that reproduced pain, with tenderness over the first dorsal compartment. Dr. Paletta suspected De Quervain's syndrome and recommended Voltaren, a splint, and physical therapy. With regard to her shoulder, Dr. Paletta ordered continued physical therapy and work restrictions.

On 12/3/21, Dr. Paletta noted Petitioner's shoulder was progressing normally. He noted her continued neck and left hand pain. (PX6) Cervical spine x-rays revealed degenerative disc disease at C5-6 with foraminal narrowing at C4-5 and C5-6, with a mild loss of normal lordatic curvature. Dr. Paletta continued her work restrictions and physical therapy, referred her to a hand specialist, and ordered a cervical MRI.

Petitioner completed physical therapy on 1/18/22 at which time she reported her shoulder was doing well, with some soreness with repetitive lifting activities.

On 1/19/22, Dr. Paletta noted the cervical MRI had not yet been scheduled. He noted Petitioner was doing well with some residual shoulder discomfort. He released her at maximum medical improvement with no restrictions for her right shoulder.

On 1/25/22, Petitioner underwent a cervical MRI that revealed disc pathology at C5, disc desiccation and loss of height at C5-6 and C6-7, with severe bilateral foraminal stenosis. (PX9) On 2/4/22, Dr. Paletta referred Petitioner to a spine specialist.

On 2/15/22, Petitioner was examined by Dr. Chris Reeves who noted that after her first shoulder surgery her neck started bothering her more. Dr. Reeves believed that when her rotator cuff was repaired, her cervical spine issues began unmasking. Petitioner reported headaches, pain in her collarbone, between her shoulder blades, on her right side, and more recently on her left side. Dr. Reeves noted Petitioner was a picker for Respondent for several years and her injury occurred while she was stocking product and reaching above her head and shoulder. He noted Petitioner had undergone carpal tunnel surgery, her shoulder went out, and her neck was now giving her issues.

Dr. Reeves reviewed the cervical MRI and found it revealed a prominent disc at C5-6, less so at C6-7, with cord compression stenosis at both levels, more severe at C5-6. Physical exam revealed painful flexion and extension, mild loss of rotation, pain with palpation over the posterior side of the cervical spine, greater on the right, and down into the intrascapular region and levator scapula, with a shooting pain out of her collarbone. His impression was significant C5-6 and C6-7 disc pathology leading to biforaminal stenosis, cervicalgia, and radiculopathy. Dr. Reeves opined that Petitioner's diagnosis was causally related to her work for Respondent and recommended physical therapy, a cervical epidural injection at C5-6, and work restrictions.

Petitioner underwent physical therapy at Apex Physical Therapy and Mulvaney Rehabilitation Services. She returned to Dr. Reeves on 3/22/22 with diminished range of motion on the left, decreased left wrist flexor strength, pain with palpation over the posterior cervical spine in the intrascapular region and levator scapula, and pain into the collarbone. Dr. Reeves noted that Petitioner had no prior neck pain or treatment. He recommended continued physical therapy, a cervical epidural injection, and continued work restrictions. He opined that if Petitioner did not experience significant improvement, she would require a disc arthroplasty at C5-6 and C6-7.

Petitioner continued therapy at Mulvaney Rehab Services through 4/20/20 where persistent neck pain and headaches were documented. (PX8) Petitioner reported ongoing difficulty performing activities of daily living, including holding up her head.

On 5/3/22, Petitioner had a telemedicine visit with Dr. Reeves who noted her continued symptoms of posterior neck pain and intrascapular pain in the levator scapular region. (PX10) He recommended a disc arthroplasty at C5-6 and C6-7.

On 5/10/22, Petitioner was examined by Dr. Robert Bernardi pursuant to Section 12 of the Act. (RX1, Ex. B) Dr. Bernardi noted Petitioner was injured at work on 4/27/20. He documented her work duties of stocking, unloading totes, and performing overhead lifting. He noted that while Petitioner noticed some shoulder problems prior to her carpal tunnel releases, her symptoms worsened when she returned to work. Dr. Bernardi noted Petitioner's neck symptoms started during rehabilitation following her initial shoulder surgery. She noticed pain and fullness over the top of her right scapula that extended up the right side of her neck. He noted that following her second shoulder surgery, the localized pain in her shoulder and its mobility improved substantially; however, her neck pain, headaches, and right suprascapular pain did not improve.

Dr. Bernardi indicated that Petitioner's symptoms diagram showed she had burning between the eyes and in the low posterior cervical region that extended over the top of her right shoulder blade. Physical examination revealed palpable tenderness, tightness, and spasm over the right rhomboids near the upper medial border of the shoulder blade. He found full range of motion. Dr. Bernardi diagnosed C5-6 and C6-7 degenerative disc disease, central foraminal stenosis that was degenerative nature, and neck pain of uncertain etiology. He requested Petitioner's imaging studies in order to finalize his causation opinion. However, Dr. Bernardi opined that Petitioner's work activities did not cause the degenerative changes or foraminal and central stenoses because she did not present with myelopathy or radiculopathy and her cervical symptoms did not manifest in the initial treatment notes. He also opined that Petitioner's mechanism of injury was not one that would produce skeletal trauma or ligamentous damage. He did not believe Petitioner required additional treatment for her cervical spine.

Dr. Bernardi stated Petitioner was very pleasant and agreed she had objective findings consistent with her complaints. He implied that Petitioner's symptoms could be muscular in nature but could not explain why she had discomfort for such a prolonged duration, as those type of episodes almost always resolve within a matter of days or weeks, or upon recovering from

shoulder surgery. He acknowledged that the etiology of Petitioner's symptoms was uncertain, and he had no explanation for same. He stated he would not be surprised if her pain developed as a consequence of overcompensating with her periscapular muscles as a result of her shoulder issues.

Dr. Robert Bernardi testified by way of deposition on 7/8/22. (RX1) Dr. Bernardi is a board-certified neurosurgeon. He testified he did not really understand what Petitioner's work incident was, as he was under the impression her shoulder symptoms were related to repetitive activities and not a singular incident. He testified that Petitioner had noticeable tenderness, tightness, spasm or fullness in the right rhomboid muscles, which attach to the upper inner border of the shoulder blade and run upward and attach to the lower cervical and upper thoracic spine.

Dr. Bernardi detected no signs of symptom magnification. He had no knowledge that Petitioner ever treated for any neck condition prior to April 2020 or had any intervening trauma since the accident. He agreed Petitioner's symptoms were consistent with what she reported to him and with his physical examination and agreed that his findings of tightness or spasm over the right rhomboids near the upper medial border of the shoulder blades could be consistent with an issue or symptoms coming from the cervical spine. Dr. Bernardi agreed there is an overlap between shoulder and cervical spine symptoms and that scapular and trapezius pain could emanate from a cervical spine issue, as could retro-orbital headaches. He agreed that even trivial trauma could aggravate underlying spinal stenosis, that overhead lifting could cause an injury to the cervical spine, and that the activities of a home exercise program or physical therapy could aggravate underlying degenerative disease. Dr. Bernardi admitted he had not reviewed Petitioner's cervical MRI films but only the report. He testified he would have to see the actual films to know whether or not he agreed with the radiologist.

Dr. Bernardi testified he would not be surprised if Petitioner's current persistent symptoms developed as a consequence of overcompensating with her periscapular muscles as a result of her shoulder issues, which would be a sequelae of her shoulder injury. He opined that Petitioner's symptoms were related to periscapular muscle spasm. He testified he was not a shoulder expert and could not testify that if Petitioner's symptoms were shoulder related it was related to her prior treatment and shoulder surgeries. Dr. Bernardi testified it is not his practice to perform cervical spine surgery without evidence of cord compression or radiculopathy; however, he agreed that not all doctors or orthopedic surgeons are in the same school of thought regarding the standard of care.

Dr. Bernardi testified he was unsure of the etiology of Petitioner's symptoms. He did not believe her symptoms were the manifestation of a cervical spine injury; however, he was not sure what they were exactly, and they seemed consistent with muscular pain. He testified he did not have a good explanation for why Petitioner would have such persistent muscular pain. He believed Petitioner's presentation was most consistent with rhomboid spasm and did not understand why her chronic spasms have been so persistent as they should have resolved long before he examined her. He agreed that the long duration of her symptoms was not consistent with muscular injury.

Dr. Chris Reeves testified by way of deposition on 8/31/22. (PX13) He is a board-certified orthopedic surgeon with a subspecialty in spine surgery. Dr. Reeves testified consistently with his records regarding Petitioner's physical examination findings of mild weakness in her left wrist flexor, significant loss of motion with rotation to the left, and posterior cervical spine pain in the scapular and levator scapular region. He testified that these symptomatic areas were areas of referred pain that would commonly be emanating from a cervical disc. Dr. Reeves reviewed Petitioner's 1/25/22 cervical MRI and noted there was a prominent disc at C5-6 and C6-7 with cord compression stenosis at both levels, most severe at C5-6.

Dr. Reeves opined that Petitioner's injury is causally related to the work injury based on her history of overhead work, MRI findings, and her persistent periscapular pain, which he indicated was typical for referred discogenic pain. He testified that the history given to Dr. Paletta regarding lifting heavy boxes overhead and above her power zone was similar to the history given to him by Petitioner. He testified that overhead injuries are common in the cervical spine, and reaching overhead and lifting any significant weight or even turning your head can injure the annulus or disc lining. He testified that any trauma that would cause an injury to the rotator cuff could certainly cause an injury to the cervical spine as well. Dr. Reeves testified that an asymptomatic degenerative condition could become symptomatic as a result of an activity, and that it was possible Petitioner aggravated her underlying condition with the overhead work she performed in April 2020.

Dr. Reeves agreed there was an overlap between cervical spine and shoulder symptoms and injury to one area could mask symptoms of an injury to the other, even up to eight months later. He testified that Petitioner still had continued pain and problems throughout. He noted that Dr. Paletta's office note dated 7/7/21 regarding Petitioner's basicervical pain and trapezius pain was consistent with the pathology at C5-6 and C6-7 that was observed on MRI. He testified it is possible to have a disc injury with referred pain into the trapezius and to develop into neck pain because it takes time for the irritation of the nerves to become severe enough for the patient to feel symptoms in different regions, and it could take quite some time with a distracting injury. He stated that even in patients that have no other injury, often the patient will report minor discomfort, and it takes some time for the pain to build and become symptomatic; and this is frequently seen with injuries that include large disc herniations.

He disagreed with Dr. Bernardi that there was no clear explanation for Petitioner's pain, stating her pain pattern of intrascapular pain coming up the levator scapula muscle and going down to the medial scapular border is very well known to be associated with disc injury or discogenic pain. He agreed that Petitioner's pain followed the muscle, but he believed her pain was secondary to disc injury, which is commonly seen. Dr. Reeves testified that every patient with a disc herniation will exhibit these exact symptoms and possibly exhibit arm symptoms. He testified that generally, the medial scapular border is not painful in shoulder conditions, and it is not a typical referred pattern of pain for rotator cuff or shoulder impingement.

Dr. Reeves disagreed with Dr. Bernardi's opinion that Petitioner was not a surgical candidate because she did not have radiculopathy or myelopathy. He testified Petitioner had discogenic pain and the disc has innervation itself. He stated that while myelopathy is an end

stage from severe stenosis and radiculopathy is from irritation of the nerve root, you can still have a painful condition of your cervical spine from the disc injury itself due to innervation to the annulus of the disc. He testified that Petitioner's pain symptoms followed that referred pattern, and she has not improved over quite a long period of time, despite multiple shoulder procedures.

Dr. Reeves testified that his surgical recommendation was based on Petitioner's complaints of severe pain, examination, pain pattern, lack of improvement from conservative treatment, and MRI findings. He did not believe an epidural steroid injection would provide long-term relief to Petitioner.

CONCLUSIONS OF LAW

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

It is undisputed Petitioner's right shoulder injury is causally connected to her work accident of 4/27/20. Respondent disputes causal connection with regard to Petitioner's cervical spine only.

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

The Arbitrator notes that the Commission has acknowledged there is overlap between shoulder injuries and cervical spine conditions. *See Tiffany Molton v. Red Bud Reg'l Care*, 18 I.W.C.C. 0381.

Petitioner immediately received medical treatment for undisputed injuries to her right shoulder. She was placed off work and prescribed medications. She was unable to lift her right arm without unbearable pain and was ordered not to use her right arm. Petitioner underwent conservative treatment before undergoing a right shoulder arthroscopy with open rotator cuff repair and acromioplasty on 10/5/20. Petitioner underwent post-operative treatment and her condition failed to improve. Dr. McIntosh continued to recommend physical therapy and medications despite Petitioner's ongoing symptoms. On 3/2/21, a right shoulder MRI arthrogram revealed a full thickness tear of the supraspinatus tendon and possible labral tear. Dr. McIntosh recommended a second rotator cuff repair at that time.

On 7/7/21, Petitioner sought a second opinion with Dr. George Paletta. On 8/17/21, Dr. Paletta performed a right shoulder diagnostic arthroscopy, revision of rotator cuff repair, revision of subacromial decompression, bursectomy and acromioplasty, and distal clavicle excision. Petitioner underwent physical therapy from 9/2/21 through 1/18/22. She was released at MMI with respect to her right shoulder on 1/19/22, twenty-one months after the accident.

The primary focus of Petitioner's treatment for almost two years following the accident was to her right shoulder. Petitioner testified that she noticed cervical spine symptoms after her first shoulder surgery while she was undergoing rehabilitation. From the date of accident until Petitioner underwent her first shoulder surgery on 10/5/20, Petitioner complained of unbearable shoulder pain, underwent physical therapy, took prescription medication, remained off work, and was ordered not to use her right arm. Post-operatively, Dr. McIntosh ordered Petitioner to perform home exercises. On 10/20/20, Petitioner reported her shoulder popped while performing a pendulum swing during home exercises. Dr. McIntosh ordered Petitioner to continue home exercises, wear her sling, and take anti-inflammatory medication. Petitioner returned on 10/27/20 and complained of persistent shoulder pain with neck pain. Dr. McIntosh ordered formal physical therapy.

On 11/4/20, Petitioner's physical therapist noted tingling in her right palm. During the course of her treatment, Petitioner reported pain and tenderness in her neck that shot down her arm. On 11/17/20, Petitioner reported to Dr. McIntosh she had significant shoulder pain that radiated down her arm, with occasional numbness in her hand. She was prescribed a Medrol dose pack, Tramadol, Voltaren gel, and instructed to continue physical therapy. Petitioner's physical therapist continued to note Petitioner had soreness and stabbing pain in her shoulder, throbbing pain in her biceps, pain in her left hand, and pain and discomfort in her right upper trapezius.

On 1/6/21, Dr. McIntosh continued to note Petitioner had constant pain in her right shoulder blade that radiated to her neck, occasional numbness in her fingers, and increased pain with daily activities. Petitioner continued to undergo physical therapy, took prescription medication, and remained off work. Dr. McIntosh ordered a right shoulder MRI arthrogram that was performed on 3/2/21 and revealed a full thickness tear of the supraspinatus tendon and possible labral tear. He noted Petitioner's shoulder pain radiated into her neck and progressively worsened throughout the day. Dr. McIntosh recommended a revision rotator cuff repair.

Petitioner sought a second opinion with Dr. Paletta on 7/7/21 who noted her persistent shoulder pain, and cervical and trapezius pain. On 8/17/21, Dr. Paletta performed a right shoulder diagnostic arthroscopy, revision of rotator cuff repair, revision of subacromial decompression, bursectomy and acromioplasty, and distal clavicle excision. Petitioner underwent post-operative physical therapy from 9/2/21 through 1/18/22. Despite the second surgery, Petitioner continued to report localized pain in the base of her neck and trapezius. It was not until fourteen months after Petitioner complained of cervical spine symptoms that diagnostic tests were ordered. Cervical spine x-rays performed on 12/3/21 revealed degenerative disc disease at C5-6 with foraminal narrowing at C4-5 and C5-6. Dr. Paletta ordered a cervical MRI that was not performed until 1/25/22. Dr. Paletta referred Petitioner to spine specialist Dr. Chris Reeves who examined her on 2/15/22, sixteen months after the onset of Petitioner's cervical symptoms. Petitioner provided Dr. Reeves a consistent history that her symptoms began during rehabilitation following her first shoulder surgery. He believed that when Petitioner's rotator cuff was repaired, her cervical spine issues began unmasking.

There is no evidence Petitioner had any symptoms or treatment related to her cervical spine prior to 4/27/20. Petitioner had worked for Respondent in a full-duty capacity since 2013.

She was off work for bilateral carpal tunnel surgeries from December 2019 through 4/21/20, at which time she returned to work in her former position.

Dr. Reeves' testified that cervical spine injuries are common while lifting, reaching, and performing overhead work and that a trauma mechanism that would injure a rotator cuff could also cause injury to the cervical spine. Dr. Reeves believes Petitioner's neck symptoms began "unmasking" after her shoulder was treated, as the two are not "mutually exclusive" and the cervical pain could start at any point, even months following the injury. Dr. Reeves' explanation is logical and comports with the medical evidence and Petitioner's testimony, as Petitioner's symptoms were first documented following her initial surgery with Dr. McIntosh, but likewise increased following her second shoulder surgery with Dr. Paletta.

Dr. Reeves gave a logical and persuasive explanation as to the etiology and presentation of Petitioner's symptoms, as he opined that her pattern of intrascapular, levator scapular, and scapular border pain is commonly seen in patients that have disc injury or discogenic pain. He also remarked that some patients with this condition might have minor arm symptoms, which correlates with the medical evidence of right hand numbness and radiating pain from Petitioner's treating records. Dr. Reeves explained that Petitioner's pain was discogenic in nature, and that with this condition, you can have pain in your cervical spine from the disc injury itself because there is innervation to the annulus of the disc.

Dr. Bernardi testified he really did not understand what Petitioner's work incident was, as he was under the impression Petitioner's shoulder symptoms were due to repetitive activities and not an acute incident. Dr. Bernardi admitted he did not review the cervical MRI films and had only seen the radiology report. He testified he would have to see the actual films to know whether or not he agreed with the radiologist. Dr. Reeves had the opportunity to review the MRI films and noted prominent disc injuries at C5-6 and C6-7, with cord compression stenosis at both levels. Dr. Bernardi agreed that Petitioner's exam findings could be consistent with a cervical spine issue, that even trivial trauma could aggravate underlying spinal stenosis, that overhead lifting could cause an injury to the cervical spine, and that the activities of a home exercise program or physical therapy could aggravate underlying degenerative disease.

Petitioner was questioned regarding an incident on 6/12/20 noted in her physical therapy records where she attempted to catch a bowl that was falling and felt a pop and pain in her shoulder. Petitioner was unable to lift her arm following the incident and she testified that her symptoms subsided. There was no testimony or evidence that Petitioner injured her cervical spine or had increased neck symptoms as a result of the incident on 6/12/20, and Respondent does not dispute causation on Petitioner's right shoulder injury. Further, Dr. Bernardi testified there were no other incidents of intervening trauma where Petitioner would have sustained injury to her neck.

Petitioner testified that following her termination from employment with Respondent in November 2021, she attempted to work at a shoe store for five or six days but failed as a result of her ongoing symptoms. It is evident from the chain of events that Petitioner's ability to perform manual duties following her accident has been decreased to the point she has been unsuccessful at procuring gainful employment due to her condition and symptoms.

Based on the above evidence, the Arbitrator finds that Petitioner's current condition of ill-being in her cervical spine is causally connected to the work accident of 4/27/20.

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

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

Respondent disputes liability for medical expenses related to Petitioner's cervical spine based on causal connection. The Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to treat her work-related injuries with respect to her cervical spine. Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 1, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Petitioner stipulates that Respondent is entitled to a credit for medical expenses paid in the amount of $87,572.73.

The evidence supports that Petitioner has not been cured or relieved from the effects of her work-related injuries. Dr. Reeves testified it is unlikely that an epidural steroid injection would provide long-term relief to Petitioner, and that she was unlikely to improve without undergoing surgery. The Arbitrator finds that Petitioner is entitled to receive the additional care recommended by Dr. Reeves as she has not reached maximum medical improvement. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a cervical disc arthroplasty at C5-6 and C6-7 and post-operative treatment, until Petitioner reaches maximum medical improvement.

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

Petitioner claims entitlement to temporary total disability benefits for the period 4/28/20 through 9/26/22. The parties stipulate that all TTD benefits have been paid through 1/19/22. Respondent alleges Petitioner reaches maximum medical improvement for her work injuries on 1/20/22 and denies benefits from that date forward. The parties stipulate that Respondent is entitled to a credit for temporary total disability benefits paid in the amount of $47,875.80, representing 90-2/7th weeks, from 4/28/20 through 1/19/22.

It is undisputed Petitioner was either off work or on light duty restrictions which Respondent could not accommodate, from 4/28/20 through 9/26/22. Petitioner testified she was terminated on 11/1/21 because she was off work too long due to her work-related injuries.

Based on the Arbitrator's finding as to causal connection, Petitioner is awarded temporary total disability benefits from 4/28/20 through 9/26/22, representing 126 weeks, less any and all days Petitioner worked in a shoe store in August 2020 pursuant to the stipulation of the parties. Respondent is entitled to a credit for temporary total disability benefits paid in the amount of $47,875.80, representing 90-2/7th weeks, from 4/28/20 through 1/19/22, pursuant to the stipulation of the parties.

Issue (O): **Whether Petitioner has reached maximum medical improvement, and if so, what is the nature and extent of Petitioner's injuries.**

Having found that Petitioner has not reached maximum medical improvement and is entitled to prospective medical care, the Arbitrator makes no findings as to the nature and extent of Petitioner's injuries.

This award shall in no instance be a bar to further hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006634
Case Name	Robert Perschall v. Felmley-Dickerson
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0320
Number of Pages of Decision	25
Decision Issued By	Amylee Simonovich, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Jason Jording

DATE FILED: 7/8/2024

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT PERSCHALL,

Petitioner,

vs. NO: 20 WC 06634

FELMLEY - DICKERSON,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 24, 2022 is hereby affirmed and adopted.

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

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

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

July 8, 2024

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AHS/ldm
051

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

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

DISSENT

I agree with that part of the majority's Decision finding that Petitioner's job as a bus driver is suitable employment, however, I disagree with the majority's wage-differential calculation, and would find that Petitioner failed to prove that he is entitled to a wage-differential in the amount of $752.52 based upon his part-time employment as a bus driver. Instead, I would find that Petitioner is entitled to a wage-differential in the amount of $489.09 based upon his earnings capacity, namely working full time as a bus driver, based upon a forty-hour work week.

At the time of his 2020 FCE, Petitioner was not restricted from full-time employment within his restrictions. I disagree with the premise of the majority's calculation of Petitioner's wage-differential, and specifically the following from the majority's opinion, "[g]iven that Petitioner is making $17.51 in a part time position, and there were part time positions on the labor market surveys Steffan produced, the arbitrator finds petitioner's current position as a part time bus driver with Chester East Elementary School earning $17.51 an hour does not underrepresent his earning capacity as it relates to the findings of Steffan's 2 labor market surveys."

Concluding that Petitioner's hourly earnings working part-time does not underrepresent his earning capacity is a non sequitur from the fact that Steffan listed part-time positions on the labor market survey, and most certainly conflicts with the following Appellate Court holding:

> To receive an award under section 8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn. 820 ILCS 305/8(d)(1) (West 2002). This court has held that the second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay. *Sroka v. Industrial Comm'n*, 412 Ill. 126, 128, 105 N.E.2d 716 (1952). In *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 76 N.E.2d 457 (1947), the court rejected the employer's argument that a wage differential under section 8(d) should be measured solely by gross yearly income. *Franklin*, 398 Ill. at 532. Rather, the court looked to factors such as wage increases, overtime, and increased hours of work. Although *Franklin* and *Sroka* interpreted an earlier version of section 8(d), the

> language "is earning or is able to earn" remains the same. Thus, the court's conclusion that "the test is the capacity to earn, not necessarily the amount earned" remains apt. *Franklin*, 398 Ill. at 533. Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity. *Cassens Transp. Co. v. Indus. Comm'n (Ade)*, 218 Ill. 2d 519, 530-531, 844 N.E.2d 414, 422-423.

I agree Petitioner established that he is partially incapacitated from pursuing his usual and customary line of employment and that he is entitled to wage-differential benefits. However, I view the evidence as to Petitioner's earning capacity differently than the majority. In the subject case, Petitioner has failed to prove that his present wage is restricted to part-time hours, as he has no restriction from working full-time. In fact, quite the opposite; Petitioner is working at his family-owned business, Hot Frog Designs, a T-shirt and decal shop, during the day, between his bus driving duties. (T. 30) Petitioner testified that the business, Hot Frog Designs, is a sole proprietorship business entity, and his wife is the sole proprietor. *Id.* Petitioner testified that he and his wife "got a d/b/a in January of '18," and they were operating the business out of their house initially. (T. 31) His wife opened a shop in September 2019. *Id.* Petitioner testified that he would "hang out there in between my bus driver job" and he would help his wife whenever she needed a hand. *Id.* Petitioner testified that he was not ever paid by Hot Frog Designs and he has never been an employee of Hot Frog Designs.

Under cross-examination, Petitioner testified that he helps his wife at the store by drawing designs, occasionally pressing shirts, putting decals on car windows, cleaning up. "Basically anything to help out…I basically just hang out there in between my two routes in the morning." (T. p. 37) He occasionally takes inventory and orders things. *Id.* He agreed that he interacts with customers while at the store. *Id.* When asked if he was a representative of the company when customers visit, he agreed and said that it's the family business and his kids are also present. He agreed that his only physical limitation is his right shoulder condition.

Petitioner in this case presented evidence confirming that he is working part-time as a bus driver, a job that he is able and qualified to perform, earning $17.51 per hour. Given the fact that Petitioner has no restrictions whatsoever from working a 40 hour work week, and that he works in his wife's store in his off hours, infers that Petitioner has made a personal choice to take himself out of the full-time job market. On cross-examination, Petitioner testified that he interacts with customers, and considers himself a representative of the company, explaining it is his family business with both his children, his wife and himself there. (T. 38) Although he testified he did not receive a salary, this obfuscates the financial gain to himself and his family by helping his wife.

Petitioner further testified that he applied for all of the positions listed on the May 5, 2022, labor market survey. (T. 33-34) He further testified that he is not COVID vaccinated and all of the medical employers listed on the labor market survey required vaccinations against COVID. Further, Petitioner had no customer service experience. (T. 33) However, his experience at his wife's store entails customer service.

Petitioner's Exhibit 17 was admitted as evidence that Petitioner applied for the available positions listed in the May 5, 2022, labor market survey. The documentation consisted of applying for these jobs via Indeed.com and the first 10 listed in Petitioner's Exhibit 17 were submitted over the course of two hours on June 17, 2022, and the remainder of the documents within the exhibit are duplicate applications. There is no evidence of follow-up for any of the positions for which he might be a candidate other than a few handwritten notes indicating the reason the job listed on the labor market survey was apparently excluded. (PX17) *Id.* Petitioner did not submit any evidence otherwise of his own job search. Petitioner's documented job search is limited to June 17, 2022. No other evidence of job search efforts are in evidence, thus I would further find Petitioner failed to prove that he conducted a diligent job search.

Further evidence of Petitioner's limited effort to seek employment with the employers listed in the labor market survey is demonstrated in the first email in Petitioner's Exhibit 17 dated June 17, 2022, which was addressed to Petitioner at his wife's store, care of hotfrogdesigns@yahoo.com. (T. 924) The June 17, 2022, email confirms that Petitioner submitted an application via Indeed to UnityPoint Health for a Food Service Aide position. (PX17) However, the email to Petitioner stated that in order to complete his application, Petitioner must create a password to log into the portal and once logged in he would be able to use the continue application button to complete the application process. However, Petitioner failed to provide any proof indicating he completed that final step. (Px17) Similarly, on his application to Buffalo Wild Wings, Petitioner was required to complete an additional step. *Id.* Without the final step, the application notes that he would not be considered as a candidate for either of those the positions.

Based on the foregoing, I find that Petitioner could work 40 hours per week as a bus driver. In fact, in August 2022, prior to the Arbitration Hearing, Petitioner emailed his attorney and informed him that he applied to three additional schools in order to be placed on their substitute bus driver list for field trips or events in the evenings or during the weekends. Therefore, I would calculate the wage-differential based upon Petitioner working a forty hour work week. I find that Petitioner's working in a part-time capacity at the time of trial was by choice and due to a lack of a diligent job search. I would calculate Petitioner's wage-differential by taking 2/3 of the difference between Petitioner's average weekly wage as a carpenter less his earnings as a full-time bus driver. I would find the Petitioner's wage-differential should be based on his earnings as a carpenter, $17.41/hour or $1,434.00 (35.85/hour X 40 hours) – his earnings as a full-time bus driver, $700.40 ($17.51/hour X 40 hours) = $733.60 x 2/3 = $489.09. This calculation comports with Ed Steffan's opinion that Petitioner working part-time as a school bus driver, underrepresents his earning capacity in a reasonably stable job market, and that Petitioner "has access to full-time employment as outlined in these two snapshots of the labor market." (RX9, p. 16)

Therefore, I dissent, in part, with the majority opinion, and would find Petitioner is entitled to a wage-differential of $489.09 per week based upon his ability to work a 40 hour work week until he is reaches the age of 67, or 5 years from the date the award becomes final, whichever is later.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006634
Case Name	Robert Perschall v. Felmley-Dickerson
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Jason Jording

DATE FILED: 10/24/2022

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

/s/Maureen Pulia, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT PERSCHALL,
Employee/Petitioner

v.

FELMLEY-DICKERSON,
Employer/Respondent

Case # **20** WC **6634**

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 **Champaign**, on **9/16/22 and 10/5/22**. 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 **10/5/18**, 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 $**36,040.61**; the average weekly wage was $**1,501.69**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **3** 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 $**61,886.50 for periods of TTD prior to 3/9/20** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**61,886.50 for periods of TTD paid prior to 3/9/20**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Maintenance

Respondent shall pay Petitioner temporary partial disability benefits of $1,001.13/week for 3/7 weeks, commencing 3/9/20 through 3/11/20, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $1,001.13/week for 22-3/7 weeks, commencing 3/12/20 through 8/15/20, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services from 10/5/18 through 3/12/20, as provided in Section 8(a) 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 permanent partial disability benefits, commencing 8/16/20, of $752.52/week until he reaches the age of 67, or 5 years from the date the award become final, whichever is later, as provided in Section 8(d)1 of the Act.

The petitioner’s claim for peanlties and attorneys’ fees is denied.

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

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

OCTOBER 24, 2022

Signature of Arbitrator

ICArbDec p. 2

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 43 year old carpenter, sustained an accidental injury to his right shoulder that arose out of and in the course of his employment by respondent on 10/5/18. Petitioner graduated high school and attended 4 years of trade school. On 10/5/18 petitioner was union carpenter and had been working for respondent for 3- 4 years. Petitioner denied any treatment for, or injuries to, his right shoulder prior to the injury on 10/5/18.

His duties included constructing buildings from the ground up, including both the interior and exterior. Petitioner was required to lift everything from doors, drywall, ceiling grid, and exterior siding. Petitioner testified that his duties included a lot of overhead ceiling and soffit work.

On 10/5/18 petitioner was constructing a building in Champaign. He went into a shipping container to retrieve a mirror and toilet dispenser. As he was walking out of the shipping container he stepped on a pallet and it broke. Petitioner fell and hit his right shoulder on the metal wall. Petitioner experienced severe pain in his right shoulder and could not lift it.

On 10/8/18 petitioner presented to Dr. Fletcher at SafeWorks on the referral of respondent. Petitioner reported pain in his right shoulder that was stabbing and burning, made worse by reaching. Dr. Fletcher examined petitioner and assessed pain in the right shoulder. He placed petitioner on restricted duty of no lifting over 10 pounds, and no work above shoulder level. He also dispensed medication and injected petitioner's shoulder. Dr. Fletcher referred petitioner to ATI for physical therapy. On 10/10/18 and 10/15/18 petitioner's condition was unchanged. Dr. Fletcher referred petitioner to Dr. Herrin, an orthopedic surgeon. He continued petitioner on the same restrictions. He ordered an MR Arthrogram of the right shoulder.

On 10/25/18 petitioner underwent an MR Arthrogram of the right shoulder. The impression was rotator cuff impingement syndrome, type II acromion, downward sloping of the lateral aspect of the distal aspect of the distal acromion; contrast in the subacromial subdeltoid bursa region; severe supraspinatus infraspinatus and subscapularis tendinosis and thickening with tears of the supraspinatus and infraspinatus tendons at the distal insertions sites; subcortical cyst formation anterior lateral, posterolateral and lateral aspect of the humeral head; and, multiple glenoid labrum tears. On 10/26/18 Dr. Fletcher reviewed the results of the MRI and continued petitioner on the same work restrictions, and again referred petitioner to Dr. Herrin.

On 11/5/18 petitioner presented to Dr. Rodney Herrin at Orthopedic Center of Illinois for his right shoulder. Dr. Herrin examined petitioner, and reviewed the diagnostic tests. He assessed right shoulder pain, right rotator cuff tear, symptomatic AC joint and glenoid labral tears. Dr. Herrin recommended surgery.

Petitioner continued to follow-up with Dr. Fletcher and in physical therapy. His work status remained the same. Petitioner underwent 18 physical therapy sessions at ATI from 10/9/18 through 12/7/18.

On 12/12/18 petitioner underwent a right shoulder arthroscopy with arthroscopically assisted repair of the supraspinatus; arthroscopically assisted debridement of the superior labrum; arthroscopically assisted distal clavicle excision; and, arthroscopically assisted subacromial decompression, performed by Dr. Herrin. Petitioner's postoperative diagnosis was status post injury to the right shoulder with tear of the supraspinatus tendon involving a majority of the insertion except for a very minimal portion remaining medially, as well as tearing of the superior glenoid labrum, and symptomatic acromioclavicular joint.

On 1/2/19 petitioner followed-up with Dr. Herrin. Dr. Herrin noted that overall he was doing well. Dr. Herrin examined petitioner, took x-rays and assessed AV joint arthropathy, complete tear of the right rotator cuff, impingement syndrome of the right shoulder, tear of the right glenoid labrum, and right shoulder pain. Dr. Herrin prescribed a course of physical therapy.

On 1/31/19 Dr. Herrin saw petitioner. Petitioner indicated that he was doing better and not having as much pain, and was in physical therapy. Dr. Herrin examined him and continued him in physical therapy and off work. On 3/21/19 petitioner told Dr. Herrin that he was gradually improving, but had noted some discomfort with some of his recent therapy. Petitioner was continued in therapy and given restrictions of no use of the right arm.

On 4/22/19 petitioner returned to Dr. Herrin and reported that he was improving in physical therapy. Dr. Herrin examined petitioner and recommended that he continue in physical therapy. He changed his work restrictions to no overhead work, and no lifting greater than 5 pounds with the right arm. On 5/23/19 petitioner reported increased pain with increased activities at physical therapy. Dr. Herrin halted physical therapy for two weeks, and continued petitioner's current restrictions. On 6/17/19 Dr. Herrin recommended petitioner progress in physical therapy with strengthening, as well as some work stimulation. He continued petitioner's work restrictions.

On 7/15/19 petitioner followed-up with Dr. Herrin. Dr. Herrin examined petitioner and recommended that he be allowed to return to work with no lifting greater than 10 pounds, and no overhead work. He continued him in physical therapy.

Petitioner underwent 57 sessions of physical therapy at Abraham Lincoln Memorial Hospital from 1/11/19-8/16/19.

On 8/19/19 petitioner returned to Dr. Herrin and continued to complain of difficulties with his right shoulder when he increased activity or tried to increase the weight during therapy. He also reported difficulty with overhead activities. Due to these ongoing complaints Dr. Herrin ordered an MRI of the right shoulder.

On 9/17/19 petitioner underwent an MRI of the right shoulder. The impression was postsurgical changes from prior rotator cuff repair; no evidence of full-thickness retearing of the supraspinatus or infraspinatus; acromioclavicular articulation mild osteoarthritis; and degenerative tearing of the superior labrum.

On 9/30/19 petitioner returned to Dr. Herrin. After reviewing the results of the MRI, Dr. Herrin was of the opinion that the rotator cuff had healed. He saw no indication for any surgery. He recommended that petitioner undergo work conditioning/work hardening to get him ready to return to his job. On 12/2/19 petitioner reported increased pain and decreased motion with work conditioning/work hardening. Dr. Herrin recommended that they progress slower in work conditioning/work hardening.

On 1/20/20 petitioner underwent a Section 12 examination performed by Dr. Mitchell Rotman, at the request of the respondent. Petitioner provided a consistent history of the injury. He also reported that he had not returned to work because every time he works on strengthening, he has a setback due to increased pain. Petitioner reported that he was still in work hardening. Petitioner reported that he needs to lift 100 pounds as part of his job. He denied any injury prior to 10/5/18. Dr. Rotman noted that he did not have the first or second MRI to review.

Following a record review through 9/17/19, as well as a physical examination. Dr. Rotman was of the opinion that the preoperative MRI showed the size of a tear between a nickel and a quarter. Dr. Rotman was of the opinion that generally, individuals with this size rotator cuff tear would have been back to work no later than 4-5 months following surgery, and have been at maximum medical improvement (MMI) shortly thereafter. He was of the opinion that a lot of the findings on the MRI, and findings at the time of surgery were chronic, including the AC joint arthritis, all of the tendinopathy changes, fraying of the superior labrum, and most likely most of his rotator cuff disease. Dr. Rotman was also of the opinion that the mechanism of injury (a direct blow to the outer shoulder after a fall), would more affect the AC joint, since it took a direct blow to the side, and petitioner did not fall on an outstretched arm. He was of the opinion that the AC joint findings on the MRI did not show any significant trauma, and the original exams after the injury did not mention any pain from the AC joint. Nonetheless, Dr. Rotman noted that the injury did appear to trigger discomfort in petitioner's right shoulder which then necessitated a rotator cuff repair, removal of the end of his arthritic distal clavicle, and a debridement of his frayed labrum. Dr. Rotman was of the opinion, based on the objective findings of the MRI report following the repair, that petitioner was at MMI. He believed petitioner's perceived impairment was obviously magnified because his right biceps was bigger than his left, and he demonstrated good function. Dr. Rotman was of the opinion that petitioner could return to full duty work without restrictions. He saw no need for any further work hardening or conditioning.

On 1/30/20 Dr. Rotman drafted an addendum to his Section 12 examination on 1/20/20. He stated that his opinion that the tear in petitioner's rotator cuff was between a nickel and a quarter, was based on a couple of photographs petitioner showed him from his surgery on his phone. Dr. Rotman stated that after reviewing the arthroscopic photographs he saw no acute tears, and all joint surfaces looked good. He saw no arthritic changes. He only saw a bit of inflammatory changes on the anterior labrum. In summary, Dr. Rotman was of the opinion that everything in petitioner's right shoulder was chronic except for the inflammatory changes on the anterior labrum. He was of the opinion that there was nothing acute noted anywhere around his rotator cuff tear. He opined there was nothing in the surgery that could have been clearly attributable to the petitioner's fall, except that he triggered discomfort from a chronically diseased shoulder a chronic old smoothed out retracted rotator cuff. He was of the opinion that the inflammatory changes on the anterior labrum were the only acute thing seen during surgery, and that petitioner only needed a debridement, and not a repair.

On 2/24/20 petitioner returned to Dr. Herrin. He noted that petitioner completed another round of work conditioning with no improvement. Based on these findings, Dr. Herrin was of the opinion that he did not think petitioner would be able to return to his work duties doing full duty work. He believed petitioner still needed to further strengthen his shoulder to decrease fatiguing. Dr. Herrin performed a cortisone injection into petitioner's right shoulder.

On 3/6/20 petitioner underwent a Functional Capacity Evaluation (FCE) at ATI. The evaluation reflected a consistent, maximal effort by petitioner. Following the evaluation, it was recommended that petitioner return to work at the Medium Heavy physical demand level with no restrictions regarding lifting from floor to waist; 10 pound occasional lifting limit with right arm from waist to overhead; avoiding repetitive and sustained tasks requiring his right arm to be out away from his body; avoiding repetitive or sustained overhead tasks with the right arm; and, avoiding climbing (ladders and scaffolds).

On 3/9/20 petitioner followed-up with Dr. Herrin. Following an examination, as well as review of the FCE and IME by Dr. Rotman, he was of the opinion that petitioner had reached maximum medical improvement, and provided him restrictions consistent with the findings of the FCE. He released petitioner on an as needed basis.

On 3/12/20 petitioner returned to Dr. Fletcher. Petitioner continued to complain of pain in his right shoulder. He rated the pain from a 1-8/10. Dr. Fletcher reviewed the essential job duties for a carpenter with Flemley Dickerson Company. These job duties, especially including those that include working and lifting materials overhead, climbing up and down ladders and scaffolding, and being able to lift over 100 pounds, do not fit within the restrictions outlined by the FCE. Dr. Fletcher indicated that he disagreed with Dr. Rotman's determination that petitioner could return to work, based on his own physical examination, current subjective

history, review of his therapy notes, and the FCE. Dr. Fletcher noted that he performed an extensive return to work medical examination of petitioner in 2018 before starting work for respondent, and found petitioner was fit to do union carpenter construction work. He further noted that petitioner would not be cleared if he came in for a post job offer for any other construction company. Dr. Fletcher was of the opinion that petitioner would need vocational assistance. He was further of the opinion that petitioner's condition is work related.

On 7/28/20 petitioner's attorney sent an email to respondent's attorney requesting vocational rehabilitation assistance for petitioner.

On 9/8/20 the evidence deposition of Dr. Fletcher, an occupational medicine doctor, was taken on behalf of petitioner. Dr. Fletcher testified that in June of 2018, after petitioner completed treatment for a knee injury, he had petitioner undergo a fitness for duty examination and FCE to determine his ability to return to work for respondent. He noted that petitioner was found fit to return to work for respondent as a union carpenter. He noted that as part of this examination, petitioner's right shoulder was examined and petitioner had no problems or complaints. He also noted that petitioner was able to demonstrate that he could do the full scope of his job duties as a union carpenter.

Dr. Fletcher opined that the FCE in March of 2020, was in contrast to the June of 2018 FCE, because in June of 2018 petitioner was found to have no restrictions, and could perform every aspect of his job as a union carpenter, but the March 2020 FCE showed petitioner had significant functional deficits that demonstrated his inability to go back to unrestricted work as a union carpenter. Dr. Fletcher testified that when he last examined petitioner he did show improvement since he had seen him in 2018, but his range of motion in his right shoulder was very limited. When he performed a medical correlation with respect to the FCE, Dr. Fletcher opined that petitioner could not go back and perform union carpentry work his client company, Felmley-Dickerson, and needed permanent restrictions.

Dr. Fletcher opined that he did not agree with Dr. Rotman's opinions. He disagreed with Dr. Rotman's assessment with respect to petitioner's work ability, and, his assessment that petitioner could return to work with no restrictions. He believed that these assessments were unreasonable and not based on his physical exam or functional testing. Dr. Fletcher also disagreed with Dr. Rotman's opinion on causation, because although petitioner had preexisting degenerative changes he was able to perform the full functions of his job as a union carpenter. Dr. Fletcher opined that at the worst petitioner would have sustained an aggravation of a preexisting condition. Dr. Fletcher opined that petitioner's right shoulder condition was the result of a work related injury in October of 2020.

On cross-examination, Dr. Fletcher testified that the FCE in June of 2018 was a modified evaluation, and the test in March of 2020 was very shoulder specific. Dr. Fletcher opined that the FCE in March of 2020 showed petitioner could lift over 100 pounds from floor to waist. He further opined that the job description of being able to lift 100 pounds could include overhead. Dr. Fletcher was of the opinion that petitioner's 100 high near lift was isometric strength, and does not necessarily transfer into dynamic lifting, and is a difficult comparison to make. Dr. Fletcher was of the opinion that petitioner was not limited from doing occasional overhead work activity. He did not believe petitioner could do any frequent lifting overhead, or climb up and down ladders or scaffolding safely. Dr. Fletcher opined that petitioner could safely operate a bus. Dr. Fletcher was of the opinion that petitioner's rotator cuff tear and labrum tear were either caused or aggravated by the accident.

On redirect examination Dr. Fletcher opined that the many of the job duties listed on the job description for the carpenter position with respondent are very vague, and don't have specific lifting requirements for those specific tasks. Based on his three decades of experience, examining hundreds of union carpenters, having reviewed other job descriptions, and performing post job offer exams for multiple union constructions businesses, Dr. Fletcher opined that he was familiar with the requirements, and union carpenters have to lift 100 pounds, and climb ladders and scaffolding. He further opined that there was not a match between petitioner's present work capacity and his ability to go back to unrestricted work.

On 10/22/20 the evidence of Dr. Rodney Herrin, an orthopedic surgeon, was taken on behalf of respondent. Dr. Herrin opined that that if petitioner was asymptomatic prior to the injury, and fell onto his upper extremity, that it can result in a rotator cuff rear because that is a common mechanism for rotator cuff tears. He further opined that the need for permanent restrictions are related to petitioner's injury on 10/5/18.

On cross examination, Dr. Herrin opined that petitioner sustained a rotator cuff tear as a result of the work injury, specifically as it relates to the supraspinatus tendon. Dr. Herrin based petitioner's final capabilities on the results of the FCE performed in March 2020. Dr. Herrin testified that petitioner's pain prevents him from lifting 10 pounds overhead, and anything away from his body. Dr. Herrin was of the opinion that petitioner's pain was coming from the AC joint and supraspinatus.

On redirect examination, Dr. Herrin opined that if petitioner's rotator cuff tear preexisted the injury, the incident could have aggravated or accelerated the rotator cuff tear.

On 12/8/20 the evidence of Dr. Mitchell Rotman, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Rotman was of the opinion that his examination of petitioner showed that he had a run of the mill routine rotator cuff tear that was healed, and did not need an FCE. He testified that petitioner already had

good motion, good strength, a healed rotator cuff and subjective pain. He was of the opinion that based on all his objective findings, and based on what his arm looked like, petitioner was doing fine. Dr. Rotman was of the opinion that since his arm did not have atrophy, petitioner's arm was working fine.

On cross-examination, Dr. Rotman testified that the fact that petitioner had no atrophy in his right arm when he examined him could have been the fact that petitioner was actively in physical therapy. Dr. Rotman agreed that the inflammatory changes in the anterior labrum had been caused or aggravated by the injury on 10/5/18, and that these changes required the debridement he underwent at the time of surgery. Dr. Rotman admitted that prior to the injury on 10/5/18 petitioner did not seek treatment for his preexisting supraspinatus tear, and that the injury on 10/5/18 could have triggered symptoms relative to the supraspinatus tear. Dr. Rotman was of the opinion that the mechanism of injury could also cause pain in the arthritic joint. Dr. Rotman was also of the opinion that the inflammatory issue that developed in the labrum area could also cause petitioner discomfort. Dr. Rotman testified that he did not review the post-operative MRI. Dr. Rotman testified that he has done a lot of Section12 examinations for respondent's attorney's firm over the past 20 years, probably over 100. He further testified that 90% of his Section 12 examinations are performed for respondent.

On 3/18/21 EPS Rehabilitation Inc. drafted a Limited Telephonic Labor Market Sampling for petitioner, in areas surrounding Hartsburg, IL. Based on the recommendations of the FCE, as well as the review of Dr. Fletcher's and Dr. Herrin's last visits, Edward Steffan, Rehabilitation Counselor, explored positions within the Sedentary and portions of the Light exertion levels as defined by the Dictionary of Occupational Titles Combined Volumes I and II Fourth Edition, Revised 1991. Steffan noted that he researched and telephoned approximately 111 employers of which only 20 provided enough information to be entered in the Limited Telephonic Labor Market Sampling. Based on the combination of The State of Illinois Bureau of Labor Market Statistics information, The West Central Illinois nonmetropolitan area Bureau of Labor Market Statistics, and the wage information provided by the employers contacted, Steffan was of the opinion that petitioner had access to open positions that pay for Receptionist or Information Clerk (2 employers, 7 positions) from $11.00-$14.86 per hour in IL, and $11.00-$12.02 in West Central IL; the pay for Customer Service Representatives (0 employers, 0 positions) from $11.00-$18.12 per hour in IL, and $11.00 to $16.57 in West Central IL; the pay for Cashiers (0 employers, 0 jobs) $10.43 in IL, and $10.43 per hour in West Central IL; the pay for Security Guards (1 employers, 2 positions) from $13.00-$15.13 per hour in IL, and from $13.00-$20.07 in West Central IL; and, the pay for Retail Salesperson (1 employers, 17 positions) from $11.00-$12.88 per hour in IL, and from $11.00-$11.30 in West Central IL. Steffan noted that 4 employers had 26 positions open an available at the time of his call. Based on this information, Steffan was of the opinion that petitioner should be able to secure employment between $11.00-$20.07 per hour. Petitioner testified that he never spoke with Steffan. Petitioner

testified that he applied for all the positions provided, but did not get interviews and was not hired by any of them.

On 3/25/21, 4/8/21, 4/15/21, and 4/22/21 petitioner's attorney sent an email to respondent's attorney requesting a copy of respondent's vocational report and the CV of the individual who prepared the vocational report. On 3/25/21 petitioner's attorney sent an email to respondent's attorney informing him that he had filed a Request for Hearing for 5/10/21.

On 5/10/21, 5/13/21 and 5/14/21 Confidential Investigative Snapshot performed surveillance of petitioner, at the request of the respondent. Surveillance totaled 28 hours. It was noted that on all three days petitioner arrived at Chester East Lincoln School in Lincoln, IL where he was believed to drive a school bus for the district. Later, each morning he was seen driving to Hot Frog Designs in Lincoln, IL. It was noted that petitioner did not wear a visible shoulder brace or any assistive devices. It was further noted that during intermittent times the petitioner was seen as he reached into is vehicle with his right hand, but did not do any heavy lifting or overhead work. No surveillance video was offered into evidence, only the report.

On 7/14/21 petitioner's attorney sent an email to respondent's attorney with a copy of his Request for Hearing filed for 8/9/21.

On 11/17/21 petitioner filed a petition for penalties and fees. The petitioner claims the respondent has engaged in unreasonable or vexatious delay in payment and/or intentional underpayment of compensation, and proceedings have been instituted or carried on by the respondent, which do not present a real controversy, but are merely frivolous or for delay.

On 5/5/22 EPS Rehabilitation Inc. drafted a Limited Telephonic Labor Market Sampling for petitioner, in areas surrounding Hartsburg, IL. Based on the recommendations of the FCE, as well as the review of Dr. Fletcher's and Dr. Herrin's last visits, Edward Steffan, Rehabilitation Counselor, explored positions within the Sedentary and portions of the Light exertion levels as defined by the Dictionary of Occupational Titles Combined Volumes I and II Fourth Edition, Revised 1991. Steffan noted that he researched and telephoned approximately 22 employers of which only 16 provided enough information to be entered in the Limited Telephonic Labor Market Sampling. Based on the combination of The State of Illinois Bureau of Labor Market Statistics information, The West Central Illinois nonmetropolitan area Bureau of Labor Market Statistics, and the wage information provided by the employers contacted, Steffan was of the opinion that petitioner had access to open positions that pay for Receptionist or Information Clerk (8 employers, 10 positions) from $11.00-$19.00 per hour in IL and West Central IL; the pay for Customer Service Representatives (2 employers, 2 positions) from $12.00-$18.01 in IL, and $12.00 to $17.48 in West Central IL; and, the pay for Host and Hostess,

Restaurant Lodge and Coffee Shops (2 employers, 2 positions) from $12.47-$16.00 per hour in IL, and none in West Central IL. Steffan noted that 12 employers had 14 positions open an available at the time of his call. Based on this information, Steffan was of the opinion that petitioner should be able to secure employment between $11.00-$19.00 per hour. Petitioner testified that he never spoke with Steffan, but did apply for the all positions provided, but did not get interviews and was not hired by any of them.

On 9/9/22 petitioner's attorney sent an email to respondent's attorney requesting a copy of the EPS Rehabilitation report dated 3/18/21 before the deposition of Steffan. Petitioner's attorney noted that he had not been provided with this report, and had only received the report of Steffan dated 5/5/22.

Petitioner offered into evidence a Subpoena sent to respondent for a complete wage statement for the specific time period 10/5/17 through 10/5/18 to include hourly rate of pain, hours worked, overtime rate or pay, overtime hours worked, etc. The Subpoena was signed on 9/12/22. This Subpoena was not in CompFile.

On 9/15/22 respondent's attorney emailed petitioner the reports of Mr. Steffan dated 3/18/21 and 5/5/22.

On 9/15/22, the evidence deposition of Edward Steffan, a vocational rehabilitation counselor, was taken on behalf of respondent, at the request of the respondent. Steffan testified that he was hired by respondent to do a labor market sampling. Steffan testified that he reviewed an extensive amount of records with the most pertinent being the record of Dr. Fletcher from 3/12/20, and Dr. Rodney Herrin from 3/20/20. Steffan was of the opinion that petitioner could secure jobs that he identified in his reports if petitioner was motivated to do so. He did not feel petitioner needed any formal vocational training to find employment in a reasonably stable job market. Steffan testified that he never met or spoke with petitioner. Steffan opined that petitioner's current part time job as a school bus driver underrepresents his earning capacity in a reasonably stable job market, given that petitioner has access to full time employment that he outlined in his two labor market surveys.

On cross examination, Steffan admitted that he did not know how many hours a week petitioner worked as a bus driver, or his hourly rate as a bus driver. Given that he did not know this information, Steffan admitted that he could not say that petitioner is earning less money than he would in some of the positions listed on the labor market survey. He also admitted that although not probable, it is possible that petitioner could be making more money in his current position as a bus driver than he would be in some of the positions listed in the 5/5/22 labor market survey. Steffan testified that no vocational rehabilitation services were offered to petitioner. Steffan admitted that if petitioner did not get the labor market survey dated 5/5/22 until June of 2022, some or all of the positions listed on that labor market survey may no longer be available. Steffan noted that only 8 of the 17 positions identified on the 5/5/22 labor market survey were for full time employment, and 6 were for full time and part time. Steffan agreed that if petitioner was making between $17 and $19 an hour, that would be

within the range of what he concluded in his labor market survey. He further agreed that there is no guarantee that petitioner could secure full time employment. In summary, Steffan was of the opinion that if petitioner had a job working part time making between $17 and $19 an hour, that would be consistent with the findings of his labor market survey.

Petitioner offered into evidence the paystubs from his job as a bus driver from the period beginning 8/16/20-8/22/20, 8/23/20-8/29/20, 11/15/20-11/21/20, periods ending 12/19/20, 1/8/21, 1/23/21, 2/6/21, 2/20/21, 3/5/21, 3/19/21, 4/10/21, 4/24/21, 5/8/21, 5/22/21, 7/2/21, 8/21/21, 9/3/21, 9/17/21, 10/1/21, 10/22/21, 11/5/21, 11/19/21, 12/4/21, 12/18/21, 1/8/22, 1/22/22, 2/4/22, 2/18/22, 3/5/22, 3/19/22, 4/8/22, 4/23/22, 5/7/22, 5/21/22, 6/3/22, 7/1/22, 8/19/22. Petitioner's earnings during this period, minus stipend of $1,216.00 equals $21,670.68.

The petitioner offered into evidence the wage records for a union carpenter on 10/5/18. That rate was $32.46 per hour. The current wages for a union carpenter on the date of trial was $35.85.

Petitioner offered into evidence his job search logs. On 6/17/22 petitioner completed 49 online applications. Petitioner filed 3 applications online on 4/4/22; 3 applications online on 4/6/22; 1 application online on 4/15/22; 2 applications online on 4/22/22; 1 application online on 4/26/22; 2 applications online on 4/27/22; 1 application online on 5/4/22; and 4 applications online on 5/5/22.

Respondent offered into evidence and ISO ClaimSearch report that shows petitioner filed a worker's compensation claim for his knee on 5/1/16 against Mid-Illinois Companies, Corp.

Petitioner testified that after he was released from care with permanent restrictions he tried to get work out of the union hall and was told he would not get work because of his restrictions. He testified that he then filed for unemployment, but was denied. He further testified that he demanded vocational rehabilitation, but never received any. Thereafter, he began his own job search and found a job outside the union driving a bus. He was hired by the Chester East Lincoln grade school in August of 2020, as a bus driver. He worked as a bus driver for the 2020-2021, and 2021-2022 school years, and is current driving for the 2022-2023 school year. He stated that in addition to driving the kids to and from school he also drives to athletic events. Petitioner testified that he continues to look for better paying jobs in the lumbaryards such as Lowe's or Menard's but has not yet found any employment.

Petitioner testified that he has worked as a union carpenter for 26 years for 4-5 different employers. He testified that he earned $32.46 an hour when he was hired, and now the current union wages for carpenter are $35.85.

Petitioner testified that his wife is the sole proprietor of Hot Frog Design, a t-shirt and decal shop, that began in their home in January of 2018, and then went brick and mortar in January of 2019. He testified that he is not an employee. He admits he hangs out there between his bus driver jobs, and helps out however he can. He testified that he draws designs, puts decals on, takes inventory, orders things, and puts decal on cars. He denied doing anything in excess of his restrictions. Petitioner has never been paid for his work at Hot Frog Design.

Petitioner testified that almost all medical provider positions identified by Steffan required the COVID vaccination, and he is not vaccinated. He further testified that he does not have any call center experience.

Currently, petitioner testified that his right shoulder is tight, sore, and he has limited range of motion. He testified that he cannot do much to the side or overhead. He testified that he cannot do the overhead work required of a carpenter. Petitioner stated that he is right hand dominant.

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

Prior to the injury on 10/5/18 petitioner denied any problems with, or treatment to, his right shoulder. In fact, on 6/21/18 petitioner underwent an FCE after an unrelated knee injury, and there were no problems identified with respect to his right shoulder. Then, immediately following the injury on 10/5/18, petitioner has had ongoing problems with his right shoulder.

With respect to the issue of causal connection between petitioner's current condition of ill-being as it relates to his right shoulder and the injury on 10/5/18, Dr. Fletcher, Dr. Rotman and Dr. Herrin offered casual connection opinions. Both Dr. Fletcher and Dr. Herrin definitively opined that petitioner's current condition of ill-being as it relates to his right shoulder is causally related to his injury on 10/5/18.

During his deposition he did agree that the inflammatory changes in the anterior labrum had been caused or aggravated by the injury on 10/5/18, and that these changes required the debridement he underwent at the time of surgery. Dr. Rotman admitted that prior to the injury on 10/5/18 petitioner did not seek treatment for his preexisting supraspinatus tear, and that the injury on 10/5/18 could have triggered symptoms relative to the supraspinatus tear. Dr. Rotman was of the opinion that the mechanism of injury could cause petitioner pain in the arthritic joint, and the inflammatory issue that developed in the labrum area could also cause petitioner discomfort. Despite these opinions, Dr. Rotman was of the opinion that on 1/20/20 petitioner had reached maximum medical improvement and needed no further treatment or work restrictions.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of petitioner's treating physicians more persuasive than those of Dr. Rotman, given that following the accident, and through the date of trial, petitioner has remained symptomatic with respect to his right shoulder, and even underwent an

FCE that showed he is unable to return to his regular duty work. For these reasons, the arbitrator finds the petitioner's current condition of ill-being, as it relates to his right shoulder, is causally related to the injury on 10/5/18.

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 petitioner's current condition of ill-being, as it relates to his right shoulder, is causally related to the injury on 10/5/18, the arbitrator finds all medical treatment the petitioner received for his right shoulder from 10/5/18 through 3/12/20, the last date petitioner followed-up with Dr. Fletcher, was reasonable and necessary to cure or relieve petitioner from the effects of his injury on 10/5/18.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The parties stipulated that respondent had already paid $61,886.50 for temporary total disability benefits prior to 3/8/20. Respondent claims the petitioner is not entitled to any additional temporary total disability benefits based on Dr. Rotman's opinion that petitioner reached maximum medical improvement on 1/20/20 and was capable of returning to full duty work without restrictions at that time. Petitioner claims he is entitled to temporary total disability benefits from 3/9/20 through 3/11/20. Having found petitioner did not reach maximum medical improvement until he was released by Dr. Fletcher on 3/12/20, the arbitrator finds the petitioner is entitled to additional temporary total disability benefits for the period 3/9/20 through 3/11/20, a period of 3/7 weeks at the rate of $1,001.13 per week.

With respect to maintenance benefits the petitioner claims he is entitled to maintenance benefits from 3/12/20 through 8/15/20. Respondent claims petitioner is not entitled to any maintenance benefits based on Dr. Rotman's opinion that petitioner reached maximum medical improvement on 1/20/20 and was capable of returning to full duty work without restrictions.

Having found petitioner's current condition of ill-being as it relates to his right shoulder is causally related to the injury on 10/5/18; that petitioner was unable to return to his regular duty job; and that petitioner did not find a job until 8/16/20, the arbitrator finds the petitioner is entitled to maintenance benefits from 3/12/20 through 8/15/20.

This finding is based on the fact that following his release from care with permanent restrictions on 3/12/20, petitioner was unable to return to work for respondent. Additionally, the petitioner testified that he went to the union hall to see if he could get some work, and was told that there were no jobs for him within his restrictions. Thereafter, petitioner conducted a self directed job search which resulted in him getting employment with Chester East Elementary School as a part time bus driver beginning 8/16/20.

Despite the fact that petitioner had permanent restrictions that prevented him from returning to work for respondent, respondent did not initially offer petitioner any vocational rehabilitation services based on the opinions of Dr. Rotman that petitioner had reached maximum medical improvement and was able to return to full duty work without restrictions on 1/20/20. Additionally, petitioner did not request vocational rehabilitation assistance until his attorney sent an email to respondent's attorney on 7/28/20.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to maintenance benefits in the amount of $1,001.13, from 3/12/20 through 8/15/20, a period of 22-3/7 weeks.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Petitioner claims he is entitled to a wage differential pursuant to Section 8(d)1 of the Act. The respondent claims the petitioner is only entitled to a loss of use of his person as a whole pursuant to Section 8(d)2 based on the opinions of Dr. Rotman.

Section 8(d)1 of Act states the following:

> "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 the 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."

In the case at bar, the arbitrator finds the credible evidence supports a finding that as a result of the injury on 10/5/18 petitioner became partially incapacitated from pursuing his usual and customary line of employment based on the opinions of Dr. Fletcher and Dr. Herrin, as well as the results of the FCE. As a result, petitioner performed a self-directed job search and found a job as a part time bus driver at Chester East Elementary School on 8/16/20.

The arbitrator also notes that respondent had Steffan perform 2 labor market surveys on 3/18/21 and 5/5/22. Petitioner noted that he never got the labor market survey dated 3/18/21, and did not get the 5/5/22 until sometime in June of 2022. The arbitrator notes that respondent made no effort to institute any vocational rehabilitation services until more than 6 months after petitioner began working his bus driver job on 8/16/20.

Steffan performed both of these labor market surveys on behalf of respondent. Although Steffan never talked to petitioner, or met with him, he was of the opinion that petitioner could secure jobs that he identified in his reports if petitioner was motivated to do so. He was also of the opinion that petitioner's current job as a part

time school bus driver underrepresented his earning capacity in a reasonably stable job market, given that petitioner had access to full time employment that he outlined in his 2 labor market surveys.

Despite these opinions, the arbitrator finds it significant that Steffan had no idea how much petitioner earned an hour, or how many hours a week petitioner worked for respondent. Given that he did not know this information, Steffan admitted that he could not say that petitioner was earning less money than he would in some positions listed on the labor market survey. Steffan also admitted, that although not probable, it is possible that petitioner could be making more money in his current position as a bus driver than he would be in some of the positions listed in the 5/5/22 labor market survey. Steffan admitted that if petitioner did not get the labor market survey dated 5/5/22 until June of 2022, some or all of the positions listed on the labor market survey may no longer be available. Steffan testified that of the 17 positions on the labor market survey 8 were for full time positions, and 6 were for part time and full time. Steffan also agreed that if petitioner was making between $17 and $19 per hour, that would be consistent with the findings of his labor market survey.

Given that petitioner is making $17.51 in a part time position, and there were part time positions on the labor market surveys Steffan produced, the arbitrator finds petitioner's current position as a part time bus driver with Chester East Elementary School earning $17.51 an hour does not underrepresent his earning capacity as it relates to the findings of Steffan's 2 labor market surveys.

Based on the above, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that he is entitled to a wage differential pursuant to Section 8(d)1 of the Act. The evidence shows that the average amount petitioner would be able to earn in the full performance of his duties as a union carpenter is $35.85 an hour, and that petitioner is currently earning $17.51 in some suitable employment as a bus driver after the accident.

The arbitrator notes that petitioner offered into evidence his payroll records from 8/16/20 through 8/19/22. The arbitrator notes that petitioner worked a total of 71 weeks for a total of 1267.15 hours during this period, with total earnings of $21,670.58. The arbitrator notes that during this period petitioner was paid 4 stipends totaling $1,216.00. The arbitrator finds no credible evidence in the record to support a finding that these amounts were part of petitioner's regular wages. Therefore, the arbitrator excluded these amounts from petitioner's total wages for the period 8/16/20 through 8/19/22. Based on this evidence the arbitrator finds the petitioner's average weekly wage while working as a bus driver from 8/16/20 through 8/19/22 was $305.22 a week.

Petitioner offered no credible evidence to support a finding that petitioner regularly worked over 40 hours a week in his union carpenter job. For that reason, the arbitrator finds the average amount petitioner would be

able to earn in the full performance of his duties as a union carpenter at a rate of $35.85 an hour, 40 hours a week, is $1,434.00.

The arbitrator finds 2/3 of $1,434.00 - $305.22 = $752.52.

For accidental injuries that occur on or after September 1, 2011, an award for a wage differential under Section 8(d)1 of the Act shall be effective only until the petitioner reaches the age of 67 or 5 years from the date the award becomes final, whichever is later. As a result, the arbitrator finds the petitioner shall receive an award pursuant to Section 8(d)1 of the Act in the amount of $752.52 per week, until he reaches the age of 67, or 5 years from the date the award becomes final, whichever is later.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?

On 10/13/21 and 11/17/21 petitioner filed the same petition for penalties and fees. In his motion, petitioner claims that he had not received all temporary total disability, maintenance benefits, or medical benefits. He further claimed that respondent had engaged in unreasonable or vexatious delay of payment and/or intentional underpayment of compensation. Petitioner alleged that proceedings had been instituted or carried on by the respondent, which did not present a real controversy, but were merely frivolous or for delay, and that such refusal to compensate petitioner was vexatious, unreasonable, and unfair. In his Motion petitioner did not provide any specifics regarding what temporary total disability benefits, maintenance benefits, or medical benefits were not received. Additionally, petitioner did not identify what proceedings had been instituted or carried on by the respondent that did not present a real controversy, but were merely frivolous or for delay, and that such refusal to compensate petitioner was vexatious, unreasonable, and unfair.

The arbitrator notes that respondent's decision to not pay temporary total disability benefits, maintenance benefits, and/or medical benefits, after the receipt of Dr. Rotman's IME was based on Dr. Rotman's opinion that individuals with a nickel to quarter size rotator cuff tear seen on the preoperative report would be able to return to work no later than 4-5 months after surgery, and would have been at MMI shortly thereafter. Dr. Rotman was also of the opinion that many of the findings on the MRI, and findings at the time of surgery were chronic, including the AC joint arthritis, all of the tendinopathy changes, fraying of the superior labrum, and most likely most of his rotator cuff disease. Dr. Rotman was also of the opinion that the mechanism of injury would more affect the AC joint, since it took a direct blow to the side, and petitioner did not fall on an outstretched arm. Dr. Rotman was of the opinion that the AC joint findings on the MRI did not show any significant trauma, and the original exams after the injury did not mention any pain from the AC joint. Although Dr. Rotman noted that the injury did appear to trigger discomfort in petitioner's right shoulder which then necessitated a rotator cuff repair, removal of the end of petitioner's arthritic distal clavicle, and a

debridement of the frayed labrum, he was of the opinion, based on the objective findings on the MRI report following the repair, that petitioner had reached maximum medical improvement, and petitioner's perceived impairment was obviously magnified. Based on his examination on 1/20/20, and review of all the related medical records, Dr. Rotman was of the opinion that petitioner could return to full duty work without restrictions, and needed no further work conditioning or work hardening.

Although the arbitrator did not adopt the opinions of Dr. Rotman, the arbitrator finds the respondent's reliance on his opinions that further temporary total disability benefits, maintenance benefits, and medical benefits were not warranted, does not rise to the level of respondent engaging in an unreasonable or vexatious delay of payment and/or intentional underpayment of compensation, given that petitioner is not claiming respondent failed to pay temporary total disability benefits, maintenance benefits or medical benefits through 1/20/20.

Based on the above, as well as the credible evidence, the arbitrator denies the petitioner's claim for penalties and attorneys' fees.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006381
Case Name	Theresa Smith v. Loyola Gottlieb Memorial Hospital
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0321
Number of Pages of Decision	19
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Jay Johnson
Respondent Attorney	Deidre Christenson

DATE FILED: 7/8/2024

/s/ Raychel Wesley, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THERESA SMITH,

Petitioner,

vs. NO: 16 WC 06381

LOYOLA GOTTLIEB MEMORIAL HOSPITAL,

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, medical expenses, temporary total disability, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT

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

On February 20, 2016, Petitioner presented to Respondent's emergency room after tripping on the carpet at work after her shoe got stuck. She fell, hitting her left side. It was noted that rapid response was called to the location, where Petitioner was found lying on the ground. Petitioner complained of left shoulder and left knee pain. She denied prior injury to both areas. Her shoulder was immobilized, and she was placed on a stretcher for transport. X-rays revealed mild degenerative changes in the patellofemoral joint, and a displaced fracture of the humeral neck. She was diagnosed with a left knee tibial plateau fracture and a left shoulder comminuted proximal

humerus fracture. *PX 1, p.4-10, 19, 23*. Surgery was recommended. *PX 1, p.24*. It was noted Petitioner had low vitamin D and may have underlying osteoporosis. *PX 1, p.40*.[1]

Petitioner underwent left shoulder and left knee surgery on February 23, 2016, and remained in the hospital thereafter. *PX 1, p.71-72, 83-85*. Dr. Kenneth Schiffman opined that Petitioner's tibial and humerus fractures were sustained during the fall. *PX 1, p.84*.

On August 18, 2016, Petitioner was discharged from ATI physical therapy. It was indicated she had only made minimal objective improvement with shoulder range of motion/strength in the past month, resulting in no additional functional gain. She indicated her left knee was fine. Her lower extremity complaints were limited to an unrelated hip issue. *PX 2, p.91-93*.

CONCLUSIONS OF LAW

I. Accident

The Commission views the evidence differently than the Arbitrator, and finds Petitioner proved an accident arising out of and in the course of her employment with Respondent.

The Arbitrator found that Petitioner failed to meet her burden of proof regarding accident. An employee's injury is compensable under the Act only if it arises out of and in the course of the claimant's employment. *820 ILCS 305/2*. Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478, 483 (1989). The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *McAllister v. Illinois Workers' Compensation Commission*, 2020 IL 124848, ¶ 34. A compensable injury occurs "in the course of" employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment. *Id*.

Under the personal comfort doctrine, engaging in acts that are necessary to an employee's health and comfort, even though they are personal, will be considered incidental to employment. *Chicago Extruded Metals v. Industrial Commission*, 77 Ill. 2d 81, 84 (1979). However, the personal comfort doctrine does not answer the whole question of compensability because it addresses only the "in the course of" requirement; the "arising out of" requirement must be met independently. *Circuit City Stores, Inc. v. Illinois Workers' Compensation Commission*, 391 Ill. App. 3d 913, 920-21 (2nd Dist. 2009).

The Commission affirms the arbitrator's finding that Petitioner's fall occurred in the course of her employment, as at the time, she was walking in her workspace to hang her coat on a coat rack. We find this act to be incidental to Petitioner's employment.

[1] The record indicates Petitioner underwent knee surgery 6 years prior. *PX 1, p.54*. However, all records indicate this was likely a misprint, as the records overwhelmingly only mention a prior left **hip replacement** 7 years prior, as well as a hysterectomy.

However, regarding the "arising out of" component of an accident under the Act, our analysis differs from that of the arbitrator. 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. *McAllister* 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.

The instant case deals with a Petitioner who fell while walking. Falls that result from something internal or inherent to the claimant are classified as "idiopathic falls" and are generally not compensable. The exception to this rule is if the employment significantly contributed to the injury by placing the employee in a position that increased the dangerous effects of the fall. See *City of Bridgeport v. Illinois Workers' Compensation Commission*, 2015 Ill. App (5th) 140532WC (2015).

A pure unexplained fall also is not compensable in Illinois, as it does not satisfy the "arising out of" requirement. *Builder's Square, Inc. v. Illinois Workers' Compensation Commission*, 339 Ill. App. 3d 1006, 1010 (2003). However, an employee may still satisfy this requirement even in an unexplained fall case by putting forth evidence which supports a reasonable inference that the fall stemmed from a risk related to the employment. *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478 (4th Dist. 2011). It is claimant's burden to present evidence that would permit a reasonable inference that the fall was related to her employment. *Id*. at 478. Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed, such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling. See *Illinois Consolidated Telephone Co. v. Industrial Commission*, 314 Ill. App. 3d 347, 352 (5th Dist. 2000).

In the instant case, there is no evidence of an idiopathic fall. However, regarding an unexplained fall, based on the totality of evidence provided, we find Petitioner has put forth sufficient evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. Accordingly, based on the totality of evidence, the Commission finds that the "arising out of" component of accident under the Act has been met.

The record reflects Petitioner's fall occurred in an area that was only open to employees, and she also provided testimony that the condition of the carpet was poor. Petitioner testified that there was a visible area of carpet she walked past which had been torn and pieced back together with tape, but was still pulling apart. Further, Petitioner testified that she noticed a hump on the floor after suffering her fall. Petitioner's testimony was contradicted by the testimony and reports of Nurse Pasquini and Ms. Hanchar, which indicated no evidence of any defects on the carpet. However, in addition to Petitioner's testimony, contemporaneous medical records along with the *reports* from Nurse Pasquini and Ms. Hanchar indicate that Petitioner's shoe stuck to the floor, causing her to lose her balance just before her fall. The word "stuck" carries particular significance here, as it suggests there was either a substance on the carpet, or the carpet itself was not smooth.

Taken in conjunction with Petitioner's testimony, a reasonable inference can be drawn that there was either something on the carpet, or the carpet itself was defective in some consequential manner. Moreover, a reasonable inference can also be drawn that the taped/torn area Petitioner passed just before her fall may have contributed to a compromise of the path Petitioner walked which was not visible.

Based on the foregoing, the Commission finds sufficient evidence permitting a reasonable inference that Petitioner fell due to a defect on the carpet, which is an employment-related risk, and satisfies the exception to the rule of unexplained falls, which also satisfies the "arising out of" component of accident. Petitioner has proven an accident under the Act.

II. Notice

Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. *820 ILCS 305/6(c)*. 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. *Id*. The notice requirement is to allow employers to investigate claims promptly and ascertain facts of the alleged accident and to allow him to minimize his liability by affording the injured employee immediate medical treatment. *United States Steel Corp. v. Industrial Commission*, 32 Ill. 2d 68, 75 (1964).

Here, Petitioner testified to informing both Ms. Pasquini and Ms. Hanchar of the accident, although she did not inform them of the alleged hump on the floor. Nevertheless, this inaccuracy is not a bar to Petitioner's claim, as no prejudice was alleged. Respondent was able to offer medical care and investigate the incident in a timely manner. Accordingly, the Commission finds that timely Notice of the accident was given to Respondent.

III. Causal Connection

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

> That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder*, at ¶26.

In the instant case, there is medical evidence Petitioner may have had preexisting osteoporosis. However, she testified that she had never previously injured her left shoulder, left arm, or left leg, and was not under any physical limitations. She was working eight hours a day, three to four days per week.

After suffering the instant accident, where she suffered a left knee tibial plateau fracture and a left shoulder comminuted proximal humerus fracture, Petitioner was immediately recommended for surgery followed by physical therapy. She also temporarily resided in a nursing home while recovering. By August 18, 2016, Petitioner still had some shoulder pain and restricted range of motion when elevating her arm. This hindered her ability to perform activities of daily living, including driving a vehicle. She was continued on a home exercise program and was released from care with no restrictions, although she chose not to return to work thereafter.

At trial, regarding her left knee, Petitioner testified she cannot sit in low chairs as it is difficult for her to stand back up. She sits in chairs with arms, but can only sit for one hour. She uses a walker all of the time, which is something she did not have prior to the accident. She does not shop as much as she used to and has to pick her leg up when getting in and out of a car. She also has to place a pillow in any chair she sits in. She also ices her knee and takes Motrin for pain.

Based on the above, the Commission finds that while Petitioner may have had a preexisting bone condition, said condition caused no complaints leading up to the date in question. Moreover, Petitioner credibly testified she had not previously injured her left shoulder, left arm, or left leg, been under any physical limitations, nor recommended for surgery on these body parts. After the accident, she was recommended for shoulder and knee surgeries, which were accompanied by subsequent recovery and physical therapy efforts. Petitioner now suffers from residual affects of her injuries which were not present prior to the accident. Lastly, treating physician Dr. Kenneth Schiffman opined that Petitioner's tibial and humerus fractures were sustained during the fall, and there is no other medical opinion in the record contradicting his opinion.

Accordingly, the Commission finds that the instant accident aggravated and accelerated Petitioner's pre-existing bone condition, which deteriorated to the point where left shoulder and left knee surgeries became necessary. The Commission finds that Petitioner's current left shoulder and left knee conditions are causally related to the instant accident.

IV. Medical Expenses

A claimant is entitled to recover reasonable medical expenses that are determined to be required to diagnose, relieve, or cure the effects of the claimant's condition of ill-being. *F&B Manufacturing Co. v. Industrial Commission*, 325 Ill. App. 3d 527, 534 (1st. Dist. 2001). Having reversed the arbitrator on the issue of accident, and finding causal connection between the accident and Petitioner's current conditions of ill-being, the Commission also awards all reasonable and necessary medical expenses listed in PX 3 directly to Petitioner, which were provided in the treatment of injuries she sustained during the instant accident, pursuant to §8(a) and §8.2 of the Act, and *Perez v. Illinois Workers' Compensation Commission*, 2018 IL App (2d) 170086WC, ¶17. The parties stipulated that Respondent is subject to reimbursement for Medicare to the extent bills were paid by Medicare. *Transcript*, p.5-6.

V. Temporary Total Disability

In order to prove temporary total disability ("TTD"), the employee must demonstrate not only that he did not work, but also that he was unable to work. *Rambert v. Industrial Commission*, 133 Ill. App. 3d 895, 903 (2nd Dist. 1985). However, determining the TTD period is a question of fact for the Commission, and its decision should not be disturbed unless it is against the manifest weight of the evidence. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Commission*, 387 Ill. App 3d 244, 256-57 (2008). There appears to be no evidence of any off work slips from Petitioner's treating physicians, nor do the records specifically indicate Petitioner must remain off work for any particular time following the alleged instant accident.

Nevertheless, the Commission finds no evidence in the treatment records from the accident date through August 16, 2016 that would have allowed her to work for Respondent. Petitioner was 72 years old and had suffered two fractures which required surgery, followed by stints in long-term care facility, in-home therapy, outpatient therapy, and non-weight-bearing status followed by partial weight-bearing status. Throughout this period, she had difficulty performing activities of daily living, including driving a vehicle. Additionally, the record reflects that Dr. Schiffman opined Petitioner had plateaued from therapy as of August 18, 2016.[2]

Petitioner's discharge notes from physical therapy on August 18, 2016 indicated she had only made minimal objective improvement with shoulder range of motion/strength in the past month, resulting in no additional functional gain. It was noted physical therapy was still appropriate, but that she was being discharged in order to conserve Medicare benefit for an upcoming unrelated surgery. Accordingly, based on the totality of evidence, the Commission finds that Petitioner was unable to work after her accident, and is entitled to TTD benefits from February 20, 2016 through August 16, 2016 at a weekly rate of $253.24.

VI. Permanent Partial Disability

Having found accident and causal connection, the Commission must now also analyze the nature and extent of Petitioner's injury. The five factors upon which the Commission must base its determination of the nature and extent of Petitioner's injury are enumerated in §8.1b(b) of the Act.

Regarding (i) the level of impairment, neither party offered an AMA impairment rating for either of Petitioner's injuries, thus the Commission gives no weight to this factor.

Regarding (ii) Petitioner's occupation was a receptionist. Petitioner testified that by August of 2016 she was released from care with no restrictions, but decided against returning to work. Substantial weight is given to this factor.

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[2] Although the appointment date is August 18, 2016, Petitioner is bound by stipulation to terminate TTD (if awarded) as of August 16, 2016. *Walker v. Industrial Commission*, 345 Ill. App. 3d 1084, 1088 (4th Dist. 2004).

Regarding (iii) Age, Petitioner was 72 years old at the time of accident. She testified to ongoing residual shoulder and knee issues. She has chosen not to re-enter the workforce, but must still deal with residual effects of her injuries for the remainder of life. Substantial weight is given to this factor.

Regarding (iv) Future earning capacity, there is no evidence in the record that Petitioner's future earning capacity had been altered by her injury. No weight is given to this factor.

Regarding (v) Evidence of disability corroborated by medical records, Petitioner still complains of ongoing left shoulder pain which increases with movement. She also complained of weakness and limited range of motion when lifting her arm. She has difficulty performing activities of daily living such as doing her hair, takes Motrin twice daily for pain, and occasionally must ice her shoulder.

Regarding her left knee, she cannot sit in low chairs due to difficulty in standing back up. She sits in chairs with arms, but can only sit for one hour, and must place a pillow in her chairs. She uses a walker all of the time, which is something she did not have prior to the accident. She does not shop as much as she used to and has to pick her leg up when getting in and out of a car. Lastly, she also ices her knee and takes Motrin for pain.

Medical records corroborated Petitioner's testimony regarding her shoulder, as Dr. Schiffman noted on August 18, 2016 that she still had pain, limited range of motion, and difficulty performing activities of daily living, including driving. He also noted that if her shoulder became bothersome enough, a humeral plate and screw removal would be considered.

Regarding her left knee, Petitioner informed Dr. Schiffman in August of 2016 that her knee was doing very well, and informed physical therapy her left knee was "fine." However, nearly seven years later, and at a more advanced age of 79 years old, Petitioner testified to difficulty sitting in low chairs, the constant use of a walker, ongoing icing of her knee and taking Motrin for pain. Considering the natural wear and tear on a knee in addition to surgery, the Commission finds Petitioner's current residual knee complaints to be persuasive. Moderate weight is given to this factor.

Based on the above, the Commission awards permanent partial disability ("PPD") benefits for a 30% loss of use of a leg for Petitioner's knee condition, and a 20% loss of use of a person as a whole for Petitioner's left shoulder condition. The weekly PPD rate is $227.92.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 10, 2023 is hereby reversed for the reasons stated herein.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved she sustained a compensable accident arising out of and in the course of her employment with Respondent on February 20, 2016.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner provided timely notice of the accident to Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved causal connection between the accident and her current left knee condition.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved causal connection between the accident and her current left shoulder condition.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses outlined in Petitioner's Exhibit 3, pursuant to §8(a) and subject to §8.2 of the Act, and *Perez v. Illinois Workers' Compensation Commission*, 2018 IL App (2d) 170086WC, ¶17. Respondent is subject to reimbursement for Medicare to the extent bills were paid by Medicare.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.24 per week for a period of 25 & 4/7ths weeks, representing February 20, 2016 through August 16, 2016, 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 $227.92 per week for a period of 64.5 weeks, as provided in §8(e)(12) of the Act, for the reason that the injuries sustained caused a 30% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $227.92 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 a 20% 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.

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 $44,300.00. 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.

July 8, 2024

/s/ *Raychel A. Wesley*

RAW/wde

O: 5/8/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC006381
Case Name	Theresa Smith v. Loyola Gottlieb Memorial Hospital
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Jay Johnson
Respondent Attorney	Deidre Christenson

DATE FILED: 4/10/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 4, 2023 4.70%

/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

Theresa Smith
Employee/Petitioner

v.

Loyola Gottlieb Memorial Hospital
Employer/Respondent

Case # **16** WC **06381**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **February 2, 2023.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 20, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident [***moot***] given to Respondent.

Petitioner's current condition of ill-being [***moot]*** related to the accident.

In the year preceding the injury, Petitioner earned $***19,752.72***; the average weekly wage was $***379.86***.

On the date of accident, Petitioner was ***72*** years of age, ***single*** with ***0*** dependent children.

Petitioner [***moot***] received all reasonable and necessary medical services.

Respondent [***moot***] 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 did not arise out of her employment.

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

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

_____ **APRIL 10, 2023**

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Theresa Smith,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 16WC06381
Loyola Gottlieb Memorial Hospital,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on February 2, 2023 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing under the Illinois Workers Compensation Act "Act." Issues in dispute include accident, notice, causation, unpaid medical bills, temporary total disability "TTD" benefits, and the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Alleged Accident of February 20, 2016

Petitioner testified that she had worked at Gottlieb for 30 years as a switchboard operator and acted as a receptionist. (T.7-8) She testified that she worked in the basement in an employee only office area. (T. 8) Petitioner testified that to get to her workstation, she walked into the office, passed two desks, turned left and then she was in her workstation, which was across from a long table with three additional desks. (T.9-10) She testified that her workstation was five or six feet from where she entered to get to the coat rack. (T.10) Petitioner testified that the carpet was old, there were defects, and an area that was separated, taped, and pulled apart. (T.12)

Petitioner testified that on her way in to work on February 20, 2016, she walked into her office area with her bag and a cup of iced tea. On her way to the coat rack (to hang up her coat) she tripped on the carpet and fell onto her left side (specifically striking her left shoulder and left leg). (T.11; 26) Petitioner testified that when she fell, she saw a little bump on the floor by the table where she was walking. (T.12) She testified that she fell about four feet from the area of the carpet that was taped. (T.12) Petitioner testified that at the time of her injury, she was wearing gym shoes with no back, slip-on shoes. (T.31) She testified that she didn't remember if her shoes fell off when she fell. (T.38)

Petitioner used her phone to call emergency personnel who came with a gurney and took her to the emergency room. (T.13) She testified that she did not tell the ER team that she had fallen due to a bump on the floor, because they had not asked her. (T.27-8)

Notice to Respondent

Petitioner testified that she reported her injury to her manager, Anita Hanchar, who came to visit her in the hospital room. Petitioner testified that she told her manager that her shoe stuck to the rug and, when she fell, she saw a little bump. (T.30-1)

Petitioner also reported the injury to Teresa Pasquini, an employee health nurse, after she was admitted to the hospital. (T.32) Petitioner testified that she did not remember what she told Ms. Pasquini because she was under so much sedation and pain medication. (T.35-6)

Testimony of Teresa Pasquini

Teresa Pasquini testified for Respondent. Ms. Pasquini testified that she is a Registered nurse and works in Employee Health at Loyola Gottlieb Hospital. (T.43-4) She testified that as part of her job duties, she conducted accident investigations for the hospital. (T.44-5) She testified that she also completed OSHA investigations for the hospital. (T.45) She testified that because Petitioner was hospitalized, the accident was reported to OSHA. (T.46) Ms. Pasquini testified that she was the OSHA investigator for this case (T.47) and the author of the OSHA report. (T.50, RX1)

Ms. Pasquini testified that she interviewed the Petitioner at the time of her investigation. (T.58) She testified that at the time of her interview, Petitioner did not identify any flaw that caused her fall. (T.59) She testified that Petitioner confirmed during her interview that she had been wearing a backless gym shoe type shoe when she fell. (T.59) In addition, she testified that Petitioner reported at the time of her interview that she was carrying a cup of tea and her bag and that was the reason she hadn't been able to grab anything to break her fall. (T.60) Ms. Pasquini testified that at the time of her interview with Petitioner, that Petitioner was able to express herself clearly, that she was cooperative and answered all of her questions. (T.51) She added that she was clear-headed and coherent during the interview. (T.71-2)

Ms. Pasquini testified that she interviewed Petitioner's manager, Anita Hanchar, as part of her investigation. She testified that Ms. Hanchar completed the supervisor's portion of the accident report. (T.57) She confirmed that Ms. Hanchar had not identified any flaw that caused Petitioner's fall. (T.58) No flaws or defects are identified as factors that contributed to the accident by Ms. Hanchar in the accident report. (RX1, p.6)

Ms. Pasquini testified that she inspected the site of the accident at the time of her investigation. (T.60-1) She testified that she inspected the location of the fall thoroughly. (T.61) She testified that the carpeting was smooth and even, the floor was smooth and there were no seams, flaw or buckling in the carpeting. (T.61).

Ms. Pasquini confirmed that she took photographs documenting the location. (T.62)

Ms. Pasquini testified that over the entire course of her investigation she did not locate or identify any flaw or defect that contributed to Petitioner's fall. (T.64) She testified that that she determined that the contributing factors to the accident were that Petitioner was holding something in both

hands and lost her balance. (T.64) She added that Petitioner was wearing backless shoes and had both hands full. (T.64-5)

Ms. Pasquini testified that she submitted Respondent's Exhibit 1 as the OSHA investigation response. (T.65) She further confirmed that OSHA did not request any follow up after the submission. (T.65) She further testified that if OSHA had determined that there was a problem, they would generally follow up with a site visit. (T.65) The OSHA report in evidence does not document any flaw or defect in the floor or the carpeting. (RX1)

Testimony of Bernard McClendon

Mr. Bernard McClendon testified for Respondent. Mr. McClendon testified that he is an investigator for CoventBridge and that he took photographs of the communications office on September 12, 2019. (T.74) He testified that the series of photographs (RX2) accurately reflects the layout of the Communications Office at Loyola Gottlieb hospital. (T.77-8) He testified that the main office space is shown in Photo 3. (T.78, RX2 – p.2) He testified that he inspected the floor surface in the area shown in Photo 3 and that it was even. (T.79) He further testified that there was no damaged carpeting shown in the area shown in Photo 3. (T.80, RX2-p.2) He testified that there was damaged carpeting in the office that is shown in pictures 7, 8 and 9. (T.80, RX2-p.4-5) He further testified that the damaged carpeting was in a different section of the office than the main work area. (T.81)

Petitioner's Medical Treatment

Petitioner was admitted to the hospital and X rays revealed that she had sustained a markedly comminuted and displaced fracture of her left humeral neck and a comminuted depressed left tibial fracture. (PX1, 14-5) Petitioner was admitted to Gottlieb Hospital and had surgeries to both her left shoulder and her left knee. (T. 14) Following her surgeries and post-surgical care, Petitioner testified that she was transferred to Symphony of Hanover Park for post-surgical rehabilitation for approximately three months (T.14-5) Following that rehabilitation, Petitioner underwent physical therapy for her left knee and left shoulder between June and August of 2016. (T17) Dr. Schiffman released Petitioner from his care on August 16, 2016 with no restrictions. (PX1, 936) Petitioner testified that she chose not to return to work after this release and is currently drawing social security retirement benefits. Petitioner testified that Medicare paid her medical bills. (T.18)

Petitioner's Current Condition

Petitioner testified that her left shoulder is always painful and she hardly has any strength in her left arm. She can only lift 5 pounds comfortably. She can only raise her left arm to just below shoulder level. She has difficulties reaching for dishes and cans on her shelves. She cannot move her arm high enough to use her curling iron. She takes Motrin twice daily. She ices her shoulder a few times per week.

Petitioner testified that she has difficulty sitting in low chairs because she has trouble bending her left knee when she stands up. She needs chairs with arms to help her stand. She can comfortably sit for no more than 1 hour. She cannot walk distances without the help of a shopping cart or

walker. She uses her walker all the time. She did not do so prior to this fall. She has difficulty getting in and out of her car. She prefers to sit with a pillow to help her prop her knee. As with her left shoulder, she takes Motrin and ices her left knee.

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. 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 personal comfort doctrine does not answer the whole question of compensability because it addresses only the "in the course of" requirement; the "arising out of" requirement must be met independently. Circuit City Stores, Inc. v. Illinois Workers' Compensation Comm'n, 391 Ill. App. 3d 913, 920-21 (2nd Dist. 2009).

In the case at hand, Petitioner's alleged work accident was in the course of her employment. Petitioner testified that she worked in an employee only office area and that she fell on her way to the coat rack (to hang up her coat), with her bag and a cup of iced tea in her hands preventing her from breaking her fall.

"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." McAllister, 2020 IL 124848, ¶ 36.

A claimant may not recover if the risk to which they were exposed was a risk personal to them. Stapleton v. Industrial Comm'n (Peabody Coal Co.), 282 Ill. App. 3d 12, 16, 668 N.E.2d 15, 19 (5th Dist. 1996). An "idiopathic" fall is not the same as an "unexplained" fall. A fall originating from an unknown neutral source is deemed "unexplained," while a fall originating from an internal and personal condition of the employee is deemed "idiopathic." Id. If the fall is idiopathic, resultant injuries are not compensable unless the employment significantly contributed to the injury by placing claimant in a position of greater risk of injury from falling. Id. *citing* Oldham v. Industrial Com. of Illinois, 139 Ill. App. 3d 594, 596, 487 N.E.2d 693, 695 (2nd Dist. 1985).

The appellate court has consistently held that the "arising out of" requirement is generally satisfied with unexplained falls. Builders Square, Inc. v. Industrial Comm'n (Peters), 339 Ill. App. 3d 1006, 1010, 791 N.E.2d 1308, 1311 (3rd Dist. 2003); Stapleton, 282 Ill. App. 3d at 16; Oldham, 139 Ill.

App. 3d at 597; Chicago Tribune Co. v. Industrial Com. of Illinois, 136 Ill. App. 3d 260, 263, 483 N.E.2d 327, 329 (1st Dist. 1985); Sears, Roebuck & Co. v. Industrial Com., 78 Ill. 2d 231, 399 N.E.2d 594 (1979). However, so as to avoid conflict with Illinois' disavowal of the positional risk doctrine, a claimant's burden of proof requires more than merely showing inability to explain why a fall occurred. In addition to such inability, a claimant must present evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. Builders Square, at 1010.

Here, there is no evidence that Petitioner's fall was idiopathic and Petitioner has not presented sufficient evidence supporting a reasonable inference that her fall stemmed from an employment-related risk.

The Arbitrator places little to no weight on the testimony of Bernard McClendon as his investigation was conducted more than three years after the fall. Instead, the Arbitrator looks to Petitioner's testimony, her medical records, Ms. Pasquini's testimony and her investigation soon after the accident. Petitioner testified that the bottom of her shoe stuck when she fell and, once on the ground, she saw a little bump on the floor by the table where she was walking. According to Ms. Pasquini, Petitioner reported that her "shoe stuck on carpet" (See Rx 1, p. 1) and none of the immediate medical records show that Petitioner provided a history of a fall due to a defect. While evidence from both parties show that the carpet was not new and there were areas of carpet that were pulled apart and then taped down, the Arbitrator places significant weight on the photographs taken by Ms. Pasquini showing no defects on the floor/carpet where Petitioner fell. (See Rx 1, pp. 8-11).

The Arbitrator finds that the accident did not arise out of and in the course of Petitioner's employment by Respondent

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident, all other issues are moot.

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

Having found for Respondent on the issue of accident, all other issues are moot.

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

Having found for Respondent on the issue of accident, all other issues are moot, and no benefits are awarded to Petitioner.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident, all other issues are moot, and no benefits are awarded to Petitioner.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

Having found for Respondent on the issue of accident, all other issues are moot, and no benefits are awarded to Petitioner.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC007778
Case Name	Maxine Dockery v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0322
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Crystal B. Figueroa
Respondent Attorney	Andrew Zasuwa

DATE FILED: 7/8/2024

/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

MAXINE DOCKERY,

Petitioner,

vs. NO: 20 WC 7778

CTA,

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 and temporary total disability (TTD) benefits, and being advised of the facts and applicable 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 modifies the Arbitrator's Decision regarding TTD benefits. The evidence demonstrated that after the January 31, 2020 work accident, Petitioner did not return to work for Respondent. She was either taken off work or given light duty restrictions by her physicians and there was no evidence that Respondent accommodated her restrictions. The parties stipulated that Respondent had paid $116,739.35 in TTD benefits to Petitioner. At arbitration, Petitioner claimed she was entitled to additional TTD benefits from June 6, 2022 through March 31, 2023, as Respondent had stopped paying TTD benefits pursuant to their Section 12 IME challenging causal connection.

The Arbitrator found that Petitioner's current condition of ill-being is related to the work accident and the Commission affirms the Arbitrator's Decision in this regard. As such, the Commission finds that Petitioner is entitled to TTD benefits covering the entire period of February 1, 2020 through March 31, 2023, less the agreed-to credit of $116,739.35 to Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 8, 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 $956.88 per week for 165 weeks, from February 1, 2020 through March 31, 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 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.

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.

July 8, 2024
CAH/pm
O: 6/20/24
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	20WC007778
Case Name	Maxine Dockery v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Crystal Figueroa
Respondent Attorney	Andrew Zasuwa

DATE FILED: 9/8/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 6, 2023 5.30%

/s/Elaine Llerena, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Maxine Dockery
Employee/Petitioner
v.
Chicago Transit Authority
Employer/Respondent

Case # **20** WC **007778**

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 **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 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 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 $**74,636.64**; the average weekly wage was $**1,435.32**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

Respondent shall be given a credit of $**116,739.35** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**116,739.35**.

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 $956.88 per week for 42 & 4/7 weeks, commencing June 6, 2022, through March 31, 2023, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $38,626.65, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for prospective medical care in the form of an anterior cervical discectomy with fusion as recommended by Dr. Mekhail, 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 8, 2023

FINDINGS OF FACT:

This matter proceeded to hearing on March 31, 2023, in Chicago, Illinois before Arbitrator Elaine Llerena on Petitioner's Request for Hearing. The issues in dispute were causal connection, medical expenses, temporary total disability benefits and prospective medical care. Arbitrator's Exhibit 1 (AX1)

Job Duties

Petitioner testified that she is employed as a Bus Operator for Respondent. (T. 9) Petitioner's job duties consist of greeting customers, picking up customers, and taking them to their destination. (T. 9-10) Petitioner has been employed by Respondent for 20 years. *Id.*

Prior Medical Condition

Petitioner testified that she did not have any problems with her neck prior to January 31, 2020. (T. 11) Petitioner denied telling Dr. Anis Mekhail that she had a prior history of neck issues that resolved with conservative treatment. (T. 34) She testified that she may have told the doctor about her injection that she had after the work accident. (T. 35)

Accident

On January 31, 2020, Petitioner was operating her bus westbound on Grand Avenue when she noticed a car heading toward her in the opposite direction. (T. 10) She tried to lay on her horn but to no avail. *Id.* The vehicle collided head-on with Petitioner's bus. *Id.*

Petitioner testified that after the accident she noticed she had pain in her neck and back. (T. 11) Petitioner did not finish her route as she had to fill out a report and take a drug test. *Id.*

Summary of Medical Records

Petitioner was first seen at Concentra/Occupational Health Centers of Illinois (Concentra). (PX1) Petitioner reported a history of her bus getting hit head on by a motor vehicle. Petitioner complained of pain in her neck, both shoulders and upper thighs. Petitioner was diagnosed as having a neck strain, thoracic strain, and lumbar strain.

Petitioner was seen at the Pain Center of Illinois that same day. (PX2) Petitioner complained of neck pain radiating to her bilateral shoulders and low back pain. Petitioner was diagnosed as having cervicalgia, low back pain, and thoracic pain. Petitioner was ordered to continue taking Motrin and cyclobenzaprine, was taken off work for two weeks and referred to physical therapy.

Petitioner underwent physical therapy from February 11, 2020, through September 3, 2020, at Illinois Pain and Therapy with Dr. Darshan Ghandi. (PX4)

Petitioner underwent an MRI of the cervical spine and MRI of the lumbar spine on February 17, 2020. (PX7) The MRI of the cervical spine revealed posterior herniations at C5-6, C6-7 and C4-5. The MRI of the lumbar spine revealed posterior herniations at L3-4, L4-5, and L5-S1.

Petitioner followed up at the Pain Center of Illinois on February 21, 2020. (PX2) Brittany Bock, PA-C reviewed the cervical MRI and diagnosed Petitioner as having cervicalgia and radiculopathy. PA Bock

indicated that Petitioner's radiating pain into the shoulders and low back pain was causally related to the January 31, 2020, work accident. PA Bock continued physical therapy, recommended a cervical steroid injection if physical therapy was ineffective, and kept Petitioner off work. Dr. Neema Bayran signed off on PA Bock's report.

Petitioner followed up with PA Bock and Dr. Bayran remotely on March 25, 2020, due to Covid-19 restrictions. PA Bock and Dr. Bayran noted Petitioner's neck pain was unchanged and that the recommended injection was deferred due to Covid-19 restrictions. They kept Petitioner off work.

Petitioner was admitted into the University of Illinois Hospital for 12 days due to Covid-19. (PX5) Petitioner was diagnosed with Covid-19 on April 4, 2020. The medical records indicate Petitioner isolated for two weeks afterwards. Petitioner was cleared to resume physical therapy on May 18, 2020.

Petitioner continued to follow up with PA Bock and Dr. Bayran. (PX2) Petitioner continued to complain of ongoing neck and back pain. On August 19, 2020, Dr. Bayran recommended a lumbar transforaminal epidural steroid injection at L4-5 and L5-S1, which she administered on September 2, 2020. On September 15, 2020, Petitioner reported 40% improvement in her back pain; however, she continued to have radiating back and neck pain. Dr. Bayan again recommended a cervical epidural steroid injection, which she administered on September 30, 2020. On October 16, 2020, Petitioner reported no pain relief from the cervical injection. Petitioner complained of neck pain that radiated into her shoulders and down her right arm into her fingers, as well as low back pain that radiated down her leg and ankle. Dr. Intesar Hussain referred Petitioner for a spinal consultation.

Petitioner saw Dr. Anis Mekhail on December 28, 2020. (PX6) Dr. Mekhail noted that Petitioner reported that she denied any history of neck or back problems on January 31, 2020. Dr. Mekhail also noted that Petitioner reported that she had neck issues in the past which resolved with conservative treatment. Dr. Mekhail wanted to review the MRIs, which he did on January 28, 2021, and recommended an anterior cervical discectomy with fusion. Petitioner continued to follow up with Dr. Mekhail as she awaited surgery approval.

Petitioner underwent a Section 12 examination (IME) by Dr. Frank Phillips on October 19, 2021, at Respondent's request. (RX1) Dr. Phillips examined Petitioner and reviewed medical records and accident reports. Dr. Phillips noted Petitioner's complaints of neck and low back pain, with neck pain being the dominant complaint. Dr. Phillips opined that Petitioner had sustained a lumbar and cervical sprain/strain injury. He believed her subjective findings far outweighed any objective findings and noted that the MRIs were of poor quality. He felt a better-quality MRI would be needed.

Petitioner underwent an MRI of the cervical spine on December 9, 2021, the results of which showed spondylosis between C4 and C7 with disc bulging and protrusions, causing variable degrees of foraminal stenosis. (PX7)

Petitioner returned to Dr. Mekhail on March 24, 2022, who noted that Petitioner continued to report neck pain. (PX6) Dr. Mekhail prescribed lidothol patches and gel and lidopro ointment, along with medications and released Petitioner to return to work, light duty. (PX6 & PX8) Petitioner testified the patches, gel, and ointment did not help her. (T. 25)

Dr. Phillips issued an addendum report on April 27, 2022. (RX2) Dr. Phillips reviewed additional medical records and the December 9, 2021, cervical MRI. Dr. Phillips concluded that the MRI showed some mild underlying degenerative changes without any acute structural findings. He believed the foraminal stenosis was most pronounced in the left at C6-7, but noted that Petitioner's symptoms appeared to be on the right side.

Dr. Phillips again indicated that Petitioner had sustained a sprain/strain injury to her cervical and lumbar area. He did not believe that the MRI confirmed any significant or acute structure pathology. He did not believe there was any objective basis that would preclude Petitioner from working regular duty, as it relates to the January 31, 2020, work accident. Dr. Phillips opined that the surgery proposed by Dr. Mekhail would be performed to address the underlying degenerative changes and would have an unpredictable chance of improving any symptoms at all.

On May 17, 2022, Dr. Phillips issued a 2nd addendum. (RX3) Dr. Phillips explained that he had recommended work restrictions in his first IME report because he had not reviewed an adequate quality cervical MRI. He stated that once he was able to review a better-quality MRI, he felt there was no contraindication to Petitioner returning to full duty work.

On September 1, 2022, Dr. Mekhail noted that surgery had still not been approved and prescribed anti-inflammatory medication for Petitioner's ongoing symptoms. (PX6) Dr. Mekhail also continued Petitioner's light duty restriction and explained that it would be difficult for Petitioner to drive safely with her ongoing neck issues. Petitioner last saw Dr. Mekhail on December 1, 2022. Petitioner complained of ongoing cervical pain with radiculopathy going down her right arm. Petitioner's cervical surgery was still not approved on this date.

Petitioner's Current Condition

Petitioner testified she has not undergone the cervical surgery and that she still wants her cervical surgery because the pain pills, patches, and icy hot are not working. (T. 27) Petitioner testified she takes Tylenol, Advil, Lisinopril, and Tramadol and nothing works. (T. 27-28)

Petitioner testified she has not returned to work for Respondent since the work accident. (T. 28) She testified she cannot work right now because of the constant pain, which would not allow her to fulfill her different duties. *Id.* Petitioner testified she used to enjoy cooking; however, after the accident, she requires assistance from her husband. (T. 29) She testified it is difficult to put stuff in the oven or take a hot pot off the stove or to reach for something in the cabinet. (T. 30) Petitioner testified she gets a sharp pain in her neck when she reaches for something. *Id.* She testified she gets pain rushing through her neck when she takes a pot off the stove or takes a pan out of the oven. *Id.*

Petitioner also testified she used to wash dishes, but has not been able to do a lot of washing because she has to sit down. (T. 30-31) She testified her husband assists her with chores. (T. 31) Petitioner also testified her husband has been driving her around since the accident due to the pain in her neck and the fear of getting hit. (T. 31) Petitioner testified it is hard to turn her head left and right to see if a car is coming. *Id.* Petitioner testified that, after the accident, she has been unable to carry heavy items when going grocery shopping. (T. 32) Petitioner testified she can maybe lift 10 pounds. *Id.*

Petitioner used to play volleyball and softball and sometimes basketball with her husband. (T. 32) After the accident, Petitioner has been unable to play sports because she cannot hit the ball or catch it because she gets pain in her neck. (T. 33)

Petitioner testified she has seven grandkids and can no longer dance with them because it leads to neck pain. (T. 32) Petitioner was able to dance with her grandkids before the accident. *Id.* Petitioner also testified her work accident has had an effect on her marriage—including intimately. (T. 34)

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 and that her testimony is supported by the medical records. The Arbitrator further notes that she observed Petitioner's demeanor as she testified and found her to be credible.

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

A casual connection between a work accident and a condition of ill-being may be established by a chain of events, including claimant's ability to perform job duties before the date of the accident and inability to perform the same duties following that date. *Peabody Coal Co v. Industrial Comm'n*, 213 Ill. App.3d 64. 65 (1991). It is the function of the Commission to resolve disputed questions of fact, including those of causal connection, to draw permissible inferences and to decide which of conflicting medical views is to be accepted. *Material Service Corp. v. Industrial Comm'n*, 97 Ill. 2d 382, 387 (1983)

The Arbitrator notes that Petitioner was working as a bus operator without problems or restrictions on January 31, 2020. The medical records do not have any treatment records from before January 31, 2020, detailing treatment for the neck or back. After the accident, Petitioner continues to have neck and back pain and has been unable to return to work.

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the January 31, 2020, 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:

Petitioner's treatment to date for her lumbar spine and cervical spine condition has consisted of doctor visits, diagnostic testing, physical therapy, injections, and medications.

Based on the Arbitrator's finding with respect to casual connection, the Arbitrator finds that Petitioner's treatment to date has been reasonable and necessary. Respondent shall pay the outstanding medical expenses

incurred by Petitioner for treatment of her lumbar and cervical conditions, totaling 38,626.65 and detailed in PX10, pursuant to Sections 8(a) and 8.2 of the Act.

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

The Arbitrator notes that the medical records and Petitioner's testimony establish that conservative treatment has failed to relieve Petitioner's ongoing condition of ill-being. Dr Mekhail has recommended surgery to treat Petitioner's ongoing condition of ill-being. The Arbitrator notes that Dr. Phillips opined that the surgery proposed by Dr. Mekhail would be performed to address underlying degenerative changes and would have an unpredictable chance of improving Petitioner's symptoms. Dr. Phillips also opined that Petitioner could return to work without restrictions. However, the Arbitrator also notes that multiple forms of conservative care (physical therapy, injections, and medications) were provided but ultimately failed to relieve Petitioner's symptoms. As such, the Arbitrator finds Dr. Phillips findings and opinions unpersuasive.

Based on the above and the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the January 31, 2020, work accident, the Arbitrator orders Respondent to authorize and pay for prospective medical care in the form of an anterior cervical discectomy with fusion as recommended by Dr. Mekhail, pursuant to Sections 8(a) and 8.2 of the Act.

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

Respondent terminated Petitioner's temporary total disability benefits on June 6, 2022, based on Dr. Phillips' IME reports. As explained above, the Arbitrator finds the findings and opinions of Dr. Phillips unpersuasive.

The Arbitrator notes that Dr. Mekhail had Petitioner off work until March 24, 2022, when he released her to return to work light duty. On September 1, 2022, Dr. Mekhail noted that it would be hard for Petitioner to drive safely at work due to her ongoing neck issues. There is nothing in the record to indicate that Respondent accommodated Petitioner's light duty restriction. Petitioner testified that she has worked for Respondent since the accident.

Based on the above, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from June 6, 2022, through March 31, 2023. Respondent has paid temporary total disability benefits in the amount of $116,739.35.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008633
Case Name	Mireya Valdez v. SKF Sealing Solutions USA
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0323
Number of Pages of Decision	20
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Donald Murphy

DATE FILED: 7/8/2024

/s/Christopher Harris, Commissioner

Signature

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIREYA VALDEZ,

Petitioner,

vs. NO: 20 WC 8633

SKF SEALING SOLUTIONS,

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, benefit rates, medical expenses, temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits and credit, and being advised of the facts and applicable 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 Decision that Respondent is not entitled to credit pursuant to Section 8(j) of the Act but does not adopt the Arbitrator's reasoning. Section 8(j) of the Act provides that:

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act . . .
>
> . . . This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an

> accidental injury under this Act. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit. *820 ILCS 305/8(j)(1)*.

The case law emphasized that:

> 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), as cited in *Elgin Bd. of Educ. Sch. Dist. U-46 v. Ill. Workers' Comp. Comm'n*, 409 Ill. App. 3d 943, 953 (2011).

Based on the Act and case law, Respondent had the burden of proving: (1) that a group plan covering non-occupational disabilities made payments on behalf of Petitioner for medical treatment related to the work injury; (2) that the employer contributed to wholly or partially to the group plan; and, (3) that the group plan precluded payments for medical treatment associated with said accidental injury arising under the Act.

In the case at bar, Respondent offered no evidence to establish its entitlement to credit under Section 8(j) of the Act. Instead, Respondent relied upon Petitioner's testimony and Petitioner's Exhibit 2, documents from Equian, LLC, to claim a credit of $25,177.87. Petitioner testified that when Respondent fired her in August 2019, she came under her husband's health insurance coverage. Petitioner's husband also worked for Respondent and their health insurance coverage was in his name. She further testified that Respondent paid a portion of the premium for that policy which had covered some of the medical costs resulting from the March 14, 2019 accident.

The Equian lien documents showed payments related to shoulder treatment. There were also health insurance claim forms for Suburban Orthopaedics as well as anesthesia and facility providers. However, the documents did not identify Respondent, did not state that the group plan was one that covered non-occupational disabilities, did not demonstrate that Respondent paid into the plan and did not indicate whether the policy would have precluded benefits if any rights of recovery existed under the Act. Overall, the Commission finds Respondent's reliance on Petitioner's testimony and the Equian lien documents inadequate to make the necessary showing required by Section 8(j) of the Act. Respondent's claim for Section 8(j) credit is therefore denied.

The Commission next affirms the Arbitrator's PPD award of twelve-percent (12%) loss of the person as a whole but corrects the number of corresponding weeks to sixty (60). The Arbitrator's Decision is modified accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 2023 is hereby modified as stated and otherwise 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 other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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

July 8, 2024

CAH/pm
O: 6/20/24
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	20WC008633
Case Name	Mireya Valdez v. SKF Sealing Solutions USA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	William Jensen

DATE FILED: 9/18/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 12, 2023 5.30%

/s/Frank Soto, 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

Mireya Valdez
Employee/Petitioner

v.

SKF Sealing Solutions USA
Employer/Respondent

Case # **20** WC **008633**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank J. Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 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 **8(j) credit**

FINDINGS

On **March 14, 2019**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**56,979.00**; the average weekly wage was $**1,095.75**.

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

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay Petitioner TTD benefits from October 1, 2019 through August 18, 2020, representing 46 and 1/7th weeks, pursuant to Section 8(b) of the Act, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay the medical expenses for the right shoulder, pursuant to Sections of the 8(a) and 8.2 of the Act, as identified in Petitioner's Exhibits 2, 3, 4, 5, 6 and 7, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner permanent partial disability benefits for 62.5 weeks because the injuries sustained caused the 12% loss of a person as a whole, as provided in §8(d)2 of the Act, as set forth in the Conclusions of Law attached hereto.

Respondent's claim for a Section 8(j) credit is hereby denied, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner compensation that has accrued from 3/14/2019 through 7/6/2023, and shall pay the remainder of the award, if any, in weekly payments.

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

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

By: */o/ Frank J. Soto* **SEPTEMBER 18, 2023**

Arbitrator

ICArbDec19(b)

Procedural History

This case was tried on July 6, 2023 and the issues in dispute are causation, average weekly wage, medical expenses, TTD benefits, nature and extent of the injury and whether Respondent is entitled to an 8(j) credit. (Arb. Ex. #1). At the onset of the trial, Petitioner made an oral motion to amend the date of accident from April 19, 2020 to March 14, 2019. With no objection to the oral motion to amend the date of accident, the motion was granted. (T. 7).

Finding of Facts

Mireya Valdez (hereinafter referred to as "Petitioner") testified she worked for SKF Sealing Solutions (hereinafter referred to as "Respondent") for 20 years. (T. 10). Petitioner was employed as a machine operator whose duties included running a press stamp machine. (T. 10-11). Petitioner testified her husband also works for Respondent.

Petitioner testified prior to her work accident of March 14, 2019 she previously underwent a right knee replacement in 2018 and a right rotator cuff repair surgery in 2007. Petitioner testified after her 2007 right shoulder surgery she returned to work full duty and continued to work full duty until her March 14, 2019 work accident. Petitioner testified after the 2007 right shoulder surgery she did not receive any medical treatment for her right shoulder until her March 14, 2019 work accident. (T. 14).

Petitioner testified her work shift was from 4 a.m. to 2 p.m. and that she worked 10 hours each day plus 8 hours on Saturdays. (T. 11). Petitioner testified overtime was mandatory except for Sundays, which was voluntary. (T. 11, 12). Petitioner testified she missed between 12 to 17 weeks of work in 2018 due to her right knee replacement surgery. (T. 15).

On March 14, 2019, as Petitioner was walking to a press carrying metal she slipped and fell on oil that was on the floor. (T. 12). Petitioner testified as she was falling her body rolled to her right side and fell onto her right hand before falling onto to her right shoulder. (T. 13). Petitioner testified after falling she was in a lot of pain and couldn't lift her arm. (T. 16). Petitioner testified after falling she continued working but she was in a lot of pain and that it was very hard for her to lift her arm. (T. 17). Petitioner testified she worked light duty but that she continued to complain of pain and to see a doctor. (T. 17).

On March 20, 2019, Petitioner presented to Physicians Immediate Care. (T. 17, 18). At that visit, Petitioner reported constant right shoulder pain since March 14, 2019 after slipping and falling on oil at work and that she tried to catch herself with her right arm. (Px. 3). Petitioner also reported she continued to work after the fall but her pain increased with repetitive motion. At that visit, Petitioner

rated her pain level as 9 out of 10). (Px. 3).

The exam noted tenderness in the right trapezius and right biceps tendon. X-rays showed no fractures or dislocations and well maintained joint spaces. Petitioner was diagnosed with a muscle strain of the fascia and tendons of parts of the biceps. Petitioner was prescribed Naproxen and Acetaminophen and she was issued work restrictions. (Px. 3).

Petitioner returned to Physicians Immediate Care on March 25, 2019 reporting continued right shoulder pain which she rated as 5 out of 10. (Px. 3). The examination noted an abnormal range of motion involving the internal rotation of the right shoulder and tenderness at the right bicep tendon groove and the right trapezius muscle. (Px. 3). Petitioner was prescribed Prednisone and Acetaminophen. (Px. 3).

On April 5, 2019 Petitioner followed up at Physicians Immediate Care reporting her shoulder pain was improving and she finished the Prednisone but that she continued to take Tylenol for pain. The exam noted minimal tenderness to deep palpation of the anterior of the right shoulder. Petitioner was diagnosed with a muscle strain of the fascial and tendons of parts of the biceps. At that time, Petitioner was released from care with no work restrictions. The office note states Petitioner reached maximum medical improvement. (Px. 3).

Petitioner testified at her last visit with Physicians Immediate Care she reported her pain improved because of the pills she was taking including Prednisone and another pill for pain. (T. 20). Petitioner testified she continued to work but she was in a lot of pain and that she continued to take Advil and anti-inflammatories. (T. 22). Petitioner's employment with Respondent terminated on August 8, 2019. (T. 25).

Petitioner testified she did not seek medical treatment after being released from Physicians Immediate Care because she was afraid her husband, who also worked for Respondent, would get fired. (T. 23). On October 1, 2019, Petitioner presented to Dr. Howard Freedberg. At that visit, Petitioner reported of pain at the top of her right shoulder with a burning sensation, weakness, and limited range of motion. (Px 4). Petitioner also reported her pain levels varies from 1 out of 10 to 8 out of 10 depending on activities and movements. (Px. 4). Petitioner said she was injured at work when she slipped and fell on oil landing on the right side of her body. Petitioner told Dr. Freedberg she continued to work after the fall but her pain worsened so she went to the occupational health clinic. Petitioner also told Dr. Freedberg her pain worsened after her work restrictions terminated. (Px. 4).

Dr. Freedberg's exam noted reduced range of motion in forward flexion; a positive cross-arm

adduction test; positive tenderness over the ACL in the right shoulder; positive tenderness over the coracoid in the right shoulder; positive Neer impingement sign and positive Hawkin's impingement test. (Px. 4). The exam also noted tenderness in the greater tuberosity of the right rotator cuff, positive tenderness in the lesser tuberosity of the right rotator cuff, and reduced rotator cuff strength in the supraspinatus, infraspinatus, and teres minor tendons. (Px. 4). The right biceps tendon was also positive for tenderness with palpation and she had a positive Speed and O'Brien's tests. (Px. 4).

X-rays taken that day showed severe degenerative changes in the acromioclavicular joint, with bone-on-bone visible and grade 3 acromion and sclerotic changes. (Px. 4). Dr. Freedberg diagnosed a right shoulder rotator cuff tear and bicipital tenosynovitis status post right shoulder reconstruction. (Px. 4). At that time, Dr. Freedberg took Petitioner off work and ordered a right shoulder MRI arthrogram. (Px. 4).

Petitioner underwent the right shoulder MRI arthrogram on January 17, 2020 which showed her supraspinatus and infraspinatus tendons were "completely ruptured" from where they would normally insert into the greater tuberosity and moderate retraction beneath the distal clavicle. (Px. 4). The MRI indicated the ruptures were causing a subluxation of the humeral head and the narrowing of the acromiohumeral space. (Px. 4). The MRI also identified an intramuscular edema with no atrophy out of proportion to age-related changes with significant tearing of the proximal fibers of the bicep tendon. (Px. 4).

On January 21, 2020, Petitioner followed up with Dr. Freedberg. At that visit, Petitioner reported weakness and burning in the top and anterior aspects of her right shoulder as well as reduced range of motion. Dr. Freedberg indicated the right shoulder MRI showed a complete rupture with significant retraction of the supraspinatus and infraspinatus tendons as well as with the proximal bicep tendon. Dr. Freedberg diagnosed a massive right shoulder rotator cuff tear and recommended surgery. (Px. 4).

On March 2, 2020, Dr. Freedberg performed a right shoulder arthroscopy, biceps tenotomy, removal or foreign bodies and capsular reconstruction procedure on Petitioner at the Ashton Center for Day Surgery. (Px. 5). During the procedure, Dr. Freedberg inserted an arthroscope into Petitioner's shoulder and observed "a very large biceps tear." (Px. 5). Dr. Freedberg indicated the bicep was "extremely torn up," and that it was "very longitudinally torn and did not even look like a normal tendon." (Px. 5). Dr. Freedberg removed old sutures from Petitioner's prior repair, debrided the glenoid, set SwiveLock suture anchors into Petitioner's bone at the junction of the articular surface of

the footprint, and affixed FiberTak and FiberWire sutures as well as dermal grafts to repair the tendons. (Px. 5). Dr. Freedberg's post-operative diagnoses consisted of a massive rotator cuff tear, status post prior repair with significant biceps tendon tear. (Px. 5).

Petitioner underwent physical therapy and continued to treat with Dr. Freedberg until August 18, 2020. At that visit, Petitioner reported feeling about 90-95% improved overall with gains in her range of motion. At that time, Dr. Freedberg determined Petitioner reached maximum medical improvement but, he said, Petitioner continues to have rotator cuff weakness. (Px. 7).

On October 28, 2020, Dr. Mark Neault performed a medical records review for Respondent. Dr. Neault opined Petitioner sustained a sprain/strain of the right shoulder as a result of her work accident which resolved as of April 5, 2019. Dr. Neault further opined Petitioner's rotator cuff tear was chronic and not related to her work accident. Dr. Neault also opined the surgery may be necessary but was not related to Petitioner's work accident. (Rx. 2, Ex. 2.)

On December 8, 2020, Dr. Neault examined Petitioner pursuant to Section 12 of the Act. The exam noted reduced active range of motion in the right shoulder with some supraspinatus weakness. Dr. Neault opined Petitioner could return to work at full duty. (Rx. 2, Ex. 3).

On January 12, 2021, Petitioner returned to Dr. Freedberg reporting her shoulder was stable and that her shoulder was not going to improve any further. The exam noted reduced range of motion with some rotator cuff weakness. At that time, Dr. Freedberg stated, "she is now at MMI." Dr. Freedberg noted Petitioner had preexisting rotator cuff pathology residual from her 2007 repair which was completely asymptomatic until her work accident. Dr. Freedberg opined it was probable the accident extended an existing rotator cuff tear allowing the humeral head to escape superiorly and preventing the shoulder from functioning normally. In his report, Dr. Freedberg wrote: "*it is my opinion that this is what occurred here and this accident decompensated the shoulder producing the need for treatment including surgery.*" Regarding Petitioner's six-month gap in treatment, Dr. Freedberg wrote: "*In my experience it is almost ubiquitous that patient's [sic] in their conditions of ill being feel better while on Prednisone because it is such an excellent anti-inflammatory. Unfortunately, most of the time the effects of the medication don't last which is true here.*" (Px. 7).

Petitioner testified the last date she worked was on August 8, 2019 and that she took retirement as of October 22, 2020. (T. 28). As to her current condition, Petitioner testified the surgery was a success and she could now carry her granddaughter and no longer needs over the counter medication for pain. Petitioner also testified that she doesn't have any right shoulder complaints. (T. 30). The

Arbitrator finds Petitioner's testimony to be credible.

Testimony of Dr. Neault, the Section 12 examiner:

Dr. Neault is a board-certified orthopedic surgeon who performed a records review on October 28, 2020 and an examination, pursuant to Section 12 of the Act, on December 8, 2020. (Rx. 2, p. 6, 24). Dr. Neault reviewed various medical records including x-rays, medical records, MRI arthrogram and the surgical report.

Dr. Neault testified the x-rays showed degenerative changes and bone spurs in the ball and socket joint with arthritis. (Rx. 2, p. 15-17). Dr. Neault said the MRI arthrogram showed a superior subluxation in the humeral head, rupture muscles and tendons and two of the main rotator cuff muscles were ruptured and retracted. Dr. Neault also said the rotator cuff was ruptured and retracted all the way back which is a process that occurs over time, typically years. (Rx. 2, p. 17, 18).

Dr. Neault opined Petitioner sustained a sprain or strain of the right shoulder from her work fall which Petitioner fully recovered from within three weeks. (Rx. 2, p. 21, 22). Dr. Neault also opined Petitioner's fall at work did not cause or aggravate the condition treated by the surgery. (Rx. 2, p. 23). Dr. Neault agreed the surgery was medically reasonable but was not related to her fall at work. (Rx. 2, p. 23).

Dr. Neault testified the findings in the January 17, 2020 MRI were not related to Petitioner's fall at work. (Rx. 2, p. 28). Dr. Neault testified the January 17, 2020 MRI arthrogram showed a massive retracted rotator cuff tear which was chronic based upon the extent of the subluxation of the humeral head and the degenerative changes in the shoulder. (Rx. 2, p. 22). Dr. Neault opined the fall did not cause the need for surgery because Petitioner reported 0 out of 10 pain when she was released to return to full duty by Physicians Immediate Care on April 5, 2019 which, he said, was a reasonable recovery time period for a strain/sprain.[1] (Rx. 2, p. 23).

Testimony of Dr. Freedberg, the treating physician:

Dr. Freedberg testified he is board certified in orthopedic surgery and sports medicine and that he is considered a master instructor of arthroscopic surgery by the Arthroscopy Association of North America. (Px. 7, p. 4, 5).

Dr. Freedberg testified his initial exam noted loss of motion, tenderness and that Petitioner was very weak inside the shoulder. Dr. Freedberg also noted some degenerative changes to the AC joint.

[1] The Physicians Immediate Care medical records dated April 5, 2019 states Petitioner reported pain level of 0/10 when resting and 3/10 with motion. The records also state that Petitioner continues to take acetaminophen to manage her pain. The exam noted an abnormal finding of minimal tenderness to deep palpation of the anterior shoulder. (Px, 3).

(Px. 7, p. 7). Dr. Freedberg testified the MRI arthrogram showed a complete rupture of the infraspinatus as well as the supraspinatus with a lot of fluid leaking, which he said was common. Dr. Freedberg testified the MRI arthrogram also showed the superior migration of the humeral head and a torn bicep tendon. (Px. 7, p. 10).

Dr. Freedberg testified he performed a superior capsular reconstruction, biceps tenotomy and put a dermal patch between the socket and humeral head and repaired the intact cuff. (Px. 7, p. 10, 11). Dr. Freedberg testified Petitioner reported doing 95% better on August 8, 2020 and, at that time, he found Petitioner reached maximum medical improvement and could return to work full duty. (Px. 7, p. 11).

Dr. Freedberg opined Petitioner's condition was directly causally connected to her April 2019 work accident. (Px. 7, p. 12). In support of his causation opinion, Dr. Freedberg testified Petitioner's right shoulder was asymptomatic until her fall at work and the fall was a competent mechanism of injury and that she had significant weakness corroborated by the MRI. (Px. 7, p. 13). Dr. Freedberg testified one of three things occurred as a result of the fall. Either Petitioner suffered a work accident that took a normally repaired rotator cuff and tore it completely or Petitioner had a partially or a complete non healing of the prior repair and the fall extended the tear or Petitioner never healed from the initial surgery and had a very large massive rotator cuff tear and the work accident didn't extend it. (Px. 7, p. 16, 17). Dr. Freedberg opined the last option wasn't possible because Petitioner did not have any symptoms for 12 years. Dr. Freedberg testified the second option was the most probable and that Petitioner had a partial healing of the previously repaired rotator cuff and the fall at work extended it and produced the symptoms. (Px. 7, p. 17).

Dr. Freedberg testified he disagrees with Dr. Neault's statement that Petitioner did not have any issues when released from treatment on April 5, 2019 by Physicians Immediate Care. Dr. Freedberg testified the medical records show when Petitioner was released from care by Physicians Immediate Care she continued to report pain levels of 3 out of 10. (Px. 7, p. 14). Dr. Freedberg also testified he doesn't agree with Dr. Neault's causation opinion because the fall at work was a competent mechanism of injury, Petitioner was symptom free prior to her fall at work, his exam noted weakness which correlated with MRI findings and because Petitioner continued to report pain at the April 5, 2019 Physicians Immediate care visit while still taking Prednisone, which was a good anti-inflammatory. (Px. 7, p. 16).

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 each aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill.App.3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence that he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201 Ill.2d 187, 266 Ill.Dec. 836 (2002).

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

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). A work activity is a sufficient cause of the aggravation of a pre-existing condition if the work activity presented risks greater than those to which the general public is exposed. *Twice Over Clean, Inc. v. The Industrial Commission*, 809 N.E.2d 778 (Ill.App.3 Dist. 2004). "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 has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes Petitioner has proven by the preponderance of the credible evidence that her right shoulder condition is causally related to her March 14, 2019 work injury, as set forth more fully below.

The Arbitrator finds the causation opinions of Dr. Freedberg to be more persuasive than those of

Dr. Neault who opined Petitioner's fall at work only caused a right shoulder strain or sprain which fully resolved within three weeks. Dr. Neault based his opinion, in part, upon the Physicians Immediate Care record dated April 5, 2019 which stated Petitioner reported 0 out of 10 pain level. (Rx. 2, p. 23). The Arbitrator finds Dr. Neault's causation opinion to be based, in part, upon an inaccurate characterizing of Petitioner's condition reflected in the Physicians Immediate Care office note dated April 5, 2019 . It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it; an expert opinion cannot be based on guess, surmise, or conjecture. *Wilfert v. Retirement Board*, 318 Ill. App. 3d 507, 514-15 (1st Dist. 2000).

The Physicians Immediate Care office note dated April 5, 2019 states Petitioner reported pain of 0/10 at rest. The office note also states Petitioner reported pain level of 3/10 with motion and that Petitioner was still taking Acetaminophen to manage pain. The office note indicates Petitioner's right shoulder exam was abnormal. (Px, 3). Petitioner testified the medications she took were very effective and were responsible for her pain being only 3/10 with movement when she was at Physicians Immediate Care and Dr. Freedberg testified Prednisone was a great anti-inflammatory and, be believed, Petitioner's shoulder was probably more quiescent during that visit as a result. (T. 20; Px. 3; Px. 7, p. 16, 125).

Dr. Freedberg diagnosed a right shoulder rotator cuff tear. Dr. Freedberg's exam noted positive cross-arm adduction, Neer, Hawkins, Speed, and O'Brien's tests, rotator cuff tenderness, reduced range of motion, and reduced strength in the supraspinatus, infraspinatus, and teres minor tendons. (Px. 4). The diagnostic imaging corroborated Dr. Freedberg's diagnosis. On January 17, 2020, Petitioner's right shoulder MRI arthrogram showed the supraspinatus and infraspinatus tendons were "*completely ruptured*" with moderate retraction, causing subluxation of the humeral head and narrowing of the acromiohumeral space. (Px. 4). The MRI also showed significant tearing of the proximal fibers of the bicep tendon. (Px. 4). Dr. Freedberg opined Petitioner's condition was directly causally connected to her work accident of March 14, 2019. (Px. 7, p. 13). He based his opinion on numerous factors including that the fall was a competent mechanism to produce a rotator cuff tear, Petitioner's previous rotator cuff repair had been asymptomatic for 12 years prior to her fall at work and that Petitioner presented with significant weakness consistent with the MRI showing a massive rotator cuff tear. (Px. 7, p. 13). Dr. Freedberg testified Petitioner likely had a partial non-healing of her prior rotator cuff repair, and that her fall at work ripped the prior repair apart and extended the tear in the rotator cuff. (Px. 7, p. 16-17, 31). The Arbitrator finds the opinions of the treating physician to be more reliable

than those of Dr. Neault who may have less familiarity with Petitioner's symptoms and medical history. (*See Generally, International Vermiculite Co. v. Industrial Comm'n*, 77 Ill. 2d 1, 4 (1979); *and see also, Sears v. Rutishauser*, 102 Ill. 2d 402, 407 (1984).

The Arbitrator notes that Dr. Neault failed to explain how Petitioner was symptom free and able to perform her job duties with a massive rotator cuff tear prior to her March 14, 2019 work accident. No evidence was presented at trial showing prior to her March 14, 2019 work accident Petitioner was experiencing right shoulder symptoms, received medical treatment or was having difficulties performing her job duties. The evidence submitted at trial shows after her March 14, 2019 work accident Petitioner was experienced right shoulder symptoms, was having difficulty performing her job duties and sought medical treatment.

With respect to issue "G" Petitioner's earnings, the Arbitrator finds as follows:

Section 10 of the Illinois Workers' Compensation Act provides as follows:

> *The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately proceeding the date of injury, illness, or disablement excluding overtime, and bonus divided by 52; but, if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of the 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.*

The purpose of the wage calculation is not to arrive at some theoretical concept of loss of earning capacity; rather it is to make a realistic judgment on what the claimant's future loss is in light of all the factors that are known. *Faris v. Industrial Comm'n*, 357 Ill. App. 3d 525 (4th Dist. 2005) citing *2 A. Larson, Workmen's Compensation* Section 60.21 (c) at 591-92 (1996). The central inquire should be which method for calculating average weekly wage adequately and reasonably represents claimant's earning potential without awarding him or her a substantial windfall. See *Sylvester v. Industrial Comm'n, 9*7 Ill.2d 225, 756 N.E. 2d, 822, 258 Ill. Dec. 584 (2001), citing *D.J. Masonry*, 295 Ill. App. 3d. 924, 693 N.E.2d 1201 (1998).

Petitioner asserts she earned $56,979.00 in the year prior to the accident for an average weekly wage of $1,095.75 while Respondent claims her average weekly wage is $1,048.57 believing a portion of Petitioner's earnings includes some voluntary overtime. The Arbitrator does not find Respondent has established their proposition.

Petitioner testified she worked 58 hours a week including 8 hours of mandatory overtime on

Saturdays: "*We worked ten-hour days every day, plus Saturdays eight hours*." (T 12). She further testified on Sunday the overtime was voluntary, stating: "*Voluntary was Sundays*." (T 12). When asked to clarify which overtime hours were not mandatory Petitioner stated: "*Sundays always volunteer*." (T 42). Petitioner did not testify to working any Sundays. Petitioner testified to only working Monday through Saturday. The Arbitrator finds Petitioner's testimony sufficient to establish the hours to be used for calculating Petitioner's average weekly wage which included 10 hours over overtime during the weekdays and 8 hours of overtime on Saturdays. Accordingly, the Arbitrator finds Petitioner's average weekly wage is $1,095.75.

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).

Petitioner has $53,514.93 in unpaid outstanding medical bills, of which $25,188.87 were initially paid by her husband's health insurance. (Arb. Ex. 1, Px. 2; Px. 5). Respondent disputes liability for the medical bills based upon causation. The Arbitrator notes that Dr. Neault, the Section 12 examiner, testified the medical treatment provided by Dr. Freedberg was medically reasonable. (Rx. 2). As discussed above in Section F, the Arbitrator found Petitioner's condition of ill-being to be causally related to her work accident. Based upon the forgoing, the Arbitrator further finds Petitioner has proven by the preponderance of the evidence that the medical treatment received was reasonable and necessary to diagnose, relieve, or cure her from the effects of her injury. As such, Respondent shall pay the medical expenses for the right shoulder, pursuant to Sections of the 8(a) and 8.2 of the Act, as identified in Petitioner's Exhibits 2, 3, 4, 5, 6 and 7.

With respect to issue "K", 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 TTD, Petitioner must not only show that he did not work, but that he was incapable of working and attempted to locate work within his abilities. *Robert F. Beuse, Sr. v. Industrial Commission of Illinois*, (1998) 299 Ill.App.3d 180, 701 N.E.2d 96, 233 Ill.Dec. 453.

Petitioner asserts she was off work from August 8, 2019, the date her employment was terminated, until October 22, 2020, the last date Petitioner saw Dr. Freedberg. Respondent disputed liability for TTD based upon causation. As discussed above in Section F, the Arbitrator found Petitioner's condition of ill-being to be causally related to her work accident. Based upon the forgoing, the Arbitrator finds Petitioner has proven by the preponderance of the evidence she is entitled to TTD benefits from October 1, 2019, the date Dr. Freedberg took her off work, until August 18, 2020, the date Dr. Freedberg determined Petitioner reached maximum medical improvement. As such, Respondent shall pay Petitioner TTD benefits from October 1, 2019 through August 18, 2020, representing 46 and 1/7th weeks, pursuant to Section 8(b) of the Act.

With respect to issues (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 "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 no permanent partial disability impairment report and/or opinion was submitted into evidence. Therefore, this factor is given no weight in determining permanent partial disability.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a machine operator which is a physically demanding occupation. As such, the Arbitrator gives this factor some weight in determining permanent partial disability.

With regard to subsection (iii) of §8.1b(b), the age of Petitioner. The Arbitrator notes that Petitioner was 62 years old at the time of the accident and she was near the end of her work life expectancy and individuals who are near the end of their work life expectance tend to experience greater difficulties recovering from injuries. As such, the Arbitrator gives this factor some weight in determining permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity. Petitioner's employment was terminated and she retired. No other evidence was submitted showing impairment of her future earning capacity. As such, the Arbitrator gives this factor little weight in determining permanent partial disability.

With regard to subsection (v) of § 8.1b(b), Evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner testified she is doing well since the surgery and that she could now carry her granddaughter and no longer takes over the counter medication for pain. Petitioner also testified she doesn't have any right shoulder complaints. Although the procedure was successful, Petitioner still has a documented reduction in range of motion, rotator cuff weakness, and pain when lifting far away from her body. As such, the Arbitrator gives this factor greater weight in determining permanent partial disability.

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 12% loss of use of a person as a whole, pursuant to §8(d)2 of the Act.

With respect to issue "O", whether Respondent is entitled to a Section 8(j) credit, the Arbitrator finds as follows*:*

Respondent claims an 8(j) credit totaling $25,188.87 for medical bills paid through Petitioner's

husband's health insurance. (Arb. Ex. #1)

Section 8(j) of the Act allows an employer credit for certain kinds of payment such as made by a group health insurance carrier but the credit is not automatic. The credit can only be claimed for benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recover existed under the Act. *See, Hill Freight Lines v. Industrial Commission*, 36 Ill.2d 419 (1967). It is the burden of the employer to establish its right to a credit under Section 8(j) of the Act. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Comm'n,* 409 Ill. App. 3d 943, 953 (1st Dist. 2011). Respondent must prove group insurance payments were made by insurance coverage Respondent paid for, in whole or part, and the amount of the payments made for which Respondent seeks a credit.

The Arbitrator finds Respondent proved entitlement to a credit pursuant to Section 8(j) of the Act but that Respondent failed to prove the amount of the credit. Petitioner testified she was insured under her husband's health insurance and her husband also worked for Respondent and that Respondent contributed to the cost of the group insurance. However, no evidence was presented showing the medical expenses paid by the group health insurance carrier. As such, Respondent's claim for a Section 8(j) credit is hereby denied.

By: */o/ Frank J. Soto* September 15, 2023

Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC028712
Case Name	James Allison v. NCR Corporation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0324
Number of Pages of Decision	15
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jeffrey Alter
Respondent Attorney	Martin Spiegel

DATE FILED: 7/11/2024

/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

James Allison,

Petitioner,

vs. NO: 21 WC 028712

NCR Corporation,

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, temporary total disability, evidentiary ruling on email admissibility 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 June 15, 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 $8,700.00. 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.

July 11, 2024

o052124
MEP/yp
049

/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	21WC028712
Case Name	James Allison v. NCR Corporation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	***Corrected*** Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Jeffrey Alter
Respondent Attorney	Martin P Spiegel

DATE FILED: 6/15/2023

/s/Charles Watts, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

JAMES ALLISON
Employee/Petitioner

v.

NCR CORPORATION
Employer/Respondent

Case # **21** WC **28712**

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 **August 18, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 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 $**40,872.00**; the average weekly wage was $**786.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**15,314.20** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**15,341.20**.

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

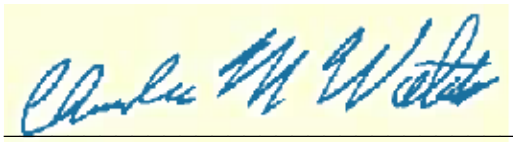
ORDER

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule as reflected in Petitioner's Exhibit #6 and as outlined in the attached Findings of Fact, as provided in sections 8(a) and 8.2 of the Act, and if any of the medical bills have been previously paid by Respondent, then Respondent is entitled to a credit thereof, and Respondent is hereby given a credit under Section 8(j) of the Act for the medical bills paid by Petitioner's group health insurance carrier, and Respondent shall hold Petitioner safe and harmless for reimbursement to Petitioner's group health insurance carrier for those payments, as provided in Section 8(j) of the Act.
- Respondent shall pay Petitioner temporary total disability benefits of $524.00/week for 45-4/7 weeks, commencing October 3, 2021 through August 18, 2022, as provided in Section 8(b) of the Act.
- Respondent shall be given a credit of $15,314.20 for temporary total disability benefits that have been paid.
- Respondent shall approve and pay pursuant to the fee schedule for prospective medical care recommended by Petitioner's treating physician, Dr. Darwish, including but not limited to physical therapy and epidural injections at L4-5 and L5-S1.

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

June 15, 2023

Allison v. NCR Corporation, 21 WC 28712

ARBITRATOR'S CORRECTED FINDINGS:

At arbitration, Petitioner, James Allison, (hereinafter "Petitioner") testified that he worked for the Respondent, NCR Corporation (hereinafter "Respondent"), since September 2017, when he started working for them as a field service technician, level 2. Petitioner testified that he was responsible for the installation, maintenance, upkeep and software upgrades for major NCR components, including self-check-out machines, ATM machines, and cash registers for retail and financial clients. Petitioner was required to travel in a company vehicle to the location necessary as assigned by the dispatch program for Respondent. Petitioner further testified that he was required to lift 50 pounds on a regular basis to perform his job duties as a field service technician.

Petitioner testified that he reported to work on October 2, 2021, at 7:30 a.m. and Respondent stipulated that Petitioner sustained an accident that arose out of and in the course of his employment on that date to his lower back. (Arb. Ex.#1). Petitioner testified that he felt good when he started work that day and was not having any type of physical problems, and that he had been working full duty for Respondent with no issues prior to October 2, 2021.

Petitioner testified that on October 2, 2021, around 11:30 a.m., he was picking up a part from a FedEx facility located in Merrillville, Indiana, and as he went to put the part into his vehicle, he lifted and twisted to get the part into the back of his work van, he felt a sharp pain in his lower back on the left side shooting down his left leg. Petitioner further testified that the part was a scalable deposit module that weighed approximately 50 pounds and he was lifting it off of the ground to put into his van when this occurred. Petitioner testified that he never had experienced pain like that previously and that the pain was getting increasingly worse as he finished his shift, which ended at 5:00 p.m.

Petitioner testified and the records reflect that he presented to the Midwest Express Clinic on October 3, 2021, at the direction of the nurse through the workers' comp helpline through the Respondent. The records reflect that Petitioner sustained a work-related injury to his back on October 2, 2021, when he was lifting a large box into his truck, and was complaining of muscle weakness, loss of sensation and tingling, with a sharp shooting pain down the left lower back to the thigh. Petitioner was prescribed pain medications and was restricted from returning to work. He was diagnosed with lumbago with sciatica on the left side. (PX#1).

The records reflect that Petitioner returned to the Midwest Express Clinic on October 6, 2021, for continued back and lower extremity pain. Lumbar x-rays were taken at that time, and Petitioner was ordered to remain off of work, and to undergo an MRI if the symptoms did not resolve. Petitioner returned again to the Midwest Express Clinic with the same complaints on October 9, 2021, and it was recommended that he undergo an MRI, remain off of work, and was referred to an orthopedic for further consultation. (PX#1).

Petitioner underwent the recommended lumbar MRI on October 20, 2021, revealing a 3 mm central disc herniation encroaching on both lateral recesses at L2-3, an annular tear with a 3.7

mm central disc herniation encroaching on both lateral recesses at L3-4, a 5 mm diffuse disc bulge compromising the spinal canal and both lateral recesses at L4-5, and a 4 mm diffuse disc bulge encroaching on both lateral recesses at L5-S1. (PX#1).

Petitioner then presented to Dr. Darwish on October 22, 2021. The record reflects the history of the injury on October 2, 2021, when Petitioner felt a sharp, severe pain on the left side of his lower back after lifting a box into his work van. The record further reflects that Petitioner had pain that radiated down the posterior aspect of his left lower extremity to his left foot, as well as right extremity as well. Petitioner was diagnosed with radiculopathy of the lumbar region and a herniated disc. Examination of Petitioner revealed a positive seated straight leg raise on the left. Dr. Darwish noted that the 2 herniated discs were causing his Petitioner's leg symptoms, and recommended a course of physical therapy and the use of a TENS unit. He also referred Petitioner to a pain management specialist for epidural steroid injections at L4-5 and L5-S1. Petitioner was also restricted from returning to work. (PX#2). Petitioner testified that the TENS unit was not approved.

Petitioner testified and the records reflect that he started the recommended therapy on October 28, 2021, at Athletico. (PX#4). Petitioner also underwent a consultation with Dr. Khan on November 1, 2021. The record reflects the history of the injury on October 2, 2021, and the course of medical treatment. After an examination and reviewing the MRI, Dr. Khan diagnosed Petitioner with a work-related injury of a lumbar disc displacement and stenosis at L4-5 and L5-S1, as well as lumbar radicular pain. Dr. Khan recommended that Petitioner remain off of work and undergo transforaminal epidural injections at L4-5 and L5-S1, and he also prescribed pain medications. (PX#7). Petitioner testified that the recommended injection was not approved.

The records reflect that Petitioner continued in therapy until his next visit with Dr. Darwish on December 8, 2021. Petitioner testified that the pain was starting to subside at that time, but he continued to have low back pain with radiculopathy. Dr. Darwish continued to recommend further physical therapy and bilateral injections at L4-L5 and L5-S1, and that Petitioner remain off of work. (PX#2).

As reflected in Petitioner's Exhibit #8, the injections were not authorized as set forth in an email from the attorney representing Respondent, Eleni Gyparakis, dated December 10, 2021, reflecting that an exam be set up "before we authorize any additional treatment."

Further confirming this email, Petitioner testified that at the request of the Respondent, he underwent a Section 12 examination with Dr. Singh on January 18, 2022. The report from Dr. Singh confirmed the mechanism of Petitioner's injury of October 2, 2021, and that there were no prior issues with his lower back. (RX#1). Petitioner testified that the examination lasted a total of 10 minutes and that the examination included the doctor testing his reflexes in his knee, doing some stretches and the doctor physically pushing on his lower back. Dr. Singh's report reflected that he requested a copy of the lumbar MRI CD to review prior to rendering his opinion, but still released the Petitioner to return to work with a 20 pound lifting restriction.

Petitioner testified that he was aware of the lifting restriction from Dr. Singh and that he discussed those restrictions with Dr. Darwish. Petitioner testified that Dr. Darwish agreed with

those restrictions. Petitioner then testified that he contacted his territory manager, Jason Dungan, and was advised that the Respondent was unable to accommodate those restrictions. Petitioner's testimony was unrebutted.

The records reflect and Petitioner testified that he returned to see Dr. Darwish again on February 9, 2022. The note from Dr. Darwish states that "work comp has stopped the PT and the lumbar ESI have not been approved by work comp." Dr. Darwish also noted that Petitioner continued to take pain medications as prescribed and that Petitioner recently suffered a heart attack in December 2021 and was treating with a cardiologist. At that time, Dr. Darwish recommended further physical therapy for Petitioner and released him to return to work with restrictions of no lifting over 20 pounds and to sit to stand as needed. (PX#2). Petitioner testified that the Respondent was unable to accommodate his restrictions.

Petitioner testified and the records reflect that he re-started physical therapy at Athletico on February 22, 2022. Petitioner continued in therapy through April 26, 2022. During that time, on April 19, 2022, Dr. Singh prepared a supplemental report indicating that he had reviewed the October 20, 2021, lumbar MRI and had diagnosed Petitioner with a lumbar muscular strain, degenerative lumbar spondylosis and an L4-5 central disc protrusion. Dr Singh opined that Petitioner sustained a soft tissue muscular strain of the lumbar spine that was work related and that the L4-5 disc protrusion was an incidental finding and does not correlate with the patient's pain complaints. Dr. Singh opined that Petitioner was not in need of any further medical treatment and was capable of returning to work full duty. (RX#2).

Petitioner testified that the therapy was helping and that his flexibility movement was improving, and that the pain was subsiding with the therapy. Petitioner testified that he stopped the therapy on April 26, 2022, because he was notified that workers' comp had cut off all of his benefits, including therapy. Pursuant to the progress note contained in the records of Dr. Darwish, on April 27, 2022, their office received a call from Athletico regarding further therapy evaluation for Petitioner, and it was noted that Petitioner's "case is also going to court and PT sessions are being denied by onecall so PT is essentially taking a risk by continuing therapy."

The records reflect that Petitioner returned to see Dr. Darwish on April 29, 2022, with continued complaints of lower back and lower extremity pain and tingling. Dr. Darwish continued to note a positive straight leg raise on the left with decreased strength and sensation over the posterior aspect of the bilateral thighs. Dr. Darwish opined in his note that he respectfully disagreed with Dr. Singh regarding the MRI findings, but agreed that the MRI was of poor quality and difficult to read. Dr. Darwish then ordered a new lumbar MRI and continued to recommend pain management for the Petitioner. He also continued to release Petitioner to return to work with the same restrictions. (PX#2).

Petitioner testified that the pain management was still not approved and that the employer could not accommodate his restrictions. On May 9, 2022, Petitioner underwent the recommended lumbar MRI, which revealed lumbar spondylosis and scoliosis with multilevel disc bulging from L2-L5 contributing to neural foraminal and central canal stenosis, with a large central 5.2 mm disc protrusion at L4-5 compressing the thecal sac with annular fissure. (PX#3).

On May 11, 2022, Petitioner returned to see Dr. Darwish and the record reflects that Petitioner's symptoms have worsened since the last visit, with continued pain in the lower back, radiating into the left lower extremity. Dr. Darwish also noted in his record that physical therapy was discontinued by workers comp and Petitioner was released to return to work with no restrictions. Dr. Darwish also noted that the physical therapy was helping before Petitioner "was forced to stop." After reviewing the recent MRI, Dr. Darwish diagnosed Petitioner with intervertebral disc prolapse, lumbar radiculopathy, low back pain, and spinal stenosis of the lumbar region. Dr. Darwish once again referred Petitioner for pain management for epidural injections at L4-L5 and L5-S1. (PX#2). Petitioner testified that the injections were not approved. Petitioner was also released to return to work with the same restrictions, which Respondent was unable to accommodate.

Petitioner testified that he is unable to perform his full job duties as a field service technician with a 20 pound lifting restriction, and that on May 10, 2022, he received a letter of termination from NCR. (PX#5).

On July 13, 2022, Petitioner returned to see Dr. Darwish and the record reflects that Petitioner continued to have left sided lower back pain that radiated into his left lateral thigh. After an examination, Dr. Darwish again recommended that Petitioner undergo pain management including left L4-5 and L5-S1 epidural steroid injections, as well as further physical therapy. Dr. Darwish further opined in his note that the work injury caused 2 lumbar herniated discs that are causing the Petitioner's symptoms. At that time, Dr. Darwish restricted the Petitioner from returning to work. (PX#2).

Petitioner further testified that he never had any injuries or treatment to his lower back prior to the work injury on October 2, 2021, and that he continues to have difficulty sitting in a chair without some discomfort or pain, that it is hard for him to walk long distances and that his daily activities are severely limited due to his pain. Petitioner further testified that since he stopped therapy, the pain is now radiating into both, his right and left lower back and right and left leg. Petitioner testified that if the injections and physical therapy were approved, he would undergo the treatment. Petitioner testified that he has gained about 50 pounds since the time of the injury because he physically cannot do what he used to be able to do. Petitioner also testified that he is scheduled to see Dr. Darwish on August 28, 2022.

On cross-examination, Petitioner testified that the Midwest Express Clinic did not refer him to Dr. Darwish, and that it was his choice to go there. Petitioner also testified on cross-examination that he was advised by his attorney that the epidurals as recommended by Dr. Darwish and Dr. Khan were not authorized.

Also on cross-examination, Petitioner testified that he had a heart attack in December 2021 and that he underwent an angioplasty, but was unable to complete the cardiac rehabilitation as the cost with his insurance was too expensive. Petitioner also testified that his cardiac physician agreed that he was capable of working with a 20 pound restriction in March 2022, and that he received clearance from his doctor to continue in physical therapy for his work injury in January 2022. Petitioner testified that he is and will remain under the care of his cardiologist for his heart.

Petitioner further testified upon cross-examination that his pain fluctuates between a 5 and 8 on a scale of 10 and that he takes Tylenol on a daily basis, and has been doing so for years, as it counteracts the effects of the joint pain caused by the statins that he takes.

Upon redirect examination, Petitioner testified that the pain management facility attempted to gain authorization for the injection, but that it was denied. Regarding physical therapy, Petitioner was of the understanding that if the therapy was not approved, that the bills would be his responsibility, which is why he stopped after learning that all of his benefits were terminated based upon the report of Dr. Singh. Petitioner further testified that when the physical therapy facility requested he perform activities that exceeded his restrictions of lifting more than 20 pounds, that he requested that Dr. Darwish be contacted first for clearance to do so. Petitioner testified that he would follow Dr. Darwish's recommendations regarding his activities in physical therapy.

CONCLUSIONS OF LAW:

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

In support of the Arbitrator's decision relating to (F), is the petitioner's condition of ill-being causally related to the injury?, the Arbitrator finds the following:

A Workers' Compensation claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

The Arbitrator finds that the Petitioner's current condition of ill-being with respect to his lower back is causally related to the injury based upon the credible testimony of Petitioner and all of the histories contained in the medical records confirm the nature of the injury and the treatment received as a result thereof. The Arbitrator notes that the Petitioner was working full time for the Respondent prior to the injury on October 2, 2021, and that every medical record contains the history of the work injury of that date when Petitioner was lifting a 50 pound box from the ground to the back of his work van, Respondent did not present any evidence contradicting Petitioner's testimony of how the injury occurred or to the histories contained in the medical

records. The Arbitrator finds the Petitioner credible and his testimony unrebutted and confirmed by the contents of all of the medical records, including Midwest Express Clinic, Dr. Darwish. Athletico, and Dr. Khan.

It is also unrebutted that Petitioner has no prior complaints, injuries or treatment for the lumbar spine, and that his lumbar spine was asymptomatic prior to the undisputed work accident on October 2, 2021, followed by the immediate onset of symptoms after the work accident, which are sufficient to establish a causal relationship between his subsequent condition of ill-being and his work accident. It is well settled that the Commission may infer causation from a sequence of lack of symptoms prior to an industrial accident, with symptom manifestation immediately following the accident. *Sisbro, Inc. v. Industrial Comm'n.,* 207 Il.2d 193, 207-208, 797 N.E.2d 665 (2003).

Petitioner's initial medical treatment included complaints of lower back pain with radiculopathy down the left lower extremity resulting from the work injury of lifting a 50 pound box into his van while working. The physical examination noted left lumbosacral tenderness and spasm. The diagnosis was lumbago with sciatica on the left side. On October 22, 2021, Dr. Darwish also diagnosed Petitioner with lumbar radiculopathy and 2 herniated discs after reviewing the MRI of October 20, 2021. Dr. Singh confirmed in his initial report that there was at least a lumbar muscular strain, and that Petitioner had no symptom magnification or positive Waddell findings. After reviewing the October 20, 2021, MRI, Dr. Singh agreed that there was at least at L4-L5 disc protrusion and noted that the MRI was of poor quality, but noted it was his opinion that the finding was incidental in nature as it did not correlate with Petitioner's pain complaints.

However, the Arbitrator notes that Dr. Singh's opinion regarding the MRI is in direct contrast to the medical records and the opinions of Dr. Darwish and Dr. Khan. As noted in all of the records and by Dr. Darwish and Dr. Khan, the findings on the MRI correlate to Petitioner's lower back pain and radiculopathy down his left lower extremity from the date of the accident to the present time. This finding is further validated by the subsequent MRI performed on May 9, 2022, confirming an over 5 mm disc protrusion at L4-5 compressing the thecal sac with an annular fissure, which was also present on the MRI of October 20, 2021. Dr. Darwish reviewed the MRIs and opined that the herniated disc was the cause of Petitioner's ongoing symptoms. Dr. Darwish's treatment recommendations remained the same for Petitioner after the May 9, 2022 MRI, including the need for the epidural injections and ongoing therapy, which was clearly helping Petitioner's condition. The Arbitrator further notes that Dr. Singh did not review the MRI of May 9, 2022, after noting in his report that the first MRI was of poor quality. The Arbitrator finds Dr. Singh's opinion that the disc protrusion was an incidental finding not credible and not supported by the medical evidence. The Arbitrator adopts the opinions Dr. Darwish and Dr. Khan in this regard.

With this, all of the histories contained in the medical records are consistent with Petitioner's testimony concerning the onset of lower back pain and left leg radicular pain, as well as his current complaints. All of the medical records support that the onset of Petitioner's disabling condition occurred as a result of Petitioner's work duties on October 2, 2021.

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.

Having heard the testimony and reviewed the exhibits, the Arbitrator finds the opinions of Dr. Darwish and Dr. Khan, corroborated by the chain of events, persuasive. Petitioner has no history of lower back problems before the accident. He presented with immediate lower back complaints running down his left leg, and every medical record reflects a diagnosis of lumbar radiculopathy, consistent with Petitioner's complaints regarding his pain after the work injury, and the Petitioner's unrebutted testimony is found to be credible. The Arbitrator observed Petitioner during his testimony and notes that Petitioner chose to stand during cross-examination after sitting during direct examination. The lumbar MRIs confirm multiple disc protrusions and stenosis, most notably at L4-5. Dr. Darwish opined that these were the pain generators regarding Petitioner's symptoms. While Dr. Singh opined that the MRI results were an incidental finding, he failed to address Petitioner's ongoing, credible complaints of pain, corroborated by objective examination findings, including a positive straight leg test on the left upon examination. The Arbitrator also notes that Petitioner had some relief of his pain from the physical therapy that was unfortunately terminated too early to resolve Petitioner's complaints.

Based on the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being to his lower back/lumbar spine is causally related to the accident on October 2, 2021.

In support of the Arbitrator's decision relating to (J), were the medical services that were provided to petitioner reasonable and necessary?, the Arbitrator finds the following:

Under section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary treatment for Petitioner's lower back/lumbar spine would be compensable.

Petitioner has submitted PX#6 consisting of the bills for medical services claimed. In Petitioner's Exhibit No. 6, Petitioner lists the following medical bills incurred as a result of his work-related injury of October 2, 2021, that remain unpaid:

	Total Charges	Group Ins./United Healthcare	Outstanding Balance
#1 - Midwest Express Clinic	$ 472.57	$345.00	$ 0.00
#2 - St. Mary Open MRI	$2600.00		$ 2600.00
#3 – Hinsdale Orthopedics	$1065.00		$ 0.00
Illinois Bone & Joint	$ 855.00		$ 285.00
#4 – Munster Medical Imaging	$1800.00		$ 1800.00
#5 – Athletico			$ 941.00
#6 – Dr. Khan-	$917.00	$624.40	$ 292.60
		$ 969.40	$ 5,918.60

The Arbitrator has reviewed the exhibit as well as the medical treatment records admitted and finds that this billing represents reasonable, necessary, and causally related medical treatment.

Based upon the record as a whole, the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical of any unpaid balances with respect to the bills identified in PX#6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that may have been paid by Workers' Compensation, per the stipulation of the parties, or the group carrier Blue Cross/Blue Shield, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision relating to (K), Is Petitioner entitled to any prospective medical care?, the Arbitrator finds the following:

The Arbitrator finds that Petitioner is entitled to receive ongoing medical care with Dr. Darwish and Dr. Kahn in relation to his lumbar condition, including, but not limited to, pain management intervention, including the recommended epidural steroid injections at L4-L5 and L5-S1, as well as further physical therapy. This finding is based upon the Arbitrator's findings above on the issue of causation and Petitioner's testimony and the medical records. The Arbitrator orders Respondent to authorize and pay for the reasonable and necessary medical treatment as recommended by Dr. Darwish, as referenced, along with all related services.

In support of the Arbitrator's decision relating to (L), what amount of compensation is due for temporary total disability and (N) Is Respondent due any credit?, the Arbitrator finds the following:

The Arbitrator adopts and affirms his findings in Paragraph (F) relating to causal connection, and incorporates it herein by this reference.

The Petitioner submits that he was temporarily totally disabled for 45-4/7 weeks and continuing, representing the period of October 3, 2021, through August 18, 2022, the date of the 19(b) hearing, and continuing. This period represents the time during which Petitioner's treating physicians have either restricted Petitioner from returning to work and/or Respondent was unable to accommodate Petitioner's restrictions. Respondent stipulated to this time period up through April 28, 2022, and has denied liability from that date forward.

Based upon the Arbitrator's previous finding that Petitioner's current condition of ill-being is causally related to his work accident of October 2, 2021, the Arbitrator finds Petitioner is entitled to receive temporarily totally disabled from October 3, 2021, up through and including August 18, 2022, the date of the hearing, pursuant to paragraph (b) of Section 19 of said Act, as amended, as the injury sustained caused the disabling condition of Petitioner, and that said disabling condition is temporary and has not yet reached a state of permanent condition. This equates to a period of 45-4/7 weeks. Based upon Petitioner's average weekly wage of $786.00, the corresponding TTD rate is $524.00, which equates to a total of $23,879.43, as of the date of the hearing. Respondent is entitled to a credit of previous TTD paid in the amount of $15,314.20.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001472
Case Name	Heidi O'Keefe v. City of East Peoria
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0325
Number of Pages of Decision	15
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Patrick Jennetten
Respondent Attorney	Michael Bantz

DATE FILED: 7/11/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HEIDI O'KEEFE,

Petitioner,

vs. NO: 21 WC 001472

CITY OF PEORIA,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and nature and extent of 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 01, 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.

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 11, 2024
O07092024
KAD/as
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC001472
Case Name	O'KEEFE, HEIDI v. CITY OF EAST PEORIA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Patrick Jennetten
Respondent Attorney	Michael Bantz

DATE FILED: 2/1/2023

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

/s/Kurt Carlson, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Heidi O'Keefe
Employee/Petitioner
v.

Case # **21** WC **001472**

Consolidated cases:

City of East Peoria
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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Peoria**, on **12-15-22**. 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 **04-29-20**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain 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 injuries, Petitioner earned $**73,184.80**; the average weekly wage was $**1,407.40**.

On the date of accident, Petitioner was **39** 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 for all paid TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**6,163.86** for other medical benefits, for a total credit of $**6,163.86 and all TTD paid**.

Respondent is entitled to a credit of $**2,580.47 (as part of the above** $**6,163.86**) under Section 8(j) of the Act.

ORDER

Medical benefits

For the reasons set forth in the attached Rider to this Arbitration Decision, the Arbitrator finds that Petitioner failed to meet her burden of proof in establishing that a medical causal connection exists between her work accident and her condition of ill-being after January 18, 2021. However, the Arbitrator does find the office visit on January 18, 2021 to be related to the accident and orders Respondent to make payment for that visit per the Illinois Fee Schedule.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. Because of this, 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 driver and laborer in the Streets Department at the time of the accident and that she continues to work full duty in this position. The Arbitrator therefore gives *moderate* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 39 years old at the time of the accident. 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 there is no evidence that indicates that the petitioner's future earnings capacity will be impacted by this injury, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner had minimal findings on her original September 28, 2020 MRI, normal

physical examinations in December of 2020 and January of 2021, and that the March 23, 2022 MRI confirmed the bone bruise had healed. Accordingly, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the Petitioner's left leg pursuant to §8(e) of the Act.

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

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

Kurt A. Carlson

Signature of Arbitrator

FEBRUARY 1, 2023

STATE OF ILLINOIS)
) ss
COUNTY OF PEORIA)

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

HEDI O'KEEFE,	)	
	)	
Petitioner,	)	
	)	No. 21 WC 001472
v.	)	
	)	
CITY OF EAST PEORIA,	)	Arbitrator Kurt Carlson
	)	
Respondent.	)	

DECISION OF ARBITRATOR

Findings of Fact

Petitioner filed an Application for Adjustment of Claim, 21 WC 001472, which alleged she sustained an accidental injury arising out of and in the course of her employment on April 29, 2020. According to the Application, Petitioner was in an accident and suffered a serious injury to her left leg while she was stepping down out of truck. (Arbitrator's Exhibit 2, PX 1). Respondent disputed liability for this claim on the basis of medical causal relationship, following a January 15, 2021 IME report with Dr. Lawrence Li, which found Petitioner to be at MMI. (Arbitrator's Exhibit 1).

Petitioner claimed that she was entitled to payment of medical bills, including $1,437.09 in unpaid bills (Arbitrator's Exhibit 1). Respondent disputed liability for same and also claimed a credit for payment of medical bills that totaled $6,163.86, as documented in RX3 and RX 4, representing payments made both through Respondent's group health and also workers' compensation insurance. (Arbitrator's Exhibit 1). The nature and extent of Petitioner's injuries was also in dispute.

Petitioner's Medical Records

On July 10, 2020, Petitioner presented to OSF Center for Occupational Health-Peoria for a new work comp case. The injury date was listed as July 10, 2020, though she reported that it occurred at the end of June. She reported that as she was climbing down from her truck, she felt her left knee pop. She denied any prior injuries to her knee. She has no tenderness of patella, MCL, LCL, patellar tendon, medial or lateral joint line. She had no pain or ligamentous instability with Varus/valgus stress and the ACL was stable with anterior drawer and Lachman. She was assessed with a negative left knee exam with the plan to rest the knee. Work restrictions were imposed. (PX 4)

On July 15, 2020, Petitioner had an appointment at OSF Center for Occupational Health. She reported that her pain was better, and resting was helping. She denied any numbness, tingling, clicking, catching or giving away. She was diagnosed with a left knee sprain that continued to improve. They discussed physical therapy and she decided to wait until she felt pain was improving with rest. Work restrictions were continued. (PX 4)

On July 22, 2020, Petitioner returned to OSF Center for Occupational Health. She complained of left knee at a 4/10. She was off work due to her restrictions. Physical therapy and an x-ray were ordered. The left knee x-ray was read to reveal no acute osseous abnormality and trace joint effusion. Work restrictions were continued. (PX 4)

Petitioner had a physical therapy initial evaluation on July 31, 2020. She reported that as she was getting out of a truck, she heard and felt a pop in the knee. She noted that it popped again later that day. She had minimal pain at first with minor swelling. She advised that she was icing and favoring the knee throughout the spring and into the summer but felt that it was getting worse. The onset date was listed as April 2020. Petitioner had 9 appointments between July 31, 2020 and September 23, 2020. (PX 4, PX5)

Petitioner returned to OSF Occupational Health on August 26, 2020; She reported that her left knee was improving and rated the pain as 3/10. She described the pain as an achiness. She noted that physical therapy was helping with strengthening. She was still off work due to work restrictions. She was diagnosed with left knee pain that was improving. Continued physical therapy was recommended and reevaluation in 2 weeks. Work restrictions were continued. (PX 4)

On September 10, 2020, Petitioner returned to OSF Occupational Health. She was having good days and bad days but since she was not improving an MRI was ordered. (PX 4)

On September 28, 2020, Petitioner underwent a left knee MRI at OSF Glen Park as ordered by Joan Mason. The scan was read to reveal the following:

- Incomplete discoid lateral meniscus. No meniscal tear.
- The ligaments are intact.
- Minimal edema-like signal in the lateral femoral condyle may represent a small contusion in the appropriate clinical setting. No fracture.
- No significant cartilage disease. (PX 4, PX 6)

Petitioner returned to OSF Occupational Health on October 1, 2020. She reported that her left knee pain was ongoing with good and bad days. She rated her pain as a 5/10. She described her pain as an achiness to her lateral and medial joint line. She described that her knee does a funny thing occasionally to what her therapist called catching. She was referred to an unspecified orthopedic specialist. Work restrictions were continued. (PX 4)

On October 12, 2020, Petitioner presented to Dr. Orlevitch for left knee pain referred by Joan Mason from Work Occupational Health Clinic. She reported that she felt a pop in her left knee climbing down a 2-3 step ladder exit from the truck. This occurred in April of 2020. Since that time, she gradually developed some deep anterior knee pain and sharp pain when she moved. She noted that sometimes her pain was worse with standing, walking, and getting out of the car. He diagnosed Petitioner with left knee pain. Dr. Orlevitch opined that there no significant abnormal findings on the MRI other than being an incomplete discoid meniscus, which really looked like a normal meniscus, and a very minimal bone marrow edema in the lateral femur, not in the weightbearing portion. The only working diagnosis he had was an inflamed plica, which could be giving her some pain and mechanical symptoms. Dr. Orlevitch administered an injection into the left knee, of triamcinolone and lidocaine. Additionally, Dr. Orlevitch recommended anti-inflammatory oral and topical medications. Work restrictions were continued. (PX 7)

X-rays from that same day, October 12, 2020, at OSF Radiology, showed mild medial compartment joint space narrowing. (PX 6)

Petitioner had an appointment with Dr. Orlevitch on November 9, 2020, 4 weeks post cortisone injection. She reported that the injection helped for almost 3 weeks then she started to have some intermittent pain again. She made some improvement but was still symptomatic. She noticed a flare up when she carried a heavy laundry load up the stairs. She was diagnosed with primary osteoarthritis of left knee. She complained of more of a global anterior achiness. He noted that the MRI was benign, and he was treating her for a provisional diagnosis of plica syndrome. He recommended a depo-Medrol injection. That same day, November 9, 2020 Petitioner also underwent the recommended left knee injection. Work restrictions were continued. (PX 6, 7)

Petitioner sought treatment for an unrelated cough on November 21, 2020. (PX 7)

Petitioner also had treatment for an unrelated illness on December 5, 2020. (PX 7)

Petitioner returned to Dr. Orlevitch on December 21, 2020. She reported that she was "definitely getting better" and did not have as many pain episodes. She had gone hiking and running with no swelling. He diagnosed a bone bruise in the lateral femoral condyle. On physical examination she had no crepitation, no plica popping, no effusion, improved hamstring flexibility, no Lachman pivot, no varus/valgus instability, no anterior/posterior drawer, no McMurray's, good muscle tone, normal gait, and negative straight leg testing; there were no abnormalities at all per the physical exam. Dr. Orlevitch recommended functional capacity evaluation and work conditioning program. He noted that she could not return to work with restrictions, so he kept her off work. (PX 7)

IME Report Dated January 15, 2021 (RX 1, PX 4)

On January 7, 2021, Petitioner underwent an IME with Dr. Lawrence Li. She reported a consistent mechanism of injury as before. She complained of an aching pain that was worse with walking and hiking. There were no notable physical examination findings. Dr. Li diagnosed Petitioner with a left knee bone contusion that was related to the work accident. He opined that stepping down from a truck and feeling a pop is consistent with developing a bone contusion. He opined that the objective findings did not correlate with her subjective complaints as there were no significant objective findings. He opined that an FCE was not necessary as the objective evidence of the knee was normal and Petitioner acknowledged that her symptoms were very mild. He placed her at MMI and opined that she could return to work without work restrictions. (RX 1, PX 4)

Petitioner returned to Dr. Orlevitch on January 18, 2021. Dr. Orlevitch advised that he did not review the IME. Dr. Orlevitch noted that Petitioner had a gym that she could utilize to get stronger and that her father was a physical trainer. Her physical examination was normal again. He reviewed the MRI scan again and noted "no significant deficits. The ligaments, extensor mechanism, meniscus cartilages are all intact. She had a very small mild bone bruise, but the cartilage overlying it was within normal limits." He recommended that Petitioner could work out with her father, who is a physical trainer. He authorized Petitioner off work through February 7, 2021 and noted that she would be at MMI and able to return to work on February 8, 2021 without work restrictions. (PX 7, RX 2)

On January 31, 2022, Petitioner returned to Dr. Orlevitch, approximately a year after her prior visit. She stated that her left knee did not feel 100% and that she had pain behind the kneecap. Her prior treatment from 2021 was noted and Petitioner also stated that a week earlier she had bowled 3 games and then her knee had bothered her for three days. Dr. Orlevitch opined that she might have some arthritis. Petitioner's physical examination was normal and Dr. Orlevitch wrote that, based on her MRI and her physical examination, she was released to full duty. They did discuss a new MRI and further assessment after same. (PX 7)

On March 23, 2022, Petitioner underwent an MRI of her left knee at Unity Point Methodist North, which was read to show mild proximal patellar tendinosis, no evidence of any tears, including of the meniscus, small effusion, and intact cruciate and collateral ligaments. (PX 8)

On April 12, 2022, Petitioner returned to Dr. Orlevitch. Dr. Orlevitch opined that Petitioner could have fat pad, impingement syndrome, or plica syndrome, but the doctor really did not know if surgery would make her any better. Based on the new MRI, Dr. Orlevitch confirmed that, "all the structural components of the knee are intact and without tear. The bone marrow edema that was seen on the first MRI is gone and not seen on this MRI." He reiterated that the bone marrow signal was gone, all structures were normal, and that he "could not detect any significant plica visibly." They discussed an opinion from another doctor but Dr. Orlevitch stated that "there is no surgery that I can think of that would potentially reliably improve her symptoms." Petitioner was discharged with no restrictions or treatment recommendations. (PX 7)

Other Evidence from Exhibits

Petitioner's Exhibit 3 contains medical bills and alleges $1,437.00 in unpaid bills. Specifically, the exhibit contains a bill for a visit to Dr. Stephen Orlevitch on January 18, 2021, for which there was a balance of $266.00.

Respondent's Exhibit 3 is a workers' compensation medical payment ledger that shows payments on all medical bills prior to the January 18, 2021 office visit to Dr. Orlevitch. Total amount paid under workers' compensation was $3,583.39.

Respondent's Exhibit 4 consists of EOBs that show payments from Respondent's self-insured group health plan, for the MRI and X-rays on March 23, 2022, and which total $2,580.47 for Respondent's 8(j) credit.

Testimony of Petitioner Heidi O'Keefe

Petitioner testified that she suffered an accident on April 29, 2020, while at work. She was climbing down from a truck that had a height over two feet off of the ground, when she injured her left knee. She tried to recover without treatment but had persistent pain and, on July 10, 2020, sough treatment at OSF Occupational for her left knee pain. Petitioner summarized her treatment consistently with what is noted above from the medical records and testified that she underwent two injections into the left knee. She stated that she was able to work full duty and had good days and bad days with some ongoing left knee symptoms.

On Cross-examination, Petitioner agreed that if her December 21, 2020 office note confirmed that she said she was "definitely getting better," that she had no reason to believe that to be false. When Dr. Li asked her questions about the history of her accident and symptoms, she was completely honest and forthcoming with him.

Conclusions of Law

ISSUES F: IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE ACCIDENT?:

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

The Arbitrator finds that Petitioner's treatment through January 18, 2021 was causally related to her work accident, however, Dr. Orlevitch opined that she was at MMI for her work injuries at that time. Therefore, the Arbitrator concludes that Petitioner failed to prove that her additional ongoing condition of ill of ill-being for her left knee after 2021, other than the original bone bruise and treatment through January 18, 2021, is medically causally connected to her April 29, 2020 accident.

Petitioner must prove by the preponderance of the credible evidence that his injuries are causally related to the employment accident. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524 (1987). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show that the claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Comm'n*, 157 Ill.App.3d 470. 478 (4th Dist. 1987), citing *Westinghouse Elec. Co. v. Industrial Comm'n*, 64 Ill.2d 257 (1976). In making its determination on this issue, the Commission is not required to accept the opinion of a treating physician over that of an examining physician. *Johnnie Green v. United Airlines*, 99 ILWC 43437 (2007) (citing *Prairie Farms Dairy v. Industrial Commission*, 279 Ill.App.3d 546, 664 N.E.2d 1150 (1996). There is no case where the Appellate Court, or the Illinois Supreme Court, has said that, as a matter of law, the Commission must give more weight to treating physician's testimony than to that of an examining physician. Although the Commission is within its discretion determine which of two conflicting doctors to give more evidentiary weight to, the Commission is not obligated to give more weight to a treating physician's opinion. *Johnnie Green v. United Airlines*, 99 ILWC 43437 (2007).

Regarding Respondent's Section 12 Independent Medical Exam, the Arbitrator finds the opinions of Dr. Lawrence Li to be generally credible and the Arbitrator incorporates the opinions of Dr. Li into these findings. The facts of the case, including Petitioner's MRI findings, her improvement as noted in physical therapy, and the normal physical examination and statements of Petitioner at her December 21, 2020 office visit, all support the opinions of Dr. Li and the conclusion that Petitioner reached MMI in January of 2021. In particular, it is crucial to note that Petitioner had normal physical examinations on December 21, 2020, during the January 7, 2021 IME with Dr. Li, and also during the office visit with Dr. Orlevitch on January 18, 2021.

However, in light of the remaining subjective complaints that Petitioner had in January of 2021, the Arbitrator does also find that Petitioner's decision to return for a final office visit with Dr. Orlevitch on January 18, 2021 was reasonable and that the treatment on that day was still causally related to Petitioner's accident. Accordingly, The Arbitrator does award payment for that visit, to be paid by Respondent per the fee schedule.

As for Petitioner's treatment after January 18, 2021, the Arbitrator notes that Dr. Orlevitch did appear to agree with Dr. Li in January of 2021 and that Dr. Orlevitch released Petitioner at MMI on January 18, 2021. The Arbitrator finds that this MMI date of January 18, 2021 is persuasive and corresponds with the other facts of the case. Dr. Orlevitch had no further treatment recommendations for Petitioner at the January 18, 2021 visit, other than working out in a gym. In the months that followed and throughout the rest of the year, Petitioner did not return for additional treatment with any provider. To wait over a year to seek further treatment for an injury is a significant gap in Petitioner's otherwise consistent record of treatment. The lack of any additional treatment in 2021 supports the conclusion of Dr. Li, and the opinions of Dr. Orlevitch at the time, that Petitioner reached MMI for her work-related injuries in January of 2021.

Lastly, it is of critical importance that Petitioner's additional MRI in 2022, while unrelated to her work accident, confirmed that her bone bruise had healed. Dr. Orlevitch wrote that, "the bone marrow edema that was seen on the first MRI is gone and not seen on this MRI." The other medical records from 2022 also support the conclusion that Petitioner's left knee treatment during that time was unrelated to her accident. During the January 31, 2022 visit, Petitioner admitted that she had significant left knee symptoms after taking part in bowling. Dr. Orlevitch provided no causation opinions, in either his January 2022 or his April 2022 office notes, that Petitioner's return for treatment after a year, or her complaints in 2022, were related to her work accident. Accordingly, the Arbitrator infers that Dr. Orlevitch still believed that Petitioner reached MMI for her work-related injuries on January 18, 2021.

For the above reasons, the Arbitrator finds that Petitioner suffered a bone bruise related to her work accident, for which she reached MMI for on January 18, 2021. Petitioner failed to prove that her return for treatment in 2022 and complaints at that time were related to her 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?

All medical benefits prior to the IME of Dr. Li were already provided by Respondent. However, the Arbitrator does award Petitioner payment of the January 18, 2021 office visit and orders Respondent to pay for same, per the Illinois Fee Schedule. For reasons noted above, Petitioner reached MMI for her work-related injuries on January 18, 2021; any and all further treatment after that time is unrelated to her work accident.

ISSUE L: WHAT IS THE NATURE AND EXTENT OF THE INJURY?

The Arbitrator finds that Petitioner suffered a left knee bone contusion, for which she underwent two injections and physical therapy, and reached MMI on January 18, 2021, after approximately six months of treatment and work restrictions. For these injuries, the Arbitrator awards 5% loss of the left leg, or 10.75 weeks of PPD.

Regarding the five factors for permanent partial disability, as noted in Section 8.1(b), 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 impairment pursuant subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability as corroborated by the treating medical records. Applying this standard to the claim, the Arbitrator makes the following findings listed below.

(i) Impairment Rating: There was no evidence of an impairment rating and no weight is given to this factor.

(ii) Occupation: Petitioner was employed as a driver and laborer in the Streets Department at the time of the accident and she continues to work full duty in this position. The Arbitrator gives moderate weight to this factor.

(iii) Age: Petitioner was 39 years old at the time of the accident. Petitioner is likely to have recovered from this injury better than an older worker might have. The Arbitrator gives lesser weight to this factor.

(iv) Future Earning Capacity. There is no evidence that indicates that Petitioner's future earnings capacity will be impacted by this injury, the Arbitrator therefore gives no weight to this factor.

(v) Evidence of disability from Records. The Arbitrator notes that Petitioner had minimal findings on her original September 28, 2020 MRI, normal physical examinations in December of 2020 and January of 2021, and that the March 23, 2022 MRI confirmed the bone bruise had healed. Accordingly, the Arbitrator therefore gives greater weight to this factor, which supports a lower PPD award compared to cases involving more serious injuries to the knee.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC027633
Case Name	Michael Oziminski v. US Smokeless Tobacco Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0326
Number of Pages of Decision	5
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Mitchell Horwitz
Respondent Attorney	Matthew Kurschinski, Anthony J. Cacchillo

DATE FILED: 7/15/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0326

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 (Prospective treatment, TTD, Permanency)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Oziminski,

Petitioner,

vs. NO: 14 WC 27633

U.S. Tobacco Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment, temporary total disability (TTD), and permanency, 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 that Petitioner's condition of ill-being regarding the right knee is causally related to the June 5, 2014, work accident. The Commission also affirms the Arbitrator's conclusions regarding medical expenses and temporary partial disability (TPD) benefits. However, the Commission strikes the Arbitrator's award of prospective medical treatment. The Commission also modifies the Arbitrator's conclusions regarding TTD benefits and permanency.

Corrections to the Arbitration Decision

The Commission corrects two scrivener's errors in the Decision. In the Order section of the Arbitration Decision Form and on page 13 of the Decision, the Arbitrator mistakenly awarded TPD benefits for 7 3/7 weeks. The Commission strikes "7 3/7 weeks" and replaces it with "7-1/7 weeks" in the aforementioned sentences.

Prospective Medical Treatment

The Commission strikes the Arbitrator's award of prospective medical treatment. This matter did not proceed to hearing pursuant to Section 19(b) of the Act. Furthermore, after

reviewing the evidence, the Commission finds there is no pending prescription for any additional treatment recommended by Dr. Tu, Petitioner's current treating physician. Pursuant to Section 8(a) of the Act, an employer must pay for "…all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred…" that are reasonably required to cure or relieve the claimant's injuries. When interpreting this provision, Illinois courts have determined that specific procedures or treatments that have been prescribed by a medical provider are "incurred." *See, e.g., Plantation Mfg. Co. v. Indus. Comm'n*, 691 N.E.2d 13, 17 (1997). As there is no pending prescription for any treatment, an award of prospective medical treatment is improper.

Temporary Total Disability Benefits

The Arbitrator concluded Petitioner met his burden of proving an entitlement to TTD benefits from July 31, 2014, through August 7, 2014, from August 9, 2014, through August 11, 2014, from January 4, 2016, through January 7, 2016, from January 12, 2016, through February 22, 2016, and from June 13, 2016, through June 30, 2016. Respondent does not dispute Petitioner's entitlement to TTD benefits from July 31, 2014, through August 7, 2014. After considering the evidence, the Commission finds Petitioner failed to prove an entitlement to TTD benefits after August 7, 2014.

A claimant is temporarily and totally disabled from the time a work injury incapacitates them from work until such time that they are "…as far recovered or restored as the permanent character of [their] injury will permit." *Shafer v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC at ¶ 45. To prove an entitlement to TTD benefits, a claimant must prove they did not work and that they were unable to work. *Freeman United Coal Mining Co. v. Indus. Comm'n.*, 318 Ill. App. 3d 170, 177 (2000). Furthermore, an award of TTD benefits is only proper "…when the claimant cannot perform any services except those for which no reasonably stable labor market exists." *Holoker v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160363WC, ¶ 34 (citations omitted). As the primary purpose of the Act is to provide financial protection to injured workers until they are able to return to the work force, the test for determining whether a claimant is entitled to TTD benefits is "…whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Id*. (internal citation omitted).

After considering the credible evidence, the Commission finds Petitioner failed to prove he was unable to work due to his June 5, 2014, work-related injury after August 7, 2014. Dr. Redondo, Petitioner's prior treating physician, either prescribed work restrictions or took Petitioner off work for much of the periods for which Petitioner seeks TTD benefits. However, none of Dr. Redondo's restrictions affected Petitioner's ability to obtain work. Instead, Petitioner admitted that any of his time off work after Respondent laid him off on July 30, 2014, was not related to his right knee condition. (Tr. at 115-16). Petitioner confirmed that any missed time after July 30, 2014, was solely due to the nature of the construction industry, testifying:

> …[Y]ou're hired to do the job from the beginning to the finish and every job comes to an end and then once you finish it there is not another place to jump off and get another job, that's just how construction works.

Id. Furthermore, Petitioner testified that he was never denied any assignments or projects due to any physical limitations related to his right knee. The evidence overwhelmingly shows Petitioner was consistently hired for new projects and his employers readily accommodated any of his physical limitations. For these reasons, the Commission finds Petitioner was entitled to TTD benefits only from July 31, 2014, through August 7, 2014, a period of eight days.

Permanent Disability

The Arbitrator concluded Petitioner sustained a 30% loss of the right leg due to the June 5, 2014, work accident. While the Commission generally agrees with the Arbitrator's analysis of the five factors pursuant to Section 8.1b(b) of the Act, it views the evidence differently. After carefully considering the totality of the evidence, the Commission finds Petitioner sustained a 25% loss of the right leg.

The Commission finds the work accident aggravated Petitioner's preexisting right knee degenerative osteoarthritis. Petitioner underwent extensive conservative treatment including physical therapy and several injections; however, none of this treatment resolved Petitioner's symptoms. While one of Petitioner's doctors recommended a total right knee replacement years ago, there is currently no recommendation that Petitioner undergo surgery. Furthermore, Petitioner testified that he was not ready to undergo surgery. Since April 2018, Petitioner's right knee symptoms have remained stable and Dr. Tu has continued to observe Petitioner's symptoms. Dr. Tu testified that Petitioner would not require a total right knee replacement as long as Petitioner's symptoms remained stable and manageable.

Dr. Tu testified that Petitioner has chronic persistent tenderness over the medial joint line of his right knee. Petitioner testified that any activity exacerbates his right knee symptoms, including walking a few blocks. Petitioner testified that he modified how he performs certain activities such as navigating stairs and kneeling. Petitioner also is unable to ride his bike without the right knee swelling. After considering the evidence and the relevant Section 8.1b(b) factors, the Commission finds an award of 25% loss of the right knee is most appropriate.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 27, 2023, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $1,014.93/week for 1-1/7 weeks commencing July 31, 2014, through August 7, 2014, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary partial disability benefits for 7-1/7 weeks, commencing June 11, 2014, through July 30, 2014, totaling $1,484.51 as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services of $4,263.71 to G&T Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that the Commission strikes the award of prospective medical treatment.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the right leg, as provided in Section 8(e) of the Act.

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

IT IS FURTHER ORDERED that 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 $45,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 15, 2024

o: 6/11/24
AHS/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC027633
Case Name	Michael Oziminski v. US Smokeless Tobacco Company
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Jacqueline Hickey, Arbitrator

Petitioner Attorney	Mitchell Horwitz
Respondent Attorney	Anthony J. Cacchillo, Matthew Kurschinski

DATE FILED: 6/27/2023

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

/s/ Jacqueline Hickey, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Oziminski
Employee/Petitioner

v.

U.S. Smokeless Tobacco Company
Employer/Respondent

Case # **14** WC **027633**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jacqueline Hickey**, Arbitrator of the Commission, in the city of **Chicago**, on **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. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Prospective Medical**

FINDINGS

On **June 5, 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 $**71,856.44**; the average weekly wage was $**1,522.38**.

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 $**0** under Section 8(j) of the Act.

ORDER

Medical Benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for medical provider G&T Orthopedics in the amount of $4,263.71, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability
Respondent shall pay Petitioner Temporary Total Disability benefits of $1,014.93/week for 10 5/7 weeks, for the periods of: July 31, 2014 through August 7, 2014; August 9, 2014 through August 11, 2014; January 4, 2016 through January 7, 2016; January 12, 2016 through January 31, 2016; February 1, 2016 through February 22, 2016; and June 13, 2016 through June 30, 2016, totaling $10,874.25, as provided in Section 8(b) of the Act.

Temporary Partial Disability
Respondent shall pay Petitioner Temporary Partial Disability benefits for 7 3/7 weeks covering the period of June 11, 2014 through July 30, 2014, totaling, $1,484.51, as provided in Section 8(a) of the Act. See Rider to Decision.

Permanent Partial Disability
Respondent shall pay Petitioner Permanent Partial Disability benefits of $721.66/week for 64.5 weeks because the injuries sustained caused the 30% loss of the right leg, as provided in Section 8(e) of the Act.

Prospective Medical

The Arbitrator finds that the current condition of Petitioner's right knee is causally related to the work accident of June 5, 2014 and adopts the opinion of Dr. Tu regarding the necessity for a future total right total knee replacement and the opinion of Dr. Redondo who ordered said surgery. The Arbitrator further finds that the right total knee replacement is reasonable, necessary and related to the work injury on June 5, 2014. See Rider to Decision.

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

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

Jacqueline C. Hickey

JUNE 27, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL OZIMINSKI, Case # 14 WC 27633
Employee/Petitioner,

v.

U.S. SMOKELESS TOBACCO CO.,
Employer/Respondent.

RIDER TO DECISION

This matter proceeded to hearing on November 28, 2022, in Chicago, Illinois before Arbitrator Jacqueline Hickey. Issues in dispute include causation, medical bills, TTD, TPD, nature & extent and prospective medical. See Arbitrator's Exhibit "Ax" 1.

FINDINGS OF FACT

Background

Michael Oziminski (hereinafter "Petitioner") is a retired millwright who lives in Chicago (Transcript of Proceedings on Arbitration, hereinafter "Tx.", 10). Petitioner started as a millwright in 1977 and retired in 2019, three years prior to the date of arbitration (Tx. 10). A millwright is similar to an industrial mechanic construction worker; generally, their job duties are heavy lifting, bending, squatting, and climbing (Tx. 10). They could be expected to lift large rails and other objects while climbing with them (Tx. 11). A millwright climbs both ladders and stairs (Tx. 11). They use mechanics tools, like combination wrenches, sockets, ratchets, sledgehammers, welding tools, hoods, gloves, and protective gear (Tx. 12). For most of his career Petitioner was a member of the Local 1693 union carpenters (Tx. 12). During his employment with U.S. Smokeless Tobacco Company (hereinafter "Respondent"), Petitioner was a member of the SEIU janitorial union (Tx. 13). Petitioner testified that work out of SEIU paid considerably less than work out of the carpenters union, but he was out of work at the time and took a job with Respondent because "making some kind of money is better than nothing" (Tx. 13).

Accident

Petitioner was employed by Respondent on June 5, 2014 (Tx. 13). Prior to this date, he had never had any issues with his right knee, difficulty using the right knee, or any injuries to it (Tx. 13). Petitioner's job duties with Respondent included servicing conveyers, preventative maintenance, and other repairs (Tx. 14). On June 5, 2014, Petitioner had a call to go fix the conveyor system; the system was antiquated and worn out (Tx. 14). While attempting to complete his work, Petitioner was standing in the shipping area with his left foot on the conveyor and his right foot on the ladder (Tx. 15). He was attempting to clean up a jam that occurred above and was throwing boxes down from above (Tx. 15). While throwing the boxes down from

the conveyor, Petitioner twisted his right knee while on the ladder (Tx. 16). He immediately felt excruciating pain and came down off the ladder (Tx. 16). He reported the accident to his employer (Tx. 16). In the following days Petitioner's knee became incredibly swollen (Tx. 16). He had difficulty walking and bending his knee (Tx. 16). Respondent accommodated Petitioner's restrictions after he was placed on light duty by the occupational health clinic (Tx. 17). He would drive a golf cart around the plant with his tools to accomplish jobs within his restrictions (Tx. 18).

Post-Accident Work Summary

During his testimony, Petitioner relied on his diaries that he kept from the years 2014 through 2016 (Tx. 18, Px11). Petitioner filled out his diaries every day after work (Tx. 18). He filled out the hours worked for each individual day because when he worked out of the millwrights, he would qualify for insurance benefits for health and welfare if he worked 250 hours (Tx. 18-19). Because of this benefit, Petitioner testified that he kept regular diaries dating back to at least 2008 (Tx. 18). The diaries are monthly calendars and Petitioner's entries demonstrate hours worked, as well as annotations for when a job starts, when a job ends, and some important dates like birthdays (Tx. 19). For example, Petitioner clarified and explained that if he wrote in the number '10' on a date, that would mean 8 hours worked with 2 hours overtime (Tx. 19). On occasion he would fill out the entries at the end of the week, but for the most part he filled out the diary every day (Tx. 20).

Petitioner testified that his last day worked at U.S. Smokeless Tobacco was July 30, 2014 (Tx. 22). Petitioner did not work again until August 8, 2014, when he performed a well test at Walsh Construction; he took three additional days off and then began working at Walsh Construction on August 12, 2014 (Tx. 24). He worked the nightshift on the deep tunnel project in the Thornton Quarry (Tx. 24). He was accommodated at this position by not having to do climbing – all of the transportation underground was done via lifts (Tx. 25); he did not have to kneel or squat because it was a welding job, so he would sit on a bucket on a lift and weld the whole shift (Tx. 26). Petitioner testified that when he obtained work after his injury that he was always able to do less strenuous work than before; he would inform his coworkers on the job that he hurt his knee, that it was sore, and they would give him some work where he did not have to do a lot of walking and being on his knees (Tx. 25). Petitioner testified that because he had been around for so many years, his bosses knew him and accommodated him (Tx. 25). Petitioner's job with Walsh Construction ended on October 31, 2014 (Tx. 26).

Petitioner's next job was at Graycor Industries on November 3, 2014 (Tx. 29). Petitioner was working on installing a DSI system and he specifically was working on silos (Tx. 29). Petitioner was a foreman on this job (Tx. 30). This was an accommodation for him because he did not have to bend his knee, climb, kneel, or take other strenuous actions (Tx. 31). He chose his own job duties and did not do anything he could not undertake because of his right knee (Tx. 31). Petitioner kept this job until May 14, 2015 (Tx. 33). Even though Petitioner obtained a full duty medical release from Dr. Redondo on March 4, 2015, he testified that he did not return to all of the normal work activities of a millwright (Tx. 35).

On July 13, 2015, Petitioner had an unrelated work accident after returning to work at Graycor Industries (Tx. 37). He broke his wrist and was transitioned to a non-working foreman role (Tx. 38). He had surgery on August 10, 2015 and returned to work in December of 2015 (Tx. 38). Petitioner began work again on December 15, 2015 for a company called Proservices (Tx. 39-40). He received the same accommodations on this job as his other jobs (Tx. 40).

Between January 1, 2016 and January 3, 2016, Petitioner worked at the Ford plant doing overhead conveyor work (Tx. 41-42). He was accommodated in the same way, except in this position he needed to again resort to carrying a bucket of tools around to help him get up and sit down without using his knee (Tx. 42). Petitioner worked between January 8, 2016 and January 11, 2016 for Authentic Branch (Tx. 43). He did not work again until February 23, 2016, at Authentic Rigging (Tx. 45).

On March 2, 2016, Petitioner began working with Siemens in Joliet, Illinois (Tx. 47). He worked as a millwright overhauling three boiler feed pump turbines as a foreman (Tx. 47-48). Petitioner used an elevator to go up and down great heights (Tx. 49). He did no climbing and would occasionally help using a slug and hammer on the Texas hotrods (Tx. 49). Petitioner continued with this employment through May 27, 2016 (Tx. 51).

Petitioner worked for Vissering Construction Company from June 1, 2016 through June 8, 2016 (Tx. 52). He was accommodated for his right knee (Tx. 52).

Petitioner worked for Rig Atlas Tube on an emergency basis on June 11 and June 12, 2016 (Tx. 52). This was his last day work in the month of June 2016 (Tx. 52).

On June 30, 2016, Petitioner asked to be released to full duty work by Dr. Tu; Dr. Tu provided this release (Tx. 50). Petitioner continued to work on and off for different contractors as a millwright from June 30, 2016, until his retirement in 2019 (Tx. 53). He earned full pay as a millwright in these years, but testified that he was never able to work the same as he did prior to his right knee injury (Tx. 53). For the rest of Petitioner's career he continued to be accommodated by his co-workers and bosses for his knee pain (Tx. 53-54).

During cross examination, Petitioner denied ever being diagnosed with arthritis of the right knee prior to this accident (Tx. 73). Petitioner could not work overtime while he was on light duty with Respondent from June 11, 2014 through July 30, 2014 (Tx. 77). Petitioner reviewed Respondent's Exhibit 2, which was purported to be the Union local 1693 hour records (Tx. 85-86). Petitioner reviewed the records and clarified that Respondent's Exhibit 2 was the health and welfare log (Tx. 93). Petitioner explained that the hours reported on Respondent's Exhibit 2 were not necessarily reported concurrently with when the work was completed; additionally, some hours worked are not paid onto the health and welfare logs (Tx. 93). Petitioner testified that sometimes he could not find work quickly in between jobs (Tx. 115). Though Petitioner was not unemployed exclusively because of his right knee, he continued working despite his restrictions because he did not have any income, including workers' compensation benefits from Respondent (Tx. 116-117). Petitioner's work as a millwright was intensely physical and taxing prior to his injury, but afterwards he was accommodated in such a way that he was not put in the

"line of fire" (Tx. 123). Petitioner never returned to performing all of the activities of his millwright trade after his June 5, 2014 accident (Tx. 125).

Petitioner testified that he has not yet undergone the right knee replacement because he is afraid to have it (Tx. 122). He admitted he does not yet have any concrete plans to have one performed (Tx. 123). He did acknowledge that he is nearing the time where he believes he will need the knee replacement (Tx. 58).

Medical Summary

Petitioner presented to the Occupational Health Centers of Illinois and Dr. Stanley Simon on June 11, 2014, with a right leg injury from June 5, 2014 where he "twisted right knee on ladder" (Px3, 4). He was prescribed physical therapy three times per week for one to two weeks and given work restrictions of no prolonged standing or walking longer than two hours, no squatting, no kneeling, no climbing (Px3, 5). He was diagnosed with a sprain/strain to the knee/leg and knee pain (Id.). Petitioner returned on June 13, 2014 and was kept on his work restrictions with no significant update to his condition (Px3, 10). Petitioner returned to the clinic on June 20, 2014 with the same symptoms (Px3, 22). He was kept on work restrictions and told to consider an MRI if not improved (Id.). Petitioner returned again on June 27, 2014 with no significant changes and was kept on light duty (Px3, 37).

On June 30, 2014, Dr. Simon ordered an MRI (Px3, 44). Dr. Simon reviewed the MRI on July 7, 2014 and found a meniscus tear (Px3, 57). He was continued on light duty. (Px3, 58).

Petitioner began treating with Dr. Luis Redondo on July 10, 2014 (Px2, 9). He presented with a chief complaint of right knee pain. He gave a history of right knee injury while clearing a jam on a conveyor belt. The given diagnosis was right knee osteoarthritis with medial meniscal tear. He was given a medial un-loader brace and told to continue with physical therapy. He did not want a cortisone injection. (Id.) Petitioner followed up on July 24, 2014 with Dr. Redondo (Px2, 13). He was told to continue with physical therapy and the brace. Petitioner once again rejected the injection. (Id.) He was returned to work on modified duty of occasional lifting, carrying, pushing, pulling, and bending (Px2, 14). He was restricted from kneeling, twisting, squatting, and using tools (Id.) On August 14, 2014, Petitioner presented to Dr. Redondo for a right knee cortisone injection (Px2, 15). He was given a return to work note without restrictions and told to follow up on September 4, 2014 (Px2, 16). On September 4, 2014, he decided to begin Orthovisc injections due to continued pain (Px2, 17). He was given modified duty of no kneeling, twisting, squatting, or climbing (Px2, 18). On Petitioner's October 2, 2014 follow-up, he was returning for his third Orthovisc injection (Px2, 19). He had his fourth on October 8, 2014 (Px2, 20). Petitioner saw Dr. Redondo again on March 4, 2015 (Px2, 21). At this time the plan was observation and he was given a full duty release with a six month follow-up (Px2, 21).

Petitioner's next follow-up for the right knee was on September 2, 2015 (Px2, 35). He presented with pain against after having several pain free months. Dr. Redondo gave a plan of a cortisone injection under ultrasounds guidance, medial unloader brace, physical therapy, and reevaluation in two weeks' time. Dr. Redondo ordered an eventual total knee replacement at this time (Id.) On September 23, 2015, Petitioner saw Dr. Redondo who continued his diagnosis of severe right knee osteoarthritis (Px2, 39). He recommended hyaluronic acid injections and therapy (Id.)

On December 8, 2015, Dr. Redondo reported that Petitioner was unable to obtain the injections due to the insurance company (Px2, 41). Dr. Redondo advised Petitioner that the most he could do would be a total knee replacement (Px2, 41). Dr. Redondo also told Petitioner that an arthroscopy would have no benefit and told him to get a second opinion to confirm the diagnosis (Px2, 42). Petitioner was taken off of work for his knee at this time (Px2, 44). Dr. Redondo again ordered the partial or total knee replacement (Px2, 41). On January 13, 2016, Petitioner was placed at maximum medical improvement by Dr. Redondo and taken off of working pending a partial knee replacement (Px. 2, 45-47).

Petitioner began treating with Dr. Kevin Tu on February 25, 2016 (Px1, 32). Dr. Tu diagnosed right knee pain and asked to review imaging studies (Px1, 32). He indicated that a right knee replacement may eventually be necessary (Px1 , 32). Petitioner followed up with Dr. Tu on June 30, 2016 (Px1, 31). Dr. Tu reviewed MRI images and released Petitioner to full duty work activities at his request (Px1, 31). He diagnosed a right knee aggravation of preexisting arthritis (Px1, 31). Petitioner next saw Dr. Tu on June 22, 2017 for a review of his right knee (Px1, 30). He was continued on full duty work at this time and he started with a course of right knee injections (Px1, 30).

On November 16, 2017, Petitioner again followed up with Dr. Tu and continued to undergo a course of viscosupplementation (Px1, 29). On November 27, 2017, Petitioner continued with his prescribed course of injections (Px1, 28). Petitioner followed up for his next injection with Dr. Tu on December 7, 2017 (Px1, 27).Petitioner had his next injection from Dr. Tu on December 14, 2017 (Px1, 26). Petitioner had his fifth and final injection in this course of injections on January 17, 2018 (Px1, 24).

Petitioner checked up again with Dr. Tu on April 12, 2018 (Px1, 23). No additional treatment was recommended at this time because his symptoms were stable (Px1, 23). He was told to follow up as needed (Px1, 23). On July 19, 2018, Dr. Tu reported that he would continue to monitor Petitioner as his symptoms could worsen (Px1, 22). He was to continue work activities with no restrictions (Px1, 22). Dr. Tu reported on December 20, 2018 that Petitioner would continue with no work restrictions (Px1, 16). If Petitioner's symptoms worsened, he would consider another course of viscosupplementation (Px1, 16).

On March 21, 2019, Dr. Tu continued to allow Petitioner to work with no restrictions and continued to recommend viscosupplementation only if symptoms worsened (Px1, 15). On July 11, 2019, Dr. Tu noted medial joint line pain in the right knee which was manageable (Px1, 13). Petitioner was not given any work restrictions (Px1, 13). Viscosupplementation was again recommended in case of worsening symptoms (Px1, 13). On October 10, 2019, Petitioner continued to report medial joint line tenderness to Dr. Tu (Px1, 11). No injections were ordered at this time (Px1, 11).

On March 5, 2020, Dr. Tu noted that the symptoms were stable and tolerable (Px1, 9). He discussed treatment options with Petitioner and decided on observation and to hold off on either viscosupplementation or surgery (Px1, 9). Dr. Tu conducted a telemedicine visit with Petitioner on May 28, 2020 (Px1, 8). Petitioner's pain remained stable and manageable in the right knee and there were no plans for procedures at this time (Px1, 8). Dr. Tu continued to provide

Petitioner with no work restrictions as of August 20, 2020 (Px1, 81). On November 12, 2020, Petitioner saw Dr. Tu in the clinic (Px1, 85). He was continued with no work restrictions and reported that his symptoms have been stable (Px1, 85).

On February 11, 2021, Petitioner again returned to the clinic to see Dr. Tu (Px1, 87). Petitioner presented with no significant issues and stable symptoms (Px1, 87). Dr. Tu opined that he may need viscosupplementation or a total knee arthroplasty in the future at this visit (Px1, 87).

On May 13, 2021, Dr. Tu again saw Petitioner for his right knee condition (Px1, 90). He reported stable symptoms and no work restrictions; the diagnosis continued to be right knee aggravation of pre-existing arthritis (Px1, 90). Petitioner saw Dr. Tu from August 19, 2021 through October 20, 2022, and was kept on full duty with stable symptoms (Px1, 92 - 111).

Throughout Petitioner's treatment with Dr. Tu, Dr. Tu always reported that the right knee arthritis had been aggravated. Petitioner testified that the injections that Dr. Tu performed helped by reducing his pain and reducing the swelling in the knee (Tx. 54-55).

Petitioner Current Condition

Though Petitioner has not yet requested nor scheduled the right total knee replacement, he feels that he is getting close to where it must be performed due to his continuously worsening condition (Tx. 58). He specifically testified that, "It's worse, everything is…exacerbated…walking makes it worse…Just a couple of blocks starts to flaring (sic) up, used to get a little bit longer. Now I walk a couple blocks, even today, I walked from my house to the orange line and that's only two or three blocks and it started up" (Tx. 59). Going down a flight of stairs has become a painful ordeal (Tx. 59). Getting up and down from the floor requires an assistive device (Tx. 60). Petitioner cannot kneel without kneepads (Tx. 60). Since the date of accident of June 5, 2014, Petitioner testified that he has had no new injuries to the right knee (Tx. 60). He takes Mobic and Ibuprofen (Tx. 61). He tries to ride a bike to keep the knee active but it causes swelling (Tx. 61).

Testimony of Dr. Tu- Treating Physician

The deposition of Dr. Tu proceeded remotely on August 3, 2022 (Px7, 1). Dr. Kevin Tu is a board-certified orthopedic surgeon who focuses on shoulder and knee surgery (Px. 7, 5:3-15). Dr. Tu explained that the need for a total knee replacement is indicated when the patient has pain that they cannot live with on a day-to-day basis, as well as bone-on-bone arthritis (Px.7, 6:3-17). Dr. Tu further explained that an asymptomatic knee with arthritis could change due to a traumatic event (Px. 7, 6:23). Generally direct trauma will not aggravate the knee (Px. 7, 6:24). To aggravate the arthritis, the event usually has to cause loading and compression of the joint as well as a rotational mechanism that causes grinding between the surfaces (Px. 7, 7:2-10). Dr. Tu testified that he has indeed been seeing Petitioner as one of his patients since 2016 for his right knee condition and that he authored a narrative report (Px. 7, 8:2-9). The report was authored on May 24, 2019 (Px. 7, 8:12). Since authoring the report, Dr. Tu testified that his opinions from the report have not changed and that he has continued to see Petitioner regularly since then (Px. 7, 9:2-11).

When asked what future treatment Petitioner will need that could or might be related to the work accident, Dr. Tu responded that Petitioner had done well with conservative treatment involving injections, therapy, and bracing and that these have helped keep his symptoms stable; however, Petitioner still has persistent pain in his knee localized to the medial joint line and persistent medial joint-line tenderness on physical examination (Px. 7, 9:18-24; 10:1-9). Dr. Tu opined that continued treatment of physical therapy, viscosupplementation, or surgical intervention including a right total knee arthroplasty are reasonable options for his current condition (Px. 7, 10:10-14). Since Petitioner did not have any complaints of right knee pain prior to the work injury on June 5, 2014 and the mechanism of injury is consistent with aggravation of preexisting right knee arthritis, the recommended treatment is related (Px. 7, 10:18-24). The treatment that Dr. Tu has administered and plans to administer is still related to the aggravation of the preexisting right knee arthritis; the aggravation never resolved and he has never returned to his pain free state, even when he has returned to work (Px. 7, 11:15-24; 12:1-2). Petitioner has been both consistent in his presentation to Dr. Tu and compliant with Dr. Tu's care (Px. 7, 13:7-11).

Dr. Tu was asked whether or not the medial meniscal tear that was present in the July 6, 2014 MRI would have pre-existed the June 5, 2014 work injury (Px. 7, 15:2-6). Dr. Tu opined that even though it is possible that Petitioner's arthritis could have been an additional cause of the meniscus tear, the main issue in his current condition is the arthritis that was aggravated by the June 5, 2014 work accident (Px. 7, 15:7-24; 16:1-8). Dr. Tu did not have evidence that could prove to him that Petitioner had a meniscus tear prior to the work accident (Px. 7, 16:13-21).

Testimony of Dr. Verma- Section 12 Examiner

The deposition of Dr. Nikhil Verma, Respondent's Section 12 examiner, proceeded in person on March 11, 2020 (Rx. 1, 1). Dr. Verma has been practicing medicine for 16 years and is board certified (Rx. 1, 5:1-5). He specializes in knees, shoulders, and elbows (Rx. 1, 5:11).

On October 22, 2014, Dr. Verma authored an independent medical examination report regarding his Section 12 examination of Petitioner (Rx. 1, 6:12-21). Dr. Verma alleged to have reviewed an MRI report and images that showed medial compartment arthritis of the knee (Rx. 1, 8:8-11). He performed a physical examination and noted that Petitioner had a small amount of fluid in the knee, that bending the knee caused pain, and that he had pain on the medial joint line (Rx. 1, 8:20-24; 9:1-2).

He diagnosed Petitioner with preexisting degenerative arthritis with a superimposed meniscal tear (Rx. 1, 10:3-5). He thought that Petitioner's prognosis was "good" because of the current clinical exam findings and his own personal experience (Rx. 1, 10:8-13). Dr. Verma recommended an arthroscopy with a partial meniscectomy based on the persistent pain, conservative care, and MRI findings (Rx. 1, 10:20-24; 11:1). Dr. Verma thought that Petitioner could work as he was currently working and then recommended six weeks off following surgery, based on the "objective exam and his current ongoing normal work activities" (Rx. 1, 11:2-13). Dr. Verma found evidence of preexisting arthritis (Rx. 1, 11:17-18). Dr. Verma found a causal relationship between the right knee issues and Petitioner's work-related injury (Rx. 1, 12:2-8). Dr. Verma did not believe that Petitioner had reached maximum medical improvement as of the date of the Section 12 examination (Rx. 1, 12). Dr. Verma believed that Petitioner's complains were consistent with meniscal pathology and preexisting arthritis (Rx. 1, 12).

On August 3, 2016, Dr. Verma authored an additional independent medical examination report. The report was for a second Section 12 examination of Petitioner; a record review and physical examination were involved (Rx. 1, 14:4-21). Dr. Verma offered additional opinions in his report. He believed that Petitioner suffered from preexisting degenerative arthritis (Rx. 1, 16:1-3). He believed that Petitioner would benefit from over-the-counter anti-inflammatories (Rx. 1, 16:12-13). He believed that Petitioner sustained a meniscal injury and an aggravation of the preexisting arthritis (Rx. 1, 17:1-4). Dr. Verma did not see an indication for a knee replacement at the time of this report due to "overall good functional status" (Rx. 1, 17:5-14). Dr. Verma retracted his recommendation of an arthroscopy due to the progression of arthritis (Rx. 1, 18:2-4). Dr. Verma believed that Petitioner was placed at maximum medical improvement as of June 5, 2014 (Rx. 1, 18:17). Dr. Verma did not see an indication for future treatment (Rx. 1, 18:20-21). Dr. Verma did not believe work restrictions were necessary (Rx. 1, 19:11). Dr. Verma opined that if he were to assign blame for Petitioner's condition, he would blame the preexisting arthritis 80 percent and the work injury 20 percent (Rx. 1, 20:4-10).

During cross examination, Dr. Verma confirmed that Orthovisc injections were a reasonable and necessary treatment for the injuries sustained (Rx. 1, 24:3-9). Dr. Verma agreed that a clinical indication for a total knee replacement is bone-on-bone osteoarthritis in the medial compartment of the knee (Rx. 1, 31:2). Dr. Verma also agreed that Petitioner suffers from bone-on-bone osteoarthritis (Rx. 1, 31:7). Dr. Verma did not believe that conservative treatment had succeeded in eliminating pain complaints (Rx. 1, 31:8-24). Dr. Verma acknowledged that Petitioner had not been pain free since the date of injury (Rx. 1, 32:5-9). Dr. Verma did not agree that a total knee replacement was indicated as of the date of his deposition (Rx. 1, 35:6-9).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47. Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

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

None of the physicians who treated or examined him noted any symptom magnification. The Arbitrator finds Petitioner's testimony to be straight forward, truthful, and consistent with the records as a whole.

The Arbitrator finds Dr. Tu to be more credible than Section 12 Examiner, Dr. Verma regarding Petitioner's right knee injury and condition, and the recommendation for right knee replacement. Overall, Respondent witness' testimony and exhibits, for reasons stated below, did not persuade the Arbitrator.

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

After a review of all evidence and testimony in this case, the Arbitrator hereby finds that Petitioner's current condition of ill-being is causally related to his June 5, 2014 work injury.

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. It is not necessary to prove that the employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor. *Tolbert v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130523WC, ¶ 1, 11 N.E.3d 453. It is axiomatic that when the injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment. *Caterpillar, Inc. v. Industrial Comm'n*., 228 Ill. App. 3d 288 (3d Dist. 1992). A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). Whether a causal connection exists between an accident and a condition of ill-being may be determined from both medical and non-medical evidence. 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).

There is no dispute between the parties that Petitioner suffered a work injury to his right knee on June 5, 2014. Petitioner sought treatment for the work injury within a week of the accident and began a course of care for his right knee that has continued through the date of arbitration. Imaging studies performed by the occupational health clinic showed a medial meniscus tear and a grade 1 MCL sprain (Px. 3, 57). Prior to Petitioner's work injury, he had never had right knee pain. Petitioner did not have any prior imaging studies that showed a preexisting medial meniscus tear. Though Dr. Verma testified that the meniscus tear could have preexisted the traumatic incident, the Arbitrator finds no evidence that it did. Dr. Tu testified that there was no evidence that the meniscus tear preexisted the work injury and the Arbitrator is persuaded by his opinions over Dr. Verma. (Px. 7, 16:13-21). Accordingly, the Arbitrator finds that Petitioner's right knee medial meniscus tear is causally related to the June 5, 2014 work injury.

Both of Petitioner's treating doctors, Dr. Redondo and Dr. Tu, agree that the June 5, 2014 work injury aggravated Petitioner's preexisting right knee osteoarthritis. Dr. Verma agrees that Petitioner suffers from right knee osteoarthritis and that the June 5, 2014 aggravated this previously asymptomatic condition. The Arbitrator notes that no medical opinion exists disputing that the right knee osteoarthritis became symptomatic as a result of the June 5, 2014 work injury. Dr. Redondo diagnosed Petitioner with right knee osteoarthritis with medial meniscal tear on July 10, 2014 (Px. 2, 9). Dr. Redondo continued to report this same diagnosis until the tear resolved, at which point he diagnosed aggravated right knee osteoarthritis. Dr. Tu agreed with the diagnosis of an aggravation of preexisting right knee arthritis (Px. 1, 31). Dr. Tu still recommends treatment that he believes it is reasonably related to the aggravation of right knee arthritis (Px. 7, 11:15-24; 12:1-2). Dr. Tu's opinion has remained unchanged that the work injury permanently aggravated the right knee osteoarthritis.

The Arbitrator finds it significant that Respondent's Section 12 examiner, Dr. Verma, also agreed that Petitioner's aggravation was causally related to the work injury. Dr. Verma further agreed that Petitioner's work injury aggravated his previously asymptomatic right knee osteoarthritis (Rx. 1, 17:1-4). And even though Dr. Verma did not agree with Dr. Tu's current treatment recommendations, including the replacement, he did not believe that conservative treatment had succeeded in eliminating Petitioner's pain complaints and acknowledged that Petitioner had not been pain free since the date of injury (Rx. 1, 31:8-24; 32:5-9).

Based upon the testimony of the Petitioner and the treating physicians, specifically Dr. Tu, the medical records, and the record as a whole, the Arbitrator concludes that Petitioner's work injury aggravated his preexisting right knee osteoarthritis. There is no material dispute between medical experts regarding whether or not the work injury permanently aggravated Petitioner's right knee osteoarthritis and whether or not the right knee has been pain free since the initial injury. Based upon all evidence and testimony in the record, the Arbitrator hereby finds that Petitioner's current condition of ill-being for the right knee is related to the June 5, 2014 work injury.

Issue J, whether or not the medical services provided to Petitioner were reasonable and necessary and whether or not Respondent has paid the appropriate charges for all reasonable and necessary services, the Arbitrator finds:

The Arbitrator adopts the above Findings of Fact and Conclusions of Law and incorporates them herein. Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for all of said treatment. As such, the Arbitrator orders Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act, from G&T Orthopedics in the amount of $4,263.71. See Petitioner Exhibit 1 and 16.

The Arbitrator has found that Petitioner's current condition of ill-being is related to his June 5, 2014 work accident. Petitioner's treating doctors as well as Respondent's section 12 examiner agree that the medical services administered were reasonable, related, and necessary. Dr. Redondo treatment was reasonable and necessary per Dr. Tu. Dr. Tu testified that all of his

treatment recommendations were reasonable, related, and necessary (Px. 7, 11:15-24; 12:1-2). Again, no evidence was introduced by Respondent to dispute this.

The only evidence introduced by Respondent in regards to the reasonableness of treatment was in the form of Dr. Verma's deposition. In his original report, Dr. Verma recommended conservative care (Rx. 1, 10:20-24; 11:1). Dr. Verma testified that Orthovisc injections were a reasonable and necessary treatment for the accident (Rx. 1, 24:3-9). Dr. Verma did testify that he did not see an indication for future treatment as of the date of his deposition (Rx. 1, 18:20-21). Dr. Verma did not, however, testify regarding any individual treatment that Petitioner has undergone since the date of the deposition. Dr. Verma's testimony as of the date of his deposition was that treatment Petitioner underwent was reasonable. The Arbitrator gives Dr. Verma's opinion less weight than Dr. Tu.

Dr. Verma agrees that Petitioner's current condition of ill-being was caused by the work injury. Dr. Verma agrees that past treatment has been reasonable and necessary. Dr. Verma agrees that Petitioner has not been pain free since the date of injury. Dr. Verma agreed that Orthovisc injections were necessary (Rx. 1, 24:3-9). Dr. Verma's opinions regarding future medical treatment from the date of his deposition are given little weight in light of the opinions of the treating doctors and in light of his other opinions contained within his reports and deposition.

Based upon all evidence and testimony, the Arbitrator agrees with Petitioner's treating physicians and hereby finds that Petitioner's medical treatment for his right knee has been reasonable, necessary, and causally related to the June 5, 2014 work injury and awards payment of the medical bills for said treatment, specifically the outstanding G&T Orthopedics/Dr. Tu bill in the amount of $4,263.71.

Issue K, whether Petitioner is entitled to TTD and TPD benefits, the Arbitrator finds as follows:
The Arbitrator adopts the above Findings of Fact and Conclusions of Law and incorporates them herein. Based upon all evidence and testimony, the Arbitrator awards both TTD and TPD benefits and further explained below.

Temporary Total Disability
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). To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work. *Holocker v. Illinois Workers' Compensation Comm'n,* 2017 IL App (3d) 16036WC, P35 (3rd Dist., 2017).

Petitioner's treating doctors took him off of work for the periods of July 24, 2014 through August 14, 2014, September 4, 2014 through March 4, 2015, and December 8, 2015 through June 30, 2016 (Px.1, Px. 2, Px. 3). The Arbitrator has found Dr. Redondo and Dr. Tu both to be credible and has given their opinions greater weight. The Arbitrator notes that even though

Petitioner was restricted from work, he nonetheless found accommodated work from various contractors within his trade as a millwright.

Additionally, Petitioner read from his diaries for a great portion of his testimony to cover his post accident work history. The Arbitrator has reviewed these diaries in addition to hearing Petitioner's live testimony from the diaries. The Arbitrator has already found Petitioner to be credible and further gives his calendared diaries and testimony regarding the same, significant weight in determining disability benefits. (Px 11, 12 & 13)

Petitioner's diaries show each and every period that Petitioner worked throughout his off-work time period (Px. 11, Px. 12, Px. 13). The blank days in his diary were periods of time where he was not working. Petitioner credibly testified that he was able to obtain accommodated work after his work injury, even though he was restricted from work by his doctors. The Arbitrator finds that even though Petitioner was capable of finding and performing modified work after his work injury, he is still entitled to Temporary Total Disability benefits while not performing accommodated work and having a valid off-work note from a treating physician. After reviewing these detailed diaries and Petitioner's testimony, the Arbitrator determines that the periods where Petitioner did not work and was restricted from working are as follows:

- July 31, 2014 through August 7, 2014
- August 9, 2014 through August 11, 2014
- January 4, 2016 through January 7, 2016
- January 12, 2016 through January 31, 2016
- February 1, 2016 through February 22, 2016
- June 13, 2016 through June 30, 2016

These periods of time total ten and five-sevenths weeks, (10 5/7) resulting in a sum of $10,874.25. Based on Petitioner's credible testimony in conjunction with a full review of the medical records and his diaries, the Arbitrator hereby finds that Petitioner was temporarily and totally disabled from July 31, 2014 through August 7, 2014; August 9, 2014 through August 11, 2014; January 4, 2016 through January 7, 2016; January 12, 2016 through January 31, 2016; February 1, 2016 through February 22, 2016; and June 13, 2016 through June 30, 2016, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner Temporary Total Disability benefits of $1,014.93/week for 10 5/7 weeks, as explained above.

Temporary Partial Disability

Section 8 of the Act states that "[w]hen the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits… equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working." 820 ILCS 305/8(a).

Petitioner was taken off of work and placed on restricted duty by Dr. Simon on June 11, 2014 (Px. 3, 5). He remained on restricted duty via Dr. Simon and Dr. Redondo through the duration

of his employment with Respondent, which ended on July 30, 2014. Petitioner was accommodated by Respondent and able to work light duty. Petitioner introduced his paystubs as evidence (Px. 9). These paystubs demonstrate that Petitioner's post-injury wages with Respondent were lower than his average weekly wage of $1,522.38. The Arbitrator finds that Petitioner is owed Temporary Partial Disability payments for any periods during which he was working for respondent, on restricted duty, and earning less than his average weekly wage. Temporary Partial Disability is calculated by determining the difference between what he would earn in the full performance of his duties and the amount earned, and then multiplying that number by 2/3 *(820 ILCS 305/8(a)).* See below for a breakdown of TPD benefits owed:

Period Ending In	**Prior AWW**	**Gross Pay**	**Difference**	**TPD award**
6/14/2014	$1,522.38	$1,266.23	$256.15	$170.76
6/21/2014	$1,522.38	$1,404.85	$117.53	$78.35
6/28/2014	$1,522.38	$1,151.75	$370.63	$247.08
7/5/2014	$1,522.38	$1,151.75	$370.63	$247.08
7/12/2014	$1,522.38	$1,151.75	$370.63	$247.08
7/19/2014	$1,522.38	$1,094.51	$427.87	$285.24
7/26/2014	$1,522.38	$1,208.99	$313.39	$208.92
8/2/14 (started 7/27) 24 hours worked	$1,522.38	$693.83	unclear	$0.00
TOTAL				**$1,484.51**

The Arbitrator notes that Petitioner worked 24 hours for the week ending 8/2/14 and it is not clear which days of that week were actually work nor if hours worked were accrued prior to 7/30/14. Therefore, no TPD benefits are awarded for that last week ending 8/2/14.

Based on Petitioner's credible testimony in conjunction with a full review of the medical records and all evidence submitted, the Arbitrator hereby finds that Petitioner entitled to temporary partial benefits from June 11, 2014 through July 30, 2014, totaling 7 3/7 weeks, as provided in Section 8(b) of the Act, in the amount of $1,484.51. *See chart above and Petitioner Exhibit 9.*

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator adopts the above Findings of Fact and Conclusions of Law and incorporates them herein. In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n,* 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall

be the sole determinant of disability." 820 ILCS 305/8.1b(b). "None of the factors set forth in section 8.1b is to be the sole determinant of the claimant's disability." *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶ 49.

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. *See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n*, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner performed work in a heavy-duty job as a millwright prior to the injury (Tx. 10). Petitioner's job duties involved lifting heavy materials, squatting, bending over, working on his knees, climbing up and down ladders to extreme heights, and the use of heavy tools. He never returned to the full duties of his occupation. Petitioner credibly testified how he was able to navigate his occupation post work injury. With his painful arthritic right knee he sought and received accommodations from multiple contractors and co-workers. He used buckets to sit on and weld as well as transition between positions. Petitioner also worked as a foreman. He took elevators up and down shafts as opposed to walking and using a ladder. He never returned to performing all the activities of a millwright. After the accident he never returned to full duty work, even though his doctors released him to work full duty. The Arbitrator notes that Petitioner requested that he be released to full duty by his treating physicians so that he could continue in his work as a millwright (Tx. 50). The Arbitrator therefore gives greater weight to this factor.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 58 years old at the time of the accident. Prior to his work injury, Petitioner did not have any pain in his right knee and was working full duty without accommodation or restriction. Following the work accident, his right knee became symptomatic with an aggravation of osteoarthritis. Petitioner was not near retirement when he was injured. His injury and constant right knee pain occurred later in his career following the work injury. The Arbitrator notes Petitioner retired 5 years after the injury. The Arbitrator gives some weight to this factor.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner has retired from his job as a millwright. He is not employed. The injury does not affect his future earning capacity as of the date he testified and evidence was not submitted showing a future loss of earnings capacity. The Arbitrator gives little weight to this factor.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner has an arthritic knee and a torn meniscus; and agrees with the treating physicians regarding the causation between Petitioner's current right knee and the 6/5/14 work accident, as well as the need for the right total knee replacement. The significant loss of function in the knee is described by Petitioner during his credible testimony. However, Petitioner did not allow his painful arthritic knee to prevent him from earning a living as a millwright. Petitioner wanted to return to millwright work, asked for a full release and found accommodated work in a job that was demanding for him and his right knee condition. The Arbitrator finds that the medical

records document that he has a painful arthritic knee related to the work accident. The right knee condition affects his ability to walk any distance, bend, squat, and kneel. He struggles with daily activities, like walking to and from the train. Petitioner testified he is in pain every day. Petitioner testified he is almost ready to schedule his total knee replacement but has not yet had the surgery. The Arbitrator notes the Petitioner overall has sustained an aggravation of preexisting osteoarthritis within his right knee. Post-accident x-rays demonstrated degenerative bone-on-bone osteoarthritis. Petitioner's treating physician, Dr. Tu, noted that Petitioner's degenerative arthritis was the primary reason for his continued pain complaints. Petitioner's physical examinations findings remained unchanged during Dr. Tu's treatment. The Arbitrator give more weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% of the right leg, pursuant to §8(e) of the Act which corresponds to 64.5 weeks of permanent partial disability benefits at a weekly rate of $721.66.

Issue O, whether prospective medical is awarded, the Arbitrator finds as follows:

The Illinois Workers' Compensation Act provides that an employer "shall provide and pay…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred." *820 ILCS 305/8(a).* In *Plantation Manufacturing Co. v. Industrial Commission,* 294 Ill.App.3d 705, 691 N.E.2d 13, 229 Ill.Dec 77 (2d Dist. 1997), the court found that section 8(a) of the Act allows for liability against an employer for prospective medical care.

Petitioner has been told by both treating doctors that because of the permanent aggravation to his preexisting right knee osteoarthritis, he will require a right total knee replacement. Dr. Redondo ordered a total knee replacement surgery. Petitioner has so far delayed scheduling the right total knee replacement. The Arbitrator gives significant weight to Dr. Redondo's order for a right total knee replacement. In regard to the conditions for a total knee replacement, Dr. Tu specifically testified at his deposition that:

> "Number 1, the most important is pain that a patient really just can't live with. So I see patients that have radiographic changes, which means X-ray changes where they have bone-on-bone arthritis. Some of them have no pain, and then some of them have excruciating pain that limits their daily living and their normal activities. So a patient who has no pain but has terrible X-rays isn't really a great candidate for surgery. A patient who has significant pain that limits their daily activities and limits their lifestyle is certainly a candidate if they have bone-on-bone arthritis or significant arthritic changes." (Px. 7, 6:3-17)

Though Petitioner has not yet requested the right total knee replacement, he testified that he is getting close to where it will need to be performed due to his continuously worsening condition (Tx. 58). Dr. Tu, though he has not ordered the surgery like Dr. Redondo did, has indicated that he believes a total knee replacement will be necessary due to Petitioner's pain complains and bone-on-bone arthritis (Px. 7, 10:10-14). The Arbitrator gives less weight to the report of Dr. Verma in light of his deposition testimony. Dr. Verma did not agree that a total knee

replacement was indicated as of the date of his deposition (Rx. 1, 35:6-9). However, Dr. Verma answered questions regarding total knee replacements at his deposition that contradict this opinion. Dr. Verma agreed that a total knee replacement is indicated when there is bone-on-bone osteoarthritis in the medial compartment of the knee (Rx. 1, 31:2). He then proceeded to admit on cross examination that Petitioner suffers from bone-on-bone osteoarthritis (Rx. 1, 31:7). In addition, Dr. Verma agreed on cross examination that conservative treatment had not succeeded in eliminating Petitioner's pain complaints (Rx. 1, 31:8-24). Dr. Verma also admitted on cross examination that Petitioner had not been pain free since the date of injury (Rx. 1, 32:5-9). Though Dr. Verma did not indicate that a total knee replacement is necessary for Petitioner, his testimony at his deposition does not fully support this opinion in light of his admission that Petitioner suffers from bone-on-bone arthritis and that conservative efforts have failed to eliminate pain complaints. The Arbitrator therefore gives less weight to these opinions from Dr. Verma.

Under Section 8(a), Respondent is responsible for reasonable and necessary medical treatment. Dr. Redondo has ordered a total knee replacement surgery. The Arbitrator finds that the right total knee replacement under the above facts and circumstances is reasonable, necessary and related to the right knee injury on June 5, 2014. The Arbitrator acknowledges that Petitioner has the freedom to undergo the surgery at a time of his choosing. He cannot be forced to obtain this surgery prematurely, but the surgery is deemed reasonable, necessary and related once Petitioner decides that his subjective pain complains have futher escalated to warrant the total knee replacement surgery, as ordered by his doctor.

Accordingly, the Arbitrator finds that on the issue of prospective medical treatment, the need for a total knee replacement at the present time is reasonable, necessary, and related. The Arbitrator hereby orders that Respondent shall authorize this surgery. Though, as of the day of his testimony, Petitioner was not ready to undergo the surgery, it shall be authorized in the future so long as there is no intervening accident, injury or break in causation. Finally, the Arbitrator notes that Petitioner as of the day he testified, was not asking for this surgery.

For the reasons stated above, Petitioner is entitled to an award of benefits under The Illinois Workers' Compensation Act consistent with the findings herein.

It is so ordered:

Jacqueline C. Hickey
Arbitrator

June 27, 2023
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027926
Case Name	Michael Walsh v. H.S. Crocker Co., Inc.
Consolidated Cases	17WC027927;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0327
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Williams
Respondent Attorney	Derrick Lloyd

DATE FILED: 7/15/2024

/s/Kathryn Doerries, Commissioner

Signature

24IWCC0327

STATE OF ILLINOIS)
) SS.
COUNTY OF McHENRY)

☐ 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

MICHAEL WALSH,

Petitioner,

vs. NO: 17 WC 027926

H.S. CROCKER CO., 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 accident, notice, causal connection, TTD, medical expenses, and nature and extent of 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.

As it pertains to PPD benefits, the Commission views the level of disability differently than the Arbitrator. The Commission finds that while the MRI was interpreted as showing a moderate grade partial-thickness articular sided tear of the mid to anterior supraspinatus tendon, the treating orthopedic surgeon found no tear during surgery. The Commission further finds that the shoulder surgery was limited to debridement involving the glenohumeral joint, tissue around the biceps tendon, glenoid labrum, and posterior capsule. The Commission modifies the Arbitrator's Section 8.1b(b) analysis as it pertains to factors IV (employee's future earning capacity) and V (evidence of disability corroborated by the treating medical records). For factor (iv), the Commission assigns moderate weight to this factor. For factor (v), the Commission assigns significant weight to this factor. The Commission further modifies the Arbitrator's Decision to reduce Petitioner's PPD award from 17.5% loss of use of the person as a whole to 11.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

The Commission strikes the fifth sentence of the last paragraph on page 11 in the Conclusions of Law, and modifies the fourth through eighth sentences in the last paragraph on

page 11 and the first two sentences on page 12, so that the Decision reads: "Petitioner testified to his injury happening at the end of his shift. The video stops at midnight. Further, the Arbitrator notes a 15 and 19 minute gap in footage. In total, the stopping of footage at midnight, and the 15 and 19 minute gaps in footage suggest the video is not reliable evidence that would cause the Arbitrator to call Petitioner's credibility into question."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $516.71 per week for a period of 57-4/7 weeks for the periods of 10/13/2017 to 5/20/2018, and from 5/23/2018 to 11/21/2018, that being the period of temporary total incapacity for work under §8(b) of the Act. No maintenance benefits are awarded. Respondent shall have a credit for paid TTD in the amount of $1,373.07.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $465.09 per week for a period of 57.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 11.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the fee schedule amounts for the bills for the reasonable, necessary, and related medical services rendered from Lake Cook Orthopedics, Open Advanced MRI of Deer Park, ATI Physical Therapy, Illinois Bone and Joint, Tri-County Emergency Physicians, and Integrated Imaging Consultants, pursuant to Section §8(a) of the Act and subject to the Medical Fee Schedule in Section 8.2 of the Act.

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

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

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

July 15, 2024
KAD/swj
O 5/21/24
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027926
Case Name	Michael Walsh v. H.S. Crocker Co., Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	David Williams
Respondent Attorney	Derrick Lloyd

DATE FILED: 7/14/2023

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

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Walsh Case # **17** WC **027926**
Employee/Petitioner
v.
H. S. CROCKER CO., INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GERALD NAPLETON**, Arbitrator of the Commission, in the city of **Woodstock**, on **3/2/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/30/2017**, 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 **$40,308.22**; the average weekly wage was **$775.15**.

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

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

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

Respondent shall be given a credit of $**1,373.07** for TTD and $00.00 for other benefits, for a total credit of **$1,373.07**.

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

ORDER

SEE ORDER ON CONSOLIDATED CASE 17WC027927

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/ Gerald W. Napleton JULY 14, 2023

Signature of Arbitrator

Michael Walsh v. H.S. Crocker Co., Inc.
17WC027926 & 17WC027927

FINDINGS OF FACT

Testimony of Petitioner

Petitioner testified that he has been working working in the printing industry since 1984 with the exception of a four-year tenure at Sea Ray boats in Florida. Tx7. He has worked for Respondent since 2013 as a press operator/plate mounter. Tx8,10. He worked on 2-man and 4-man presses up until 2017. Tx9.

On June 30, 2017 Petitioner was finishing his shift and cleaning ink in the press room without the aid of his helper, Christian. Tx10. Petitioner testified that he needed to wedge himself underneath the deck with his arms at a 40-degree angle and his head inside and attempted to twist and pull himself out when he felt his right arm pop. Tx11. He didn't notice pain aside from "everyday operator's pain." Tx11. He did not notify anybody that day of his injury as minor injuries like banging your knee or cutting your hand are common. Tx11-12.

Petitioner worked his normal shift after this occurrence. Tx12. He would take Aleve or Advil every day.

On July 28, 2017 Petitioner was working between decks nine and ten and standing on a steel platform with a rubber mat on it. Tx13. Petitioner leaned and bent his body at a 45-degree angle and was using a rag with chemicals to wipe when the rubber mat slipped, and Petitioner twisted his back and bent backward causing him to put his weight on his arm. Tx13. He felt a pop again in his arm but noticed severe back pain. Tx13-14. This happened toward the end of the shift around 10:30 or 11pm and was with his helper, Christian. Tx14. Petitioner is unaware if Christian witnessed his accident. Tx.14-15. This was a Friday and he had Saturday and Sunday off. Tx15.

On the following Monday Petitioner called a receptionist at Respondent and told her that he slipped by a press, his back hurts, and that he will not be to work. Tx15. He stayed in bed that day and the next when he called in again. Tx.15. He sought medical treatment after that as a doctor's note is needed after two days absence. Tx15. He sought treatment for his back first and was sent to a doctor for his shoulder. Tx17. Petitioner testified that his back hurt for only about a week and improved with the help of muscle relaxers until it resolved completely. Tx18.

Petitioner testified to treating with Dr. Panchal at Lake Cook Orthopedics where he received an MRI, injection, and work restrictions. Tx19. Petitioner was given the option of an injection or surgery and chose injections despite a fear of needles. Tx.19. The injection provided relief for two days. Tx19. Petitioner was given a work restriction of 20lbs maximum lifting for four weeks and returned to work. Tx19. He testified that he was restricted from all work after that and decided to proceed with surgery which happened on November 9, 2017. Tx20. He underwent a regimen of physical therapy with Illinois Bone and Joint Institute for 25 visits.

Tx21. He also attended therapy at ATI but switched back to Illinois Bone and Joint. Tx21-22. He was still in pain after therapy and did not believe he could return to work. Tx22. He had issues with strength, movement, and sleeping. Tx22-23.

Petitioner attempted to return to work on May 21, 2018 as he was concerned about losing his job. Tx23. The two-man press he was working on was filled and the only opening was for a one man press where he struggled with lifting the roll shafts, cylinders, and moving ink buckets from shoulder height. Tx.24-26. Petitioner requested to be returned to work by Dr. Panchal during his physical therapy regimen. Tx.25.

Petitioner testified that Dr. Panchal then sent him for a functional capacity evaluation. TX27. He did not return to work at that time and began a work-hardening program. Tx27. Petitioner testified that his results plateaued, and he underwent another Functional Capacity Evaluation where his lifting capacity improved. Tx28. Petitioner received permanent restrictions from Dr. Panchal where he could only operate a 2-man press. Tx29. Petitioner testified that he was terminated from his employment sometime during his work hardening course. Tx30.

The differences between a one-man and two-man press mainly involve sharing the responsibilities between two workers. Tx36. Petitioner testified he would be unable to lift the shafts in a one-man press. Tx36. Petitioner testified to having to lift five-gallon buckets of ink regularly at work which can weight 20 to 70 pounds on to a pallet jack. Tx50-51.

Petitioner testified that he was told he was unable to return to work without a full release by Furlon, the plant manager. Tx31-32. Petitioner testified he was not offered a job within his restrictions and was offered an "off-line" position, but it still required lifting over 50lbs. Tx32. Petitioner testified he spoke with a Jill Rucker in HR about an "offset line" job. Tx34. Petitioner confirmed that after his accident the only time he worked for Respondent was for four weeks of light duty and the two days when he attempted to return. Tx36. Petitioner testified he knew the cylinders weighed more than 50 pounds because he lifted them all the time. He testified that they never weighed the cylinders. Tx.45-47.

Upon receiving permanent work restrictions on November 21, 2018, Petitioner did not immediately look for a job as a result of a house fire where he lost everything. Tx37. He claimed he was unable to look for work while dealing with demolition, contractors, and design. Tx37. He began looking for work in November of 2019. Tx38. He looked for printing work but was unsuccessful and broadened his search to inspections. Tx37-38.

Petitioner met with Susan Entenberg, vocational counselor, in August of 2019. Tx39. Petitioner began working for Smalley Steel Ring on February 19, 2020 where he inspects small and light retaining rings and springs. Tx39-40. He was hired at the rate of $15 per hour and works there as of the date of hearing. Tx40-41.

Petitioner testified that he currently has issues with weakness, sporadic twinges of pain, difficulty working overhead, lifting and playing catch with his grandchildren where he used to be more hands-on. Tx41-43. He does not take any

pain medication. Tx43. Petitioner did not recall attending an IME appointment. Tx44.

On cross-examination, Petitioner acknowledged not telling his treating doctors the exact date of his accident. TX60. Petitioner elaborated on the position he was in when he was injured the second time. TX64-66. Petitioner did not feel shoulder pain at the time of his injury. Tx68. Petitioner acknowledged not filling out an accident report for his June 2017 injury. Tx70-71. Petitioner confirmed there was no one at the shop to report his July 28, 2017 injury to when it happened or over the next two days which were weekends. TX71-72. Petitioner acknowledged not calling a supervisor until August 1, 2017. Tx73.

On cross-examination, Petitioner testified he was unaware that a therapist in his work conditioning program recommended that he be discharged from work conditioning as he met the physical demands of his job on September 9, 2018. Tx75. He acknowledged being released from medical care by Dr. Panchal on November 21, 2018. Tx76. He has not seen Dr. Panchal or any other doctor for his shoulder since that date. Tx76. Petitioner denied that his permanent restrictions were provided at his request. Tx77.

On cross-examination, Petitioner admitted that the lifting requirements for a one-man press and a two-man press are the exact same. Tx.77-78. Petitioner acknowledged receiving a letter date July 17, 2018 requesting that he contact Respondent upon his release from care about job opportunities. RX11, Tx.80-81. Petitioner stated after his release he spoke with Respondent about the "off-line" position. Tx82. Petitioner admitted he did not keep a job log of his attempts to find employment. Tx83. Petitioner admitted that he advised Susan Entenberg that he did not perform any job search. Tx85. Petitioner currently earns $17.70 an hour at his current job with possible weekly overtime at time and a half. Tx92. Petitioner works an average of 55 hours per week. Tx93.

Petitioner reiterated that plate mounting duties as involving picking up a cylinder, putting it on plate mounter, lining up the plates, sealing it, removing it, and placing it on a table. Tx94.

Testimony of Matthew Thompson

Matthew Thompson is the maintenance supervisor at Respondent who maintains the facility, grounds, and machines. Tx98. He also handled security cameras, is knowledgeable about their software, and location. Tx98-99. He testified that each press is covered by a camera and that they are motion-activated with a sensitivity setting of 70-75 percent. Tx99. Anything moving in front of the press would be captured in the footage. Tx100.

Mr. Thompson secured the footage from July 28, 2017 through a request from Jill and saved it to a computer and eventually a flash drive. Tx101-102. A specific block of time was requested and provided. Tx104-105. He stated that the footage should show everything aside from locking up at night and that no further footage

of Petitioner should exist. Tx105. Mr. Thompson testified he is incapable of editing footage. Tx106.

On cross-examination, Petitioner acknowledged he did not remember what block of time was requested by Jill but that it was for an hour's worth of footage. Tx108. Footage of workers going home at the end of shift should trigger the cameras to record. Tx108-109. Mr. Thompson believed shifts ended around 11 o'clock. Tx109. While viewing the surveillance (RX14), Mr. Thompson testified that the video was from July 28, 2018 at 2200 hours or 10pm. Tx110. At 23:05, a worker cleaning a press was shown. Tx112. He acknowledged that from 23:05:14 to 23:05:22 the camera turned off. Tx112. At 23:25:18 the video skips to 23:44:47, a 20-minute period, was not on video and stated that would be from a lack of motion. Tx113.

Mr. Thompson acknowledged that Petitioner's accident allegedly happened at 11:30pm which would be 23:30 and that no footage of that time frame exists to his knowledge. Tx114. The camera then capture footage at 23:44:47, 20 minutes later, but no motion was discernable. Tx114. The video then cuts from 23:44:47 to 23:59:59. Tx115. When asked if there is any footage of Petitioner grabbing his lunch box and leaving, Mr. Thompson said, "if it's in the video, yes. If not, then no." Tx115. He was unaware what time Petitioner ended his shift that night. Tx116.

On redirect, Mr. Thompson stated it would be possible to exit the facility without appearing on camera. Tx118.

Testimony of Furlon Clemons

Furlon Clemons is the plant manager at Respondent, has worked in that position for five years, and prior to that was the second shift supervisor. Tx119-120. He worked as a press operator prior to that for 25 years. Tx120. He oversees production of presses, die-cutting, safety, and the facility overall. Tx120.

He described the job duties of a press operator, and that the job duties of a one-man press, and a two-man press are the same. Tx121-122. The lifting requirements include lifting buckets of ink and cylinders. Tx122. White ink buckets weight from 48 to 50lbs. Tx122. He has not seen buckets of ink that weigh over 50lbs. Tx124. The large shafts weight just over 48lbs. Tx124. Rolls can weight 600 to 700lbs but a pressman doesn't have to lift them as they are brought by forklift, but a pressman does roll the roll to the back of the press about 14 inches. Tx126-127. He denied that any overhead lifting of buckets is required. Tx127.

Mr. Clemons testified that a 50lb restriction would not preclude someone from working as a pressman at Respondent. Tx128. He is unaware of situations which would require lifting over 50lbs. Tx129. A plate mounter would not have to lift over 50lbs or perform overhead work. Tx130.

He acknowledged that Petitioner called him after his July 28, 2017 incident but denied that Petitioner mentioned his shoulder, only his back. Tx131. Mr. Clemons reviewed the surveillance and did not see anything that was consistent with Petitioner's report of injury. Tx132.

Machines are cleaned every Friday on the second shift. Tx132. Petitioner was working second shift. Tx132. He testified that if someone was working till 11:00pm they would shutdown at 9:00pm and if they were working till 1:00am they would shut down at 11:00pm for clean up as clean up took two hours. Tx133.

Mr. Clemons stated Petitioner's initial accident was not reported until after his second accident. Tx133. Petitioner did not complain of any shoulder injuries to him and performed his regular job until his second accident. Tx134.

Mr. Clemons testified that he took issue with Petitioner's report of his initial accident as the dryers are not wide enough for someone to get stuck in them. Tx134. It is 31-32 inches wide and 14-18 inches in depth and four inches deep. Tx135. He testified that he had never seen a pressman clean the way Petitioner described when he was injured initially. Tx135. Mr. Clemons denied telling Petitioner he could not return to Respondent until he was 100%. Tx137.

On cross-examination, Mr. Clemons acknowledged that Petitioner could have been working overtime on the date of his second incident. Tx140-141.

Testimony of Rebecca Wooley

Rebecca Wooley testified that she is HR manager at Respondent and has worked there for eight years. Tx144. At the time of Petitioner's alleged injuries the HR manager was Jill Rucker. Tx145. She testified about procedures for reporting accidents. Tx145-146. She stated that Petitioner received a handbook outlining these procedures. Tx147. She reviewed RX7, a job description, and noted the job description has a lifting requirement of 50lbs. Tx150. She testified that RX12, a job description of a plate mounter, notes that the lifting requirements are the same as a press operator of 50lbs.

Ms. Wooley testified that a restriction of no lifting greater than 50lbs and 30lbs overhead would not preclude them from applying for a position as a press operator so long as a pre-employment physical was passed. Tx152-153. Ms. Wooley took issue with Petitioner not reporting the injury immediately. Tx154.

RX10 was reviewed by Ms. Wooley which was a 2017 attendance calendar. Tx154. The last day Petitioner worked was October 13, 2017. Tx155. She acknowledged Petitioner was terminated with possibility of being rehired on July 17, 2018. Tx155. She testified that Petitioner was offered a job on August 2, 2021 as a plate mounter. Tx156.

On cross-examination, Ms. Wooley stated that Petitioner worked 10 hours on July 28, 2017. Tx.159. This means Petitioner would have started at 3pm and finished at 1am. Tx159. She acknowledged that she didn't' know the surveillance footage only shows footage from 10:06pm to 11:25pm and 11:44pm to 11:59pm. Tx.160. She has not viewed the footage herself. Tx160. She stated that Jill, the prior HR manager, was terminated and that it was correct that Jill would request a time frame of surveillance footage. Tx162. She denied being involved in the process of securing surveillance footage. Tx163.

Rebuttal Testimony of Petitioner

Petitioner testified on rebuttal that his day starts at 3:00 but possibly 2:30pm and he works between eight and ten hours. Tx166-67. Petitioner reviewed the surveillance footage and did not see his accident. Tx167. Petitioner testified that the surveillance is incomplete because he takes his Playmate lunch box home with him and doesn't show him leaving. Tx167-68. Petitioner acknowledged that his accident report lists 1130pm as the time of his accident but was an approximation and that if he was working a 10-hour day until 1am then it could have happened after midnight. Tx169.

Testimony of Susan Entenberg, Vocational Rehabilitation Counselor

Susan Entenberg testified that she has been a certified rehabilitation counselor since 1978 and a licensed clinical professional counselor since 1993. PX11. She testified that she met with Petitioner on August 9, 2019. Prior to their visit, Ms. Entenberg reviewed an operative report and two FCE reports dated 6/21/18 and 11/13/18 along with a progress note and work status report from Dr. Panchal dated 11/21/18. She noted that Petitioner's restrictions as of November 21st 2018 were permanent and consisted of a maximum lift of 50lbs, a maximum overhead lift of 30lbs, and indicated that he must be on a two-man press. PX11,p.13. She considered these restrictions to be medium duty work.

Ms. Entenberg noted Petitioner's "advanced" age of 56 and his level of education of some college but no degree or certificates. She noted he is right-hand dominant, and his injury was to his right arm. She testified that Petitioner gave a history of a "pinching pain" at a 5-6/10 level with repetitive movement with shooting pains of 4-5/10 occasionally along with tightness and cramping and sharp pain in the shoulder and back of shoulder. She stated that Petitioner testified that his hand shakes and he drops items and that he cannot fully extend his arm behind his back. He testified he could lift about 50lbs from the floor but only about 20 to 30lbs from table height.

She noted Petitioner has worked as a pressman since 1982 with a brief stint in Florida. She testified that a pressman is a heavy job which requires lifting heavy cylinders up to 70lbs and frequent lifting of 40 to 50lb buckets of ink. She testified that Petitioner advised that he does a lot of overhead work as well. She testified that her understanding is based on the definition of printing press operator from the US Department of Labor's dictionary of occupational titles.

Ms. Entenberg testified that work as a press operator is beyond his restrictions, and he would not be able to perform his past work. Her determination was based solely on his restrictions.

Petitioner was noted to be a good candidate for vocational rehabilitation in the form of job placement. He may be able to use transferable skills from printing and seek quality control, quality assurance, forklift operator, building maintenance, and other medium-level jobs. She testified that quality control or quality assurance

type jobs would pay 12.28 an hour with a median of 17.92, forklift jobs would pay 12.28 an hour with a median of 16.33 and building maintenance would pay 10.53 an hour with a median of 14.13.

Ms. Entenberg testified that Petitioner returned, or tried to return, to work for two days in May of 2018 but was unable to because of the requirements of the job. She indicated that Petitioner's restrictions were not able to be accommodated after these permanent restrictions were implemented in November of 2018.

She testified that she believes Petitioner sustained a reduction in earning power and job security. She spoke with Petitioner again on April 17 of 2020 for an update and noted that he was working. She stated that Petitioner searched for jobs within 30 miles and started a job on February 19, 2020 with Smalley Steel Rings where he inspects small springs earning $15 an hour.

On cross-examination, Ms. Entenberg acknowledged her opinion is based on roughly 22 pages of medical records and her interview and that if his current physical capabilities were different her opinion could possibly change. She acknowledged that she primarily provides opinions for Petitioners in workers' compensation matters to the tune of 85% or 90%. She noted that he was diagnosed with a right rotator cuff sprain and had arthroscopic surgery.

On cross-examination, she stated that with Petitioner's description of lifting cylinders and buckets of ink frequently her opinion likely wouldn't change if Petitioner was physical capable of lifting more than 50lbs safely or 30lbs overhead. She based this on what Petitioner reported in terms of weight of cylinders and buckets along with the USDOL occupational definition. She was unaware if Dr. Panchal knows the difference between a one man and two-man press. She noted that Petitioner asked to not be placed on a one-man press.

Ms. Entenberg acknowledged that the treating records do not note issues of Petitioner's hand shaking or dropping things. She further acknowledged that the November 21st 2018 treatment note stated that Petitioner had full range of motion but was unaware what a range of motion test consisted of or if it included reaching behind one's back.

Ms. Entenberg was questioned on cross regarding the USDOL definition she used and whether it closely relates to a "web-press operator" which has a medium physical demand level according to the USDOL. She stated that the description was 27 years old. She acknowledged that there are different types of press operators, including a "cylinder press operator," "plant press operator," and "Europe-press operator" which are also medium physical demand level jobs and that some press operator positions are listed as light physical demand along with some that are heavy. She mentioned "cylinder press operator helper" and some plastic and synthetic press jobs are heavy duty.

Ms. Entenberg acknowledged that her determination of heavy-demand-level was based primarily on Petitioner's description of his job duties. She did not perform a site visit at Respondent's premises. She did not know what specific types of presses are used and relied on the Petitioner's description of the weight of things.

She acknowledged that if ink buckets weighed less than 50lbs he could possibly return to work for Respondent if his overhead lifting was limited to 30lbs.

She continued to acknowledge that for the roughly nine months prior to her visit with him, Petitioner gave a history of daily activities included waking up, playing games, using Facebook, walking around the house, watching tv, dishes, and visiting his grandchildren. She stated that nothing in his restrictions would prevent him from performing household duties.

Medical Treatment

Petitioner sought treatment on August 1, 2017 when he reported to the emergency room at Good Shepherd Hospital. At that time, he was complaining of acute low back pain and right shoulder pain. He reported that he worked behind a large printer on Friday, July 28, 2017. As he leaned in with his weight supported on his right shoulder, he stated his right shoulder gave out causing immediate low back pain. Petitioner reported that he felt intermediate radicular pain going down his left posterior leg into his left toes. Petitioner also complained of right shoulder pain which he stated was exacerbated from a previous injury that occurred roughly one to two months prior. He complained of pain at a severity of 7-8/10. At rest, his pain was at 0/10. He was given a sling and advised to ice and elevate his right shoulder. He was also instructed to take over-the-counter pain medication as needed. He was instructed to follow up with Dr. Brebach for further management. The record does not explicit state any work restrictions. PX6, p30-33.

On August 7, 2017, Petitioner sought treatment at Lake Cook Orthopedics with Dr. Surbhi Panchal for right shoulder pain. He reported that he was leaning on his right arm into a press while cleaning and felt sudden, sharp pain in his right shoulder. He also had low back pain. He reported that he was currently off work. Dr. Panchal's assessment was a possible rotator cuff injury. Given the weakness on exam and the two injuries he reported, an MRI was ordered to further diagnoses the problem. He was prescribed Norco and a muscle relaxer. (PX7 023 – 024). He was given lifting restrictions of 20 lbs. (PX7 - 050)

An August 10, 2017 MRI revealed a moderate partial thickness articular sided tear of the anterior supraspinatus tendon and no rotator cuff tear. PX8. Dr. Panchal reviewed the MRI on August 11, 2017 who noted the partial rotator cuff tear and stated Petitioner likely suffered an acute on chronic exacerbation. PX7, p22. Surgery was discussed and Petitioner received a cortisone injection as he wanted to continue to work. Light duty restrictions were continued.

Petitioner followed up with Dr. Panchal on September 11, 2017 where he reported that the injection worked for a few days, but the pain returned. Surgery was recommended. Work restrictions continued. On September 21, 2017, Dr. Panchal continued Petitioner's work restrictions until surgery. On October 13, 2017 Dr. Panchal placed petitioner completely off of work.

On November 9, 2021, Petitioner underwent surgery consisting of right shoulder arthroscopy with glenohumeral debridement, debridement of tissue

around the biceps tendon and glenoid labrum, and subacromial decompression. PX6, 151. No "big tears" or "severe defects" were observed. PX6, 152.

Petitioner followed up with Dr. Panchal later that month who stated Petitioner did not need a sling due to the fact that the rotator cuff was not repaired, physical therapy was ordered, and pain management was continued. Petitioner then began a regimen of physical therapy at IBJ for his right shoulder. He completed his PT in January of 2018 but still had pain and returned to Dr. Panchal on January 3, 2018 where more PT was ordered, and pain management continued.

On February 1, 2018, Petitioner reported to his physical therapist that he wished to get back to work and mentioned having to lift 50lbs at work. PX10, p25. He continued to have difficulty reaching overhead and behind his back and still complained of pain. Id. He continued to perform PT exercises.

Petitioner followed up with Dr. Panchal on February 14, 2018 and remained restricted from work. He was reassessed by Dr. Panchal on March 14, 2018 noting significant improvement, but ongoing insurance issues were getting in the way of continued therapy. PX10, p37, 41. On March 28, 2018 Dr. Panchal noted improvement upon finishing physical therapy as Petitioner was no longer taking pain medication. He was restricted from work and underwent more physical therapy.

On May 9, 2018, six months post-surgery, Dr. Panchal released Petitioner to work as Petitioner reported feeling ready to do so and that his shoulder was functioning well. PX7, p9-10. Petitioner continued physical therapy to continue to regain strength. He complained to his therapist about his difficulties performing his job duties.

Petitioner underwent an FCE on June 21, 2018 at ATI which was noted to demonstrate a valid effort. The FCE stated Petitioner is capable of working at a "light to medium" physical demand level and that Petitioner's job using DOT code 651.362-010 required a medium level. He followed up with Dr. Panchal on July 11, 2018. Dr. Panchal ordered work hardening and noted Petitioner's restrictions on the FCE (though it appears she may have misread or misunderstood "light-to-medium" as "light" by itself). PX7,p8. She explained it may take several months to close the gap on his current ability and job duties. Dr. Panchal did not elaborate on Petitioner's job duties and what the gap was. Id. He then underwent work hardening at ATI 5 days per week.

The September 12, 2018 Progress note from ATI states Petitioner will continue to require skilled PT to address remaining deficits until one-year post-operation. PX9, p36. The ATI discharge summary from October 21, 2018 states Petitioner stiff has stiffness, weakness, and fatigue with overhead and heavy lifting/pushing/pulling and that pain is a big limiting factor. Petitioner was given a home exercise plan. PX9, p1.

Dr. Panchal on September 10, 2018 stated that Petitioner would likely reach maximum recovery 12 months after surgery at which time she shall address permanent abilities. PX6, p5-6. On October 31, 2018 Dr. Panchal ordered another FCE.

Another valid FCE was performed on November 13, 2018 which again showed a demonstrated physical demand level of "light to medium" noting Petitioner's job requires a medium physical demand level. The therapist noted Petitioner's capabilities for weights lifted above shoulders fall below the DOT level. PX9,p146.

Petitioner followed-up a final time with Dr. Panchal on November 21, 2018. Dr. Panchal noted 4/5 strength, full range of motion, flexion of 120 and adduction of 100. Dr. Panchal noted the FCE demonstrated Petitioner was not able to carry more than 60lbs and not able to do overhead work with more than 30lbs. Dr. Panchal noted that Petitioner requested that he be restricted from one-man press work. He was released from care at this point. PX7, p1-2.

Respondent's Section 12 Examination

Petitioner was examined by Dr. Troy Karlson at DMG Orthopedics on May 19, 2020. Rx2. Petitioner gave Dr. Karlson a history of his first accident of June 30, 2017, describing that he was cleaning a press while on his back with his arms overhead and felt himself getting stuck, tried to wiggle out without using his arms, and felt a pop in his right shoulder. He then described his July 28, 2017 accident where he was cleaning a press from above while on a platform leaning over the press with his right arm on a cross bar when his feet slipped back causing injury to his back and shoulder.

He complained about pain on the outer side of his arm and back of his shoulder between 1/10 and 5/10, difficulty throwing, twisting, and a loss of mobility with difficulty reaching behind himself. RX2. He was no longer taking medication for his pain and working full duty with a new employer that didn't require lifting. RX2.

A physical exam demonstrated a 10-degree difference in rotation between the right and left arm with 80 degrees on the left and 70 degrees on the right. Adduction and extension were both at 50 degrees. RX2. Dr. Karlson reviewed Petitioner's medical records from Dr. Panchal and Advocate Good Shepherd hospital. He did not review the functional capacity evaluations or physical therapy notes. RX2, p7.

Dr. Karlson opined that Petitioner suffered from subacromial impingement and rotator cuff tendonitis. He stated that surgical debridement of the acromion was necessary as was debridement of inflamed tissue. The rotator cuff and biceps were noted to be intact. Dr. Karlson said Petitioner's complaints are greater than to be expected with the objective findings on physical exam and the findings at the time of surgery which indicates some degree of symptom magnification as his subjective complaints are greater than any objective findings. RX2, p8.

Dr. Karlson stated the mechanism of injury described by Petitioner on July 28, 2017 of leaning forward with his weight on his right arm could be enough to cause a tendonitis or bring about some symptoms of impingement and that his diagnosis of tendonitis and impingement may be partially related to work activity.

RX2,p8. Petitioner has pre-existing anatomy of a type 2 acromion, which makes him more prone to impingement and rotator cuff tendinitis. Dr. Karlson believed the treatment received was reasonable, necessary, and causally related to his alleged accident and that he reached MMI when discharged by Dr. Panchal on November 21, 2018. RXp8-9. Dr. Karlson believes Petitioner is capable of full duty work with no restrictions whatsoever due to minimal loss of motion and full strength demonstrated on physical examination. RX2, p9. Dr. Karlson's AMA impairment rating of petitioner was 5% upper extremity impairment and 3% of the whole person.

CONCLUSIONS OF LAW

Regarding Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner sustained two accidents that arose out of and in the course of his employment with Respondent. The Arbitrator finds petitioner credibly testified that on June 30, 2017 Petitioner was cleaning a printing press while laying on his back, scraping off dried ink, and injured his right arm trying to wiggle himself free. Similarly, the Arbitrator finds petitioner credibly testified that on July 28, 2017 Petitioner was again cleaning the press, leaning over a support, when the mat he was standing on slipped causing injury to his right shoulder and back.

The Arbitrator finds Petitioner's actions reasonable insofar as he did not immediately think much of his initial injury and did not notify anybody right away despite Respondent's argument that Petitioner was aware of his responsibility through Petitioner's receipt of Respondent's injury protocol handbook. The Arbitrator notes Petitioner's testimony that he didn't believe his initial injury was something aside from "everyday operator's pain" (TX11) and operated under the belief that workers' shouldn't report minor injuries "like banging your knee or cutting your hand" as they are common. TX11-12.

Further, the Arbitrator is not swayed by Respondent's reliance on minor inconsistencies concerning the dates of injury relayed to his medical providers. Petitioners in general can be imperfect historians but the record as a whole supports a finding that Petitioner repeatedly and credibly testified to the mechanism of injury in both situations that gave rise to his two accidents.

The Arbitrator viewed the video footage submitted by Respondent related to the July 28, 2017 injury and reviewed the testimony at trial. The Arbitrator finds it noteworthy that Petitioner testified to working a 10-hour shift which would have ended around 1am. Petitioner testified to his injury happening at the end of his shift. The video stops at midnight. Petitioner testified that his lunch pail is still visible at the end of the footage and that he brings his lunch pail home every day. Further, the Arbitrator notes a 15 and 19 minute gap in footage. In total, the lunch pail, the stopping of footage at midnight, and the 15 and 19 minute gaps in footage

suggest the video is not reliable evidence that would cause the Arbitrator to call Petitioner's credibility into question.

Accordingly, the Arbitrator finds that Petitioner sustained injuries that arose out of and in the course of his employment with Respondent.

Regarding Issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Section 6(c) of the Act states that a Petitioner must give notice to the employer as soon as practicable but no later than 45 days after sustaining an injury. See 820 ILCS 305/6(a). There is no question that Petitioner gave notice of both injuries within 45 days of their respective occurrence. Again, the Petitioner did not reasonably believe his initial injury was something to be concerned about as he seemingly chalked it up to everyday operator pain. Petitioner did not seek medical treatment and continued to work his full shift after his initial injury. Any defect or inaccuracy concerning notice of the June 30, 2017 accident is inconsequential, however (as the Arbitrator will discuss later) as Petitioner's second injury is the main cause of his current condition of ill-being. Even if the Arbitrator were to find Petitioner did not sustain an accident with regard to the June 30, 2017 shoulder injury the July 28, 2017 accident is the primary cause of Petitioner's ongoing shoulder-related issues. No medical expenses, TTD, or permanency is alleged (or herein awarded) as a result of the June 30, 2017 injury.

Petitioner testified that he did not report his July 28 2017 accident the same day as it was late, and nobody was around. He reported it the following week and sought medical treatment.

Accordingly, the Arbitrator finds that timely notice of his accidents was given by Petitioner.

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

Based on the totality of the evidence adduced at trial, including the Petitioner's testimony, medical treatment, and Respondent's Section 12 examination, the Arbitrator finds Petitioner's current condition of ill-being is related to his accidents – primarily, the July 28, 2017 accident.

The record demonstrates that Petitioner did not suffer from any ongoing shoulder issues which required medical intervention. Petitioner felt a shoulder "pop" on June 30, 2017 but didn't' seek medical treatment and continued to work. Petitioner sought regular medical treatment after his July 28, 2017 incident.

Dr. Panchal, Petitioner's treating surgeon, stated his incidents likely caused a partially torn rotator cuff and impingement syndrome in the shoulder. Dr. Karlson, the Section 12 examiner, further states that while a rotator cuff tear was not viewed during surgery, that Petitioner's tendonitis and impingement was at least partially caused by the alleged injuries. Throughout his treatment and even

with the Section 12 examiner, Petitioner's purported mechanism of injury remained consistent.

Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his injuries.

Regarding Issue (J), whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges, the Arbitrator finds as follows:

Having found in favor on the issues of accident and causation and noting that there is no evidence in the record supporting a finding to the contrary, the Arbitrator finds that the medical treatment received by Petitioner was reasonable and necessary. Further, the Arbitrator awards payment of the medical bills to Petitioner pursuant to Sections 8(a) and 8.2 of the Act. The six unpaid medical bills in the record from Lake Cook Orthopedics, Open Advanced MRI, ATI physical therapy, Illinois Bone and Joint, Tri-County Emergency Physicians, and Integrated Imaging Consultants are awarded to Petitioner pursuant to Section 8(a) and the medical feel schedule in Section 8.2. of the Act.

Regarding Issue (K), concerning the temporary benefits in dispute, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner continued to work in some capacity through October 12, 2017 and awards TTD for the period of October 13, 2017 through May 20, 2018. The Arbitrator finds that Petitioner attempted to return to work after that but was unable to as of May 23, 2018 through November 21, 2018 when he was deemed to reach MMI.

Petitioner acknowledged that he did not attempt to seek work within his permanent restrictions until about a year later and is claiming maintenance from November 1, 2019 to February 18, 2020 when he was able to secure employment. Petitioner met with vocational expert, Sue Entenberg, on August 9, 2019. No job logs were submitted into evidence. Petitioner testified that he looked for jobs and called potential employers from his phone, but no further detail was given.

The Arbitrator does not find that Petitioner is entitled to maintenance benefits as the record does not reflect that he performed a good faith job search for the maintenance benefit period alleged. Further, as the Arbitrator will discuss below, it is not clear from the record that Petitioner was unable to return to work as a pressman with Respondent.

Accordingly, the Arbitrator awards TTD from October 13, 2017 through May 20, 2018 and May 23, 2018 through November 21, 2018.

Regarding Issue (L), the nature and extent of the injury, the Arbitrator finds as follows:

Section 8.1(b) of the Act states, "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."

Regarding factor (i), Dr. Karlson provided an AMA rating of 5% of the arm and 3% of the person as a whole. This factor is afforded moderate weight.

Regarding factor (ii), the occupation of the injured employee, the Arbitrator notes that Petitioner worked as a press operator for 30 years and that he may be required to lift up to 50lbs and 30lbs to shoulder length. Dr. Panchal's records note that Petitioner sought to be restricted from working a one-man press and asked that he be restricted to only working a two-man press. Petitioner acknowledged that the lifting requirements for a one man or two-man press were not different. There is some evidence in the record of self-limiting on the part of Petitioner. Petitioner did not return to work as a pressman for Respondent but did not submit any job logs showing he was unable to return to other employers as a pressman. This factor is given substantial weight.

Regarding factor (iii), Petitioner's age, the record shows Petitioner was 54 years old at the time of his injuries in 2017. The Petitioner is of somewhat advanced working age. This factor is given some weight.

Regarding factor (iv), the employee's future earning capacity, despite Susan Entenberg's testimony that Petitioner suffered a loss of future earning capacity, the record shows that Petitioner is making more at his new job, inclusive of overtime.

Regarding factor (v), evidence of disability corroborated by the medical records, the record shows Petitioner was given permanent restrictions as mentioned above. He does not take any medications currently and has not seen Dr. Panchal since his last visit in November of 2018.

Accordingly, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 17.5% loss of use of the person as a whole.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027927
Case Name	Michael Walsh v. H.S. Crocker Co., Inc.
Consolidated Cases	17WC027926;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0328
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Williams
Respondent Attorney	Derrick Lloyd

DATE FILED: 7/15/2024

/s/Kathryn Doerries, Commissioner

Signature

24IWCC0328

STATE OF ILLINOIS)
) SS.
COUNTY OF McHENRY)

☐ 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

MICHAEL WALSH,

Petitioner,

vs. NO: 17 WC 027927

H.S. CROCKER CO., 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 accident, notice, causal connection, TTD, medical expenses, and nature and extent of 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.

As it pertains to PPD benefits, the Commission views the level of disability differently than the Arbitrator. The Commission finds that while the MRI was interpreted as showing a moderate grade partial-thickness articular sided tear of the mid to anterior supraspinatus tendon, the treating orthopedic surgeon found no tear during surgery. The Commission further finds that the shoulder surgery was limited to debridement involving the glenohumeral joint, tissue around the biceps tendon, glenoid labrum, and posterior capsule. The Commission modifies the Arbitrator's Section 8.1b(b) analysis as it pertains to factors IV (employee's future earning capacity) and V (evidence of disability corroborated by the treating medical records). For factor (iv), the Commission assigns moderate weight to this factor. For factor (v), the Commission assigns significant weight to this factor. The Commission further modifies the Arbitrator's Decision to reduce Petitioner's PPD award from 17.5% loss of use of the person as a whole to 11.5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

The Commission strikes the fifth sentence of the last paragraph on page 11 in the Conclusions of Law, and modifies the fourth through eighth sentences in the last paragraph on

page 11 and the first two sentences on page 12, so that the Decision reads: "Petitioner testified to his injury happening at the end of his shift. The video stops at midnight. Further, the Arbitrator notes a 15 and 19 minute gap in footage. In total, the stopping of footage at midnight, and the 15 and 19 minute gaps in footage suggest the video is not reliable evidence that would cause the Arbitrator to call Petitioner's credibility into question."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $516.71 per week for a period of 57-4/7 weeks for the periods of 10/13/2017 to 5/20/2018, and from 5/23/2018 to 11/21/2018, that being the period of temporary total incapacity for work under §8(b) of the Act. No maintenance benefits are awarded. Respondent shall have a credit for paid TTD in the amount of $1,373.07.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $465.09 per week for a period of 57.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 11.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the fee schedule amounts for the bills for the reasonable, necessary, and related medical services rendered from Lake Cook Orthopedics, Open Advanced MRI of Deer Park, ATI Physical Therapy, Illinois Bone and Joint, Tri-County Emergency Physicians, and Integrated Imaging Consultants, pursuant to Section §8(a) of the Act and subject to the Medical Fee Schedule in Section 8.2 of the Act.

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

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

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

July 15, 2024
KAD/swj
O 5/21/24
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC027927
Case Name	Michael Walsh v. H.S. Crocker Co., Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	David Williams
Respondent Attorney	Derrick Lloyd

DATE FILED: 7/14/2023

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

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Walsh Case # **17** WC **027927**
Employee/Petitioner
v.
H. S. CROCKER CO., INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GERALD NAPLETON**, Arbitrator of the Commission, in the city of **Woodstock**, on **3/2/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/28/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,308.22**; the average weekly wage was **$775.15**.

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

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

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

Respondent shall be given a credit of $**1,373.07** for TTD and $00.00 for other benefits, for a total credit of **$1,373.07**.

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

ORDER

The Arbitrator finds that Petitioner sustained accidental injuries on June 30, 2017 and July 28, 2017 and that Petitioner's condition of ill-being is causally related to his accidental injuries.

Respondent shall pay Petitioner TTD benefits of $516.71/week for 57 4/7 weeks for the periods of 10/13/2017 to 5/20/2018, and from 5/23/2018 to 11/21/2018 as provided in Section 8(b) of the Act. No maintenance benefits are awarded.

Respondent shall pay Petitioner permanent partial disability benefits of $465.09/week for 87 and 1/2 weeks, because the injuries sustained caused a 17.5% loss of use of the person as a whole as provided in Section 8(d)(2) of the Act.

Respondent shall pay to Petitioner the fee scheduled amounts for bills for the reasonable, necessary and related medical services rendered from Lake Cook Orthopedics, Open Advanced MRI of Deer Park, ATI Physical Therapy, $ Illinois Bone & Joint, Tri-County Emergency Physicians, and Integrated Imaging Consultants, pursuant to Section 8(a) and subject to the Medical Fee Schedule in Section 8.2 of the Act.

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

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

/s/ Gerald W. Napleton

Signature of Arbitrator

JULY 14, 2023

Michael Walsh v. H.S. Crocker Co., Inc.
17WC027926 & 17WC027927

FINDINGS OF FACT

Testimony of Petitioner

Petitioner testified that he has been working working in the printing industry since 1984 with the exception of a four-year tenure at Sea Ray boats in Florida. Tx7. He has worked for Respondent since 2013 as a press operator/plate mounter. Tx8,10. He worked on 2-man and 4-man presses up until 2017. Tx9.

On June 30, 2017 Petitioner was finishing his shift and cleaning ink in the press room without the aid of his helper, Christian. Tx10. Petitioner testified that he needed to wedge himself underneath the deck with his arms at a 40-degree angle and his head inside and attempted to twist and pull himself out when he felt his right arm pop. Tx11. He didn't notice pain aside from "everyday operator's pain." Tx11. He did not notify anybody that day of his injury as minor injuries like banging your knee or cutting your hand are common. Tx11-12.

Petitioner worked his normal shift after this occurrence. Tx12. He would take Aleve or Advil every day.

On July 28, 2017 Petitioner was working between decks nine and ten and standing on a steel platform with a rubber mat on it. Tx13. Petitioner leaned and bent his body at a 45-degree angle and was using a rag with chemicals to wipe when the rubber mat slipped, and Petitioner twisted his back and bent backward causing him to put his weight on his arm. Tx13. He felt a pop again in his arm but noticed severe back pain. Tx13-14. This happened toward the end of the shift around 10:30 or 11pm and was with his helper, Christian. Tx14. Petitioner is unaware if Christian witnessed his accident. Tx.14-15. This was a Friday and he had Saturday and Sunday off. Tx15.

On the following Monday Petitioner called a receptionist at Respondent and told her that he slipped by a press, his back hurts, and that he will not be to work. Tx15. He stayed in bed that day and the next when he called in again. Tx.15. He sought medical treatment after that as a doctor's note is needed after two days absence. Tx15. He sought treatment for his back first and was sent to a doctor for his shoulder. Tx17. Petitioner testified that his back hurt for only about a week and improved with the help of muscle relaxers until it resolved completely. Tx18.

Petitioner testified to treating with Dr. Panchal at Lake Cook Orthopedics where he received an MRI, injection, and work restrictions. Tx19. Petitioner was given the option of an injection or surgery and chose injections despite a fear of needles. Tx.19. The injection provided relief for two days. Tx19. Petitioner was given a work restriction of 20lbs maximum lifting for four weeks and returned to work. Tx19. He testified that he was restricted from all work after that and decided to proceed with surgery which happened on November 9, 2017. Tx20. He underwent a regimen of physical therapy with Illinois Bone and Joint Institute for 25 visits.

Tx21. He also attended therapy at ATI but switched back to Illinois Bone and Joint. Tx21-22. He was still in pain after therapy and did not believe he could return to work. Tx22. He had issues with strength, movement, and sleeping. Tx22-23.

Petitioner attempted to return to work on May 21, 2018 as he was concerned about losing his job. Tx23. The two-man press he was working on was filled and the only opening was for a one man press where he struggled with lifting the roll shafts, cylinders, and moving ink buckets from shoulder height. Tx.24-26. Petitioner requested to be returned to work by Dr. Panchal during his physical therapy regimen. Tx.25.

Petitioner testified that Dr. Panchal then sent him for a functional capacity evaluation. TX27. He did not return to work at that time and began a work-hardening program. Tx27. Petitioner testified that his results plateaued, and he underwent another Functional Capacity Evaluation where his lifting capacity improved. Tx28. Petitioner received permanent restrictions from Dr. Panchal where he could only operate a 2-man press. Tx29. Petitioner testified that he was terminated from his employment sometime during his work hardening course. Tx30.

The differences between a one-man and two-man press mainly involve sharing the responsibilities between two workers. Tx36. Petitioner testified he would be unable to lift the shafts in a one-man press. Tx36. Petitioner testified to having to lift five-gallon buckets of ink regularly at work which can weight 20 to 70 pounds on to a pallet jack. Tx50-51.

Petitioner testified that he was told he was unable to return to work without a full release by Furlon, the plant manager. Tx31-32. Petitioner testified he was not offered a job within his restrictions and was offered an "off-line" position, but it still required lifting over 50lbs. Tx32. Petitioner testified he spoke with a Jill Rucker in HR about an "offset line" job. Tx34. Petitioner confirmed that after his accident the only time he worked for Respondent was for four weeks of light duty and the two days when he attempted to return. Tx36. Petitioner testified he knew the cylinders weighed more than 50 pounds because he lifted them all the time. He testified that they never weighed the cylinders. Tx.45-47.

Upon receiving permanent work restrictions on November 21, 2018, Petitioner did not immediately look for a job as a result of a house fire where he lost everything. Tx37. He claimed he was unable to look for work while dealing with demolition, contractors, and design. Tx37. He began looking for work in November of 2019. Tx38. He looked for printing work but was unsuccessful and broadened his search to inspections. Tx37-38.

Petitioner met with Susan Entenberg, vocational counselor, in August of 2019. Tx39. Petitioner began working for Smalley Steel Ring on February 19, 2020 where he inspects small and light retaining rings and springs. Tx39-40. He was hired at the rate of $15 per hour and works there as of the date of hearing. Tx40-41.

Petitioner testified that he currently has issues with weakness, sporadic twinges of pain, difficulty working overhead, lifting and playing catch with his grandchildren where he used to be more hands-on. Tx41-43. He does not take any

pain medication. Tx43. Petitioner did not recall attending an IME appointment. Tx44.

On cross-examination, Petitioner acknowledged not telling his treating doctors the exact date of his accident. TX60. Petitioner elaborated on the position he was in when he was injured the second time. TX64-66. Petitioner did not feel shoulder pain at the time of his injury. Tx68. Petitioner acknowledged not filling out an accident report for his June 2017 injury. Tx70-71. Petitioner confirmed there was no one at the shop to report his July 28, 2017 injury to when it happened or over the next two days which were weekends. TX71-72. Petitioner acknowledged not calling a supervisor until August 1, 2017. Tx73.

On cross-examination, Petitioner testified he was unaware that a therapist in his work conditioning program recommended that he be discharged from work conditioning as he met the physical demands of his job on September 9, 2018. Tx75. He acknowledged being released from medical care by Dr. Panchal on November 21, 2018. Tx76. He has not seen Dr. Panchal or any other doctor for his shoulder since that date. Tx76. Petitioner denied that his permanent restrictions were provided at his request. Tx77.

On cross-examination, Petitioner admitted that the lifting requirements for a one-man press and a two-man press are the exact same. Tx.77-78. Petitioner acknowledged receiving a letter date July 17, 2018 requesting that he contact Respondent upon his release from care about job opportunities. RX11, Tx.80-81. Petitioner stated after his release he spoke with Respondent about the "off-line" position. Tx82. Petitioner admitted he did not keep a job log of his attempts to find employment. Tx83. Petitioner admitted that he advised Susan Entenberg that he did not perform any job search. Tx85. Petitioner currently earns $17.70 an hour at his current job with possible weekly overtime at time and a half. Tx92. Petitioner works an average of 55 hours per week. Tx93.

Petitioner reiterated that plate mounting duties as involving picking up a cylinder, putting it on plate mounter, lining up the plates, sealing it, removing it, and placing it on a table. Tx94.

Testimony of Matthew Thompson

Matthew Thompson is the maintenance supervisor at Respondent who maintains the facility, grounds, and machines. Tx98. He also handled security cameras, is knowledgeable about their software, and location. Tx98-99. He testified that each press is covered by a camera and that they are motion-activated with a sensitivity setting of 70-75 percent. Tx99. Anything moving in front of the press would be captured in the footage. Tx100.

Mr. Thompson secured the footage from July 28, 2017 through a request from Jill and saved it to a computer and eventually a flash drive. Tx101-102. A specific block of time was requested and provided. Tx104-105. He stated that the footage should show everything aside from locking up at night and that no further footage

of Petitioner should exist. Tx105. Mr. Thompson testified he is incapable of editing footage. Tx106.

On cross-examination, Petitioner acknowledged he did not remember what block of time was requested by Jill but that it was for an hour's worth of footage. Tx108. Footage of workers going home at the end of shift should trigger the cameras to record. Tx108-109. Mr. Thompson believed shifts ended around 11 o'clock. Tx109. While viewing the surveillance (RX14), Mr. Thompson testified that the video was from July 28, 2018 at 2200 hours or 10pm. Tx110. At 23:05, a worker cleaning a press was shown. Tx112. He acknowledged that from 23:05:14 to 23:05:22 the camera turned off. Tx112. At 23:25:18 the video skips to 23:44:47, a 20-minute period, was not on video and stated that would be from a lack of motion. Tx113.

Mr. Thompson acknowledged that Petitioner's accident allegedly happened at 11:30pm which would be 23:30 and that no footage of that time frame exists to his knowledge. Tx114. The camera then capture footage at 23:44:47, 20 minutes later, but no motion was discernable. Tx114. The video then cuts from 23:44:47 to 23:59:59. Tx115. When asked if there is any footage of Petitioner grabbing his lunch box and leaving, Mr. Thompson said, "if it's in the video, yes. If not, then no." Tx115. He was unaware what time Petitioner ended his shift that night. Tx116.

On redirect, Mr. Thompson stated it would be possible to exit the facility without appearing on camera. Tx118.

Testimony of Furlon Clemons

Furlon Clemons is the plant manager at Respondent, has worked in that position for five years, and prior to that was the second shift supervisor. Tx119-120. He worked as a press operator prior to that for 25 years. Tx120. He oversees production of presses, die-cutting, safety, and the facility overall. Tx120.

He described the job duties of a press operator, and that the job duties of a one-man press, and a two-man press are the same. Tx121-122. The lifting requirements include lifting buckets of ink and cylinders. Tx122. White ink buckets weight from 48 to 50lbs. Tx122. He has not seen buckets of ink that weigh over 50lbs. Tx124. The large shafts weight just over 48lbs. Tx124. Rolls can weight 600 to 700lbs but a pressman doesn't have to lift them as they are brought by forklift, but a pressman does roll the roll to the back of the press about 14 inches. Tx126-127. He denied that any overhead lifting of buckets is required. Tx127.

Mr. Clemons testified that a 50lb restriction would not preclude someone from working as a pressman at Respondent. Tx128. He is unaware of situations which would require lifting over 50lbs. Tx129. A plate mounter would not have to lift over 50lbs or perform overhead work. Tx130.

He acknowledged that Petitioner called him after his July 28, 2017 incident but denied that Petitioner mentioned his shoulder, only his back. Tx131. Mr. Clemons reviewed the surveillance and did not see anything that was consistent with Petitioner's report of injury. Tx132.

Machines are cleaned every Friday on the second shift. Tx132. Petitioner was working second shift. Tx132. He testified that if someone was working till 11:00pm they would shutdown at 9:00pm and if they were working till 1:00am they would shut down at 11:00pm for clean up as clean up took two hours. Tx133.

Mr. Clemons stated Petitioner's initial accident was not reported until after his second accident. Tx133. Petitioner did not complain of any shoulder injuries to him and performed his regular job until his second accident. Tx134.

Mr. Clemons testified that he took issue with Petitioner's report of his initial accident as the dryers are not wide enough for someone to get stuck in them. Tx134. It is 31-32 inches wide and 14-18 inches in depth and four inches deep. Tx135. He testified that he had never seen a pressman clean the way Petitioner described when he was injured initially. Tx135. Mr. Clemons denied telling Petitioner he could not return to Respondent until he was 100%. Tx137.

On cross-examination, Mr. Clemons acknowledged that Petitioner could have been working overtime on the date of his second incident. Tx140-141.

Testimony of Rebecca Wooley

Rebecca Wooley testified that she is HR manager at Respondent and has worked there for eight years. Tx144. At the time of Petitioner's alleged injuries the HR manager was Jill Rucker. Tx145. She testified about procedures for reporting accidents. Tx145-146. She stated that Petitioner received a handbook outlining these procedures. Tx147. She reviewed RX7, a job description, and noted the job description has a lifting requirement of 50lbs. Tx150. She testified that RX12, a job description of a plate mounter, notes that the lifting requirements are the same as a press operator of 50lbs.

Ms. Wooley testified that a restriction of no lifting greater than 50lbs and 30lbs overhead would not preclude them from applying for a position as a press operator so long as a pre-employment physical was passed. Tx152-153. Ms. Wooley took issue with Petitioner not reporting the injury immediately. Tx154.

RX10 was reviewed by Ms. Wooley which was a 2017 attendance calendar. Tx154. The last day Petitioner worked was October 13, 2017. Tx155. She acknowledged Petitioner was terminated with possibility of being rehired on July 17, 2018. Tx155. She testified that Petitioner was offered a job on August 2, 2021 as a plate mounter. Tx156.

On cross-examination, Ms. Wooley stated that Petitioner worked 10 hours on July 28, 2017. Tx.159. This means Petitioner would have started at 3pm and finished at 1am. Tx159. She acknowledged that she didn't' know the surveillance footage only shows footage from 10:06pm to 11:25pm and 11:44pm to 11:59pm. Tx.160. She has not viewed the footage herself. Tx160. She stated that Jill, the prior HR manager, was terminated and that it was correct that Jill would request a time frame of surveillance footage. Tx162. She denied being involved in the process of securing surveillance footage. Tx163.

Rebuttal Testimony of Petitioner

Petitioner testified on rebuttal that his day starts at 3:00 but possibly 2:30pm and he works between eight and ten hours. Tx166-67. Petitioner reviewed the surveillance footage and did not see his accident. Tx167. Petitioner testified that the surveillance is incomplete because he takes his Playmate lunch box home with him and doesn't show him leaving. Tx167-68. Petitioner acknowledged that his accident report lists 1130pm as the time of his accident but was an approximation and that if he was working a 10-hour day until 1am then it could have happened after midnight. Tx169.

Testimony of Susan Entenberg, Vocational Rehabilitation Counselor

Susan Entenberg testified that she has been a certified rehabilitation counselor since 1978 and a licensed clinical professional counselor since 1993. PX11. She testified that she met with Petitioner on August 9, 2019. Prior to their visit, Ms. Entenberg reviewed an operative report and two FCE reports dated 6/21/18 and 11/13/18 along with a progress note and work status report from Dr. Panchal dated 11/21/18. She noted that Petitioner's restrictions as of November 21st 2018 were permanent and consisted of a maximum lift of 50lbs, a maximum overhead lift of 30lbs, and indicated that he must be on a two-man press. PX11,p.13. She considered these restrictions to be medium duty work.

Ms. Entenberg noted Petitioner's "advanced" age of 56 and his level of education of some college but no degree or certificates. She noted he is right-hand dominant, and his injury was to his right arm. She testified that Petitioner gave a history of a "pinching pain" at a 5-6/10 level with repetitive movement with shooting pains of 4-5/10 occasionally along with tightness and cramping and sharp pain in the shoulder and back of shoulder. She stated that Petitioner testified that his hand shakes and he drops items and that he cannot fully extend his arm behind his back. He testified he could lift about 50lbs from the floor but only about 20 to 30lbs from table height.

She noted Petitioner has worked as a pressman since 1982 with a brief stint in Florida. She testified that a pressman is a heavy job which requires lifting heavy cylinders up to 70lbs and frequent lifting of 40 to 50lb buckets of ink. She testified that Petitioner advised that he does a lot of overhead work as well. She testified that her understanding is based on the definition of printing press operator from the US Department of Labor's dictionary of occupational titles.

Ms. Entenberg testified that work as a press operator is beyond his restrictions, and he would not be able to perform his past work. Her determination was based solely on his restrictions.

Petitioner was noted to be a good candidate for vocational rehabilitation in the form of job placement. He may be able to use transferable skills from printing and seek quality control, quality assurance, forklift operator, building maintenance, and other medium-level jobs. She testified that quality control or quality assurance

type jobs would pay 12.28 an hour with a median of 17.92, forklift jobs would pay 12.28 an hour with a median of 16.33 and building maintenance would pay 10.53 an hour with a median of 14.13.

Ms. Entenberg testified that Petitioner returned, or tried to return, to work for two days in May of 2018 but was unable to because of the requirements of the job. She indicated that Petitioner's restrictions were not able to be accommodated after these permanent restrictions were implemented in November of 2018.

She testified that she believes Petitioner sustained a reduction in earning power and job security. She spoke with Petitioner again on April 17 of 2020 for an update and noted that he was working. She stated that Petitioner searched for jobs within 30 miles and started a job on February 19, 2020 with Smalley Steel Rings where he inspects small springs earning $15 an hour.

On cross-examination, Ms. Entenberg acknowledged her opinion is based on roughly 22 pages of medical records and her interview and that if his current physical capabilities were different her opinion could possibly change. She acknowledged that she primarily provides opinions for Petitioners in workers' compensation matters to the tune of 85% or 90%. She noted that he was diagnosed with a right rotator cuff sprain and had arthroscopic surgery.

On cross-examination, she stated that with Petitioner's description of lifting cylinders and buckets of ink frequently her opinion likely wouldn't change if Petitioner was physical capable of lifting more than 50lbs safely or 30lbs overhead. She based this on what Petitioner reported in terms of weight of cylinders and buckets along with the USDOL occupational definition. She was unaware if Dr. Panchal knows the difference between a one man and two-man press. She noted that Petitioner asked to not be placed on a one-man press.

Ms. Entenberg acknowledged that the treating records do not note issues of Petitioner's hand shaking or dropping things. She further acknowledged that the November 21st 2018 treatment note stated that Petitioner had full range of motion but was unaware what a range of motion test consisted of or if it included reaching behind one's back.

Ms. Entenberg was questioned on cross regarding the USDOL definition she used and whether it closely relates to a "web-press operator" which has a medium physical demand level according to the USDOL. She stated that the description was 27 years old. She acknowledged that there are different types of press operators, including a "cylinder press operator," "plant press operator," and "Europe-press operator" which are also medium physical demand level jobs and that some press operator positions are listed as light physical demand along with some that are heavy. She mentioned "cylinder press operator helper" and some plastic and synthetic press jobs are heavy duty.

Ms. Entenberg acknowledged that her determination of heavy-demand-level was based primarily on Petitioner's description of his job duties. She did not perform a site visit at Respondent's premises. She did not know what specific types of presses are used and relied on the Petitioner's description of the weight of things.

She acknowledged that if ink buckets weighed less than 50lbs he could possibly return to work for Respondent if his overhead lifting was limited to 30lbs.

She continued to acknowledge that for the roughly nine months prior to her visit with him, Petitioner gave a history of daily activities included waking up, playing games, using Facebook, walking around the house, watching tv, dishes, and visiting his grandchildren. She stated that nothing in his restrictions would prevent him from performing household duties.

Medical Treatment

Petitioner sought treatment on August 1, 2017 when he reported to the emergency room at Good Shepherd Hospital. At that time, he was complaining of acute low back pain and right shoulder pain. He reported that he worked behind a large printer on Friday, July 28, 2017. As he leaned in with his weight supported on his right shoulder, he stated his right shoulder gave out causing immediate low back pain. Petitioner reported that he felt intermediate radicular pain going down his left posterior leg into his left toes. Petitioner also complained of right shoulder pain which he stated was exacerbated from a previous injury that occurred roughly one to two months prior. He complained of pain at a severity of 7-8/10. At rest, his pain was at 0/10. He was given a sling and advised to ice and elevate his right shoulder. He was also instructed to take over-the-counter pain medication as needed. He was instructed to follow up with Dr. Brebach for further management. The record does not explicit state any work restrictions. PX6, p30-33.

On August 7, 2017, Petitioner sought treatment at Lake Cook Orthopedics with Dr. Surbhi Panchal for right shoulder pain. He reported that he was leaning on his right arm into a press while cleaning and felt sudden, sharp pain in his right shoulder. He also had low back pain. He reported that he was currently off work. Dr. Panchal's assessment was a possible rotator cuff injury. Given the weakness on exam and the two injuries he reported, an MRI was ordered to further diagnoses the problem. He was prescribed Norco and a muscle relaxer. (PX7 023 – 024). He was given lifting restrictions of 20 lbs. (PX7 - 050)

An August 10, 2017 MRI revealed a moderate partial thickness articular sided tear of the anterior supraspinatus tendon and no rotator cuff tear. PX8. Dr. Panchal reviewed the MRI on August 11, 2017 who noted the partial rotator cuff tear and stated Petitioner likely suffered an acute on chronic exacerbation. PX7, p22. Surgery was discussed and Petitioner received a cortisone injection as he wanted to continue to work. Light duty restrictions were continued.

Petitioner followed up with Dr. Panchal on September 11, 2017 where he reported that the injection worked for a few days, but the pain returned. Surgery was recommended. Work restrictions continued. On September 21, 2017, Dr. Panchal continued Petitioner's work restrictions until surgery. On October 13, 2017 Dr. Panchal placed petitioner completely off of work.

On November 9, 2021, Petitioner underwent surgery consisting of right shoulder arthroscopy with glenohumeral debridement, debridement of tissue

around the biceps tendon and glenoid labrum, and subacromial decompression. PX6, 151. No "big tears" or "severe defects" were observed. PX6, 152.

Petitioner followed up with Dr. Panchal later that month who stated Petitioner did not need a sling due to the fact that the rotator cuff was not repaired, physical therapy was ordered, and pain management was continued. Petitioner then began a regimen of physical therapy at IBJ for his right shoulder. He completed his PT in January of 2018 but still had pain and returned to Dr. Panchal on January 3, 2018 where more PT was ordered, and pain management continued.

On February 1, 2018, Petitioner reported to his physical therapist that he wished to get back to work and mentioned having to lift 50lbs at work. PX10, p25. He continued to have difficulty reaching overhead and behind his back and still complained of pain. Id. He continued to perform PT exercises.

Petitioner followed up with Dr. Panchal on February 14, 2018 and remained restricted from work. He was reassessed by Dr. Panchal on March 14, 2018 noting significant improvement, but ongoing insurance issues were getting in the way of continued therapy. PX10, p37, 41. On March 28, 2018 Dr. Panchal noted improvement upon finishing physical therapy as Petitioner was no longer taking pain medication. He was restricted from work and underwent more physical therapy.

On May 9, 2018, six months post-surgery, Dr. Panchal released Petitioner to work as Petitioner reported feeling ready to do so and that his shoulder was functioning well. PX7, p9-10. Petitioner continued physical therapy to continue to regain strength. He complained to his therapist about his difficulties performing his job duties.

Petitioner underwent an FCE on June 21, 2018 at ATI which was noted to demonstrate a valid effort. The FCE stated Petitioner is capable of working at a "light to medium" physical demand level and that Petitioner's job using DOT code 651.362-010 required a medium level. He followed up with Dr. Panchal on July 11, 2018. Dr. Panchal ordered work hardening and noted Petitioner's restrictions on the FCE (though it appears she may have misread or misunderstood "light-to-medium" as "light" by itself). PX7,p8. She explained it may take several months to close the gap on his current ability and job duties. Dr. Panchal did not elaborate on Petitioner's job duties and what the gap was. Id. He then underwent work hardening at ATI 5 days per week.

The September 12, 2018 Progress note from ATI states Petitioner will continue to require skilled PT to address remaining deficits until one-year post-operation. PX9, p36. The ATI discharge summary from October 21, 2018 states Petitioner stiff has stiffness, weakness, and fatigue with overhead and heavy lifting/pushing/pulling and that pain is a big limiting factor. Petitioner was given a home exercise plan. PX9, p1.

Dr. Panchal on September 10, 2018 stated that Petitioner would likely reach maximum recovery 12 months after surgery at which time she shall address permanent abilities. PX6, p5-6. On October 31, 2018 Dr. Panchal ordered another FCE.

Another valid FCE was performed on November 13, 2018 which again showed a demonstrated physical demand level of "light to medium" noting Petitioner's job requires a medium physical demand level. The therapist noted Petitioner's capabilities for weights lifted above shoulders fall below the DOT level. PX9,p146.

Petitioner followed-up a final time with Dr. Panchal on November 21, 2018. Dr. Panchal noted 4/5 strength, full range of motion, flexion of 120 and adduction of 100. Dr. Panchal noted the FCE demonstrated Petitioner was not able to carry more than 60lbs and not able to do overhead work with more than 30lbs. Dr. Panchal noted that Petitioner requested that he be restricted from one-man press work. He was released from care at this point. PX7, p1-2.

Respondent's Section 12 Examination

Petitioner was examined by Dr. Troy Karlson at DMG Orthopedics on May 19, 2020. Rx2. Petitioner gave Dr. Karlson a history of his first accident of June 30, 2017, describing that he was cleaning a press while on his back with his arms overhead and felt himself getting stuck, tried to wiggle out without using his arms, and felt a pop in his right shoulder. He then described his July 28, 2017 accident where he was cleaning a press from above while on a platform leaning over the press with his right arm on a cross bar when his feet slipped back causing injury to his back and shoulder.

He complained about pain on the outer side of his arm and back of his shoulder between 1/10 and 5/10, difficulty throwing, twisting, and a loss of mobility with difficulty reaching behind himself. RX2. He was no longer taking medication for his pain and working full duty with a new employer that didn't require lifting. RX2.

A physical exam demonstrated a 10-degree difference in rotation between the right and left arm with 80 degrees on the left and 70 degrees on the right. Adduction and extension were both at 50 degrees. RX2. Dr. Karlson reviewed Petitioner's medical records from Dr. Panchal and Advocate Good Shepherd hospital. He did not review the functional capacity evaluations or physical therapy notes. RX2, p7.

Dr. Karlson opined that Petitioner suffered from subacromial impingement and rotator cuff tendonitis. He stated that surgical debridement of the acromion was necessary as was debridement of inflamed tissue. The rotator cuff and biceps were noted to be intact. Dr. Karlson said Petitioner's complaints are greater than to be expected with the objective findings on physical exam and the findings at the time of surgery which indicates some degree of symptom magnification as his subjective complaints are greater than any objective findings. RX2, p8.

Dr. Karlson stated the mechanism of injury described by Petitioner on July 28, 2017 of leaning forward with his weight on his right arm could be enough to cause a tendonitis or bring about some symptoms of impingement and that his diagnosis of tendonitis and impingement may be partially related to work activity.

RX2,p8. Petitioner has pre-existing anatomy of a type 2 acromion, which makes him more prone to impingement and rotator cuff tendinitis. Dr. Karlson believed the treatment received was reasonable, necessary, and causally related to his alleged accident and that he reached MMI when discharged by Dr. Panchal on November 21, 2018. RXp8-9. Dr. Karlson believes Petitioner is capable of full duty work with no restrictions whatsoever due to minimal loss of motion and full strength demonstrated on physical examination. RX2, p9. Dr. Karlson's AMA impairment rating of petitioner was 5% upper extremity impairment and 3% of the whole person.

CONCLUSIONS OF LAW

Regarding Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner sustained two accidents that arose out of and in the course of his employment with Respondent. The Arbitrator finds petitioner credibly testified that on June 30, 2017 Petitioner was cleaning a printing press while laying on his back, scraping off dried ink, and injured his right arm trying to wiggle himself free. Similarly, the Arbitrator finds petitioner credibly testified that on July 28, 2017 Petitioner was again cleaning the press, leaning over a support, when the mat he was standing on slipped causing injury to his right shoulder and back.

The Arbitrator finds Petitioner's actions reasonable insofar as he did not immediately think much of his initial injury and did not notify anybody right away despite Respondent's argument that Petitioner was aware of his responsibility through Petitioner's receipt of Respondent's injury protocol handbook. The Arbitrator notes Petitioner's testimony that he didn't believe his initial injury was something aside from "everyday operator's pain" (TX11) and operated under the belief that workers' shouldn't report minor injuries "like banging your knee or cutting your hand" as they are common. TX11-12.

Further, the Arbitrator is not swayed by Respondent's reliance on minor inconsistencies concerning the dates of injury relayed to his medical providers. Petitioners in general can be imperfect historians but the record as a whole supports a finding that Petitioner repeatedly and credibly testified to the mechanism of injury in both situations that gave rise to his two accidents.

The Arbitrator viewed the video footage submitted by Respondent related to the July 28, 2017 injury and reviewed the testimony at trial. The Arbitrator finds it noteworthy that Petitioner testified to working a 10-hour shift which would have ended around 1am. Petitioner testified to his injury happening at the end of his shift. The video stops at midnight. Petitioner testified that his lunch pail is still visible at the end of the footage and that he brings his lunch pail home every day. Further, the Arbitrator notes a 15 and 19 minute gap in footage. In total, the lunch pail, the stopping of footage at midnight, and the 15 and 19 minute gaps in footage

suggest the video is not reliable evidence that would cause the Arbitrator to call Petitioner's credibility into question.

Accordingly, the Arbitrator finds that Petitioner sustained injuries that arose out of and in the course of his employment with Respondent.

Regarding Issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Section 6(c) of the Act states that a Petitioner must give notice to the employer as soon as practicable but no later than 45 days after sustaining an injury. See 820 ILCS 305/6(a). There is no question that Petitioner gave notice of both injuries within 45 days of their respective occurrence. Again, the Petitioner did not reasonably believe his initial injury was something to be concerned about as he seemingly chalked it up to everyday operator pain. Petitioner did not seek medical treatment and continued to work his full shift after his initial injury. Any defect or inaccuracy concerning notice of the June 30, 2017 accident is inconsequential, however (as the Arbitrator will discuss later) as Petitioner's second injury is the main cause of his current condition of ill-being. Even if the Arbitrator were to find Petitioner did not sustain an accident with regard to the June 30, 2017 shoulder injury the July 28, 2017 accident is the primary cause of Petitioner's ongoing shoulder-related issues. No medical expenses, TTD, or permanency is alleged (or herein awarded) as a result of the June 30, 2017 injury.

Petitioner testified that he did not report his July 28 2017 accident the same day as it was late, and nobody was around. He reported it the following week and sought medical treatment.

Accordingly, the Arbitrator finds that timely notice of his accidents was given by Petitioner.

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

Based on the totality of the evidence adduced at trial, including the Petitioner's testimony, medical treatment, and Respondent's Section 12 examination, the Arbitrator finds Petitioner's current condition of ill-being is related to his accidents – primarily, the July 28, 2017 accident.

The record demonstrates that Petitioner did not suffer from any ongoing shoulder issues which required medical intervention. Petitioner felt a shoulder "pop" on June 30, 2017 but didn't' seek medical treatment and continued to work. Petitioner sought regular medical treatment after his July 28, 2017 incident.

Dr. Panchal, Petitioner's treating surgeon, stated his incidents likely caused a partially torn rotator cuff and impingement syndrome in the shoulder. Dr. Karlson, the Section 12 examiner, further states that while a rotator cuff tear was not viewed during surgery, that Petitioner's tendonitis and impingement was at least partially caused by the alleged injuries. Throughout his treatment and even

with the Section 12 examiner, Petitioner's purported mechanism of injury remained consistent.

Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his injuries.

Regarding Issue (J), whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges, the Arbitrator finds as follows:

Having found in favor on the issues of accident and causation and noting that there is no evidence in the record supporting a finding to the contrary, the Arbitrator finds that the medical treatment received by Petitioner was reasonable and necessary. Further, the Arbitrator awards payment of the medical bills to Petitioner pursuant to Sections 8(a) and 8.2 of the Act. The six unpaid medical bills in the record from Lake Cook Orthopedics, Open Advanced MRI, ATI physical therapy, Illinois Bone and Joint, Tri-County Emergency Physicians, and Integrated Imaging Consultants are awarded to Petitioner pursuant to Section 8(a) and the medical feel schedule in Section 8.2. of the Act.

Regarding Issue (K), concerning the temporary benefits in dispute, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner continued to work in some capacity through October 12, 2017 and awards TTD for the period of October 13, 2017 through May 20, 2018. The Arbitrator finds that Petitioner attempted to return to work after that but was unable to as of May 23, 2018 through November 21, 2018 when he was deemed to reach MMI.

Petitioner acknowledged that he did not attempt to seek work within his permanent restrictions until about a year later and is claiming maintenance from November 1, 2019 to February 18, 2020 when he was able to secure employment. Petitioner met with vocational expert, Sue Entenberg, on August 9, 2019. No job logs were submitted into evidence. Petitioner testified that he looked for jobs and called potential employers from his phone, but no further detail was given.

The Arbitrator does not find that Petitioner is entitled to maintenance benefits as the record does not reflect that he performed a good faith job search for the maintenance benefit period alleged. Further, as the Arbitrator will discuss below, it is not clear from the record that Petitioner was unable to return to work as a pressman with Respondent.

Accordingly, the Arbitrator awards TTD from October 13, 2017 through May 20, 2018 and May 23, 2018 through November 21, 2018.

Regarding Issue (L), the nature and extent of the injury, the Arbitrator finds as follows:

Section 8.1(b) of the Act states, "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."

Regarding factor (i), Dr. Karlson provided an AMA rating of 5% of the arm and 3% of the person as a whole. This factor is afforded moderate weight.

Regarding factor (ii), the occupation of the injured employee, the Arbitrator notes that Petitioner worked as a press operator for 30 years and that he may be required to lift up to 50lbs and 30lbs to shoulder length. Dr. Panchal's records note that Petitioner sought to be restricted from working a one-man press and asked that he be restricted to only working a two-man press. Petitioner acknowledged that the lifting requirements for a one man or two-man press were not different. There is some evidence in the record of self-limiting on the part of Petitioner. Petitioner did not return to work as a pressman for Respondent but did not submit any job logs showing he was unable to return to other employers as a pressman. This factor is given substantial weight.

Regarding factor (iii), Petitioner's age, the record shows Petitioner was 54 years old at the time of his injuries in 2017. The Petitioner is of somewhat advanced working age. This factor is given some weight.

Regarding factor (iv), the employee's future earning capacity, despite Susan Entenberg's testimony that Petitioner suffered a loss of future earning capacity, the record shows that Petitioner is making more at his new job, inclusive of overtime.

Regarding factor (v), evidence of disability corroborated by the medical records, the record shows Petitioner was given permanent restrictions as mentioned above. He does not take any medications currently and has not seen Dr. Panchal since his last visit in November of 2018.

Accordingly, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 17.5% loss of use of the person as a whole.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC009505
Case Name	Tom Snyder III v. Azcon Metals
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0329
Number of Pages of Decision	15
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	Michael Rusin, R Mark Cosimini

DATE FILED: 7/15/2024

/s/ Raychel Wesley, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TOM SNYDER, III,

Petitioner,

vs. NO: 20 WC 09505

AZCON METALS,

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 the nature and extent of Petitioner's permanent disability as well as whether Respondent is entitled to credit the prior amputation payment against the §8(d)2 award, 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. Permanent Disability

The Arbitrator provided the requisite §8.1b analysis and concluded Petitioner sustained 65% loss of use of the person as a whole. While the Commission agrees with the Arbitrator's analyses of the individual factors, including the Arbitrator's recitation of the relevant facts as well as the weight accorded each factor, we reach a different result as to Petitioner's ultimate permanent disability. Specifically, while the Commission agrees Petitioner sustained a significant injury, the Commission finds the §8.1b factors establish a 45% loss of use of the person as a whole. The Commission concludes this corresponds to the evidence demonstrating Petitioner is a very young individual who suffered a life-altering injury that resulted in a loss of trade, but who nonetheless remains capable of heavy, physically-demanding work at a wage commensurate with his pre-accident earnings.

II. Credit for Amputation Payment

The parties stipulated Respondent paid amputation benefits of $97,010.30, representing 100% loss of Petitioner's right foot under §8(e)11. ArbX1. In dispute was whether Respondent can apply that amount toward the §8(d)2 award. The Arbitrator determined credit was not permissible. The Commission reaches the same conclusion. We write separately to detail our analysis.

At the outset, the Commission observes immediate payment of "statutory amputation benefits" is not expressly mandated in the Act but rather is a judicial construction dating back to *Lester v. Industrial Commission*, 256 Ill. App. 3d 520, 523 (1st Dist. 1993):

> Applying the above statutory construction principles to the statute, we find that the legislature intended that individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment. Such a result is consistent with the legislature's intent because prompt payment alleviates the possibility that an employee will be faced with unnecessary financial burdens. Requiring immediate payment is not unfair to the employer because statutorily it would have to pay the amount owed at some point in time. It is consistent with the purpose of the Act to require the amount owed to be paid promptly. The employer can pay the amount owed immediately since section 8(e) clearly sets forth the compensation an employer is obligated to pay. As such, it is unreasonable that an employee should have to wait for a judgment to be entered before receiving the compensation clearly owed.

As indicated above, Respondent made prompt payment of benefits under §8(e). The Commission notes, however, Respondent's statutory amputation benefit payment was made under the incorrect section and therefore used the wrong number of weeks. Respondent paid 167 weeks of benefits, representing 100% loss of the right foot under §8(e)11. However, the March 20, 2020 operative report reflects Dr. Anna Miller performed a "right trans-tibial amputation (location: mid-tibia)" (PX3, Emphasis added), and §8(e)12 specifically states where the injury "results in the amputation of a leg below the knee, such injury shall be compensated as loss of a leg." *820 ILCS 305/8(e)12*. Given Petitioner underwent a below-knee amputation, the proper statutory amputation payment is 100% loss of the right leg, or 215 weeks.

Turning to the question of credit, the Commission's research reveals an absence of appellate precedent on this specific issue. As such, we begin our analysis by considering the interplay between §8(e) and §8(d)2. We first observe the sections contain seemingly contradictory language. As the Arbitrator indicated, §8(d)2 states, "Compensation awarded under this subparagraph 2 shall not take into consideration injuries covered under paragraphs (c) and (e) of this Section and the compensation provided in this paragraph shall not affect the employee's right to compensation payable under paragraphs (b), (c) and (e) of this Section for the disabilities therein covered." *820 ILCS 305/8(d)2* (Emphasis added). Yet, as Respondent emphasizes, §8(e) specifically precludes an additional award beyond the specific loss: "…but shall not receive any compensation under any other provisions of this Act." *820 ILCS 305/8(e)* (Emphasis added). Directing our attention to *General Electric Co. v. Industrial Commission,* 89 Ill. 2d 432 (1982),

and *Payetta v. Industrial Commission*, 339 Ill. App. 3d 718 (2nd Dist. 2003), Respondent argues the §8(e) exclusion should be applied to §8(d)2 in the same manner the courts have applied it to §8(d)1. The Commission emphasizes, though, §8(d)1 expressly prohibits simultaneous benefits under §8(e):

> 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 66-⅔% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. *820 ILCS 305/8(d)1* (Emphasis added).

In the Commission's view, the exclusivity provisions in §8(d)1 and §8(e) complement each other, and it was the interaction between those sections that was addressed in *Payetta*:

> The payments made by respondent were made promptly in accordance with the demands for statutory loss of a member under section 8(e). *820 ILCS 305/8(e)* (West 1994). The framework of the Act calls for prompt payment for loss of a member and crediting the complying employer if the employee later decides to seek compensation under section 8(d)(1). (Citation) Indeed, the rationale for penalizing an employer who does not promptly pay a scheduled award is based on the fact that the employer would be entitled to a credit if the employee later seeks an award for wage differential. (Citation) *Payetta*, 339 Ill. App. 3d at 723 (Emphasis added).

To be clear, there is no such exclusion in §8(d)2. As such, the Commission finds Respondent's reliance on *General Electric* and *Payetta* is unavailing.

Petitioner, in turn, relies on *Beelman Trucking v. Illinois Workers' Compensation Commission*, 233 Ill. 2d 364 (2009), to argue credit was properly denied. The Commission finds *Beelman Trucking* is distinguishable. We note *Beelman Trucking* addressed a claimant who sustained injuries to all four limbs in a single accident: right arm amputation above the elbow, as well as paralysis in both legs and in the left arm below the shoulder. At issue was whether the claimant could recover scheduled losses of his arms in addition to the statutory permanent total disability under §8(e)18 for his legs. Here, Petitioner sustained a single crush injury to his foot; he underwent emergency amputation of his first four toes in an attempt to save his foot, but within hours, it was determined the foot was not salvageable and the trans-tibial amputation was done the next day. Therefore, contrary to Petitioner's argument, this is not a situation where Respondent paid the scheduled foot amputation benefits and "subsequent treatment required a subsequent amputation below the knee." Petitioner's Response, p. 13. Therefore, the Commission finds Petitioner's reliance on *Beelman Trucking* to be similarly unavailing.

The Commission recognizes that Respondent acted in good faith and promptly made what it considered the appropriate statutory amputation payment. While it may be anticipated, at first

blush, that Respondent would be permitted to credit that payment against whatever permanence award was ultimately entered, the language of §8(d)2 lacks the exclusion provision which makes that possible. The Commission finds §8(d)2 does not permit an offset for the previously paid amputation benefits. As such, the Commission finds Respondent is not entitled to credit the §8(e) payment against the award of 45% loss of use of the person as a whole under §8(d)2.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 15, 2023, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses detailed in Petitioner's Exhibit 10, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $363.57 per week for a period of 225 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 45% loss of use of the person as a whole.

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 $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

July 15, 2024

/s/ *Raychel A. Wesley*

RAW/mck

O: 5/22/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC009505
Case Name	Tom Snyder III v. Azcon Metals
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	David Galanti
Respondent Attorney	R. Mark Cosimini, Michael Rusin

DATE FILED: 3/15/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 14, 2023 4.70%

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tom Snyder, III
Employee/Petitioner

v.

Azcon Metals
Employer/Respondent

Case # **20** WC **009505**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **1/27/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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? **Is Respondent entitled to a credit for the statutory loss payment made under Section 8(e)11 of the Act against Petitioner's entitlement to permanent partial disability benefits under Section 8(d)2 of the Act?**
O. ☐ Other _____

FINDINGS

On **3/19/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,509.40**; the average weekly wage was $**605.95**.

On the date of accident, Petitioner was **20** 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 $**17,438.31** for TTD, $**0** for TPD, $**42,822.94** for maintenance, and $**0** for other benefits, for a total credit of $**60,261.25**.

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

ORDER

Respondent shall pay the medical expenses outlined in Petitioner's Exhibit 10, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule.

Respondent shall pay Petitioner the sum of $**363.57**/week for a period of **325** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **65%** loss of Petitioner's body as a whole.

The Arbitrator finds that Respondent **is not** entitled to a credit for the statutory loss payment made under Section 8(e)11 of the Act against Petitioner's entitlement to permanent partial disability benefits.

Respondent shall pay Petitioner compensation that has accrued from **1/13/21** through **1/27/23**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Arbitrator Linda J. Cantrell **MARCH 15, 2023**

STATE OF ILLINOIS)
) SS
COUNTY OF MADION)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARIBTRATION DECISION

TOM SNYDER, III,
Employee/Petitioner,
v.
AZCON METALS,
Employer/Respondent.

Case No.: 20-WC-009505

FINDINGS OF FACTS

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 27, 2023. The parties stipulate that Petitioner sustained accidental injuries on 3/19/20 that arose out of and in the course of his employment with Respondent and that Petitioner's injuries are causally connected to the work accident. Respondent stipulates it is liable for payment of outstanding medical expenses from BJC Home Medical Equipment, City of Alton, and England & Company. The parties stipulate Petitioner is entitled to temporary total disability benefits from 3/20/20 through 1/14/21, representing 43 weeks, and maintenance benefits from 1/15/21 through 1/26/23, representing 106 weeks. The parties stipulate that all TTD and maintenance benefits have been paid. The parties further stipulate that Respondent is entitled to a credit for TTD benefits paid in the amount of $17,438.31 and maintenance benefits paid in the amount of $42,822.94.

The issues in dispute are medical expenses, whether Respondent is entitled to a credit of $97,010.30 for a statutory loss payment made under Section 8(e)11 of the Act against Petitioner's entitlement to permanent partial disability benefits, and the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 20 years old, single, with no dependent children at the time of accident. Petitioner was employed by Respondent as a switchman for 11 months prior to his undisputed accident on 3/19/20. He testified that on that date his right foot got crushed between two railcars. He was transported to Barnes-Jewish Hospital where he underwent emergent surgery involving amputation of four toes. Petitioner's right foot was amputated the following day.

Petitioner underwent a second functional capacity evaluation in December 2021. On 5/9/22, Dr. Grover placed Petitioner on permanent restrictions of full-time work that includes

standing, walking, reaching, gripping, bending, and sitting; frequent ladder climbing and squatting; stair climbing using handrails; stance, time, gait deviations; frequent lifting up to 65 pounds; and occasional lifting up to 95 pounds. Petitioner testified he can work full-time within the permanent restrictions. He testified that Respondent cannot accommodate his restrictions. Petitioner stated he had to climb on and off moving railcars while working for Respondent which he can no longer do.

Petitioner participated in vocational rehabilitation with Tim Kaver who recommends a restraining program. Petitioner testified he does not want to pursue retraining and intends to find employment in HVAC or a position in the construction industry, which were positions identified by Mr. Kaver that he could perform. He agreed that these positions would require him to traverse uneven ground but felt he could do the job as it is slower paced than the train yard he worked in for Respondent. He did not perform a job search with Mr. Kaver.

Petitioner testified that due to his right foot amputation he is no longer able to run. He has a minor lack of endurance that worsens as the day progresses. He can walk on a flat, level surface well, but has difficulty walking on uneven surfaces and easily loses his balance. He testified he stumbles and loses his balance and has to catch himself often. Petitioner testified he fatigues easily with stair climbing and is more methodical when using stairs. He drives with his left foot most of the time.

MEDICAL HISTORY

Petitioner was transported to Barnes-Jewish Hospital immediately following the accident. (PX1) An x-ray of the right tibia, fibula, foot, and ankle revealed: (1) degloving injury of right foot; (2) intra-articular fracture and subluxation at 1st metatarsophalangeal joint with dislocation of interphalangeal joints of great toe and fracture of great toe tuft; (3) distal phalanx fracture of 2nd toe; (4) distal phalanx fracture of 3rd toe; (5) dislocation of interphalangeal joint of 4th toe; (6) dislocation of interphalangeal joint of 5th toe; and (7) 4th metatarsal shaft fracture. He was diagnosed with a right mangled foot and underwent an excisional debridement and irrigation of skin, subcutaneous tissue, muscle, and bone; amputation of the 1st through 4th toes at the MTP joints; and placement of negative pressure wound therapy.

Due to the severity of the crushing injury, Petitioner underwent a medical amputation below the right knee on 3/20/20, specifically a right transtibial amputation at the mid-tibia.

Petitioner was discharged from Barnes-Jewish Hospital on 2/23/20 and continued to receive post-operative care with various providers at Washington University Orthopaedic Surgery Center for Advanced Medicine. In July 2020, Petitioner was fitted for a transtibial prosthetic. He was admitted at The Rehabilitation Institute of St. Louis for gait training from 9/1/20 through 9/9/20. Upon discharge, Petitioner underwent formal physical therapy and work hardening at Athletico.

On 1/8/21, Petitioner underwent a Functional Capacity Evaluation (FCE) at Athletico. His performance was found to be consistent and he demonstrated a functional ability to perform in the heavy physical demand level. However, his overall functional ability was limited due to

decreased tolerance to prolonged standing and walking on even and uneven surfaces. While he displayed prolonged walking/standing on a frequent basis overall, the longer duration of standing/walking was 12 minutes. He required multiple rest breaks due to break down of gait mechanics throughout the evaluation. It was felt he would benefit from rest breaks every 10 to 15 minutes. Petitioner demonstrated a functional ability to lift up to 100 pounds occasionally and 75 pounds frequently, with peak push force of 145 pounds and peak pull force of 136 pounds. He demonstrated standing/walking and squatting on a frequent basis and kneeling, stair climbing, static standing, walking on uneven surfaces, and ladder climbing occasionally. There were no functional limitations with reaching, gripping, bending, or sitting.

On 1/13/21, Petitioner was placed at maximum medical improvement by Dr. Anna Noel Miller at Washington University Orthopaedic Surgery Center for Advanced Medicine. Dr. Miller prescribed permanent restrictions indicating Petitioner could perform at a heavy physical demand level, but he should take breaks every 10 to 15 minutes.

Petitioner continued to treat with Dr. Prateek Grover at Washington University Neuro Rehab Center for Advanced Medicine. On 11/23/21, Petitioner reported he felt better than he did in January when he underwent the FCE. Dr. Grover noted Petitioner was wearing his prosthetic 12 to 14 hours per day and walking 60 to 80% of the time. Dr. Grover noted Petitioner walked with good cadence, equal step length, and an adequate base of support. Petitioner was stable on turns and demonstrated a consistent heel strike. He noted Petitioner's shoulder and pelvis leaned to the non-prosthetic side when standing.

In June 2021, Petitioner underwent a vocational rehabilitation evaluation with Tim Kaver of England Company Rehabilitation Services. Petitioner's self-described physical limitation was 3-hour limit standing, but he "believes he will be able to stand up to 8 hours when he receives an improved fit of his prosthetic". Mr. Kaver reported Petitioner could qualify as a trainee in numerous careers including, auto aftermarket sales, engineering technician, machine operator, machinist, CNC operator, computer repair technician, boat motor/small engine repair technician, and medical equipment repair technician. Petitioner expressed an interest in becoming an arborist. Despite concerns about climbing, he felt he would be able to safely perform the work activities of an arborist including climbing.

On 12/17/21, Petitioner underwent a second FCE at Athletico. Petitioner reported that his pain level was almost nonexistent with the new prothesis. He demonstrated an ability to perform full-time work within the heavy physical demand level, including an ability to perform 65% of the job duties of a switchman. It was determined he could lift up to 95 pounds occasionally and 65 pounds frequently. Petitioner displayed difficulty with lower-level work secondary to prosthetic limb mechanics limiting deep squatting ability. He displayed walking/standing ability on a constant basis and ladder climbing, stair climbing, and squatting frequently. He had no functional limitations with reaching, gripping, bending, and sitting. It was noted that since the FCE in January, Petitioner received another socket for his prosthetic limb which fit a lot better. He reported some soreness in his quads and hamstrings. Petitioner stated he was able to walk a lot better with the new prosthesis and wanted his restrictions relaxed so he could look for more employment opportunities.

On 5/9/22, Dr. Grover prescribed permanent restrictions of full-time work that includes standing, walking, reaching, gripping, bending, and sitting; frequent ladder climbing and squatting; stair climbing using handrail with stance time gait deviations; frequent lifting up to 65 pounds; and occasional lifting up to 95 pounds. Dr. Grover noted that Petitioner's capacity for work could change overtime and should be determined in the context of job specifications.

In November 2022, Dr. Grover noted Petitioner was using his prosthetic for ADL and mobility at home, in the community when working on cars, recreationally when walking 1 to 2 times a week for long distances, driving with his left leg and regular foot pedal, and vocationally he was deciding to return to work. Dr. Grover noted that with the appropriate prosthetic, Petitioner had the ability for unlimited community mobility with variable cadence on uneven terrain.

CONCLUSIONS OF LAW

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

Respondent stipulates it is liable for payment of outstanding medical expenses from BJC Home Medical Equipment, City of Alton, and England & Company. Petitioner submitted outstanding medical expenses from Washington University Physicians - $151.00; BJC Home Medical Equipment - $108.89; City of Alton - $1,477.17; and Tim Kaver - $2,716.00. (PX10)

Based on the stipulation of the parties as to accident and causal connection, and the lack of evidence that said outstanding medical expenses are unreasonable or unnecessary, Respondent shall pay the medical expenses outlined in Petitioner's Exhibit 10, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule.

Issue (L): What is the nature and extent of Petitioner's injury?

It is undisputed Petitioner sustained accident injuries to his right foot that resulted in a medical amputation at the mid-tibia. The parties stipulate that Respondent paid Petitioner a statutory loss payment of $97,010.30 under Section 8(e)11 of the Act, using a stipulated minimum statutory amputation rate of $580.90. Petitioner waived his right to an award under Section 8(d)1 of the Act. The Arbitrator now analyzes the remaining issue of the nature and extent of Petitioner's injury.

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

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

(ii) **Occupation**: As a result of the right foot amputation, Petitioner was unable to return to his pre-accident employment with Respondent. Dr. Grover placed Petitioner on permanent restrictions of full-time work that includes standing, walking, reaching, gripping, bending, and sitting; frequent ladder climbing and squatting; stair climbing using handrail with stance time gait deviations; frequent lifting up to 65 pounds; and occasional lifting up to 95 pounds. Dr. Grover noted that Petitioner's capacity for work could change overtime and should be determined in the context of job specifications. Petitioner testified he does not desire to undergo retraining as recommended by Mr. Kaver and intends to obtain employment in HVAC or the construction industry. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 20 years old at the time of accident and 23 years old at the time of arbitration. He is a young individual and must live and work with his disability for a significant number of years. The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: Petitioner was not able to return to his pre-accident employment with Respondent due to his injuries. Despite the permanent restrictions recommended by Dr. Grover, Petitioner testified he intends to obtain employment in HVAC or the construction industry which he believes he is capable of performing. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of the undisputed accident, Petitioner was diagnosed with a mangled right foot and underwent two surgeries, including an excisional debridement and irrigation of skin, subcutaneous tissue, muscle, and bone; amputation of the 1st through 4th toes at the MTP joints; and ultimately a right transtibial amputation at the mid-tibia. Petitioner was fitted with a prosthetic limb. Dr. Grover prescribed permanent restrictions of full-time work that includes standing, walking, reaching, gripping, bending, and sitting; frequent ladder climbing and squatting; stair climbing using handrail with stance time gait deviations; frequent lifting up to 65 pounds; and occasional lifting up to 95 pounds. Dr. Grover noted that Petitioner's capacity for work could change overtime and should be determined in the context of job specifications. He opined that with the prosthesis, Petitioner had the ability for unlimited community mobility with variable cadence on uneven terrain.

Petitioner testified he is no longer able to run. He has a minor lack of endurance that worsens as the day progresses. He can walk on a flat, level surface well, but has difficulty walking on uneven surfaces and easily loses his balance. He testified he stumbles and loses his balance and has to catch himself often. Petitioner testified he fatigues easily with stair climbing and is more methodical when using stairs. He drives with his left foot most of the time. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 65% loss of his body as a whole, under Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 1/13/21 through 1/27/23, and shall pay the remainder of the award, if any, in weekly payments.

Issue (N): Is Respondent entitled to a credit for the statutory loss payment made under Section 8(e)11 of the Act against Petitioner's entitlement to permanent partial disability benefits?

The parties stipulate that Respondent paid $97,010.30 pursuant to Section 8(e)11 of the Act for the statutory loss of Petitioner's right foot. The amount represents 167 weeks at a stipulated statutory minimum rate for amputations of $580.90. Respondent does not dispute that Petitioner is entitled to compensation under both Sections 8(e) and 8(d)2 of the Act; however, Respondent claims it is entitled to a credit for the statutory loss payment made under Section 8(e)11 of the Act against any permanent partial disability benefits awarded under Section 8(d)2.

Petitioner suffered not only the complete loss of his right foot, which was amputated mid-tibia, but his permanent restrictions prevent him from returning to his pre-accident employment, thereby entitling him to permanent partial disability benefits under Section 8(d)2 of the Act. The Arbitrator notes Petitioner waived his right to compensation under Section 8(d)1 of the Act.

The only provision of Section 8(e) that addresses credits is 8(e)17 which provides Respondent is entitled to a credit for all *prior* losses or partial losses of any member under Section 8(e) which occurred before the accident for which he claims compensation.

Section 8(d)2 provides in part, "Compensation awarded under this subparagraph 2 shall not take into consideration injuries covered under paragraphs (c) and (e) of this Section and the compensation provided in this paragraph shall not affect the employee's right to compensation payable under paragraphs (b), (c) and (e) of this Section for the disabilities therein covered. The plain language of Section 8(d)2 states that any recovery under 8(e) is to have no effect on an award under 8(d)2, and vice versa. Allowing Respondent to receive a credit for the 100% statutory loss payment under Section 8(e) against the Section 8(d)2 award herein, directly affects Petitioner's right to compensation for the statutory loss of his right foot. Section 8(d)2 specifically directs the Arbitrator to not take into consideration injuries covered under Section 8(e).

The Commission has previously held that a Respondent is not entitled to a credit for a 100% statutory loss payment of a finger against a concurrent award under Section 8(e) where the same accident caused traumatic carpal tunnel syndrome to the hand. The Commission has also affirmed this Arbitrator's Decision in finding a Petitioner is entitled to concurrent awards under Sections 8(e)18 and 8(d)2, which does not result in a double recovery to Petitioner. The Arbitrator finds the same analogy applies to the present case as there is no windfall or double recovery by allowing Petitioner to recover a 100% statutory loss payment to his right foot, and an 8(d)2 award for his inability to return to his pre-accident employment due to his permanent

restrictions. The Arbitrator finds that the 100% statutory loss payment falls far short of addressing the full scope of Petitioner's injuries from the accident and denies Respondent's entitlement to a credit of the Section 8(e) statutory loss payment against the 8(d)2 award herein.

Arbitrator Linda J. Cantrell

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC034686
Case Name	Teresa Mroczko v. Janitorial Services Inc
Consolidated Cases	
Proceeding Type	***Remand from the Circuit Court***
Decision Type	Commission Decision
Commission Decision Number	24IWCC0330
Number of Pages of Decision	11
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Matthew Belcher, Jordan Browen
Respondent Attorney	Craig Bucy

DATE FILED: 7/15/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresa Mroczko,

Petitioner,

vs. No. 12 WC 34686

A & R Janitorial Services, Inc.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court. The Circuit Court reversed the Commission's Decision dismissing the law firm of Aleksy Belcher's petition for review for being untimely. The Circuit Court remanded the matter to the Commission "to review the Arbitrator's Order of January 24, 2022 approving the $1.00 settlement contract and denying Aleksy Belcher's Petition for Attorney's Fees on the merits."

Following the Order of the Circuit Court, Aleksy Belcher promptly brought before the Commission a Motion on the Merits of Movant's Petition for Attorney Fees. Respondent brought a Motion to Dismiss Respondent from Petition for Attorney's Fees filed by Aleksy Belcher. On April 9, 2024, the parties argued their respective motions before Commissioner Stephen Mathis. Also present was Petitioner's current workers' compensation attorney, the law firm of Costa Ivone.

The Commission hereby complies with the Order of the Circuit Court and addresses both motions before us. The matter before us stems from multi-case civil litigation arising from a work injury sustained by Teresa Mroczko (Petitioner). Although a workers' compensation claim was filed, it was never tried before the Commission. Instead, multiple proceedings were brought in the Circuit Court. On judicial review, certain issues went up to the Illinois Supreme Court, which found Petitioner's third-party negligence action filed by Aleksy Belcher, Petitioner's first

attorney, was properly dismissed as untimely.[1] The Supreme Court further found the Circuit Court properly dismissed Petitioner's petition to intervene[2] in Respondent's timely-filed third-party subrogation action under section 5(b) of the Act.

Ultimately, Respondent, by stepping into Petitioner's shoes, obtained an $850,000.00 settlement in the third-party action. After deducting the workers' compensation benefits paid to Petitioner, and Respondent's attorney fees and costs, a balance remained. Respondent did not remit the balance to Petitioner, as the workers' compensation claim was still pending. Petitioner then sued Respondent for conversion (theft). The Circuit Court in the conversion action granted Respondent's motion for summary judgment and denied Petitioner's cross-motion for summary judgment. Shortly thereafter, on November 19, 2019, the parties entered into a global settlement, a material part of which was an approval of a $1.00 settlement contract by the Commission. To that end, the global settlement agreement states, in pertinent part:

> "11. The Parties have calculated and determined the total sum of the workers' compensation benefits paid, costs, attorney's fees and reasonable expenses from the A&R Subrogation Matter is $576,262.81. The Parties dispute whether [Petitioner] has suffered any permanent injury.
>
> 12. The Parties have reached an agreement resolving the disbursement of the $850,000.00 settlement proceeds, the Conversion Matter, and any other issues that may exist between the Parties. Acuity Insurance will pay $273,737.19 on behalf of A&R and [Petitioner] will accept $273,737.19 in full and final settlement of the Conversion matter. In addition, Acuity Insurance will pay and [Petitioner] agrees to accept $1.00 as consideration to resolve the IWCC matter. These agreements are understood and do resolve all issues between [Petitioner] and Acuity Insurance/A&R."

Correspondingly, Petitioner agreed "to execute a $1.00 Contract in the IWCC Matter, and submit same for approval by the arbitrator and/or the IWCC."

As agreed, Petitioner and Respondent executed a $1.00 settlement contract, which provides: "Respondent to pay and petitioner to accept $1.00 plus net third party recovery $273,737.19 in full and final settlement of any and all claims under [the Act] for all accidental injuries allegedly incurred as described herein and including any and all [results and sequelae]. *** This settlement represents: full and final compromise of all rights under the Act in exchange for petitioner being paid all proceeds obtained by the employer from third parties ($850,000.00) less the workers' compensation benefits already paid (TTD $110,280.67) (Medical $262,982.14), civil expenses, attorney fees and costs incurred in said third party recovery ($203,000.00) total net recovery of $273,737.19 to petitioner plus $1.00." The settlement contract provides for zero workers' compensation attorney fees and costs.

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[1] The Supreme Court noted a malpractice lawsuit in that regard against Aleksy Belcher.
[2] Filed by a successor attorney.

Aleksy Belcher objected to the approval of the $1.00 settlement contract, as it sought to collect attorney fees in the non-litigated workers' compensation action. In January of 2020, Aleksy Belcher filed a petition for attorney fees, requesting an evidentiary hearing so that the Commission would "ascertain the value of the services performed by Aleksy Belcher on behalf of Petitioner and *** require Petitioner to compensate Aleksy Belcher upon settlement of her claim or by award from [the Commission]." Scheduling an evidentiary hearing was significantly delayed due to the Covid pandemic interrupting the Commission's normal operations.

On April 27, 2021, an Arbitrator held a hearing in the matter and received voluminous evidence. On January 24, 2022, the Arbitrator approved the settlement contract which included an order awarding zero attorney fees, explaining: "[S]ince the workers' compensation claim has settled for $1.00, there is no attorney's fee to [disburse] for settlement of the workers' compensation claim;" and "The settlement contract notes a net recovery from a third party in a civil case. This recovery is not before or under the jurisdiction of the Arbitrator."

In its brief on review, Aleksy Belcher alleged that Respondent deducted an excessive attorney fee. Aleksy Belcher further alleged that Petitioner's current workers' compensation attorney and her civil litigation firm: (1) colluded with Respondent to take "$45,000 in attorneys' fees from the [civil] settlement" under the guise of prosecuting a conversion action against Respondent; and (2) presented to the Commission a "misleading" $1.00 settlement contract, which the Arbitrator "mistakenly approved." Aleksy Belcher asked the Commission to "set aside the arbitrator's approval of the lump sum settlement order, reverse the arbitrator's finding that the real settlement of this case was $1, and remand this case to any arbitrator for a complete itemized accounting of the proceeds from the entire $850,000 settlement; as clearly, attorneys' fees and litigation costs were taken from the settlement by three law firms without any oversight, and without the necessary approval of the Commission." Following such accounting, Aleksy Belcher sought an award of attorney fees.

In its motion on remand, Aleksy Belcher asks: "This Commission should ascertain the value of the services performed by ALEKSY BELCHER, LLC on behalf of Petitioner and should require Petitioner to compensate ALEKSY BELCHER, LLC upon settlement of her claim or by award from this Honorable Commission. WHEREFORE, the law firm of ALEKSY BELCHER, LLC prays this Honorable Commission to spread this claim of record and conduct a hearing on the Merits of Movant's Petition for Attorney Fees."

Respondent counters:

> "4. A&R ultimately recovered $850,000.00 in a settlement of its subrogation lawsuit against [the civil defendants]. From such amount, A&R retained the amounts required to reimburse its own workers' compensation lien, its costs, and attorney fees, leaving the excess amount to be paid to [Petitioner] consistent with the provisions of Section 5(b).
>
> 5. [Petitioner] disputed the excess amount and filed a Complaint for Conversion in Circuit Court. Cross Motions for Summary Judgment were filed and the Court ruled in favor of A&R determining that the excess amount at the

time totaled $299,141.00. (Note that since A&R was continuing to make workers' compensation payments to [Petitioner] during the briefing, such excess amount was reduced to $273,737.19 at the time of the IWCC contract).

6. A&R then agreed to pay [Petitioner] and her attorneys the $273,737.19 amount from the subrogation settlement, resulting in a $1.00 contract to close out the workers' compensation matter."

Respondent argues that "the Commission lacks jurisdiction to order further payments by either the employer or injured worker." Respondent further "requests dismissal from the current proceedings, as the approved settlement contracts are a collateral matter to the Fee Petition and the Commission has no jurisdiction to overturn the same."

At the April 9, 2024, hearing before Commissioner Mathis, Aleksy Belcher argued: "[I]t's the position of Aleksy Belcher that we need to identify the correct amount of money that's in controversy; and the only way we do that is we look at this settlement, which was a total of $850,000, figure out where—what money went where." Aleksy Belcher continued:

"The employer has not paid their pro rata share. It took all of the costs and attributed them to the claimant. They will—they admit that that's what they did. That's improper; and we need to start over from the very beginning, figure out where this money was supposed to go.

In very broad strokes, this is a workers' compensation claim where the max fee is approximately $35,000. The people that filed the third-party claim wasn't because we blew any statute. [Petitioner] did not want to file the third-party case because she could not identify anyone else in the case. This has already been litigated. That case has been dismissed because the petitioner couldn't sue somebody. Should sue Rusin and Maciorowski's client, too, saying that they were engaged in fraudulent transfer. People are suing each other in this case.

My office didn't do anything wrong. We represented the client. She's—she eventually moved to a different law firm. The case settled for $850,000. Rusin Maciorowski, they filed a third-party case, and it's true they went all the way up to the Supreme Court. There were fights between the new lawyer for the claimant and Rusin's office. They prevailed in the Illinois Supreme Court, and they got to be in charge of the third-party case.

So the question before the Illinois Supreme Court was did the claimant's lawyer have the right to intervene in their 5(b) proceeding; and the Supreme Court said they don't have the right to intervene, that the employer is in charge of that cause of action.

A lawyer then settled that cause of action, as I mentioned, for $850,000; but Rusin and Maciorowski are entitled to their attorney's fees. No one is saying

> that they shouldn't be paid. The issue that's before the Commission is that there were separate—there were a large sum of costs that nobody has identified; but they will acknowledge that they didn't take their pro rata share but they charged the claimant for a hundred percent of the costs totaling hundreds of thousands of dollars.
>
> So from $850,000, the claimant walked away with $200,000, and we need to figure out where the rest of the money went and why it didn't pass through the Commission. All of this should have been approved by the Commission because all of this stems from—I know they filed in the Circuit Court, but their only right to file in the Circuit Court is because the Act provides them with that statutory cause of action. The Commission has jurisdiction over all of these numbers."

Aleksy Belcher also alleged that Costa Ivone took "$40,000 out of the settlement." Aleksy Belcher, who is no longer Petitioner's attorney, repeatedly purported to represent Petitioner, at one point saying: "You can't just take money from this lady." Aleksy Belcher concluded with:

> "There's $850,000. We need to figure out where all that money went, how Plaintiff's counsel walked away with $45,000 outside of the Commission. Outside of the dollar contracts, they got $45,000 without approval from the Commission. Rusin's office took 100 percent of the fees—100 percent of the costs and apportioned them to the claimant. They will admit that they did that despite the Act clearly stating in 5(b), 'Out of any reimbursement received by the employer pursuant to the Section the employer shall pay its pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim.' It says it right there in black-and-white language.
>
> So those costs need to be refunded to the Commission. This $45,000 needs to be refunded to the Commission. They need to be put into hold. Then once we know all—where all the money is, then we can sort out my quantum meruit petition for fees because the Arbitrator has already had a day-long hearing on a thousand pages' worth of work I did on this case until I was let go."

Respondent's counsel answered thusly on the merits and in support of its motion to be dismissed from Aleksy Belcher's petition for attorney fees:

> "Petitioner filed a workers' compensation claim, but she failed to file a civil personal injury complaint within the applicable statute of limitations. My client preserved its right by timely filing the subrogation lawsuit pursuant to Section 820 ILCS 305/5(b) of the Act.
>
> We prosecute our subrogation action and we sought recovery of all damages that would have been available to Petitioner had she timely filed against [the civil defendants].

During such prosecution of the subrogation claim, Petitioner became aware of our Section 5(b) lawsuit and sought to intervene in the same in order to take control, amend the complaint, and add new parties. The Circuit Court denied that request, and the Illinois Supreme Court affirmed such denial in A & R Janitorial versus Pepper Construction, 2018 IL 123220, which was decided 2018.

My client, Respondent, ultimately recovered $850,000 in a settlement of its subrogation lawsuit against [the civil defendants]. From that amount, we retained the amounts required to reimburse its own workers' compensation lien, costs and attorney's fees, leaving the excess amount to be paid to Petitioner consistent with the provision of Section 5(b).

Please note that in the subrogation matter Respondent is being treated as Petitioner because we stepped into her shoes as she failed to timely file/prosecute her claim. Accordingly, under the law, Respondent had the same rights and remedies as Petitioner. *Petitioner disputed this excess amount and filed a complaint for a conversion in Circuit Court. That matter was litigated. A complete copy of—breakdown of all fees and where they went were submitted, and the Circuit Court ruled in Respondent's favor in summary judgment. They found that at the time of the judgment the excess amount was $299,141*.

At that time, Respondent continued to make weekly payments to Petitioner; and by the time contracts were approved, such excess amount was reduced to $273,737.19. This is the amount that was tendered to Petitioner, her attorneys.

The [$1.00] contracts were approved at the Commission on January 24th, 2022, and a ruling finding no attorney's fees for Aleksy Belcher was issued on March 21 of 2022. Those contracts became final. Once those contracts became final, the Commission no longer has jurisdiction over Respondent or Petitioner pursuant to the Illinois Supreme Court case Alvarado versus Industrial Commission, 216 Ill.2d. 547. The Commission does, however, maintain primary jurisdiction over a pending fee petition. A settlement contract can be approved while a fee petition remains pending according to this Illinois Supreme Court case.

*** [I]t is Respondent's position that we should be dismissed from the matter as we have properly prosecuted our Section 5(b) lien, turned over all excess funds obtained to Petitioner; and after the settlement contracts became final, the Commission has not retained a jurisdiction over Petitioner or Respondent 20 days after the contracts were approved.

I would further indicate that Mr. Belcher's office is not a named party on record for purposes of standing in connection with appealing an approved settlement contract or a decision. If a settlement contract was approved or a decision was issued, Mr. Belcher would not be able to file any kind of appeal of

the same because he doesn't agree with the terms. He was fired by Petitioner. The only attorney who could file such a petition for review is the attorney of record at the time the contracts were approved. Accordingly, the contracts remain absolutely final, and the Commission lacks jurisdiction over Respondent as well as Petitioner. And the Alvarado case explicitly states that the purpose of the Act is to allow the timely resolution of issues. It is exactly on point with this case.

It again indicates that in the matter where a settlement contract is approved while a fee petition remains pending, the Commission loses jurisdiction over Respondent and Petitioner and solely retains jurisdiction over the two involved attorneys that are at the heart of the fee petition.

With respect to this case, Respondent would say that the dispute is between what fees are attributable to Costa Ivone and Mr. Belcher's office, and there is no dispute with respect to what fees are owed by Respondent as we have already tendered all appropriate fees to Petitioner and the Commission no longer has jurisdiction over us." (Emphasis added.)

Costa Ivone provided the following statement and argument:

"There's three actions in this case. There's a work comp claim, a subrogation claim, and then a conversion matter. See, Respondent was—wanted to retain a hundred percent of all their costs in this matter. That was at issue, which is why the conversion matter against Respondent was filed. Now, he's right, that was—they did win on summary judgment, and then there were appeals. Ultimately, there was a settlement agreement in that case on the conversion claim, which is where the number $273,737.19 comes from.

* * *

I just want to clarify because [Aleksy Belcher is] implying that my office did something that would be—could be construed as unethical, and that's not the case.

* * *

[W]hat I did is I attempted to negotiate attorney's fees, a split with Mr. Belcher, at one point offered him $15,000 to resolve his fee petition. I never received a response or a counter to that; and ultimately, we went to hearing. The hearing was April 27th, 2021, on the fee petition.

* * *

in front of Arbitrator Llerena.

* * *

At which time we did a fee petition hearing. We also presented signed settlement contracts. You'll see the settlement contracts are actually dated 2019.

* * *

[T]he contracts were signed years prior to the fee petition hearing, but we were never able to submit them because there was no agreement between my office and Belcher's office regarding attorney's fees.

So all of this information—Well, so anyway, we had the fee petition hearing April 27th where we gave the Arbitrator the contracts, and then she was going to render a decision.

Now, some time had passed. In fact, no party had heard anything on this case for months. I emailed both counsels February 24 of 2022—'Have either of you heard anything regarding the decision?'—to which I did not receive a response from either party.

On March 21st of 2022, my paralegal called the clerk for Arbitrator Llerena and was informed that a decision was actually rendered in this case. I then immediately emailed Arbitrator Llerena and cc'd all the parties on this email.

That email read, 'It has come to my attention that a decision was rendered in this case back in January. I have not received notice of such decision or a copy of same. Can you please send me a copy of this decision or let me know who I can contact to receive it? Thank you. Cc: Douglas B. Keane, Matthew Belcher.'

Later that day—Arbitrator Llerena entered the decision in CompFile later the same day. You'll see that the contracts were actually approved January 24th, 2022, the same contracts that were signed in 2019 that were submitted at the fee petition hearing that we had April 27th, 2021.

With respect to the claims, the fee that was split between my office and [Petitioner's civil litigation firm], that was paid out on a conversion claim. Okay? The Commission does not have any jurisdiction over a matter that is completely separate. 5(b) says it has to arise under the work injury—or the underlying cause of action. That cause of action was against [the civil defendant]. That's the third-party defendant. Our claim was against A & R Janitorial for a conversion of these funds and not tendering the funds over. The Commission does not have jurisdiction over that matter. And so we believe that Arbitrator Llerena correctly decided this the first time saying that they don't have—the Commission does not have jurisdiction and that no fees should be awarded."

We begin our analysis by noting that the Circuit Court directed the Commission "to review the Arbitrator's Order of January 24, 2022 approving the $1.00 settlement contract and

denying Aleksy Belcher's Petition for Attorney's Fees *on the merits*" (emphasis added). Accordingly, the Commission will not consider Respondent's argument that the Commission no longer has jurisdiction over Respondent, or Petitioner, or the $1.00 settlement contract. The Commission likewise will not address whether Aleksy Belcher has standing to dispute the $1.00 settlement contract. The Commission only finds that Respondent properly preserved these issues for judicial review, if any.

The Commission first reviews the Arbitrator's ruling that "[t]he settlement contract notes a net recovery from a third party in a civil case. This recovery is not before or under the jurisdiction of the Arbitrator." The Commission agrees and notes that Aleksy Belcher had every opportunity to assert an attorney fees lien (see Attorneys Lien Act, 770 ILCS 5/0.01 *et seq.*) or otherwise protect its attorney fees interest in the Circuit Court. Once the third-party (subrogation) action settled for $850,000.00, it became likely the workers' compensation claim would settle for $1.00. The conversion lawsuit further delayed the global settlement, which gave Aleksy Belcher more time to bring before the Circuit Court the issue of its attorney fees. Aleksy Belcher failed to do so, even though accounting of the deductions from the settlement money in the third-party action was at the heart of the conversion action. Accounting was performed and tendered to the Circuit Court, which approved it and granted Respondent's motion for summary judgment in the conversion action. The global settlement followed. The Commission has no jurisdiction over the third-party action, the conversion action or the global settlement. All the Commission can do is review the Arbitrator's approval of the $1.00 settlement contract and denial of attorney fees.

We now turn to the Arbitrator's approval of the $1.00 settlement contract and her ruling that "since the workers' compensation claim has settled for $1.00, there is no attorney's fee to [disburse] for settlement of the workers' compensation claim." The Commission agrees. The Commission has carefully reviewed the entire voluminous record and sees no basis upon which to invalidate the $1.00 settlement contract. Pursuant to the $1.00 settlement contract, there are no attorney fees to disburse. Because of the gravity of Aleksy Belcher's accusations, the Commission underscores that the Circuit Court in the conversion action approved Respondent's accounting and deductions and granted summary judgment in Respondent's favor. The Commission further notes that the record shows Petitioner's civil litigation firm reduced its attorney fees by more than half, to $45,000.00, of which it shared a portion with Petitioner's current workers' compensation attorney, Costa Ivone. Additionally, the civil litigation firm reimbursed Aleksy Belcher $6,344.48 for costs. Whatever legal or equitable claims Aleksy Belcher might have against Costa Ivone or Petitioner's civil litigation firm belong in the Circuit Court, as there are no attorney fees to disburse out of the $1.00 settlement contract.

Lastly, the Commission considers Respondent a necessary party, at least for the purposes of judicial review of our Decision and Opinion on Remand. The Commission therefore denies Respondent's Motion to Dismiss Respondent from Petition for Attorney's Fees filed by Aleksy Belcher.

IT IS THEREFORE ORDERED BY THE COMMISSION that Arbitrator's Order approving the $1.00 settlement contract and denying Aleksy Belcher's Petition for Attorney's Fees is affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Respondent from Petition for Attorney's Fees filed by Aleksy Belcher is denied.

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.

July 15, 2024
SJM/sk
o-6/5/2024
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC007107
Case Name	Lisa Alexakos (Widow of John Alexakos Deceased) v. Able Engineering
Consolidated Cases	17WC011444;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0331
Number of Pages of Decision	13
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Jasper

DATE FILED: 7/16/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0331

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

Lisa Alexakos (Widow of John Alexakos Deceased),

Petitioner,

vs. NO: 15 WC 007107

Able Engineering,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability, and permanent partial disability and being advised of the facts and law, affirms in part and reverses in part the Decision of the Arbitrator as stated below.

The Commission agrees with the award of permanent partial disability with regard to the right leg, however, disagrees with the Arbitrator's award of permanent partial disability with regard to Decedent, John Alexakos' (hereinafter "Decedent"), lumbar spine condition, as that condition had not reached maximum medical improvement prior to the Decedent's death.

Factual Background

On February 12, 2015, Decedent was placing a twelve-foot ladder at work, when he slipped, fell to the floor and the ladder fell on top of him. He was injured and was ultimately treated for his cervical and lumbar spine, and his right knee. PX 7.

After his initial treatment at Lake Forest Hospital Emergency Room and follow up with his primary care physician Dr. Demetrios Giokaris, (PX7, PX3) Petitioner sought treatment for his knee and spine conditions with Dr. Ellis Nam and Dr. Branko Prpa, respectively. PX5, PX1.

On March 7, 2015, Decedent was evaluated by and treated with Dr. Ellis Nam of Chicago Orthopedics for his right knee injury. He was diagnosed with a displaced fracture of the fibular head of the right knee. PX5, p.3-4. He was provided conservative care and was released from care with regard to the right knee on June 20, 2015. PX2, p.15.

On June 2, 2015, Decedent was evaluated by orthopedic surgeon, Dr. Branko Prpa for his lumbar and cervical spine complaints. PX1, p. 27-28. Dr. Prpa diagnosed Decedent with a midlevel L5-S1 disc herniation and cervical herniations at levels C5-6 and C6-7. PX1, p. 26. Dr. Prpa recommended addressing the lumbar spine prior to addressing the cervical spine. *Id*. After conservative treatment failed, Dr. Prpa preformed an L5-S1 decompression and fusion with cages on September 19, 2016. PX1, p. 6-7.

After the lumbar surgery was completed, Decedent's neck complaints were addressed. On October 25, 2016, cervical MRI revealed a C5-C6 moderate herniation with cord encroachment consistent with C6 radiculopathy. PX1. On November 23, 2016, a cervical EMG demonstrated C6 radiculopathy. PX1.

On November 29, 2016, Decedent was seen in follow-up for his spine complaints. Dr. Prpa noted low back nerve root irritation on the left L5-S1, which he thought was postoperative healing. Epidural steroid injections were discussed. Dr. Prpa opined both the lumbar and cervical injuries were a result of his work accident and prescribed cervical epidural injections. PX1, p. 21.

Decedent returned to see Dr. Prpa on January 10, 2017 with complaints of persistent back pain. Dr. Prpa thought it was post-operative healing. He noted that as a last resort a re-exploration of L5-S1 might need to be performed. PX1, p. 20.

On February 21, 2017, Decedent followed up with Dr. Prpa with left lower extremity pain. The CT scan demonstrated the implanted hardware was in excellent position. Dr. Prpa noted that "just to make sure they were not missing anything", an MRI would be obtained to look at the adjacent level. Decedent was noted to have an old anterior vertebral body fracture at L3-4 and an EMG with a minimally positive finding on the left L5-S1 nerve. Dr. Prpa noted that, "As a last resort, we might have to reexplore the L5-S1." Dr. Prpa noted there were issues with Decedent having multiple pain medication providers. Dr. Prpa noted the plan was to have Dr. Prpa be the sole provider of pain medications. Decedent was to return to see him again in one week. PX 1, p. 19.

On February 28, 2017, Dr. Prpa re-evaluated Decedent's low back. At that time, Dr. Prpa noted the MRI was wide open on the left at L5-S1. The foramen were patent and there was no evidence of disk extrusion. He thought the left lower extremity pain was possibly all postoperative healing. He noted there was "really nothing else to do". However, Dr. Prpa also noted that, "As the last resort, we will have to do a formal open procedure and trace out the nerve roots." He prescribed low dose Neurontin and scheduled Decedent for his cervical surgery. PX1, p. 18.

On March 27, 2017, Decedent underwent a C5-C7 two-level discectomy with fusion. The operative note indicated Decedent was already on MS Contin, an opioid, for pain from his previous back surgery and additional Fentanyl was prescribed at the time of discharge. PX1, p. 4-5.

Records from the Lake County Sheriff's Office confirm that on March 28, 2017, police responded to a call for assistance at Decedent's residence and found Decedent lying in his bed, unresponsive, blue, cold to the touch with rigor mortis. PX15, p.8.

An autopsy report revealed lethal levels of Fentanyl combined with Oxycodone and Valium and listed the cause of death as polysubstance toxicity status post "recent neck surgery" and "remote back surgery." PX16, p. 2.

Legal Analysis

Generally, an award of permanent partial disability (PPD) benefits serves as compensation for the diminishment of the employee's earning capacity caused by a work-related injury. Therefore, unpaid PPD payments ***accrued*** while the claimant was alive are payable to his estate. *Bell v. Illinois Workers' Compensation Comm'n*, 2015 IL App (4th) 140028WC. [Emphasis added]. Illinois Courts have repeatedly found that in order for a claimant to be entitled to permanent partial disability benefits for an injury he or she must have reached maximum medical improvement for the injury in question. See *Bell* at ¶17, *Nationwide Bank & Office Mgmt. v. Indus. Comm'n*, 361 Ill. App. 3d 207, 212, (2005) (no PPD as claimant did not reach MMI prior to death) and *Republic Steel Corp. v. Indus. Comm'n*, 26 Ill. 2d 32, 47, (1962) (benefits awarded as claimant reached MMI prior to death).

The Arbitrator relies upon Dr. Prpa's statement in his February 28, 2017 office note that there was "really nothing else to do" in determining Decedent had reached maximum medical improvement for the lumbar spine condition. However, the Arbitrator fails to note that during the same office visit, Dr. Prpa also stated, "As the last resort, we will have to do a formal open procedure and trace out the nerve root." PX1. Decedent was still receiving pain medication for his low back pain, and his physician had not declared him to be at maximum medical improvement.

After reviewing the evidence, the Commission finds that Petitioner failed to demonstrate Decedent had reached maximum medical improvement for his lumbar spine condition prior to his death, as such the award for permanent partial disability for this condition is hereby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 13, 2023, is reversed as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $926.23/week for 110 5/7 weeks, commencing on February 12, 2015 and continuing through March 27, 2017 as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the reasonable and necessary medical services received by Decedent pursuant to Section 8(a) and the medical fee schedule as provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $735.37/week for a further period of 32.25 weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused 15% loss of use of the right leg.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner/Decedent 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 $10,247.75. 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.

July 16, 2024
o: 5/21/2024
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC007107
Case Name	Lisa Alexakos (Widow of John Alexakos Deceased) v. Able Engineering
Consolidated Cases	17WC011444;
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Jasper

DATE FILED: 3/13/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 7, 2023 4.97%

/s/Gerald Napleton, 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

Lisa Alexakos, widow of John Alexakos, deceased, Case # **15** WC **7107**
Employee/Petitioner

v.

Able Engineering
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Waukegan**, on **10/24/2022**. 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **February 12, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,246.20**; the average weekly wage was $**1,389.35**.

On the date of accident, Petitioner was **47** years of age, married, with **3** dependent children.

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

Respondent shall be given a credit for all benefits previously paid.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**926.23**/week for **110 5/7** weeks, commencing **2/12/2015 through 3/27/2017** as provided in Section 8(b) of the Act. Respondent is entitled to a credit for TTD paid.

Medical benefits

Respondent shall pay for the reasonable and necessary medical services received by Petitioner pursuant to Section 8(a) and the medical fee schedule as provided in 8.2 of the Act.

Nature and Extent

Respondent shall pay Petitioner the sum of $**735.37**/week for a further period of 100 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused 20% loss use of a man as a whole. Respondent shall also pay Petitioner the sum of $**735.37**/week for a further period of 32.25 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 15% loss use of the right leg.

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/ Gerald W. Napleton *March, 9, 2023*

Signature of Arbitrator Date

DECISION OF ARBITRATOR
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

On February 12, 2015, Petitioner was a 47 year old stationary engineer who suffered an injury to his whole spine, right arm, right leg and right ankle when he slipped while placing a twelve foot ladder, fell to the floor, and the ladder fell on top of him. (PX7). Records received into evidence confirm Petitioner presented to Lake Forest Hospital on February 12, 2015 with "major trauma" complaining of neck pain, thoracic pain, low back pain with spasms to the left leg, right arm pain, right leg pain and right ankle pain due to a fall at work that day and a 12 foot ladder landed on him. (PX7).

While in the Emergency Department, x-rays were taken of the neck, thoracic and lumbar spine, along with the right leg and ankle. (PX1). Petitioner was given Dilaudid, Torodol, Hydrocodone and Valium during his stay. (PX7). Petitioner also underwent a CT scan of the lumbar spine which showed damage to the L2-S1 disc spaces and a straightening of the normal spinal lordosis. (PX7).

Petitioner was diagnosed with a fractured right fibula of the knee, cervical and back sprains, and a trunk injury; prescribed Valium, Ibuprofen, Norco and Zofran and a knee immobilizer; and instructed off work. (PX7).

On February 17, 2015, Petitioner was evaluated by his primary care doctor, Demetrios Giokaris, M.D. (PX3). Dr. Giokaris took a history confirming an injury at work on February 12, 2015 while "hanging a 50 lbs. ladder on a ladder rack." (PX3). Petitioner slipped and fell on his right side. (PX3). Dr. Giokaris noted cervical and lumbar spasms and right knee pain. (PX3). Petitioner was diagnosed with cervical and lumbar strains, lumbar radiculopathy, and a right knee injury. (PX3). Petitioner was prescribed MRIs of the low back and right knee, physical therapy, referred to Dr. Saoud Dabbah, and taken off work. (PX3).

A March 3, 2015 MRI of the lumbar spine revealed a disc protrusion at L5-S1 effacing the thecal sac along with disc bulges at L3-L4 and L4-L5. (PX3).

On March 7, 2015, Petitioner was evaluated by Dr. Ellis Nam of Chicago Orthopedics for evaluation of his right knee. After an examination and review of x-ray reports from the emergency room visit, Dr. Ellis recommended Petitioner continue to use the knee brace, additional x-rays, off work and referred Petitioner to a back specialist to treat his lumbar radiculopathy. (PX5). Petitioner was diagnosed with a displaced fracture of the fibular head of the right knee. (PX2). He was discharged from Dr. Ellis' care on June 20, 2015 for the right knee fracture. (PX2).

Petitioner was evaluated by Dr. Giokaris on April 17, May 4, and May 28, 2015 with consistent complaints of low back and cervical pain with radiculopathy, along with knee pain, and was eventually referred to an orthopaedic physician, Dr. Branko Prpa.

Petitioner initially presented to Dr. Prpa on June 2, 2015 complaining of neck and right arm pain, with numbness and tingling into the thumb and index finger, and low back pain with shooting pain down his right foot. (PX1). An exam revealed a positive straight leg raise without Waddell's signs. (PX1). Dr. Prpa reviewed the MRI films and noted a midlevel L5-S1 disc herniation to the right greater than the left. (PX1). Dr. Prpa recommended addressing the low back issues first before addressing the neck and prescribed a series of lumbar epidurals, with possible surgery. (PX1). A June 27, 2015 cervical MRI indicated a C6-7 protrusion with exaggerated cervical lordosis possibly due to muscle spasms. (PX2).

Petitioner returned to Dr. Prpa on October 20, 2015, complaining of radiating neck and lumbar pain. (PX1). Dr. Prpa noted large disc herniations at C5-C6 and C6-C7 based on his review of the cervical MRI, along with a right paramedian disc herniation at L5-S1. (PX1). Dr. Prpa diagnosed cervical and lumbar radiculopathy and prescribed Vicodin along with a lumbar discogram. (PX1).

After conservative measures failed and an April 22, 2016 discogram confirmed L5-S1 as the pain generator, Dr. Prpa preformed an L5-S1 decompression and fusion with cages on September 19, 2016. (PX1, PX6).

After the lumbar surgery, Petitioner's neck complaints were addressed. An October 25, 2016 cervical MRI revealed a C5-C6 moderate herniation with cord encroachment consistent with C6 radiculopathy. (PX1). A November 23, 2016 cervical EMG demonstrated C6 radiculopathy. (PX1). On November 29, 2016, Dr. Prpa noted the low back and cervical injuries were a result of his work accident and prescribed cervical epidural injections. (PX1).

On February 28, 2017, Dr. Prpa evaluated Petitioner's low back. (PX1). At that time, Dr. Prpa noted there was "really nothing else to do," other than prescribe pain medication. (PX1).

With regard to the neck, Petitioner underwent a C5-C7 two level discectomy with fusion on March 27, 2017 after failing "extensive nonoperative treatment." The operative note indicated Petitioner was already on MS Contin, an opioid, for pain from his previous back surgery and additional Fentanyl was prescribed at the time of discharge. (PX1).

Petitioner's wife, Lisa Alexakos, testified that after surgery, Petitioner was discharged home. She testified that she was with him until the early morning of March 28, 2017 when he went to sleep. Petitioner did not wake up from his sleep and died March 28, 2017.

Records from the Lake County Sheriff's Office confirm police responded to a call for assistance and found John Alexakos lying in his bed, unresponsive, blue, cold to the touch with rigor mortis. (PX16). Lisa Alexakos reported her husband took a prescribed Fentanyl patch and went to sleep in the early hours of March 28, 2017 and was found unresponsive later that morning. (PX15). An autopsy report revealed lethal levels of Fentanyl combined with Oxycodone and Valium and listed the cause of death as polysubstance toxicity status post "recent neck surgery" and "remote back surgery." (PX16).

At the time of his death, Petitioner left his widow, Lisa, and three children. At the time of the hearing, the ages of John Alexakos' children were Peter, 21, Evan, 20 and Gianna, 11.

Petitioner presented the testimony of Dr. Branko Prpa, a board certified orthopedic surgeon who attended medical school at the Mayo Clinic and did a combined neurosurgery orthopedic surgery fellowship at Cleveland Clinic, where he served as Chief Resident. (PX8, P. 4). Dr. Prpa testified Petitioner's low back and neck conditions, and the need for surgery, were related to the February 12, 2015 work accident. (PX8, P. 8-9, 11, 13).

Dr. Prpa testified the treatment for the neck and back was reasonable, necessary, and related to the February 12, 2015 work accident. (PX8, P. 14). At no time did he note any malingering or secondary gain issues. (PX8, P.14).

Respondent presented the testimony of its §12 examiner, Dr. Ryon Hennessy. (RX1). Dr. Hennessy confirmed that Petitioner provided a history of falling while placing a ladder and reported injuries to his lumbar and cervical spine along with his right knee and ankle. (RX1, P. 9). Dr. Hennessy agreed with Dr. Prpa's recommendation for a lumbar fusion. (RX1, P. 10, 16). On cross examination, Dr. Hennessy agreed that if there were records he was not provided, it could change his opinion. (RX1, P. 15). In this case, Dr. Hennessy was not provided either operative report of the cervical and lumbar surgeries, the cervical MRI of October 25, 2016, the November 23, 2016 EMG, autopsy report nor prescription records. (RX1, P. 15-18, 27). Dr. Hennessy confirmed that prior to the February 12, 2015 accident, Petitioner was working full duty without any neck pain or receiving treatment. (RX1, P. 23). At no time did he note any Waddell signs nor malingering/secondary gain issues. (PX1, P.25). Nevertheless, Dr. Hennessy agreed that the narcotics prescribed for Petitioner's work related back injury would have contributed to his death. (PX1, P.30).

Conclusions of Law

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

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. Id.

Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a preexisting injury in Hopkins, the Commission noted that petitioner was in good health prior to

the fall, he had no restrictions prior to his fall, and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Decedent/Petitioner sustained injuries to his cervical and lumbar spine necessitating surgical intervention, along with a right knee tibial fracture as a result of the work accident of February 12, 2015. The Arbitrator finds that Decedent/Petitioner's work accident caused the need for the surgeries performed by Dr. Prpa on September 26, 2016 and March 27, 2017.

There is no evidence in the record that Decedent had any issues or problems with his neck or back immediately prior to February 12, 2015. No evidence was offered to refute Petitioner's physical condition before and after February 12, 2015. Since the injury on February 12, 2015, until the time of his death, Petitioner had continued neck and low back symptoms consistent with his injuries and was unable to return to work. The Arbitrator finds the opinions of Dr. Prpa's that Petitioner's neck and low back conditions are causally connected to the February 12, 2015 to be more credible than Respondent's Section 12 examiner that did not review the entirety of the medical records available in this case.

In addition, the Arbitrator finds a temporal link between Decedent's surgery, the narcotic pain management prescribed, and his subsequent death due to said narcotics to be causally related to his work-related injury. This is corroborated by the medical records, the autopsy report, and Dr. Hennessy's testimony.

(J) 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?

Petitioner submitted the following medical expenses without objection:

Exhibit 9 – Preferred Open MRI - $6,841.83
Exhibit 10 – Illinois Pain Management - $1,530.00
Exhibit 11 – Skypoint Medical Center - $6,578.25
Exhibit 12 – Out of pocket expenses to Walmart Pharmacy - $77.26
Exhibit 13 – Out of pocket expenses to Walgreens Pharmacy - $4,987.49
Exhibit 17 – Demetrio Giokaris, MD/Centro Medico - $2,680.00

The Arbitrator, having found in favor of Decedent Petitioner on the issue of causal connection and noting the ongoing and credible complaints made by Petitioner which required treatment, finds the above-referenced medical treatment to be reasonable and necessary and orders Respondent to pay for such pursuant to Section 8(a) and the Medical Fee Schedule.

(L) What is the nature and extent of the injury?

This claim involves injuries sustained by Decedent Petitioner on February 12, 2015, along with a consolidated claim where Petitioner is the widow and

appropriate taker under the Act for Decedent's work related death. It is well-settled that a cause of action for Petitioner's decedent's death is separate and distinct from the decedent. A.O. Smith v. Industrial Commission, 109 Ill.2d 52, 485 N.E.2d 335, 92 Ill.Dec. 524 (1985), McDevitt v. Nesko, 03WC59039, 07 I.W.C.C. 0421. Therefore, separate awards will be made for the separate consolidated claims.

Regarding the 15WC7107 case at issue, the Arbitrator finds that Petitioner's leg injury reached MMI on June 20, 2015 and Petitioner's low back reached MMI on February 28, 2017. His injuries resulted in permanent injuries to the right leg and person as a whole. The Arbitrator looks to five factors as enumerated in Section 8.1(b) of the Act to determine the nature and extent of the injury: (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.

Regarding factor (i), neither party presented an AMA permanent impairment rating. Accordingly, this factor is assigned no weight. Regarding factor (ii), Petitioner's occupation, the evidence established that Petitioner was employed with Respondent as a Stationary Engineer, a heavy duty job. The Arbitrator notes, however, that Petitioner's inability to continue to work was related to his ongoing cervical issues and not his lower back. This factor is afforded some weight. Regarding factor (iii), Petitioner was 47 years old on the date of accident and had many years of work life ahead but passed away before he was able to re-enter the workforce. This factor is afforded some weight. Regarding factor (iv), the Arbitrator notes there was no evidence submitted regarding Petitioner's future earning capacity because of the work accident. This factor is afforded no weight.

Finally, regarding factor (v), the Arbitrator finds that treatment records reflect Petitioner sustained a right fibula fracture of the right knee that healed with the use of a knee brace and did not require surgery. In addition, Petitioner sustained a herniated disc at L5-S1 that required a surgical fusion. The Arbitrator finds that Petitioner suffered 20% loss of use to the body as a whole under §8(d)2 of the Act. and 15% loss use of a right leg under §8(e) of the Act.

Regarding the 17WC7107 case at issue, based on the above, Arbitrator finds Petitioner suffered fatal injuries as a result of the accident of February 12, 2015. Respondent shall pay death benefits, commencing March 28, 2017, of $926.22/week to the surviving spouse, Lisa Alexakos, on her own behalf and on behalf of the children: Peter Alexakos, born 3/20/2001; Evan Alexakos, born 10/7/2002; and Gianna Alexakos, born 3/12/2011, 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC011444
Case Name	Lisa Alexakos (Widow of John Alexakos Deceased) v. Able Engineering
Consolidated Cases	15WC07107;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0332
Number of Pages of Decision	11
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Jasper

DATE FILED: 7/16/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0332

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

Lisa Alexakos (Widow of John Alexakos Deceased),

Petitioner,

vs. NO: 17 WC 011444

Able Engineering,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability and permanent partial disability/nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below.

As the Petitioner has a separate but consolidated case, 15 WC 007107, for which a separate Commission Decision will issue, the Commission strikes the language pertaining the Section 8.1(b) analysis relating to case 15 WC07107 from the Arbitration Decision for the pending 17 WC 011444 case. The Commission specifically strikes from the Arbitration Decision paragraphs one (1) through three (3) on page 9, beginning with the phrase, "Regarding the 15WC7107 case at issue…" and ending with "…15% loss use of a right leg under §8(e) of the Act".

The Commission further corrects a scrivener's error in the first sentence of the last paragraph on page 9, striking the case number "17WC7107" and replacing it with "17WC11444".

The Commission further strikes the following language from the Order, "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." Arbitration Order, p. 2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 13, 2023, is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION, Respondent shall pay death benefits of $926.22/week, commencing on March 28, 2017, to the surviving spouse, Lisa

Alexakos, on her own behalf and on behalf of her children: Peter Alexakos, born 3/20/2001; Evan Alexakos, born 10/7/2002; and Gianna Alexakos, born 3/12/2011, until $500,000 has been paid or 25 years, whichever is greater.

If the surviving spouse dies before the maximum benefit level has been reached, and the children herein named still survived, 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.

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 §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION, Respondent shall be given a credit for all benefits previously 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 $17,695.46. 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.

July 16, 2024
o: 5/21/2024
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC011444
Case Name	Lisa Alexakos (Widow of John Alexakos Deceased) v. Able Engineering
Consolidated Cases	15WC007107;
Proceeding Type	
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Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Michael Jasper

DATE FILED: 3/13/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 7, 2023 4.97%

/s/Gerald Napleton, 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
FATAL

Lisa Alexakos, widow of John Alexakos, deceased, Case # **17** WC **11444**
Employee/Petitioner

v.

Able Engineering
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Waukegan**, on **10/24/2022**. 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 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, **March 28, 2017**, 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 $**72,246.20**; the average weekly wage was $**1,389.35**.

On the date of accident, Decedent was **50** years of age, married, with **3** dependent children.

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

Respondent shall be given a credit for all benefits previously paid.

ORDER

Respondent shall pay death benefits, commencing **March 28, 2017**, of $**926.22**/week to the surviving spouse, ***Lisa Alexakos***, on her own behalf and on behalf of the children: ***Peter Alexakos***, born ***3/20/2001***; ***Evan Alexakos***, born ***10/7/2002***; and ***Gianna Alexakos***, born ***3/12/2011***, 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.

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.

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/ Gerald W. Napleton — March, 9 2023

Signature of Arbitrator — Date

March 13, 2023

DECISION OF ARBITRATOR
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

On February 12, 2015, Petitioner was a 47 year old stationary engineer who suffered an injury to his whole spine, right arm, right leg and right ankle when he slipped while placing a twelve foot ladder, fell to the floor, and the ladder fell on top of him. (PX7). Records received into evidence confirm Petitioner presented to Lake Forest Hospital on February 12, 2015 with "major trauma" complaining of neck pain, thoracic pain, low back pain with spasms to the left leg, right arm pain, right leg pain and right ankle pain due to a fall at work that day and a 12 foot ladder landed on him. (PX7).

While in the Emergency Department, x-rays were taken of the neck, thoracic and lumbar spine, along with the right leg and ankle. (PX1). Petitioner was given Dilaudid, Torodol, Hydrocodone and Valium during his stay. (PX7). Petitioner also underwent a CT scan of the lumbar spine which showed damage to the L2-S1 disc spaces and a straightening of the normal spinal lordosis. (PX7).

Petitioner was diagnosed with a fractured right fibula of the knee, cervical and back sprains, and a trunk injury; prescribed Valium, Ibuprofen, Norco and Zofran and a knee immobilizer; and instructed off work. (PX7).

On February 17, 2015, Petitioner was evaluated by his primary care doctor, Demetrios Giokaris, M.D. (PX3). Dr. Giokaris took a history confirming an injury at work on February 12, 2015 while "hanging a 50 lbs. ladder on a ladder rack." (PX3). Petitioner slipped and fell on his right side. (PX3). Dr. Giokaris noted cervical and lumbar spasms and right knee pain. (PX3). Petitioner was diagnosed with cervical and lumbar strains, lumbar radiculopathy, and a right knee injury. (PX3). Petitioner was prescribed MRIs of the low back and right knee, physical therapy, referred to Dr. Saoud Dabbah, and taken off work. (PX3).

A March 3, 2015 MRI of the lumbar spine revealed a disc protrusion at L5-S1 effacing the thecal sac along with disc bulges at L3-L4 and L4-L5. (PX3).

On March 7, 2015, Petitioner was evaluated by Dr. Ellis Nam of Chicago Orthopedics for evaluation of his right knee. After an examination and review of x-ray reports from the emergency room visit, Dr. Ellis recommended Petitioner continue to use the knee brace, additional x-rays, off work and referred Petitioner to a back specialist to treat his lumbar radiculopathy. (PX5). Petitioner was diagnosed with a displaced fracture of the fibular head of the right knee. (PX2). He was discharged from Dr. Ellis' care on June 20, 2015 for the right knee fracture. (PX2).

Petitioner was evaluated by Dr. Giokaris on April 17, May 4, and May 28, 2015 with consistent complaints of low back and cervical pain with radiculopathy, along with knee pain, and was eventually referred to an orthopaedic physician, Dr. Branko Prpa.

Petitioner initially presented to Dr. Prpa on June 2, 2015 complaining of neck and right arm pain, with numbness and tingling into the thumb and index finger, and low back pain with shooting pain down his right foot. (PX1). An exam revealed a positive straight leg raise without Waddell's signs. (PX1). Dr. Prpa reviewed the MRI films and noted a midlevel L5-S1 disc herniation to the right greater than the left. (PX1). Dr. Prpa recommended addressing the low back issues first before addressing the neck and prescribed a series of lumbar epidurals, with possible surgery. (PX1). A June 27, 2015 cervical MRI indicated a C6-7 protrusion with exaggerated cervical lordosis possibly due to muscle spasms. (PX2).

Petitioner returned to Dr. Prpa on October 20, 2015, complaining of radiating neck and lumbar pain. (PX1). Dr. Prpa noted large disc herniations at C5-C6 and C6-C7 based on his review of the cervical MRI, along with a right paramedian disc herniation at L5-S1. (PX1). Dr. Prpa diagnosed cervical and lumbar radiculopathy and prescribed Vicodin along with a lumbar discogram. (PX1).

After conservative measures failed and an April 22, 2016 discogram confirmed L5-S1 as the pain generator, Dr. Prpa preformed an L5-S1 decompression and fusion with cages on September 19, 2016. (PX1, PX6).

After the lumbar surgery, Petitioner's neck complaints were addressed. An October 25, 2016 cervical MRI revealed a C5-C6 moderate herniation with cord encroachment consistent with C6 radiculopathy. (PX1). A November 23, 2016 cervical EMG demonstrated C6 radiculopathy. (PX1). On November 29, 2016, Dr. Prpa noted the low back and cervical injuries were a result of his work accident and prescribed cervical epidural injections. (PX1).

On February 28, 2017, Dr. Prpa evaluated Petitioner's low back. (PX1). At that time, Dr. Prpa noted there was "really nothing else to do," other than prescribe pain medication. (PX1).

With regard to the neck, Petitioner underwent a C5-C7 two level discectomy with fusion on March 27, 2017 after failing "extensive nonoperative treatment." The operative note indicated Petitioner was already on MS Contin, an opioid, for pain from his previous back surgery and additional Fentanyl was prescribed at the time of discharge. (PX1).

Petitioner's wife, Lisa Alexakos, testified that after surgery, Petitioner was discharged home. She testified that she was with him until the early morning of March 28, 2017 when he went to sleep. Petitioner did not wake up from his sleep and died March 28, 2017.

Records from the Lake County Sheriff's Office confirm police responded to a call for assistance and found John Alexakos lying in his bed, unresponsive, blue, cold to the touch with rigor mortis. (PX16). Lisa Alexakos reported her husband took a prescribed Fentanyl patch and went to sleep in the early hours of March 28, 2017 and was found unresponsive later that morning. (PX15). An autopsy report revealed lethal levels of Fentanyl combined with Oxycodone and Valium and listed the cause of death as polysubstance toxicity status post "recent neck surgery" and "remote back surgery." (PX16).

At the time of his death, Petitioner left his widow, Lisa, and three children. At the time of the hearing, the ages of John Alexakos' children were Peter, 21, Evan, 20 and Gianna, 11.

Petitioner presented the testimony of Dr. Branko Prpa, a board certified orthopedic surgeon who attended medical school at the Mayo Clinic and did a combined neurosurgery orthopedic surgery fellowship at Cleveland Clinic, where he served as Chief Resident. (PX8, P. 4). Dr. Prpa testified Petitioner's low back and neck conditions, and the need for surgery, were related to the February 12, 2015 work accident. (PX8, P. 8-9, 11, 13).

Dr. Prpa testified the treatment for the neck and back was reasonable, necessary, and related to the February 12, 2015 work accident. (PX8, P. 14). At no time did he note any malingering or secondary gain issues. (PX8, P.14).

Respondent presented the testimony of its §12 examiner, Dr. Ryon Hennessy. (RX1). Dr. Hennessy confirmed that Petitioner provided a history of falling while placing a ladder and reported injuries to his lumbar and cervical spine along with his right knee and ankle. (RX1, P. 9). Dr. Hennessy agreed with Dr. Prpa's recommendation for a lumbar fusion. (RX1, P. 10, 16). On cross examination, Dr. Hennessy agreed that if there were records he was not provided, it could change his opinion. (RX1, P. 15). In this case, Dr. Hennessy was not provided either operative report of the cervical and lumbar surgeries, the cervical MRI of October 25, 2016, the November 23, 2016 EMG, autopsy report nor prescription records. (RX1, P. 15-18, 27). Dr. Hennessy confirmed that prior to the February 12, 2015 accident, Petitioner was working full duty without any neck pain or receiving treatment. (RX1, P. 23). At no time did he note any Waddell signs nor malingering/secondary gain issues. (PX1, P.25). Nevertheless, Dr. Hennessy agreed that the narcotics prescribed for Petitioner's work related back injury would have contributed to his death. (PX1, P.30).

Conclusions of Law

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

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. Id.

Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a preexisting injury in Hopkins, the Commission noted that petitioner was in good health prior to

the fall, he had no restrictions prior to his fall, and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Decedent/Petitioner sustained injuries to his cervical and lumbar spine necessitating surgical intervention, along with a right knee tibial fracture as a result of the work accident of February 12, 2015. The Arbitrator finds that Decedent/Petitioner's work accident caused the need for the surgeries performed by Dr. Prpa on September 26, 2016 and March 27, 2017.

There is no evidence in the record that Decedent had any issues or problems with his neck or back immediately prior to February 12, 2015. No evidence was offered to refute Petitioner's physical condition before and after February 12, 2015. Since the injury on February 12, 2015, until the time of his death, Petitioner had continued neck and low back symptoms consistent with his injuries and was unable to return to work. The Arbitrator finds the opinions of Dr. Prpa's that Petitioner's neck and low back conditions are causally connected to the February 12, 2015 to be more credible than Respondent's Section 12 examiner that did not review the entirety of the medical records available in this case.

In addition, the Arbitrator finds a temporal link between Decedent's surgery, the narcotic pain management prescribed, and his subsequent death due to said narcotics to be causally related to his work-related injury. This is corroborated by the medical records, the autopsy report, and Dr. Hennessy's testimony.

(J) 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?

Petitioner submitted the following medical expenses without objection:

Exhibit 9 – Preferred Open MRI - $6,841.83
Exhibit 10 – Illinois Pain Management - $1,530.00
Exhibit 11 – Skypoint Medical Center - $6,578.25
Exhibit 12 – Out of pocket expenses to Walmart Pharmacy - $77.26
Exhibit 13 – Out of pocket expenses to Walgreens Pharmacy - $4,987.49
Exhibit 17 – Demetrio Giokaris, MD/Centro Medico - $2,680.00

The Arbitrator, having found in favor of Decedent Petitioner on the issue of causal connection and noting the ongoing and credible complaints made by Petitioner which required treatment, finds the above-referenced medical treatment to be reasonable and necessary and orders Respondent to pay for such pursuant to Section 8(a) and the Medical Fee Schedule.

(L) What is the nature and extent of the injury?

This claim involves injuries sustained by Decedent Petitioner on February 12, 2015, along with a consolidated claim where Petitioner is the widow and

appropriate taker under the Act for Decedent's work related death. It is well-settled that a cause of action for Petitioner's decedent's death is separate and distinct from the decedent. A.O. Smith v. Industrial Commission, 109 Ill.2d 52, 485 N.E.2d 335, 92 Ill.Dec. 524 (1985), McDevitt v. Nesko, 03WC59039, 07 I.W.C.C. 0421. Therefore, separate awards will be made for the separate consolidated claims.

Regarding the 15WC7107 case at issue, the Arbitrator finds that Petitioner's leg injury reached MMI on June 20, 2015 and Petitioner's low back reached MMI on February 28, 2017. His injuries resulted in permanent injuries to the right leg and person as a whole. The Arbitrator looks to five factors as enumerated in Section 8.1(b) of the Act to determine the nature and extent of the injury: (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.

Regarding factor (i), neither party presented an AMA permanent impairment rating. Accordingly, this factor is assigned no weight. Regarding factor (ii), Petitioner's occupation, the evidence established that Petitioner was employed with Respondent as a Stationary Engineer, a heavy duty job. The Arbitrator notes, however, that Petitioner's inability to continue to work was related to his ongoing cervical issues and not his lower back. This factor is afforded some weight. Regarding factor (iii), Petitioner was 47 years old on the date of accident and had many years of work life ahead but passed away before he was able to re-enter the workforce. This factor is afforded some weight. Regarding factor (iv), the Arbitrator notes there was no evidence submitted regarding Petitioner's future earning capacity because of the work accident. This factor is afforded no weight.

Finally, regarding factor (v), the Arbitrator finds that treatment records reflect Petitioner sustained a right fibula fracture of the right knee that healed with the use of a knee brace and did not require surgery. In addition, Petitioner sustained a herniated disc at L5-S1 that required a surgical fusion. The Arbitrator finds that Petitioner suffered 20% loss of use to the body as a whole under §8(d)2 of the Act. and 15% loss use of a right leg under §8(e) of the Act.

Regarding the 17WC7107 case at issue, based on the above, Arbitrator finds Petitioner suffered fatal injuries as a result of the accident of February 12, 2015. Respondent shall pay death benefits, commencing March 28, 2017, of $926.22/week to the surviving spouse, Lisa Alexakos, on her own behalf and on behalf of the children: Peter Alexakos, born 3/20/2001; Evan Alexakos, born 10/7/2002; and Gianna Alexakos, born 3/12/2011, 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031080
Case Name	Juana Perez v. Carl Buddig
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0333
Number of Pages of Decision	31
Decision Issued By	Amylee Simonovich, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Adam Rosner, Brenton Schmitz, Matthew Jones
Respondent Attorney	Nicole V. Russo

DATE FILED: 7/16/2024

/s/Amylee Simonovich, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

24IWCC0333

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

Juana Perez,

Petitioner,

vs. NO: 21 WC 31080

Carl Buddig,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment, and temporary total disability (TTD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 seeks to correct certain errors in the Arbitration Decision. In the Findings section of the Arbitration Decision Form, the Arbitrator mistakenly wrote that Respondent has paid all reasonable and necessary medical expenses. The Commission strikes "has paid" and replaces it with "has not paid." Also in the Findings section, the Arbitrator wrote that Respondent shall be given a credit of $0 for TTD. The Commission modifies this sentence to read as follows:

> Respondent shall be given a credit of $4,622.09 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $4,622.09.

Finally, in the Order section of the Decision Form, the Commission strikes the second sentence regarding TTD benefits and replaces it with the following:

> Pursuant to stipulation by the parties, Respondent shall receive a credit of $4,622.09 for TTD benefits it paid to Petitioner covering all time off work prior to September 23, 2022. This credit is not applicable to any TTD benefits awarded in this Decision.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 1, 2023, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $449.37/week for 29-6/7 weeks, commencing September 23, 2022, through April 19, 2023, as provided in Section 8(b) of the Act. Pursuant to stipulation by the parties, Respondent shall receive credit for $4,622.09 in TTD benefits it previously paid to Petitioner covering all time off work prior to September 23, 2022. This credit is not applicable to any TTD benefits awarded in this Decision.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges of $12,034.94 to Illinois Orthopedic Network, $9,668.70 to Midwest Specialty Pharmacy, $1,800.00 to Munster Medical Imaging, $15,400.00 to Premier Healthcare Services, $3,161.94 to Metro Anesthesia Consultants, $2,338.00 to Parkview Orthopaedics, and $24,755.54 to South Suburban Physical Therapy.

IT IS FURTHER ORDERED that Respondent shall authorize the cervical discectomy and fusion surgery recommended by Dr. Sampat.

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

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

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.

July 16, 2024

o: 5/21/24
AHS/jds
51

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

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

DISSENT

I agree in part and dissent in part. I agree with the majority's findings regarding causal connection, TTD, and prospective medical benefits; however, I respectfully dissent from the majority's opinion that all the physical therapy provided by South Suburban Physical Therapy was medically reasonable and necessary.

I would also deny medical benefits for the 7-week rental of a Cold Therapy Compression Unit (VascuTherm) ordered by Dr. Lipov. The charges for the rental unit do not appear in the medical bills admitted into evidence; however, Respondent's utilization review report addressing this device was a retrospective review, thus suggesting the device had been dispensed, and the Arbitrator's decision noted this utilization review report in his findings of fact and later found that "the medical services provided to Petitioner were reasonable and necessary." (Arbitration Decision at 15) The Arbitrator further concluded "Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment." (*id*.) Because this case is being remanded to the arbitrator for further proceedings, I believe we should address the cold therapy compression unit. Though the Arbitrator's decision itemizes the medical bills to be paid, the written findings mentioned above could be misinterpreted as an adjudication of the disputed cold therapy unit.

Medical Treatment:

Petitioner initially sought treatment at Community Chiropractic Clinic on April 26, 2021, where she received chiropractic care with Dr. Cordova over a period of six and a half months through November 8, 2021. While under his care, Petitioner underwent an MRI of the cervical spine on July 7, 2021, followed by a pain management evaluation with Dr. Kondamuri at Midwest Interventional Spine Specialists on August 9, 2021. Dr. Kondamuri recommended an epidural steroid injection at C5-C6 which was not performed due to workers compensation authorization not being approved.

Petitioner then commenced treatment with Illinois Orthopedic Network (ION) on November 10, 2021. Dr. Mandal performed the initial evaluation and recommended an epidural injection along with physical therapy for the neck and left elbow to be provided over the course of four weeks at three sessions per week. (T. 198) Petitioner commenced physical therapy at South Suburban Physical Therapy with Dr. Horner on November 12, 2021. The therapy records show Petitioner attended 17 visits from November 12, 2021 through December 16, 2021.

While undergoing therapy, Petitioner saw Dr. Lipov at ION for a pain evaluation on November 30, 2021. Dr. Lipov performed an epidural injection on December 1, 2021. On her return follow-up visit, Dr. Lipov referred Petitioner for a spine surgery evaluation. Petitioner then presented for a spine surgery consultation with Dr. Koutsky on February 18, 2022. Dr. Koutsky discussed treatment options including surgery and noted that Petitioner wished to exhaust all conservative treatment options before considering surgery.

On January 5, 2022, Dr. Lipov ordered continued therapy for the neck, for an additional four weeks at three times per week. (T. 211) Dr. Horner at South Suburban Therapy then provided

therapy from January 6, 2022 through March 17, 2022 . During this period, Petitioner attended 30 sessions. Petitioner also continued treating with Dr. Koutsky.

While Petitioner continued with therapy, Dr. Koutsky ordered additional therapy for the neck and elbow on February 18, 2022, for a period of four weeks at three times per week. (T. 225) On March 11, 2022, Dr. Koutsky ordered another course of therapy for the neck and elbow, for a period of four to six weeks at two to three times per week. (T. 231)

On April 1, 2022, Dr. Koutsky recommended surgery and indicated Petitioner agreed with his surgical treatment plan. Pending approval for the surgery, Dr. Koutsky also ordered more therapy for the neck and elbow, for a period of four to six weeks at two to three times per week. (T. 243) Per the referrals from Dr. Koutsky, Petitioner attended 48 therapy sessions at South Suburban Physical Therapy from March 21, 2022 through July 6, 2022.

Following Dr. Koutsky's April 1, 2022 recommendation for surgery, Petitioner sought a second opinion with Dr. Sampat at Parkview Orthopedics on May 31, 2022. Dr. Sampat agreed surgical intervention was appropriate. Petitioner testified she wants to undergo surgery with Dr. Sampat.

Medical Necessity – Physical Therapy:

Respondent admitted into evidence several utilization reports concerning non-certified cervical epidural steroid injections, medications, physical therapy, and a Cold Therapy Compression Unit. (Rx #13, A through Q) Additional utilization review reports were also included in the therapy records admitted into evidence by Petitioner. (Px #5) Even though these additional reports were not produced by Respondent, we must nevertheless consider those reports. The Commission is obligated to consider all evidence in the record regardless of which party presented the evidence. See e.g., *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, P52.

On November 17, 2021, a prospective utilization review non-certified Dr. Mandal's initial request for 12 therapy sessions for the period of November 12, 2021 through January 11, 2021. (Rx #13D; T. 829) The reviewing physician noted that Dr. Mandal had documented prior therapy having been attempted without disclosing the number of therapy sessions attended. The reviewing physician also noted that Dr. Mandel had not performed a physical examination as the initial office visit was conducted via telemedicine. Due to the limited documentation, the requested therapy was non-certified.

On December 15, 2021, a referral was made for utilization appeal peer review which again non-certified a request for therapy. Several attempts were made to speak with Dr. Mandal who did not respond. This report noted Petitioner had already received 12 therapy sessions and indicated another 12 sessions were requested. The reviewing physician non-certified the additional therapy because the Petitioner should have been able to transition to a home exercise program after having completed 12 sessions. (Rx #13G; T. 854-855)

On December 22, 2021, a second utilization appeal review report non-certified a prior

request for 12 therapy sessions from December 15, 2021 through February 13, 2022. (Rx #13K; T. 873-874) The reviewing physician agreed with the earlier non-certification.

On January 10, 2022, a referral was made for a utilization review peer review which non-certified a request for 12 therapy sessions. This report noted Petitioner had attended 16 therapy sessions ending December 16, 2021. The report further noted Petitioner had already attained 60% reported pain reduction following a cervical epidural injection performed October 1, 2021. As such, the ODG indicated Petitioner should transition to home exercises. (Rx #13R; T. 935-936)

On January 13, 2022, a prospective utilization review report non-certified a request for 12 therapy sessions for the period January 7, 2022 through March 8, 2022. (Rx #13S; T. 938-939) The report noted Petitioner had attended 16 therapy sessions ending December 16, 2021 and had attained 60% reduction in her neck pain status-post a cervical epidural injection performed on October 1, 2021, with Petitioner's then current symptoms limited to left arm numbness from the elbow to the shoulder. The reviewing physician determined that additional therapy was not medically necessary.

On February 15, 2022, a utilization appeal review non-certified a prior request for 12 therapy visits between February 8, 2022 and April 9, 2022. (Px #5; T. 446-447) The reviewing physician noted Petitioner had completed 16 therapy sessions ending December 16, 2021. The reviewer noted that per the guidelines physical therapy should have objective functional gains and that subjective complaints should be considered and given relative weight when the pain has an anatomic and physiological correlation. The reviewing physician found that the documentation failed to reflect the functional gains to be met. The reviewer concluded that, "Given the length of time since the date of injury, it is unclear why the injured worker cannot be directed to a self-home exercise program by now."

On February 24, 2022, a utilization review found therapy *appropriate and certified* 12 physical therapy visits for the neck and elbow for the period February 24, 2022 through April 25, 2022. (Px #5; T. 444-445) The reviewing physician noted a recent injection had been administered and that therapy was reasonable for increasing range of motion and strength.

On March 18, 2022, a utilization review report *partially* non-certified a request for 18 physical therapy visits for the neck and elbow for the period March 18, 2022 through May 17, 2022. (Px #5; T. 440-441) The reviewing physician noted Petitioner had progressed in therapy with improvements in motion and strength but had remaining deficits with muscle spasm, radiculopathy and functional deficits. The reviewer noted the requested additional therapy exceeded the guidelines but that weaning if reasonable to allow for final gains with a transition to a home program. As such, the reviewer certified 4 additional therapy visits.

On April 11, 2022, a utilization review report non-certified a request for 18 physical therapy visits for the neck and elbow for the period April 5, 2022 through June 4, 2022. (Px #5; T. 437-438) The reviewing physician noted Petitioner already had extensive therapy as well as two cervical injections. The reviewing physician further noted that additional therapy was not supported unless the patient undergoes surgery. Instead, the ODG recommends transition to home exercises.

On May 11, 2022, a utilization appeal review report non-certified a prior request for 18 therapy sessions from May 4, 2022 through July 3, 2022. (Px #5; T. 455-456) The reviewing physician agreed with the prior utilization review result.

Under Section 8(a) of the Act, claimants are entitled to receive medical benefits "for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred" so long as they are "reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a). Section 8.7 affords employers the option to request evaluation of proposed or provided treatment to determine the appropriateness, efficiency, and efficacy of the treatment based on medically accepted standards. 820 ILCS 305/8.7. Section 8.7(i)(3) permits employers to deny payment of or refuse to authorize payment of treatment on the grounds that the extent and scope of the proposed or provided treatment is excessive and medically unnecessary. 820 ILCS 305/8.7(i)(3). When payment for medical services has been denied or not authorized pursuant to utilization review, the employee has the burden of proving by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review is reasonably required to cure or relieve the effects of the injury. 820 ILCS 305/8.7(i)(4). A utilization review must be considered "along with all other evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical bills or treatment." 820 ILCS 305/8.7(i).

Prior to commencing treatment at ION, Petitioner had completed 6-½ months of chiropractic treatment from April 26, 2021 through November 8, 2021. Dr. Cordova ordered a cervical MRI which was completed in July 2021. The chiropractic treatment failed to provide meaningful improvement. The furnishing of additional conservative therapy over a period of eight months was excessive and medically unreasonable. When treatment fails to provide meaningful improvement over time, then providing more of the same does not qualify as treatment required to cure or relieve the effects of the injury.

In total, Petitioner received 98 therapy sessions at South Suburban Physical Therapy between November 12, 2021 and July 6, 2022. The therapy records are comprised of one-page daily visit notes which document very little in the way of subjective complaints and objective findings. They appear to be identical from visit to visit. The therapy records reflect reported initial pain levels of 6-7 out of 10 in November 2021 which then improved to 4-5 out of 10 in December 2021. Thereafter, the reported pain levels remain fairly consistent through the last therapy session on July 6, 2021, with occasional interspersed increases and reductions in the pain levels. Based on what is documented, Petitioner achieved some minor improvement when she initiated therapy but plateaued soon thereafter.

Based on the utilization review reports, considered along with all the other evidence, I would direct Respondent to pay for the 16 therapy visits certified through the utilization review process. On February 24, 2022, a utilization review found therapy certified 12 physical therapy visits for the neck and elbow for the period February 24, 2022 through April 25, 2022. (Px #5; T. 444-445) Then on March 18, 2022, a utilization review report *partially* certified four more therapy visits for the neck and elbow for the period March 18, 2022 through May 17, 2022. (Px #5; T. 440-441) I would find the remaining therapy visits unreasonable and unnecessary as Petitioner failed

to provide any evidence that a variance from the guidelines was reasonably required to cure or relieve the effects of the injury. 820 ILCS 305/8.7(i)(4).

Medical Necessity – Cold Compression Therapy Unit:

After Dr. Lipov administered a cervical epidural steroid injection on December 1, 2021, he prescribed a Cold Therapy Compression Unit (VascuTherm) to be rented for a 7-week period. Dr. Lipov indicated the cold compression therapy would help address post-procedure symptoms like edema and pain. Respondent submitted the prescribed durable medical equipment device for a retrospective utilization review. On January 5, 2022, a utilization review report non-certified the device prescribed on December 1, 2021. (Rx #13J; T. 923) As set forth in the peer review report, the reviewing physician telephoned Dr. Lipov's office on six occasions and spoke with the staff in order to arrange a peer-to-peer conference; however, Dr. Lipov did not respond. (Rx #13Q; T. 870) The reviewing physician considered the office visit notes of Dr. Mandal and Dr. Lipov, the procedure report, and Dr. Lipov's prescription and letter of medical necessity. Based on the applicable guidelines, the reviewing physician determined the requested device was not medically necessary. The guidelines recommend local application of cold packs over the first several symptomatic days followed by application of heat packs based on subjective response. The reviewing physician further noted that the requested cold compression therapy unit was not supported by the guidelines and there are limited subjective and objective data to support the request.

I believe Petitioner failed to prove the Cold Therapy Compression Unit is medically necessary and reasonable as the guidelines indicate locally applied cold packs are suitable and appropriate. Additionally, because Petitioner failed to present any evidence attempting to show a variance from the standards set forth in the ODG, I would deny payment of medical benefits for the Cold Therapy Compression Unit.

I further note that this Commission previously denied medical benefits for the same device in *Bell vs. Costco Wholesale*, 2023 Ill. Wrk. Comp. LEXIS 614; 23 IWCC 0497. In that case, we found the utilization review was reliable and persuasive, and like the case at bar, the claimant had not proved a variance from the standard of care was reasonably required. In *Bell*, this Commission vacated the arbitrator's award for medical bills related to VascuTherm cold therapy unit provided by Windy City Medical Specialists. "This Commission is obliged to have consistency in its decisions." See *Sheldon vs. Cerro Copper*, 1999 Ill. Wrk. Comp. LEXIS 22, 99 IIC 205 (Commissioner Douglas Stevenson, dissenting).

As mentioned above, the Arbitrator concluded, "Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment." (Arbitration Decision at 15) Even though the charges for the device do not appear in the medical bills in the instant case, the findings of fact noted Respondent's utilization review without further comment, and thus, I believe we should deny medical benefits for this device for the reasons noted above.

For all the above reasons, I respectfully dissent from the majority's affirmance of the arbitration award directing Respondent to pay for all the physical therapy charges. I also dissent

from the majority's opinion to the extent that the opinion fails to address the non-certified cold therapy compression unit.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031080
Case Name	Juana Perez v. Carl Buddig
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Brenton Schmitz, James McHargue
Respondent Attorney	Nicole V. Russo

DATE FILED: 8/1/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 1, 2023 5.27%

/s/Charles Watts, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Juana Perez
Employee/Petitioner
v.
Carl Buddig
Employer/Respondent

Case # **21** WC **031080**

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, Arbitrator **Charles Watts** of the Commission, in the city of **Chicago**, on **April 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 **Choice of Doctor**

FINDINGS

On the date of accident, **April 22, 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 $**35,050.60**; the average weekly wage was $**674.05**.

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

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

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $449.37 per week for 29 6/7 weeks, commencing September 23, 2022 through April 19, 2023, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $0 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 Illinois Orthopedic Network, $12,034.94; Midwest Specialty Pharmacy, $9,668.70; Munster Medical Imaging, $1,800.00; Premier Healthcare Services, $15,400.00; Metro Anesthesia Consultants, $3,161.94; Parkview Orthopaedics, $2,338.00; South Suburban Physical Therapy, $24,755.54

Prospective Medical

The Arbitrator orders Respondent to authorize the surgical cervical discectomy and fusion and associated care as recommended by Dr. Sampat.

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.

AUGUST 1, 2023

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Juana Perez,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21WC31080
Carl Buddig & Company,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on April 19, 2023, in Chicago, Illinois before Arbitrator Charles Watts on Petitioner's Petition for Immediate Hearing under Sections 19(b) and 8(a). The issues in dispute were causal connection, medical expenses, temporary total disability benefits, and prospective medical care. Arbitrator's Exhibit 1 (AX 1).

Testimony of Petitioner

Petitioner testified that she was employed by Respondent, Carl Buddig, and had been employed there for around fifteen years as of April of 2021. (Tr.7-8) Petitioner testified that her job duties as a packer included packing meat, grabbing trays to pack on pallets, and placing meat in the slicer. (Tr. 8) Petitioner testified she was working for Respondent on April 22, 2021 placing meat in the machine. (Tr. 9) Petitioner testified that it was a large machine with a slicer where Petitioner would place baskets of sausage in. Id. Petitioner testified that she was lifting the baskets of meat from the floor to around chest height. (Tr. 9-10) Petitioner testified the baskets of meat weigh around eighteen to twenty pounds. (Tr. 10-11) Petitioner testified that on April 22, 2021, as she was lifting sausages to place in the machine, she felt pain in the left inside part of her elbow up into her arm and neck. (Tr. 11-12) Petitioner testified she also felt numbness in middle, index, and ring fingers. (Tr. 13) Petitioner testified that she immediately felt the pain in her left elbow up to her left shoulder and then throughout the day, felt pain up to her neck and back and numbness in her left fingers that started the following day, with the left middle finger being most numb and the left ring finger being the least numb. (Tr. 14)

Petitioner testified that she finished her shift and then reported the accident to her supervisor, Ernie, on the accident date. (Tr. 15) Petitioner testified that she notified her supervisor again the following day on April 22, 2021 about her pain and attempted to work that shift. (Tr. 15-16) Petitioner could not finish her shift due to the pain in her arm and hand, so she filled out an

accident report (RX 3) and went home. (Tr. 18-20) Petitioner then sought medical treatment with a chiropractor, Dr. Cordova, that following Monday, April 26, 2021. (Tr. 20-21) Petitioner testified that she returned to work for Respondent that following Thursday, April 29, 2021, performing light duty work such as placing labels, making boxes, opening bags and packing two-ouncers. (Tr. 22) Petitioner testified that in November 2021, she began treating with various doctors at Illinois Orthopedic Network and was able to continue working light duty through that time. (Tr. 26) Petitioner testified that over the first few months of treatment and working light duty, she noticed improvement but was still feeling pain. Id. Petitioner testified that the injections did help temporarily. (Tr. 27) Petitioner testified that was seen by Dr. Koutsky on April 1, 2022, and that he recommended surgery to the cervical spine. (Tr. 29) She was able to continue working light duty while still treating with Dr. Koutsky. (Tr. 29) She then sought another opinion from Dr. Sampat on May 31, 2022, who also recommended cervical surgery. Petitioner testified that she wishes to proceed with surgery recommended by Dr. Sampat. (Tr. 30)

Petitioner testified she continued working for Respondent through September 23, 2022. (Tr. 32) Petitioner testified that Respondent asked her to return to work full duty at that point and no more light duty was offered. (Tr. 35) Petitioner testified that she has been willing to work with restrictions since September 23, 2022. (Tr. 36) Petitioner testified that towards the end of her "light duty," she was performing heavier work such as packing heavier items and pushing down covers. (Tr. 36-37) Petitioner testified that she has not worked for Respondent or any other employer since September 23, 2022. (Tr. 37) Petitioner testified that she still has symptoms in her left elbow, left arm, neck, and fingers including pain and numbness. (Tr. 38-39) Petitioner testified that she has difficulty showering, playing with her son, lifting heavy objects, and performing yard work. Id. Petitioner testified that prior to the work accident, she did not have any issues with her neck. (Tr. 39-40) Petitioner testified she did have an injury to her left thumb over a decade prior and only took medication for it. (Tr. 40) Petitioner testified that she was not having issues with her left thumb as of the date of the accident. (Tr. 40)

On cross examination, Petitioner testified that she filled out the accident form the following day after the accident. (RX 3) (Tr. 41-42) Petitioner testified she did not mention an injury to her neck or radiating pain in the accident report but did indicate she had pain in her left arm. (Tr. 43-44) Petitioner testified that the initial work restrictions from Dr. Cordova pertained to her left arm and shoulder. (Tr. 46-47) Petitioner testified that she told Dr. Gleason her symptoms were in her left elbow, left shoulder, and neck. (Tr. 51) Petitioner testified that she was off work following the injections. (Tr. 52) Petitioner testified that she then returned for light duty until September 22, 2022. (Tr. 54) Petitioner testified that she has five children. (Tr. 57)

Petitioner testified that she currently has symptoms in the back of her left shoulder and in her neck. (Tr. 57-58) Petitioner testified regarding the pain diagram from Dr. Cordova's visit on April 26, 2021, where Petitioner testified that she filled out the pain diagram and not the written portion. (Tr. 59-60) Petitioner testified that she was indicating where she was feeling pain that day on April 26, 2021. (Tr. 60)

Testimony of David Streeter

David Streeter [hereinafter "Mr. Streeter"] testified that he was employed for Respondent as a Director of Occupational Safety and Security for fourteen years. (Tr. 63) Mr. Streeter testified that he oversees the safety of all the associates for Respondent including auditing, monitoring performance, and training. (Tr. 64) Mr. Streeter testified that he prepares injury reports. (Tr. 64) Mr. Streeter testified that he was notified that Petitioner was claiming a work injury, which prompted him to complete a Form 45 First Report of Injury, which was dated May 3, 2021. (Tr. 65-67) (RX 1) Mr. Streeter testified regarding Petitioner's first report of injury (RX 1), dated May 3, 2021, that indicates Petitioner suffered a strain to left shoulder and arm due to lifting. Mr. Streeter testified that it does not indicate an injury to the cervical spine. Mr. Streeter testified that if there was an allegation of an injury to any other body part aside from the left arm and shoulder, he would have documented it. (Tr. 68) Mr. Streeter testified that he is familiar with Petitioner's role as a packer and testified regarding that position. (Tr. 70-72)

Mr. Streeter testified that Carl Buddig has a light duty policy in place, which includes honoring any work restrictions as long as the injury is work related. (Tr. 74) He explained that the light duty policy is intended to allow employees to be able to earn full wages, and that care is made to ensure that the light duty position does not exceed the individual's restrictions. (Tr. 74-75) Mr. Streeter testified that Petitioner's work restrictions were initially accommodated. (Tr. 74)

Mr. Streeter testified that he had the opportunity to review the IME report from Dr. Gleason dated June 14, 2022. (Tr. 75) He agreed that the IME report from June 2022 factored into the decision to offer Petitioner a full duty return to work in August 2022. (Tr. 75) Mr. Streeter testified that he prepared a full duty offer letter to Petitioner, advising that she was expected to transition to full duty beginning August 29, 2022. (Tr. 76) (RX 10) He explained that the decision to extend a full duty offer was based on the IME opinion deeming Petitioner able to work full duty. (Tr. 76) Mr. Streeter indicated that following Dr. Gleason's June of 2022 IME report, Respondent sent a letter (RX 10) offering Petitioner a full duty work position based on the IME report. (Tr. 75-76) Mr. Streeter indicated he authored the letter, and it was in English sent to Petitioner. (Tr. 78-79) Mr. Streeter testified that it was a full duty offer position as Petitioner's work restrictions would no longer be accommodated. (Tr. 80)

Mr. Streeter testified that when Petitioner did transition in August 2022, where she was working at the end of the line and filling in for employees as needed, this was in the palletizing position, and was lighter than the regular line packing duties. (Tr. 77) He testified that the palletizing position that Petitioner transitioned to required lifting of cardboard boxes weighing 5 pounds, as opposed to lifting the 17-20 pound meat logs for the slicing role. (Tr. 77) Lastly, Mr. Streeter confirmed that Petitioner is still employed by Carl Buddig. (Tr. 77)

Summary of Medical Records

On April 26, 2021, Petitioner presented to Community Chiropractic Clinic with Dr. Jose Cordova for chiropractic and physical therapy care. (PX 1) Petitioner completed an "Initial Health Status Form" and identified the left arm as being injured. (PX 1) The history of injury states that "while working picked up a pack of meat approx. 25 pounds pushing it over and felt

a sudden sharp pulling, continued to work, got a lump and bruising upper arm..." Dr. Cordova excused Petitioner from work from April 26-28, 2021, and then gave light duty work restrictions for the left shoulder. (PX 1) These restrictions included refraining from activities requiring resistance or repetition to the left shoulder including abduction, flexion/extension, and external rotation, with no lifting greater than 20 pounds. (PX 1) Dr. Cordova placed Petitioner on light duty restrictions. Petitioner treated with Dr. Cordova from April 26, 2021 through November 8, 2021. (PX 1)

Petitioner was eventually recommended to undergo an MRI of her cervical spine, which she underwent on July 27, 2021. (PX 7) The radiologist's impressions were: (1) minor degenerative disc bulging at C5-C6 with moderate to severe right IVF stenosis, moderate left IVF stenosis and minor central canal stenosis; and (2) minor degenerative disc bulging at C6-C7 with minor bilateral IVF and central canal stenosis. (PX 7)

Dr. Cordova referred Petitioner to Dr. Kondamuri (PX 1) On August 9, 2021, Petitioner presented to Dr. Kondamuri at Midwest Interventional Spine Specialists with neck pain, numbness in the left arm, and radiation of pain down the left arm. (PX 2) On physical examination of the cervical spine, Dr. Kondamuri noted limited range of motion and positive Spurling test on the left. Id. Dr. Kondamuri diagnosed Petitioner with cervical radicular pain, cervical spinal stenosis, recommended a cervical epidural steroid injection, and placed Petitioner on work restrictions. (PX 2)

On November 10, 2021, Petitioner began treating with Dr. Mandal at Illinois Orthopedic Network via a telephonic consultation. (PX 3) During this visit, Petitioner complained of neck pain, pain over the left arm and into the left hand. Petitioner was diagnosed with cervicalgia with left-sided radiculopathy and left upper extremity pain. She was given Lidocaine cream, a muscle relaxer, and Celebrex to help with her pain, inflammation and muscle spasm. (PX 2) Dr. Mandal placed Petitioner off work and recommended Petitioner undergo physical. (PX 3) Petitioner underwent a course of physical therapy at South Suburban Physical Therapy from November 12, 2021 through July 6, 2022. (PX 5)

Petitioner then presented to Dr. Lipov on November 30, 2021 with left-sided neck pain as well as left arm pain. (PX 3) On physical examination of the cervical spine, Dr. Lipov noted positive Spurling on the left and pain with extension of the neck. Dr. Lipov reviewed the cervical MRI and diagnosed Petitioner with left-sided radiculopathy and recommended a cervical epidural steroid injection. On December 1, 2021, Petitioner underwent the cervical epidural injection at C5-C6 with Dr. Lipov. (PX 3)

Petitioner followed up with Dr. Lipov on January 5, 2022 with sixty percent relief of neck pain from the injection but with numbness continuing from the left elbow to the left shoulder. (PX 3) Dr. Lipov noted positive Spurling on left and weakness on the left biceps and triceps. (PX 3) Dr. Lipov continued Petitioner off work and referred Petitioner for a spinal consultation. (PX 3) On January 18, 2022, Dr. Lipov authored a note indicating he agreed with Dr. Gleason and recommended an MRI of the left elbow and an EMG. Id. On February 1, 2022, Petitioner underwent the MRI of her left elbow which showed mild radiocapitellar and humeroulnar joint effusion of indeterminate etiology. (PX 3) On February 11, 2022, Petitioner underwent an

NCVEMG of her bilateral upper extremities at Associated Medical Centers of Illinois, which showed evidence of C6 radiculopathy acute in nature and evidence of right median mononeuropathy at the wrist. (PX 3)

After the EMG, Petitioner presented to Dr. Day on February 11, 2022 with ongoing left arm and shoulder pain with numbness/tingling along the elbow. (PX 3) Dr. Day noted painful range of motion with the left elbow and positive Tinel's sign. (PX 3) Dr. Day noted positive Tinel at the left wrist as well. (PX 3) On February 18, 2022, Petitioner presented to Dr. Koutsky, an orthopedic surgeon, with neck pain as well as radiation of pain down the left upper extremity into the thumb including numbness/tingling, medial left elbow pain, and a history consistent with the testimony at trial. (PX 3) On physical examination, Dr. Koutsky noted a positive left sided Spurling's test and cervical tenderness with limited range of motion. Dr. Koutsky reviewed the cervical MRI and noted disc/spur complex at C5-C6 contributing to central and foraminal stenosis and generalized protrusion at C6-C7. (PX 3) Dr. Koutsky continued Petitioner's physical therapy (2-3 times per week for 4-6 weeks) and indicated Petitioner may benefit from a left tennis elbow strap and a second cervical injection. (PX 3) Dr. Koutsky reviewed Dr. Gleason's IME report and noted that Petitioner had objective findings of cervical radiculopathy and medial epicondylitis and indicated Petitioner could return to work with a ten-pound weight restriction and minimal use of the left arm. (PX 3)

Petitioner followed up with Dr. Koutsky on March 11, 2022 Petitioner reported temporary improvement with a recent cervical epidural injection. (PX 3) Petitioner underwent a second cervical epidural injection with Dr. Lipov on March 16, 2022. (PX 3) Petitioner followed up with Dr. Koutsky on April 1, 2022 with temporary relief from the cervical injection and a similar physical examination. At this visit, Dr. Koutsky recommended anterior cervical decompression and fusion with instrumentation and bone graft at C5-C6 and released Petitioner with a five-pound restriction. (PX 3) Petitioner was released with a 5-pound lifting restriction.

Petitioner was then referred for a second opinion with an orthopedic surgeon, Dr. Sampat, at Parkview Orthopaedics, on May 31, 2022. (PX 3) Petitioner subjective complaints were fifty percent neck pain and fifty percent arm symptoms. Dr. Sampat reviewed the MRI of the cervical spine and noted C5-C6 cervical stenosis which correlated with Petitioner's symptoms. (PX 3) On physical examination of the cervical spine, Dr. Sampat noted neck pain with flexion/extension, diminished sensation into the dorsal forearm into the left long and index finger, and positive Spurling test on the left. (PX 3) Dr. Sampat recommended a C5-C6 anterior cervical discectomy and fusion and placed Petitioner on the same five-pound lifting restriction. (PX 3) On June 14, 2022, Dr. Sampat authored a note after discussing the cervical MRI with Petitioner, which states:

> [t]here appears to be a disc herniation and cervical stenosis, especially at C5-C6, which corresponds well with her symptoms of neck pain radiating down the left upper extremity that is left sided and paracentral in nature with significant stenosis upon the C6 nerve root. We discussed anterior cervical discectomy and fusion, and she wishes to proceed with surgery. . . She still has significant numbness and tingling in the left upper extremity down to the thumb and index finger in the C6 dermatome and distribution. All questions were answered. The need for surgery is

> related to her work injury, as she was asymptomatic before the work injury and became symptomatic afterwards. (PX 3)

Petitioner followed up with Dr. Lipov on August 2, 2022 with numbness in digit three in the left-hand and radiating pain down the left neck. (PX 3) Dr. Lipov deferred treatment to Dr. Sampat. (PX 3) Petitioner followed up with Dr. Sampat with persistent neck pain and pain radiating down her left upper extremity, similar physical examination findings, and awaiting surgical authorization. In the August 23, 2022 note, Dr. Sampat reviewed Dr. Gleason's June 14, 2022 IME report, and disagreed with Dr. Gleason in that Dr. Sampat found objective findings on physical examination, EMG, and the cervical MRI which he opined supported Petitioner's symptoms. Petitioner continued treating with Dr. Sampat for the next several months and maintained the same lifting restriction. On January 24, 2023, Dr. Sampat placed Petitioner off work pending surgery. (PX 3)

Testimony of Dr. Chintan Sampat (Treating Physician)

On January 24, 2023, Dr. Sampat testified regarding his opinions and treatment of Petitioner. (PX 10) Dr. Sampat testified that when he saw Petitioner on May 31, 2022, Petitioner indicated she was asymptomatic and did not have these symptoms prior to the work accident. (PX 10, pg 9) Dr. Sampat testified that he broke down his physical examination findings down into categories because neck pain with radiating pain can involve different issues such as neuropathy, carpal tunnel, cervical radiculopathy, or shoulder pain. (PX 10, pg 11) Dr. Sampat testified he noted limited range of motion of the neck, positive Spurling's sign on the left, and loss of sensation in the C6 distribution coming from the neck. (PX 10, pg 12) Dr. Sampat testified that a Spurling's test issued to look for cervical radiculopathy or nerve root irritation. (PX 10, pg 13) Dr. Sampat testified that Petitioner's distribution of symptoms in the physical examination including the sensation and Spurling's tests indicated there could be pathology at C5-6. (PX 10, pg 14-17) Dr. Sampat testified that Petitioner's subjective complaints and physical examination "lined up" in that it suggested cervical radiculopathy in the C6 distribution. (PX 10, pg 18)

Dr. Sampat testified he reviewed the July 27, 2021 cervical MRI and noted cervical stenosis resulting in thecal sac lateral recess and neural foraminal stenosis, which meant there was nerve compression at the middle, central, lateral, and outside parts of the foramen. (PX 10, pg 20) Dr. Sampat testified that he reviewed x-rays during the June 14, 2022 visit which showed loss of cervical lordosis. (PX 10, pg 21) Dr. Sampat testified that Petitioner has a pinched nerve with compression in the middle, side, and into the foramen at C5-C6. (PX 10, pg 21-22)

Dr. Sampat testified he reviewed the EMG report which indicated Petitioner had left C6 acute radiculopathy. (PX 10, pg 24) Dr. Sampat testified regarding the correlation of symptoms:

> [e]verything correlates. Her symptoms are in the C6 distribution subjectively. Objectively the physical exam findings suggest a C6 radiculopathy. The MRI shows a pinched nerve at C5-6, which is the C6 nerve, and the EMG confirms it. So, the subjective and objective findings line up here. (PX 10, pg 24)

Dr. Sampat testified that the carpal tunnel finding on the EMG was not clinically relevant because Petitioner did not have symptoms or physical examination findings that indicated Petitioner was suffering from carpal tunnel syndrome. (PX 10, pg 27) Dr. Sampat testified that even without the EMG, it would not make a difference as he would have diagnosed Petitioner with cervical radiculopathy. (PX 10, pg 27) Dr. Sampat testified that Petitioner's mechanism of injury was a competent cause or aggravation of Petitioner's condition as Petitioner was bent forward lifting meat into a slicer and Petitioner was asymptomatic prior to the work accident. (PX 10, pg 29)

Dr. Sampat testified that Petitioner had tried multiple conservative non-surgical treatment measures, so he recommended a cervical fusion. (PX 10, pg 30-31) Dr. Sampat testified that the right-sided stenosis seen on the cervical MRI was clinically irrelevant as Petitioner was not complaining of right-sided pain. (PX 10, pg 32) Dr. Sampat testified that the C6 nerve root goes into the thumb, index finger, long finger and there is overlap with the middle finger. (PX 10, pg 33-34) Dr. Sampat testified he recommended the cervical fusion, and that the prognosis is good in helping to unpinch the nerve. (PX 10, pg 35) Dr. Sampat testified that without the surgery, he would expect Petitioner to remain the same. (PX 10, pg 35-36) Dr. Sampat testified that Petitioner's clinical presentation was the same for the follow up visits. (PX 10, pg 36-38) Dr. Sampat testified that he reviewed Dr. Gleason's IME report and indicated he disagreed with his opinions in that Petitioner had cervical radiculopathy and not a condition related to the left elbow. (PX 10, pg 39-40) Dr. Sampat testified he can differentiate between left elbow conditions and cervical radiculopathy through physical examination, which he did. (PX 10, pg 41) Dr. Sampat testified that Petitioner does not have carpal tunnel syndrome that is symptomatic. (PX 10, pg 42) Dr. Sampat testified that he did not note symptom magnification during his treatment of Petitioner. (PX 10, pg 42-43)

Dr. Sampat testified that he diagnosed Petitioner with symptomatic cervical stenosis with radiculopathy at C5-6 causing radiculopathy down the left arm and related to the work accident. (PX 10, pg 46) Dr, Sampat testified that Petitioner's clinical presentation made sense and correlated. (PX 10, pg 47) Dr. Sampat testified that Petitioner's surgical treatment is causally related to the work accident. (PX 10, pg 48)

On cross examination, Dr. Sampat testified that he did not review a written job description for Petitioner. (PX 10, pg 49) Dr. Sampat testified that he noted Dr. Gleason found negative Spurling's signs. (PX 10, pg 51-52) Dr. Sampat testified that cervical spondylosis and a bone spur would be considered a degenerative finding. (PX 10, pg 53-54) Dr. Sampat testified that he does not have any opinion about what another doctor found on their physical examination. (PX 10, pg 57) Dr. Sampat testified that a normal range of motion of the cervical spine is not contradictory to a positive EMG. (PX 10, pg 58-59) Dr. Sampat testified that he treats the whole picture of a patient's clinical presentation, not just the MRI. (PX 10, pg 58) Dr. Sampat testified that neuropathy would be in a glove stocking pattern and would start at the fingertips and go up the elbow. (PX 10, pg 62) Dr. Sampat testified that neuropathy was not similar to what Petitioner's subjective complaints were. (PX 10, pg 62)

On redirect examination, Dr. Sampat testified full range of motion of the cervical spine means Petitioner could move her neck, but there was pain with extreme flexion/extension. (PX 10, pg

63) Dr. Sampat testified he saw Petitioner six times and noted a positive Spurling's test on the left every visit. (PX 10, pg 66)

Respondent's IME Dr. Gleason October 5, 2021

On October 5, 2021, Petitioner presented for an independent medical examination (IME) at the request of Respondent with Dr. Gleason, a board-certified orthopedic spine surgeon. (RX 6) In his report, Dr. Gleason noted that Petitioner was complaining of posterior left shoulder pain near the upper shoulder blade and left arm pain and numbness over the inner aspect of the left arm as well as over the left shoulder and upper arm. (RX 6) On physical examination, Dr. Gleason noted tenderness over the cervical spine including the left para-cervical muscles, "crawling ants" over the upper inner part of the forearm, over the left proximal volar forearm, and left cubital tunnel, and tenderness over the left elbow. (RX 6) Dr. Gleason reviewed the cervical MRI and indicated it showed cervical spondylosis, especially at C5-C7 with disc space narrowing; broad spur disc complex at C5-C6; broad spur disc complex with mild central spinal stenosis; and bilateral foraminal narrowing at C6-C7. (RX 6) Dr. Gleason opined that Petitioner's mechanism of injury was consistent with his objective findings and found her condition to be causally related. (RX 6) With regard to treatment, Dr. Gleason opined that the treatment by Dr. Cordova had been excessive given that Petitioner reported that her left shoulder and upper arm symptoms remained essentially unchanged. (RX 6) He felt that two visits with Dr. Kondamuri were reasonable and necessary. He felt that two visits with Dr. Kondamuri were reasonable and necessary. Dr. Gleason recommended a home exercise program, non-steroidal anti-inflammatory medication an EMG of the bilateral upper extremities, an MRI of the left elbow, placed Petitioner on twenty-five-pound weight restrictions, and did not find Petitioner to be at maximum medical improvement and that this could better be estimated following the recommended MRI and EMG/NCV study. (RX 6)

Respondent's IME Dr. Gleason June 14, 2022

On June 14, 2022, Petitioner presented for a second IME with Dr. Gleason, complaining of neck pain on the left side, extending to the base of the skull. Rx7. On physical examination, Dr. Gleason noted Petitioner demonstrated a negative Spurling's test bilaterally. Petitioner demonstrated tenderness over the cervical spine and limited range of motion of the left shoulder and elbow. (RX 7) Dr. Gleason noted that he found no positive physical examination findings of the cervical spine, found Petitioner had normal range of motion and opined that Petitioner exhibited symptom magnification. Dr. Gleason opined that Petitioner required no further treatment or restrictions for the cervical spine. (RX 7) Dr. Gleason indicated that he had no opinion regarding the EMG showing evidence of acute C6 radiculopathy although he agreed that the NCV/EMG of February 11, 2022 did document evidence of C6 radiculopathy. (RX 7) Dr. Gleason noted that if a patient has C6 radiculopathy, a fusion surgery and decompression of the nerve root could be the appropriate course of treatment. (RX 7) Dr. Gleason noted that Petitioner's EMG findings did not relate to Petitioner's conditions as Petitioner's symptoms could be related to other factors such as diabetes or thyroid disease. (RX 7) With regard to work status, Dr. Gleason opined that Petitioner was capable of full-time regular work without restrictions, with respect to the cervical spine. (RX 7) With regard to medical treatment, Dr. Gleason encouraged a home exercise program and occasional use of over-the-counter

medication or non-steroidal anti-inflammatories. (RX 7) No additional treatment was recommended.

Respondent's IME (Records Review) Dr. Gleason June 14, 2022

On February 16, 2023, Dr. Gleason authored an addendum report after reviewing additional records from Dr. Sampat, for treatment that occurred subsequent to his prior independent medical examination. (RX 8) Dr. Gleason opined that based on his review of Dr. Sampat's records, it seemed that Petitioner's complaints and objective findings seemed to have evolved into a clinical picture more suggestive of C6 radiculopathy, which Dr. Gleason explained was different from the condition she presented with at this last IME of June 14, 2022. (RX 8) Dr. Gleason felt that Petitioner's clinical presentation after the June 2022 IME did substantiate the need for a cervical fusion, but he did not feel that the need for surgery was causally related to the April 22, 2021 work injury. (RX 8) The reason the need for surgery was not related to the April 22, 2021 work injury was based on the change in Petitioner's clinical presentation subsequent to June 14, 2022. (RX 8) Dr. Gleason diagnosed Petitioner with left cervical radicular syndrome related to the C6 distribution with findings reflected in the EMG and cervical MRI. (RX 8) Dr. Gleason noted that subsequent to his examination on June 14, 2022, Petitioner developed a clinical picture suggestive of left C6 radiculopathy. Dr. Gleason found that Petitioner could have a twenty-pound weight restriction, but this was unrelated to the work accident. (RX 8)

Testimony of Thomas Gleason (IME Physician)

On March 21, 2023, Dr. Gleason testified consistent with his independent medical examinations of Petitioner and his reports. (RX 9)

On cross examination, Dr. Gleason testified that Petitioner's condition had an evolution to left side C6 cervical radiculopathy sometime after his June 14, 2022 IME. (RX 9, pg 72) Dr. Gleason testified that he could not point to a specific date in which Petitioner's condition had evolved. Dr. Gleason testified that he noted Petitioner's condition was a classic C6 radiculopathy based on the positive Spurling test, and sensation diminished into the dorsal forearm to the left second, third, and first digits, which correlated with the cervical MRI and EMG findings. (RX 9, pg 74-75) Dr. Gleason testified he reviewed Dr. Sampat's May 31, 2022 note (two weeks prior the June 14, 2022 IME), which indicated a positive Spurling on the left and diminished sensation into the left dorsal forearm and into the left long and index finger. (RX 9, pg 76-77) Dr. Gleason testified that he reviewed Dr. Koutsky's February 18, 2022 note which indicated radiation in the left upper extremity into the left thumb. (RX 9, pg 78) Dr. Gleason testified that an elbow condition would not typically radiate upward from the elbow into the neck. (RX 9, pg 83-84) Dr. Gleason testified that his physical examinations were different than the treating physicians. (RX 9, pg 87) Dr. Gleason testified that Petitioner's condition as of February of 2023 was left-sided cervical radiculopathy, and he was not aware of any intervening accidents. (RX 9, pg 88) Dr. Gleason testified that there were similarities between the physical examinations of the treating physicians, but "maybe the conclusions were misinterpreted." (RX 9, pg 91)

On redirect examination, Dr. Gleason testified that cervical radiculopathy could have progressed absent any new injury or incident. (RX 9, pg 92)

Utilization Review Reports

Respondent offered into evidence multiple utilization review reports, which addressed the medical necessity of various treatment recommendations prescribed. The UR reports set forth why the treatment modalities from these dates is not reasonable and necessary, and therefore non-certified pursuant to ODG Guidelines. (RX 13a-13t) The results of the admitted reports are as follows:

- 11/10/2021 Report: Assessing the medical necessity for (1) cervical epidural steroid injection at level C5-6. Result: NON-CERTIFY
- 11/15/2021 Report: Assessing the medical necessity for (1) cervical epidural steroid injection at C6-7 and (12) sessions of physical therapy for the cervical spine between 11/12/21 to 1/11/22. Result: NON-CERTIFY
- 12/17/2021 Report: Assessing the medical necessity for (10) tablets of Ondansetron Hcl 4 mg. Result: NON-CERTIFY
- 12/21/2021 Report: Assessing the medical necessity for 7 weeks rental of cold compression unit for cervical spine. Result: NON-CERTIFY
- 12/24/2021 Report: Assessing the medical necessity for (60) capsules of Lyrica 75 mg with (3) refills. Result: NON-CERTIFY
- 12/27/2021 Report: Assessing the medical necessity for (1) Lidocaine 5% Ointment 100 grams, (30) tablets of Cyclobenzaprine 7.5 mg with (3) refills, and (60) capsules of Celecoxib 100 mg with (3) refills. Result: NON-CERTIFY
- 1/13/2022 Report: Assessing the medical necessity for (12) sessions of physical therapy for the cervical spine between 1/07/22 to 3/8/22. Result: NON-CERTIFY

CONCLUSIONS OF LAW

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

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

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

Credibility is the quality of a witness which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

Petitioner testified before the Arbitrator on April 19, 2023. The Arbitrator had the opportunity to personally observe the Petitioner's testimony and demeanor at trial and finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, which were offered into evidence at the time of the hearing. Her tone of voice and expressions were consistent and appropriate for an individual who is in pain as she described in her testimony. Her responses were easily given with a quick measure and her body language also appeared natural without being exaggerated.

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).

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury. The Arbitrator gives greater weight to Petitioner's treating physicians than to the opinions of Respondent's IME physician, Dr. Gleason.

On April 22, 2021, Petitioner credibly testified that she was lifting meat to place into the machine slicer when she felt pain in her left elbow and pain radiating from her neck to the left shoulder. The Arbitrator notes that Petitioner's testimony is consistent with the medical records and the Supervisor Report indicates Petitioner was lifting an item when she noted left arm pain. (RX 2) Respondent argues that Petitioner only indicated left shoulder or arm pain immediately following the accident. However, Dr. Sampat testified that there can be overlap between shoulder, cervical, or carpal/cubital tunnel syndrome. Dr. Sampat testified that he can differentiate between those conditions through physical examination. As such, Dr. Sampat was able to eliminate Petitioner's left elbow and shoulder as the source of Petitioner's pain and concluded that Petitioner's cervical radiculopathy was the source of the symptoms. This is corroborated by the treating physicians' physical examinations; Petitioner's subjective complaints; the cervical MRI; and the EMG.

Petitioner started treating with chiropractic care with Dr. Cordova for her neck, left shoulder, and left arm pain from April 26, 2021 through November 8, 2021. Petitioner was recommended to undergo a cervical MRI on July 27, 2021, which showed disc bulging at C5-C6 and C6-C7 with stenosis. Petitioner then presented to Dr. Kondamuri on August 9, 2021 with radiation of pain down the left arm and positive Spurling test on the left. Petitioner completed a course of physical therapy at South Suburban Physical Therapy from November 12, 2021 through July 6, 2022. Petitioner then started treatment at Illinois Orthopedic Network with Dr. Mandal on November 10, 2021. Petitioner was then referred to Dr. Lipov for pain management where she underwent two cervical epidural steroid injections. Petitioner treated with Dr. Lipov from November 30, 2021 through August 2, 2022. Throughout majority of Petitioner's treatment with Dr. Lipov, Dr. Lipov noted positive Spurling's tests on the left, and Petitioner complained of neck pain, pain radiating down her left arm as well as numbness/tingling in her thumb or third digit.

Petitioner underwent a left elbow MRI on February 1, 2022, which showed some joint effusion. Petitioner underwent an EMG of the upper extremities on February 11, 2022, which showed acute left sided C6 radiculopathy and right median mononeuropathy. Petitioner was then referred to Dr. Koutsky for orthopedic evaluation. Petitioner treated with Dr. Koutsky from March 11, 2022 through April 1, 2022. Throughout Petitioner's treatment with Dr. Koutsky, Petitioner complained of neck pain radiating down her left upper extremity including numbness/tingling in the left thumb and positive Spurling's test on the left. Petitioner was then referred to Dr. Sampat for a second orthopedic evaluation. Petitioner treated with Dr. Sampat from May 31, 2022 through January 4, 2023. Throughout Petitioner's treatment with Dr. Sampat, Petitioner complained of neck pain radiating down left arm into the long finger, thumb, and index finger with positive Spurling tests on the left and decreased sensation in the left biceps and dorsal forearm and index finger and long finger on the left side.

As Dr. Sampat testified, Petitioner's clinical picture all fit together. Petitioner had consistent subjective complaints of left-sided neck pain with pain radiating down the left arm in a C6

dermatomal distribution; physical examinations with the treating physicians showed positive Spurling's test on the left; cervical MRI showed disc bulging at C5-6 with stenosis; and an EMG which showed acute left-sided C6 radiculopathy. Dr. Sampat explained:

> [w]e look to match up the subjective findings with the object identify findings. And in this case subjectively she had C6 nerve root involvement. Objectively she has findings of C6 radiculopathy on physical exam. The EMG shows that very nerve is involved, and the MRI shows that's the nerve that's pinched. And she had temporary relief with an epidural injection, which is a diagnostic test as well. So, that tells you that there's some irritation of that nerve root. . . So, the subjective findings and objective findings all correlate here. (PX 10, pg 47)

Further, Dr. Sampat testified that Petitioner's mechanism of injury, i.e., lifting meat into a machine slicer is a competent mechanism of injury to either cause Petitioner's cervical condition or permanently aggravate Petitioner's degenerative cervical condition. Dr. Sampat testified:

> [Petitioner] has symptoms of C6 radiculopathy after being bent forward and lifting an 18-pound piece of meat and then putting it into a machine, which can result in onset of symptoms of cervical radiculopathy. She didn't have the symptoms before this accident and then started developing symptoms after that accident. So, that time component says that there was an injury that started causing onset of symptoms. Lifting an object and sort of being bent and putting the object into a machine and using that type of motion can result in cervical radiculopathy. She was able to work on a full duty basis prior to that day and prior to that injury, and then afterwards had a difficult time because of the C6 radicular symptoms. (PX 10, pg 29)

In his October 5, 2021 and June 14, 2022 IME reports, Dr. Gleason opined that Petitioner did not exhibit any signs of cervical radiculopathy and noted Petitioner's left elbow to be the cause of Petitioner's symptoms. Dr. Gleason based this on his normal cervical physical examinations including negative Spurling signs. Dr. Gleason, even recommended a left elbow MRI and an EMG, which Petitioner underwent. The Arbitrator notes that the left elbow MRI was fairly normal, and the EMG showed acute left-sided radiculopathy, thus supporting that Petitioner's cervical radiculopathy was the source of Petitioner's symptoms as Dr. Sampat testified to. Even Dr. Gleason noted in his October 5, 2021 independent medical examination that the mechanism of injury as described by the Petitioner "could be" consistent with the Petitioner's complaints of pain and or objective findings noted in the medical records. Dr. Gleason testified that he noted findings of mild to moderate cervical spondylosis from C5 through C7 with disc space narrowing and spurring, which Petitioner's treating doctors agreed with. Dr. Gleason testified that based on Petitioner's age, the findings of mild to moderate cervical spondylosis with mild spurring and a little narrowing was not unusual and that the cervical MRI findings were degenerative and "typically take years to develop in this pattern and at these levels" and were "characteristic and consistent with the natural aging process." (RX 9, pg 30)

In Dr. Gleason's February 16, 2023 addendum report, he agreed that Petitioner has cervical radiculopathy, but opined that it was unrelated to her work accident. Dr. Gleason testified that

he based his diagnosis on the fact that Petitioner had a positive Spurling test with Dr. Sampat on December 13, 2022. Dr. Gleason explained that Petitioner had an "evolution" of symptoms after his June 14, 2022 IME which indicated Petitioner had cervical radiculopathy. Dr. Gleason testified he reviewed Petitioner's prior treatment records. If Dr. Gleason did review Petitioner's prior treatment records, he should have noted the several positive Spurling's tests and physical examination findings which pointed to Petitioner's cervical radiculopathy. Petitioner correctly notes that Dr. Kondamuri, Dr. Koutsky, Dr. Lipov and Dr. Sampat all noted positive Spurling's tests on August 9, 2021; November 30, 2021; January 5, 2022; February 18, 2022; March 11, 2022; April 1, 2022; May 31, 2022; June 14, 2022; July 26, 2022; August 23, 2022; September 20, 2022; November 1, 2022; December 13, 2022; and January 24, 2023. In light of this, Dr. Gleason's opinions are wholly inconsistent with the evidence in that Petitioner's condition did not "evolve" into cervical radiculopathy following his June 14, 2022 exam but that the medical records and testimony point to Petitioner's cervical radiculopathy starting after the work accident. Dr. Gleason was unable to explain Petitioner's history of prior complaints other than to say that her all of the conclusion of her treaters were "misinterpreted or that she had condition which miraculously improved and then reoccurred again" following his June 14, 2022 exam. (RX 9 pg. 91)

Further, Dr. Gleason discounted the EMG findings of acute left sided C6 radiculopathy and termed it as "subclinical." Dr. Gleason defined subclinical as "a condition which is asymptomatic, not reflected in any clinical presentation whether by subjectively or objectively." (RX 9, pg 53) However, as noted above, Petitioner was clearly symptomatic at the onset of her symptoms with cervical radiculopathy given the extensive amount of subjective radicular complaints from the neck and positive Spurling's tests. Again, Dr. Gleason had no explanation for this wither in his written reports or his testimony.

Throughout Petitioner's treatment, Petitioner consistently complained of left-sided neck pain with radiating pain down the left arm. As Dr. Sampat testified and noted, Petitioner also complained of radiating pain into her left long finger, ring finger, middle finger, and thumb, which is consistent with a C6 cervical radiculopathy. Therefore, the Arbitrator notes that Petitioner's clinical presentation following the work injury is consistent with a left-sided C6 radiculopathy supported by Petitioner's subjective complaints, physical examinations, cervical MRI, and EMG. The Arbitrator finds Dr. Sampat as credible and does not find Dr. Gleason as credible on the issue of causation.

Petitioner was asymptomatic and working full duty prior to the work accident. Petitioner had been working for Respondent for around fifteen years with no issue related to her cervical spine. Petitioner testified that she had no intervening accidents between the work accident and the trial date. There were no medical records introduced into evidence that indicated Petitioner had prior neck or left arm issues. Furthermore, the Arbitrator notes that accident was not at issue and takes Petitioner's testimony regarding accident as credible. Thus, based on the medical records and testimony, the Arbitrator finds that Petitioner's onset of symptoms started a result of the work accident.

The Arbitrator finds Dr. Kondamuri, Dr. Cordova, Dr. Lipov, Dr. Koutsky, and Dr. Sampat to have been credible in their medical opinions regarding the nature of Petitioner's injuries and

their causal relationship to the claimed injury at work for the Respondent. The Arbitrator does not find the opinions of Dr. Gleason as credible or persuasive on this issue. Based on this, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

As discussed above in Issue F, the Arbitrator finds Petitioner's treating physicians to be more persuasive than Respondent's Section 12 examiner, Dr. Gleason, and Respondent's UR findings.

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary. This is supported by Petitioner's medical records from Dr. Cordova, Dr. Kondamuri, Dr. Lipov, Dr. Koutsky, and Dr. Sampat. As Petitioner's treating physicians, they were the most equipped physicians to diagnose Petitioner and recommend treatment based on Petitioner's subjective complaints and their own objective findings.

Respondent introduced several utilization reviews to rebut Petitioner's treatment as reasonable and necessary. (RX 13a-13t) Specifically, the utilization reviews non-certified Petitioner's cervical epidural steroid injections. (RX 13a-13t) In response to the utilization reviews non-certifying the second injection, Dr. Lipov authored a rebuttal in his March 21, 2022 note. (PX 3) Dr. Lipov noted that Petitioner clearly had left C6 cervical radiculopathy confirmed by EMG and indicated:

> "[t]he patient is trying to avoid any kind of surgical intervention thus I believe it is absolutely reasonable to proceed with cervical epidural number two in light of the fact that the patient has positive EMG findings consistent with the patient's symptomatology and want to attempt avoidance of her surgical intervention will obtain a more specific change following a cervical epidural and we will have that available as soon as possible. I do believe it is totally reasonable to proceed with cervical epidural injection number two considering the patient's history and MRI findings of protruding disk at C5-C6, C6-C7 as well as EMG changes". (PX 3)

Moreover, Dr. Gleason opined that treatment by Dr. Cardova was excessive and unnecessary because the patient's condition remained largely unchanged. The Arbitrator does not find this a persuasive or appropriate argument. He seems to infer that because Petitioner did not improve, the treatment was excessive. He further noted that one or two visits with Dr. Kondamuri could be considered reasonable and necessary but did not elaborate further to explain why. Interestingly, Dr. Gleason went on to make his own recommendations as to course of treatment.

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to Sections 8(a) and 8.2 of the Act and *Perez v. Illinois Workers' Compensation Comm'n*, 2018 IL App (2d)

170086WC, 96 N.E.3d 524. As such, the Arbitrator orders Respondent to pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

- Illinois Orthopedic Network; $12,034.94
- Midwest Specialty Pharmacy; $9,668.70
- Munster Medical Imaging; $1,800.00
- Premier Healthcare Services; $15,400.00
- Metro Anesthesia Consultants; $3,161.94
- Parkview Orthopaedics; $2,338.00
- South Suburban Physical Therapy; $24,755.54

The parties stipulate that Respondent is entitled to a credit under Section 8(j) of the Act of $0.00.

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

The Arbitrator finds that Petitioner is entitled to the anterior cervical discectomy and fusion as recommended by Dr. Sampat. Petitioner attempted all conservative treatment available to her including medication, physical therapy, and injections. As Petitioner's cervical spinal condition progressively worsened, Dr. Sampat recommended surgery.

Dr. Sampat testified that the purpose of the surgery is to unpinch Petitioner's nerve in her neck which is causing Petitioner's symptoms. Irrespective of causation, Dr. Gleason testified that he did not disagree with Dr. Sampat's surgical recommendation. Therefore, there is no dispute that Petitioner's cervical condition warrants surgery.

Having found Dr. Sampat more credible than Dr. Gleason on the issue of causation, the Arbitrator finds that the surgical recommendation of an anterior cervical discectomy and fusion for Petitioner is reasonable, necessary, and causally related to her work accident. The Arbitrator relies on the medical records and opinions of her treating physicians and Petitioner's testimony regarding the necessity of the surgery at this time.

Respondent shall approve and pay for the surgical anterior cervical discectomy and fusion and necessary post-operative care as prescribed by Dr. Sampat as provided in Section 8(a) and 8.2 of the Act.

Issue (L), whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

As discussed above in Issue F, the Arbitrator finds Petitioner's treating physicians to be more persuasive than Respondent's Section 12 examiner, Dr. Gleason. The Arbitrator looks to the medical records and finds that Petitioner's treaters had adequately documented Petitioner's work status. The Arbitrator finds that Petitioner is entitled to TTD benefits from September 23, 2022 through April 19, 2023. Petitioner's treating physicians placed Petitioner on work

restrictions or off work throughout her treatment. Respondent was able to accommodate Petitioner's work restrictions until September 22, 2022. Petitioner testified that at that time, Respondent was no longer able to accommodate the light duty restrictions. Respondent's witness, Mr. Streeter, corroborated this testimony by indicating a full duty offer letter was sent to Petitioner. However, Petitioner was still on light duty restrictions by her treating physicians at the time the offer was made.

Thus, having previously found that Petitioner's injury arose in and out of the course of her employment and that Petitioner's current condition of ill-being was causally related to her work injury, Petitioner is entitled to TTD benefits from September 23, 2022 through April 19, 2023. Based on the above, the Arbitrator finds Respondent liable for 29 and 6/7 weeks of temporary total disability benefits (September 23, 2022 through April 19, 2023) at a weekly rate of $449.37, which corresponds to $13,416.90 to be paid directly to Petitioner.

Issue (N), whether Respondent is due any credit, the Arbitrator makes the following conclusions of law:

Respondent offered into evidence the TTD pay history from Liberty Mutual, which reflects that TTD benefits were paid in the amount of $4,622.09 for the period between November 11, 2021 and January 19, 2022. (RX 11) The Arbitrator finds that since Petitioner is entitled to TTD benefits from September 23, 2022 through April 19, 2023 and no benefits were paid by Respondent to Petitioner during that period, Respondent is not entitled to a credit for TTD benefits previously paid.

Other issues: whether Petitioner exceeded her choice of providers

Subsections 8(a)(2) and (a)(3) of the Workers' Compensation Act states as follows:

> [T]he employer's liability to pay for *** medical services selected by the employee shall be limited to:
>
> (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus
>
> (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. Thereafter the employer shall select and pay for all necessary medical, surgical and hospital treatment and the employee may not select a provider of medical services at the employer's expense unless the employer agrees to such selection. At any time the employee may obtain any

> medical treatment he desires at his own expense." 820 TLCS 305/8(a)(2), (a)(3) (West 2004).

Respondent offered no evidence that Petitioner exceeded her choice of providers and no arguments have been made in support of that assertion. Petitioner began treatment with Dr. Jose Cordova, her first choice of doctor) at Community Care Clinic on April 26, 2021. (PX 1) She was subsequently referred to Dr. Kondamuri at Midwest Interventional Spine Specialists by Dr. Cordova. (PX 2) While it is unclear how Petitioner began treating at ION, the treatment there would be her second choice of doctor. Petitioner further testified that Dr. Koutsky at ION referred her to Dr. Sampat at Parkview Orthopedic. (Tr. 30) The Arbitrator finds that Petitioner has not exceeded her two choices of doctors.

CONCLUSION

In light of the above facts and considerations, the Arbitrator adopts the credible and persuasive medical opinions of Dr. Kondamuri, Dr. Cordova, Dr. Lipov, Dr. Koutsky, and Dr. Sampat. The Arbitrator, therefore, finds that Respondent is to pay for outstanding medical services pursuant to the fee schedule. Petitioner is entitled to prospective medical care of an anterior cervical discectomy and fusion and necessary post-operative care. Additionally, the Arbitrator award TTD benefits from September 23, 2022 through April 19, 2023 at a weekly rate of $449.37.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC006200
Case Name	Michael Rees v. CSD Environmental
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0334
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Gregory Sgro
Respondent Attorney	Rich Lenkov

DATE FILED: 7/17/2024

/s/Carolyn Doherty, Commissioner

Signature

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL REES,

Petitioner,

vs. NO: 23 WC 6200

CSD ENVIRONMENTAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 26, 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 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.

July 17, 2024

o: 7/11/24
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	23WC006200
Case Name	Michael Rees v. CSD Environmental
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Gregory Sgro
Respondent Attorney	Rich Lenkov

DATE FILED: 12/26/2023

THE INTEREST RATE FOR THE WEEK OF DECEMBER 19, 2023 5.13%

/s/ Dennis OBrien, Arbitrator

Signature

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
19(b)

MICHAEL REES
Employee/Petitioner

v.

CSD ENVIRONMENTAL
Employer/Respondent

Case # **23** WC **006200**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 24, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 17, 2023**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $**126,333.48**; the average weekly wage was $**2,429.49**.

On the date of accident, Petitioner was **39** years of age, **single** with **no** dependent children.

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

Respondent shall be given a credit of $**9,717.96** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**9,717.96**.

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

ORDER

Petitioner suffered an accident on February 17, 2023, which arose out of and in the course of his employment by Respondent.

Petitioner's medical condition, superior labrum anterior-to-posterior SLAP tear of the right shoulder, is causally related to the accident of February 17, 2023.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Tapscott, to wit, a right shoulder arthroscopic labral debridement with repair, bicep tenodesis, subacromial decompression, acromioplasty and a possible distal clavicle excision.

Petitioner was temporarily totally disabled as a result of the accident from February 18, 2023 to October 24, 2023, the date of arbitration, a period of 35 4/7 weeks, said period of disability to be paid at a rate of $1,619.66 per week. Respondent is entitled to credit for $9,717.96 previously paid, for a net temporary total disability award of $47,895.66.

All of the bills introduced into evidence in Petitioner Exhibit 9 are related to Petitioner's right shoulder injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid by Respondent pursuant to the Medical Fee Schedule.

Respondent's actions in delaying payment of temporary total disability have been unfair, unreasonable, and vexatious. In addition, as it placed accident in dispute but introduced no evidence whatsoever to support that defense, that, too, is found to be unfair, unreasonable and vexatious. For purposes of §19(k), the 50% of the temporary total disability amount payable at the time of this award is $23,947,83, and that amount is awarded as §19(k) penalties. For purposes of §19(l), payment of temporary total disability benefits was delayed for a net total of 207 days, and §19(l) penalties are awarded at $30.00 per day for said 207 days, a total of $6,210.00. Attorney fees equal to 20% of the $47,895.66 net temporary total disability owing are to be awarded pursuant to §16, $9,579.13 is awarded as attorney fees.

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

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

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

DECEMBER 26, 2023

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that he is employed as a laborer, doing physical work, including concrete and tree work. He said he did work as both a subcontractor for others and as an employee. He said took a job with CSD Environmental, who was aware of his subcontractor work as they had previously hired his concrete company. (T. 24). In February, 2023 Petitioner was employed as a Laborer by CSD Environmental, clearing the area between a creek and a railroad track. He said the work was physical and the terrain made it difficult, as you had to walk up and down hills, and at times the hills were so step they had to set up a relay line to move things to where machines could come in and get it out. He said the creek varied from ten to twenty feet or more below the road surface. He said they would normally have ten to eleven people employed on this job, and all of them were present on February 17, 2023.

Petitioner said that on February 17, 2023, a Friday, he was dragging brush which had already been cut down by other employees. He said the previously cut brush was entangled and had to be jerked out of the pile, and then taken up the hill. At the top of the hill the employee would climb over the guardrail and put it in the chipper. He said he went to the top of the hill and his material while going over the guardrail got hung up on the guardrail, and it ratcheted his arm back and he felt "a few popping things" and a warm feeling in his arm. Later, after lunch, it found it had stiffened up. He said that on February 17, 2023, he told Shane Duncan, his supervisor, what had happened. He said Mr. Duncan instructed him to take it easy to see how the injury progressed.

Mr. Rees testified that the following day, Saturday, his arm had tightened up and was swelled up, and he went to Taylorville Memorial emergency center due to ongoing arm. Petitioner said he informed the emergency personnel that he injured his shoulder dragging brush at work. He said he underwent x-rays, was given a sling, and was instructed to follow up with Dr. Tapscott at Taylorville Springfield Clinic.

Petitioner said he returned to work on Wednesday and he did work with one arm, moving the chipper forward, fueling and oiling saws and moving cones. He said he was not doing his regular work as his arm still hurt. At the beginning of work the next day he was told he could not return to work for Respondent until he had a note from the doctor saying he was safe to work. He said he had to wait a long time to see Dr. Tapscott, perhaps seeing him on February 24, He said he told Dr. Tapscott how he was hurt. Dr. Tapscott recommended an MRI, and provided him with an off-work slip, which Petitioner provided to CSD Environmental or its insurance adjuster. Petitioner said he had the MRI, which Dr. Tapscott reviewed with him, with Dr. Tapscott assessing it as a SLAP tear, and he provided Petitioner with a shoulder injection, recommended physical

therapy, and gave him another off-work slip. He said that after he had physical therapy, Dr. Tapscott recommended a shoulder surgery. He said that as of the date of arbitration he had not yet had that surgery.

Petitioner said Respondent scheduled, and he attended, an examination with Dr. Rotman in St. Louis, on June 28. Petitioner explained a comment in Dr. Rotman's report by saying that he did not shake Dr. Rotman's hand because of fear that his right arm and shoulder might be jerked, as guys on construction sites often shake hands vigorously. He said at this point he was shaking everybody's hand with his left hand, even though he is right arm dominant. He said Dr. Rotman agreed that he needed surgery, but he would do a different surgery than was being planned by Petitioner's doctor. Dr. Rotman noted that Petitioner could work with a 25-pound lifting restriction, though it could be lower if it was bothering him.

Petitioner said he spoke with his physical therapist and asked if he could cut grass using a stand up, zero turn mower, as he had a grass cutting business. She asked him questions about how the mower was operated and told him he could do so as long as it did not bother him and inflict pain, but he was not to do activities such as weed eating. Petitioner said he was not getting paid temporary total disability benefits at this time by Respondent, and would have lost everything if he had not owned a business due to his lack of income. He said Respondent did not offer him light duty accommodations. Petitioner said he had no other employment other than his subcontracting, his medical bills were not unpaid and he had paid for out-of-pocket expenses, such as prescription medication.

Petitioner said he had not seen any physicians since being examined by Dr. Rotman. He said his recommended shoulder surgery had never been authorized.

On cross examination Petitioner said he was honest and truthful with his treaters regarding his shoulder condition, and while he had not read the doctors' records, he had no reason to doubt the accuracy of their notes. Petitioner treated with his doctor at Springfield Clinic on March 22, 2023, and on that day he would have told Dr. Tapscott that he was miserable at that time due to ongoing severe right shoulder pain, but he had discontinued use of the sling to work on his range of motion.

Petitioner agreed that he had attended physical therapy at Taylorville Memorial Hospital in April, 2023, and that he had informed his therapist on April 5, 2023 that he continued to experience right shoulder stiffness and pain which would occasionally wake him up, and right shoulder pain when reaching laterally or reaching back. He also agreed that on April 12, 2023, he reported to his therapist that he continued to experience right shoulder pain and was unable to hold a gallon of milk hanging down, as otherwise he felt as if his shoulder would pop. Petitioner was asked if he, on April 27, 2023, reported to his therapist that he was able to do some forward reaching which he thought was surprising, and he said he did. He said it seem surprising because, through the hearing date, Petitioner has been unable to lift his right arm out from his body to the side. He said he also informed his therapist that he was unable to reach in front of himself, demonstrating the movement he could not do at the hearing. He said he told the therapist he could reach forward, but he could not reach up.

Petitioner said he last treated with Dr. Tapscott on May 4, 2033, described motions and activities which were difficult for him, or he was incapable of, noted he was still experiencing right shoulder pain, and Dr. Tapscott gave him work restrictions of no use of the right arm. Petitioner reported to Dr. Tapscott that he had ongoing right shoulder weakness and he was unable to wipe his own bottom.

At this point in the cross examination a surveillance video, Respondent Exhibit 5, was shown by Respondent counsel to Petitioner, Petitioner's attorney, and the Arbitrator. The parties agreed the video was approximately 30 minutes in length. Petitioner agreed he was the person shown in the surveillance video taken on May 11, 2023. He said the activity shown on the video was of him mowing, which had been approved by his physical therapist, as he had said on direct examination.

Petitioner testified during direct examination that, through the course of his treatment, he was not working.

The Arbitrator, with the consent of the attorneys, then read into the record his notes of what he observed in the video, principally of Petitioner cutting grass on a stand up, zero radius mower at various locations, opening a pickup door with his left hand, closing it with his right hand, and driving the pickup. His standing on a trailer attached to the pickup, of two women with him performing tasks, including one operating a riding mower, of he and one of the women lifting the trailer gate together, one on each side, and latching it. One woman operated a leaf blower, Petitioner did not operate a leaf blower or an edger. He was seen driving a mower off of the trailer. At one point he was seen for two minutes operating a sit-down mower with levers that moved forward and backward at lap height. Much of the video was of him driving the pickup truck. Both attorneys agreed to the above description.

Shane Lee Duncan

Shane Lee Duncan was called as a witness by the Petitioner. He testified that he is the owner and operator of Duncan Trees & Landscaping (Duncan Trees), which was employed by CSD Environmental Services for a project on Interstate 54. He said that job lasted from January through April, and he was the Superintendent on the job. He testified Petitioner worked as a laborer on the job. As a laborer, Petitioner was responsible for moving equipment, dragging brush and chipping, the same work everyone else was doing. He said they were to remove trees in the ditch alongside the road. Dragging brush involved cutting trees into smaller pieces and dragging them up an embankment to throw them over the guardrail of the highway, where they would then be chipped. The work schedule varied, with days of work being missed based on the weather or traffic.

Mr. Duncan testified that he was present on the Interstate 54 job site on February 17, 2023, and on that date, at about 10:30 or 11:00, Petitioner approached him and informed him that he had injured his arm. They talked about it and it was decided that Petitioner would continue to work to see how it progressed. Petitioner completed his work that day. They did not work on Monday or Tuesday, as it was raining, and Petitioner returned to work the following Wednesday, February 23, 2023. Due to his arm pain, Petitioner helped Mr. Duncan move vehicles around and keep the job site orderly. Mr. Duncan said Petitioner did not complete his work that day, as Mr. Duncan received a text from his supervisor, Frank at CSD Environmental, instructing him to have Petitioner visit the doctor for his arm. He said he showed the text to Petitioner and told him he needed to go to the doctor and show proof his arm was messed up.

MEDICAL EVIDENCE

Petitioner was seen at Taylorville Memorial Hospital on February 18, 2023, giving a history of having several pops in his right shoulder while dragging brush the day before. He said it had pain at that time, but overnight the pain had worsened, and in the morning, he was unable to move his arm at all. While he could move his hands and elbows, he could not lift his shoulder at all due to pain. He denied any prior injuries. X-rays on that date were negative for shoulder separation and fracture. The clinical impression was that of a muscle strain to the rotator cuff of the right shoulder. Medication and a sling were prescribed, and he was told to call Dr. Tapscott for an orthopedic appointment. (PX3)

On February 24, 2033, Petitioner was seen by Dr. Tapscott' Nurse Practitioner (NP), Amy Armstrong. He gave a history of injuring the right shoulder while clearing brush at work, of the pain worsening, and of his later being unable to lift his arm. When seen on this date he reported severe pain when reaching out, up and away from his body, that he could not even brush his teeth with his right hand due to pain. He denied ever having an injury to this arm prior to this event. On physical examination he could only tolerate 90 degrees of forward elevation and 30 degrees of external rotation, due to severe pain. He had anterior and lateral pain of the right shoulder with palpation, and positive Jobe, Hawkins, and Speeds tests. NP Armstrong advised Petitioner he had concerns due to his physical examination and ordered an MRI of the shoulder. Petitioner was excused from work. (PX4)

An MRI of the right shoulder was performed on March 20, 2023. It revealed a superior labral tear, mild acromioclavicular osteoarthritis, and mild subacromial bursitis. The rotator cuff was deemed to be intact. (PX 5)

NP Armstrong again saw Petitioner on March 22, 2023, and Petitioner advised the doctor he was still miserable, had discontinued his sling to work on range of motion, but he still had extreme pain with reaching up, out, and away from his body. Petitioner was found to have greater range of motion reaching in front of his body, but the motion was accompanied by severe pain. He now had positive Jobe, Hawkins, Speed, and Neer tests, and a negative belly press test. NP Armstrong reviewed the diagnostic imaging with Petitioner, and she noted she agreed with the radiologist's interpretation. Her diagnosis for Petitioner was changed on this date to "Right shoulder SLAP tear." It was noted there was also a cyst associated with the labrum. It was decided to follow conservative treatment for a period of time to see if a glenohumeral joint injection could give him relief, and if he had no relief in six weeks, they would consider arthroscopic labral repair. Petitioner voiced a hope that an injection could get him back to work. The glenohumeral injection was performed at this visit. Petitioner was advised to do no lifting, pushing or pulling with his right shoulder. (PX5)

Petitioner received physical therapy at Taylorville Memorial Hospital on five occasions, from April 5, 2023 through April 27, 2023. On the initial visit Petitioner gave a history consistent with his testimony at arbitration and his complaints were also consistent with his prior treatment records. His examination revealed a positive impingement test, minor tightness and weakness in the right shoulder, limited range of motion, and it is noted he was not at that time able to work due to this injury. The therapist noted observing Petitioner having difficulty getting his sweatshirt on and off. (PX3)

The Springfield Clinic medical records reflect Petitioner returned to see NP Armstrong on May 4, 2023. Dr. Tapscott in his deposition indicated he actually saw Petitioner on the date. The assessment on this date was superior labrum anterior-to-posterior SLAP tear of the right shoulder. Petitioner reported that the injection and physical therapy had helped a little, but he was still in a lot of pain and unable to fully lift his arm. His physical examination was very similar to his prior exams. A right shoulder arthroscopic labral debridement with repair, bicep tenodesis, subacromial decompression, acromioplasty and a possible distal clavicle excision was to be scheduled, pending work comp approval. It was noted that Petitioner was anxious to proceed with the surgery, as he wanted to get back to work. Petitioner was excused from work on that date, with no use of the right arm. (PX5)

On June 28, 2023, Dr. Rotman performed a Section 12 examination at Respondent's request. Petitioner advised Dr. Rotman that the May 4, 2023 visit was with Dr. Tapscott, not the nurse practitioner, though the earlier visits had been with the nurse practitioner. Petitioner's history and complaints were consistent with the earlier treating records. Dr. Rotman's physical examination of Petitioner showed reduction in internal rotation due to discomfort, and a difficulty in assessing external rotation as it was difficult for Petitioner to relax. His Speed test result was negative. He did not believe Petitioner's MRI results would cause the amount of pain Petitioner was voicing, He did note that Petitioner's discomfort could be coming from his biceps, noting that biceps problems are not always well visualized on an MRI scan, saying he had seen biceps which looked good on MRIs that were actually quite diseased when seen during an arthroscopic procedure. He noted that the existence of a cyst in the labrum indicated the cyst was pre-existing and his labrum problem could be chronic. He did not know if Petitioner's subjective complaints could be relied on. Dr. Rotman said that at most Petitioner's incident "may have triggered discomfort from a chronic condition noted on his MRI that was done following the February 17, 2023 incident." He said it was impossible at that time to determine if Petitioner's bicep was involved or if there was inflammation in the joint, "[t]his can be seen, though, at the time of arthroscopy." Dr. Rotman said "[i]t is impossible to suggest at this point whether there is a connection between his current should complaints to his work activities, but this would be better ascertained at the time of diagnostic shoulder arthroscopy." Dr. Rotman recommended that the shoulder arthroscopy be performed. What surgical procedures he thought should be performed appear to depend upon the actual findings at the surgery itself. He also noted, "[h]is treatment may be related to his work activities depending on the findings of the diagnostic shoulder arthroscopy," going on to note conditions which could be found which would be related to the accident. In essence, he deferred opinions on work relatedness until after the arthroscopic surgery. He felt Petitioner could work with a 25-pound lifting restriction with the right arm. He also said he could not opine whether the work restrictions were work injury related. (RX 3)

DEPOSITION TESTIMONY OF DR. DAVID TAPSCOTT

Dr. Tapscott testified via deposition as a witness for Petitioner. He testified that he was a board eligible orthopedic surgeon, having passed the board examination he was waiting for a time limitation to pass to be board certified. His testimony reference history, complaints and physical examination findings was consistent with the summary of his examination of Petitioner and his nurse practitioner's examinations of Petitioner, summarized above. He testified that Petitioner would have started being totally disabled at the time he was in the emergency room and thereafter. He said Petitioner's findings on his MRI, coupled with his being asymptomatic prior to the accident, indicate the pathology on the MRI was acute. He noted that both the

paralabral cyst and tears of the superior labrum cause pain, especially when fluid from the labral tear produces fluid which puts pressure on a nerve. In addition, subacromial impingement, which was shown on the MRI, can also cause pain. He said all of these things are possible outcomes of a trauma to the shoulder. When Petitioner did not respond to an injection, he recommended arthroscopic surgery to debride and repair the labrum and address other inflamed areas of the shoulder. (PX8 p.5,6,13-16,18)

On cross examination, Dr. Tapscott said in order to have a cyst such as was seen with Petitioner's right shoulder, there must be a tear of the labrum, and many of such tears are caused by trauma, but they can also be chronic. He said bursitis of the subacromial area tends to be from an acute cause in Petitioner's age group. While Dr. Tapscott was questioned about a utilization review report, as no such report was introduced into evidence, that testimony is not summarized here. (PX8 p.27,28)

ARBITRATOR CREDIBILITY ASSESSMENT

Petitioner testified in a forthright manner, answering all questions asked of him without any apparent attempt to evade the questions or exaggerate his answers. His testimony was consistent with and confirmed by the testimony of Mr. Duncan and the medical records for treatment visits immediately following the February 17, 2023 incident. It is noted that Petitioner offered testimony about his having operated a standing zero radius turn mower prior to Respondent's disclosure it had video and reports indicating he had performed such a task. The Arbitrator finds Petitioner to have been a credible witness.

Mr. Duncan also testified in a forthright manner. His testimony was consistent with that of Petitioner and was consistent with documentary evidence, screen shots of texts, introduced into evidence. The Arbitrator finds Mr. Duncan to have been a credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on February 17, 2023, and whether Petitioner's current condition of ill-being, superior labrum anterior-to-posterior SLAP tear of the right shoulder, is causally related to the accident of February 17, 2023, and whether Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The Arbitrator's credibility assessments, above, are incorporated herein.

Petitioner's testimony in regard to feeling pops in his right shoulder and immediate pain in that shoulder, while dragging brush as part of his laboring job for Respondent, was unrebutted. He reported the accident to his superior, Mr. Duncan, that same day. Mr. Duncan confirmed Petitioner's testimony. Petitioner testified that he had not had any injuries or problems with the right shoulder prior to the incident of February 17, 2023. No

evidence was introduced indicating Petitioner had any complaints about or medical treatment to the right shoulder prior to the incident of February 17, 2023.

Per his testimony and medical histories given to medical providers, Petitioner on the morning after the February 17, 2023 incident was in greater pain than he had been the day before, causing him to go to Taylorville Memorial Hospital on February 18, 2023, and to NP Armstrong and Dr. Tapscott thereafter. No evidence of any intervening incident was introduced into evidence. A right shoulder MRI revealed a SLAP of the labrum of the right shoulder, as well as other possible pain generators. While Petitioner did operate a standing, zero radius mower, which he said he was advised by his physical therapist was acceptable. The video of his operating that mower, and ancillary work associated with it, do not show Petitioner doing any physical labor with the right arm, nor does he lift the arm at any time in one of the manners which he told his physicians caused him pain or restricted his motion. Dr. Tapscott was deposed, but he was not asked if operating the mower was an injurious practice on the part of Petitioner or if it would have worsened his right shoulder condition.

Dr. Tapscott testified the actions described by Petitioner in dragging brush to the chipper could cause the injuries he suffered. Dr. Rotman, Respondent's examining physician, did not testify that Petitioner's actions would not have caused his injuries, he specifically said he did not know, that a diagnostic arthroscopy would better answer the condition of Petitioner's right shoulder, that MRIs of the shoulder could fail to show pathology of the sort which could generate Petitioner's pain. Dr. Rotman felt such surgery should be performed.

The Arbitrator finds that Petitioner suffered an accident on February 17, 2023, which arose out of and in the course of his employment by Respondent.

The Arbitrator further finds that Petitioner's medical condition, superior labrum anterior-to-posterior SLAP tear of the right shoulder is causally related to the accident of February 17, 2023.

The Arbitrator further finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Tapscott, to wit, a right shoulder arthroscopic labral debridement with repair, bicep tenodesis, subacromial decompression, acromioplasty and a possible distal clavicle excision. These findings are based on the testimony of Petitioner, Mr. Duncan, and Dr. Tapscott, as well as the treating medical records summarized above. It is also based upon the testimony of Dr. Rotman that he could not opine whether Petitioner's injuries were causally related, and that diagnostic arthroscopic surgery to the right shoulder was recommended.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of February 17, 2023, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The Arbitrator's credibility assessments, above, are incorporated herein.

The findings in regard to accident, causal connection, and prospective medical, above, are incorporated herein.

Petitioner's work for Respondent was heavy laboring work involving the upper extremities. Petitioner returned to accommodated work on the first work day after the date of accident. During that work day Respondent advised Mr. Duncan, by text, that Petitioner could not work until they had medical clearance for him from a doctor. A copy of that text was introduced into evidence as Petitioner Exhibit 5. No such medical clearance was ever issued by the hospital or Dr. Tapscott. Dr. Tapscott's records and testimony clearly restrict Petitioner's work. While Petitioner did operate a standing, zero radius mower, none of his actions shown on the video introduced into evidence required him to reach in front, to the side or above his head, the movements which were painful to him. There is no evidence his operating that mower was an injurious practice or increased his symptoms in any way.

Respondent has not authorized the surgery its own examining physician, Dr. Rotman, and Dr. Tapscott, recommended. Petitioner's recovery has therefore been delayed as the surgery has not been performed.

While Dr. Rotman testified Petitioner could have worked with a 25-pound right arm lifting limit, there is no evidence Respondent offered an accommodated job with that restriction, nor does that negate the testimony of Dr. Tapscott that Petitioner could not perform such work.

The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident from February 18, 2023 to October 24, 2023, the date of arbitration, a period of 35 4/7 weeks. This finding is based upon the testimony of Petitioner and Mr. Duncan, the text message stating Petitioner could not work until they had medical clearance for him from a doctor, the medical records summarized above, and the opinions of Dr. Tapscott contained in his deposition.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of February 17, 2023, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The Arbitrator's credibility assessments, above, are incorporated herein.

The findings in regard to accident, causal connection, prospective medical, and temporary total disability, above, are incorporated herein.

The medical bills contained in Petitioner Exhibit 9 are for medical services rendered by Taylorville Memorial Hospital and Walmart Pharmacy for treatment related to Petitioner's right shoulder as a result of injuries incurred on February 17, 2023 to the right shoulder.

The Arbitrator finds that all of the bills introduced into evidence in Petitioner Exhibit 9 are related to Petitioner's right shoulder injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident, and are to be paid by Respondent pursuant to the Medical Fee Schedule. This finding is based upon the testimony of Petitioner and Dr. Tapscott as well as the medical records introduced into evidence.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l), and/or §16 of the Act, as a result of the Accident of February 17, 2023, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence and deposition testimony, above, are incorporated herein.

The Arbitrator's credibility assessments, above, are incorporated herein.

The findings in regard to accident, causal connection, prospective medical, temporary total disability, and medical, above, are incorporated herein.

In considering penalties, the employer has the burden to show that any delay in paying benefits is reasonable. *Electro-Motive Division v. Industrial Comm.,* 250 Ill.App.3d 432, 436 (1993). "The standard an employer is held to is one of objective reasonableness in its belief. Thus, it is not good enough to merely assert honest belief 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 which a reasonable person in the employer's position would have would justify it." *Id.* (internal citations omitted).

Petitioner filed a Petition for Penalties, with attachments, on August 22, 2023. Those documents are contained in Petitioner Exhibit 2. Respondent filed a Response to Petitioner for Penalties & Attorneys Fees, which it introduced as Respondent Exhibit 2.

In its response, Respondent listed all of the detailed allegations pled by Petitioner in its Petition for Penalties. Respondent in its response made a general statement that it had "significant and compelling evidence that Petitioner is not owed TTD as a result of the alleged 2/17/23 accident."

Respondent also noted the law applicable in penalty cases, including Petitioner's failure to produce any evidence supporting its allegations that Respondent was "vexatious or unreasonable," and tat when an employer acts in reliance on reasonable medical opinion or there are conflicting medical opinions "penalties ordinarily are not imposed."

In this case Respondent cannot be relying on the medical opinions of Dr. Rotman that there is no causal connection, as he testified he did not know if there was a causal connection, that there might be a causal connection, but to determine that he would need for a diagnostic arthroscopic surgery to occur, and, based upon what was seen in that surgery, he then might be able to render a causal connection opinion. He noted the types of findings which might be found in that surgery, noting some of them are often missed on MRI scans, and that some of those types of findings could be causally related to the accident of February 17, 2023. In other words, Dr. Rotman's opinions cannot be relied upon as of the date of his examination of Petitioner to rebut the opinions of Dr. Tapscott, who found there to be a causal connection. Relying on Dr. Rotman's opinions is therefore not reasonable, as it does not support Respondent's actions, or inactions.

Dr. Rotman's examination was on June 28, 2023, nearly two months prior Petitioner's filing of the Petition for Penalties. Between the date of that examination and Petitioner's filing of the Petitioner for Penalties, Petitioner had emailed Respondent counsel noting Dr. Rotman's comments to Petitioner during the

examination about a 25-pound lifting limit and inquiring about return to work issues. Petitioner's counsel also requested a copy of Dr. Rotman's report. No evidence was introduced by Respondent of an accommodated job offer being made to Petitioner pursuant to Dr. Rotman's restriction.

Petitioner's counsel again wrote Respondent counsel on August 22, 2023, again noting it had never received Dr. Rotmans report, and again requesting a copy of it. It was also noted that Respondent had never responded to Petitioner attorney's request for information on addressing the return to work with Dr. Rotman's 25-pound lifting restriction.

Respondent in its February 23, 2023 text message contained in Petitioner Exhibit 5 stopped Petitioner from performing the accommodated work he had been doing, and said he could not return to work until they had medical clearance.

Respondent also disputed accident but introduced no evidence whatsoever to rebut the allegation of accident.

With the exception of a six week payment of temporary total disability benefits to allow for the examination by Dr. Rotman rather than an immediate hearing, Respondent has paid no temporary total benefits despite unrebutted evidence Petitioner's condition was causally related to this accident, and had been restricted from work, and did not make any effort to accommodate the restrictions set out by its own examining physician, even when reminded of Petitioner's willingness and interest in exploring a return to work.

The Arbitrator is not considering the failure to authorize the medical procedure recommended by both Dr. Tapscott and Dr. Rotman as grounds for any penalties, pursuant to Hollywood Casino-Aurora, Inc. vs. Illinois Workers' Compensation Commission, 2012 Ill.App. (2d) 110426WC (2012).

Petitioner as of the date of arbitration had been disabled from February 18, 2023 to October 24, 2023, the date of arbitration, a period of 35 4/7 weeks, with those benefits payable at a rate of $1,619.66 per week, a total of $57,613.62. Respondent is entitled to credit for $9,717.96 previously paid, representing six weeks of temporary total disability, an amount stipulated to by the parties at arbitration, leaving a net owed amount for temporary total disability of $47,895.66, and a delay of 29 4/7 weeks, 207 days, in the payment of temporary total disability.

The Arbitrator finds that Respondent's actions in delaying payment of temporary total disability have been unfair, unreasonable, and vexatious. In addition, as it placed accident in dispute but introduced no evidence whatsoever to support that defense, that, too, is found to be unfair, unreasonable and vexatious. For purposes of §19(k), the 50% of the temporary total disability amount payable at the time of this award is $23,947,83, and that amount is awarded as §19(k) penalties. For purposes of §19(l), payment of temporary total disability benefits was delayed for a net total of 207 days, and §19(l) penalties are awarded at $30.00 per day for said 207 days, a total of $6,210.00. Attorney fees equal to 20% of the $47,895.66 net temporary total disability are to be awarded pursuant to §16, $9,579.13 is awarded as attorney fees.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC002356
Case Name	Glenda Jean Myrick v. Danville Metal Stamping
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0335
Number of Pages of Decision	27
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Gary Stokes
Respondent Attorney	John Sturmanis

DATE FILED: 7/18/2024

/s/Carolyn Doherty, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GLENDA JEAN MYRICK,

Petitioner,

vs. NO: 18 WC 2356

DANVILLE METAL STAMPING,

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, permanent partial disability, and a *Ghere* objection, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission writes additionally on the issues of causal connection, medical expenses, and permanent partial disability.

I. Causal Connection

Regarding causal connection, the Arbitrator found that the Petitioner's low back condition, which resulted in surgery and permanent restrictions, was causally related to the November 6, 2017, accident, but also that Petitioner failed to prove that any of her conditions which arose after June 29, 2018, were causally related to the accident, as opposed to the natural progression of her degenerative spine condition. The Commission disagrees with the latter finding and concludes that Petitioner's current condition of ill-being is causally connected to the work accident.

In this case, following Petitioner's May 16, 2018, lumbar discectomy, her left leg pain was about 70% improved, a straight-leg test was negative, and the footdrop on her left leg was

gone completely. Accordingly, the Commission focuses on Petitioner's post-surgical treatment and the continued causal connection for Petitioner's continued complaints and symptomology.

When determining causal connection, "[e]very natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury." *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶ 26. Moreover, a work-related injury need only be *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003).

In this case, the Commission finds that Petitioner's post-surgical treatment records clearly support a finding that Petitioner's current condition is causally related to the work accident. Dr. Huler found that Petitioner had reached MMI for her pre-surgical symptoms, but he also referred Petitioner to Dr. Jasper for treatment of pain which arose almost immediately after the surgery. After a series of injections failed to provide relief, Dr. Jasper diagnosed Petitioner with lumbar foraminal stenosis and lumbar radiculitis. On January 25, 2019, Dr. Poulter ordered an EMG/NCS, which was an abnormal study with evidence of chronic bilateral L5-S1 radiculopathy and evidence to suggest remote nerve injury. Petitioner was then referred to a neurologist, Dr. Meshberger, who agreed with Dr. Poulter that Petitioner's pain was not congruent with the mechanism of injury of the initial accident. Instead, Dr. Meshberger diagnosed Petitioner with failed back surgical syndrome and chronic pain associated with significant psychosocial dysfunction. Dr. Belamkar also diagnosed Petitioner with failed back syndrome. Dr. Plattner diagnosed post-laminectomy syndrome, but also related Petitioner's symptoms to Petitioner's chronic back problem. The Section 12 examiner, Dr. VanFleet, initially diagnosed Petitioner with lumbar degenerative disc disease and lumbar spinal stenosis, opining that her current condition was "by no means" related to the work accident. However, he explained that Petitioner had degenerative disc disease and her condition progressively worsened secondary to her multiple failed surgeries. The Commission notes that Dr. VanFleet later agreed with the diagnosis of failed back syndrome with persistent spinal pain syndrome.

In short, after considering every natural consequence that flows from Petitioner's injury, the preponderance of the evidence establishes that the work accident resulted in surgery which in turn resulted in failed back syndrome and its sequelae. Accordingly, the Commission modifies the Decision of the Arbitrator to find a continuing causal connection between the work accident and Petitioner's current condition of ill-being.

II. Medical Expenses

Given that Petitioner's current condition of ill-being is causally connected to the accident, Respondent is ordered to pay Petitioner's necessary and reasonable medical expenses as set forth in Petitioner's Exhibits 32 through 38, pursuant to Sections 8(a) and 8.2 of the Act and the statutory fee schedule. Respondent shall be given a credit for medical benefits that have been paid. 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 and agreed by the parties in the Request for Hearing.

III. Permanent Partial Disability

The Arbitrator ordered Respondent to pay Petitioner permanent partial disability (PPD) benefits of $387.80 per week for 225 weeks, representing a 45% loss of the person as a whole. As the Commission has found that Petitioner's current condition of ill-being is causally related to the accident, we modify the Arbitrator's award of permanent partial disability (PPD) benefits. When considering PPD, the Commission considers the following factors: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. See 820 ILCS 305/8.1b(b) (West 2022). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

Regarding factor (i), Petitioner's level of impairment, Dr. Huler provided an AMA impairment rating of 7% of the person as a whole. Given that Dr. Huler's rating reflects Petitioner's immediate post-surgical condition, not Petitioner's current condition of ill-being, the Commission places slight weight on this factor.

Regarding factor (ii), Petitioner's occupation, the Arbitrator correctly found that Petitioner cannot work at her previous job due to the permanent restrictions from Dr. Huler and is unemployed. The Commission finds that Petitioner has suffered a loss of occupation and places great weight on this factor.

Regarding factor (iii), Petitioner's age was 57 years old at the time of the injury and thus her work life has been cut short by nearly a decade. The Commission places some weight on this factor.

Regarding factor (iv), Petitioner's current earning capacity is unknown, though she is collecting Social Security disability benefits. Given the lack of specific evidence on the record, the Commission places slight weight on this factor.

Regarding factor (v), Petitioner's disability as reflected by the treatment records, the diagnoses of the physicians in this case, including the Section 12 examiner, generally indicate that Petitioner suffers from some form of failed back syndrome. Her work restrictions render her unable to return to her former job. Petitioner testified without rebuttal that she had no change in her lower back and lower extremity condition since 2021 and remains on the SCS and hydrocodone. She rated her pain as 4-5/10, increasing to 10/10, at which point she must take pain pills or lie down with her knees pulled up to her chest. Petitioner continues to treat for the back and leg pain, as well as fibromyalgia. She testified that her current condition limits her daily activities of life. Her testimony generally finds support in the treatment records indicating that she is not a candidate for further surgery and can only consider more conservative treatment for her ongoing condition. The Commission places great weight on this factor.

In sum, based on the above factors, and the record taken as a whole, the Commission finds that Petitioner sustained permanent partial disability to the extent of a 60% loss of the person as a whole, pursuant to Section 8(d)(2) of the Act.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 17, 2023, is hereby modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner established a causal connection between the November 6, 2017 accident and her current condition of ill-being, *i.e.*, her failed back syndrome and its sequelae.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's necessary and reasonable medical expenses as set forth in Petitioner's Exhibits 32 through 38, pursuant to Sections 8(a) and 8.2 of the Act and the statutory fee schedule. Respondent shall be given a credit for medical benefits that have been paid. 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 and agreed by the parties in the Request for Hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $387.80 per week for 300 weeks representing 60% person as a whole under Section 8(d)(2) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under 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.

July 18, 2024

o: 7/11/24
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	18WC002356
Case Name	Glenda Jean Myrick v. Danville Metal Stamping
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Gary Stokes
Respondent Attorney	John Sturmanis

DATE FILED: 11/17/2023

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 14, 2023 5.27%

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

GLENDA JEAN MYRICK
Employee/Petitioner

v.

DANVILLE METAL STAMPING
Employer/Respondent

Case # **18** WC **002356**

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 **Urbana**, on **September 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **November 6, 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 arising on or before June 29, 2018, ***is*** causally related to the accident. Those conditions arising thereafter are not.

In the year preceding the injury, Petitioner earned $**32,962.76**; the average weekly wage was $**646.33**.

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 $**6,762.74** for TTD, $**0** for TPD, $**0** for maintenance, $**6,000.00** for nonoccupational indemnity disability benefits and $**336.60** for other benefits, for a total credit of $**13,099.34**.

Respondent is entitled to a credit for all group health insurance payments on charges reflected in Petitioner's Exhibits 32 – 38, under Section 8(j) of the Act.

ORDER

Respondent is ordered to pay medical expenses listed in Petitioner's Exhibits 32, 33, 34, 35 and 36 that were incurred on or before June 29, 2018, pursuant to Section 8(a) of the Act and in accordance with applicable medical fee schedules. 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 $430.89/week for 33 and 4/7 weeks, commencing November 7, 2017, through June 29, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $387.80/week for 225 weeks to the extent of 45% loss of a Person as a Whole pursuant to §8(d)2 of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

NOVEMBER 17, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on February 23, 2023, on all disputed issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's left ??? condition; 3) the Petitioner's average weekly wage (AWW); 4) payment of medical bills; 5) entitlement to temporary total disability benefits (TTD) from November 7, 2017, through June 29, 2018; and 6) the nature and extent of the Petitioner's injuries. The Petitioner is seeking permanent total disability (PTD) benefits pursuant to Section 8(f) of the Act.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 57 years old and employed by the Respondent as a parts marker – bending over to get a cast-iron part weighing 12-15 pounds, taking it to her work station, using a machine to mark the part and taking it to a drop area about 15 feet away. (AX1, T. 14-19) She said she handled about 200 parts per day. (T. 19)

The Petitioner acknowledged that she had two back surgeries prior to her work accident. (T. 20) In 2005, she underwent a laminectomy (removal of vertebral bone) (RX7) The Petitioner was placed on permanent restrictions of no lifting more than five pounds that could be increased to 20 pounds occasionally and 10 pounds frequently, no high force or frequency repetitive job tasks, no repetitive waist bending and no constant overhead activities. (T. 52, RX7)

On July 29, 2014, the Petitioner was diagnosed as having sciatica caused by extraforaminal disc herniation at L4-5 (herniation of the disc where the nerve exits the spine) by Dr. Robert Huler, a spine surgeon at OrthoIndy. (RX 9) On August 8, 2014, Dr. Huler performed an extraforaminal discectomy (removal of the damaged part of a disc) at L3-4 on the left side. (RX12) He released

the Petitioner to full duty work starting August 15, 2014. (Id.) The Petitioner testified that the outcome of that surgery was "great." (T. 21)

The Petitioner testified she did great over the next three years but had occasional flare-ups for which she would see Dr. Gary Page, a chiropractor at the Back Pain Clinic of Danville. (T. 22) She said she had no left leg complaints after the 2014 surgery and returned to her job for three years at a full-duty pace. (T. 73-74) Dr. Page's records show the Petitioner treated with him for: acute lumbosacral sprain/strain and acute lumbar myofascitis (a local manifestation of a toxic condition of the blood evidenced by low-grade inflammation of the muscles and connective tissue) from April through May 2015 and in July 2015; sprain of other parts of the lumbar spine and pelvis in October 2015; sprain of other parts of the lumbar spine and pelvis and cervicocranial syndrome (neurologic syndrome following injury of the spinal sympathetic nerves of the neck that control heart rate, blood pressure, digestion, urination and sweating) from March through May 2016; sprain of other parts of the lumbar spine and pelvis, cervicocranial syndrome and sprain of the cervical spine from September 6, 2017, through October 30, 2017. (RX5) At the October 30, 2017, visit, the Petitioner reported that the pain in her low back was less intense and rated it a 1/10. (Id.) The Petitioner agreed that in 2016 and June 2017, she was on FMLA (Family and Medical Leave Act) for low back pain. (T. 50, RX5)

The Petitioner testified that on November 6, 2017, she was bending over to put a part back in its box on the floor when something popped in her low back and she could not stand up. (T. 23-24) She said she got sick to her stomach, broke out in a sweat and had pain shooting down her left leg and severe back pain. (T. 24) She said a coworker helped her back to her seat. (T. 27) She said she notified her supervisor and had to leave for the day because she could not complete her shift. (Id.) She said the pain radiating down her left leg was new. (T. 28)

The Petitioner saw Dr. Page that day and described the incident consistently with her testimony. (RX5) She rated her low back pain at 9/10. (Id.) Dr. Page diagnosed sprain of the ligaments of the lumbar spine and strain of the muscle fascia and tendons of the lower back. (Id.) Dr. Page performed massage therapy, manipulation and interferential therapy (electrotherapy) that day and the following day. (Id.)

The Petitioner testified that the Respondent referred her to Occupational Medicine at Carle Clinic, where she saw Physician Assistant Steve Jacobs on November 7, 2017. (T. 28, PX2) The Petitioner described the accident consistently with her testimony and complained of back pain radiating down to the left posterior thigh region. (PX2) PA Jacobs observed swelling in the paraspinal muscles with spasm, restricted her from work and provided Therma care, ice and a TENS unit as well as prescribing pain medication and ordering the Petitioner off work. (Id.) Petitioner returned the next day with little to no improvement. (Id.) PA Jacobs diagnosed a possible herniated disk, prescribed another pain medication. (Id.)

The MRI was performed on November 20, 2017, and showed a left central disc protrusion at L3-L4 with left greater than right bilateral neural foraminal stenosis (narrowing of the area where the nerves exit the spine) and osteophyte (bone spur) formation with disc bulge and moderate left neural foraminal stenosis at L4-5. (PX3). On November 21, 2017, PA Jacobs referred the Petitioner to an orthopedic surgeon. (PX2)

The Petitioner saw Dr. Huler on December 8, 2017. (PX5) He read the MRI as showing extraforaminal disc herniation at L4-L5 left with L4 nerve compression. (Id.) He recommended a left-sided laminectomy (removal of part or all of the vertebral bone) with extension into the lateral margin to remove the extraforaminal material. (Id.)

On February 14, 2018, the Petitioner underwent a Section 12 examination by Dr. Timothy VanFleet, an orthopedic spine surgeon at the Orthopedic Center of Illinois. (RX1) She described the accident consistently with her testimony. (Id.) Dr. VanFleet reviewed the November 20, 2017, MRI and found lateral recess stenosis (narrowing of the area where the nerve starts to exit the spinal canal) bilaterally at L4-5 and L3-4 with left-sided disc protrusion at L3-4 and multilevel degenerative disc disease. (Id.) He diagnosed lumbar degenerative disc disease and lumbar spinal stenosis and found an exacerbation but no aggravation of the Petitioner's pre-existing condition. (Id.) He said the medical care provided so far was reasonable and necessary and suggested an evaluation by an interventional pain specialist for consideration of epidural injections and at least six weeks of physical therapy. (Id.) He said the Petitioner was not a surgical candidate at that time and recommended restrictions of no lifting more than 15 pounds, and no repetitive bending or twisting.

The Petitioner testified that her workers' compensation benefits were terminated in March 2018. (T 31) Patricia Stanwich, human resources specialist for the Respondent, testified at arbitration that after receiving Dr. VanFleet's report, she offered the Petitioner a light-duty position marking smaller parts that was within Dr. VanFleet's restrictions. (T. 78-80) She did not know how many parts were handled in the position being offered nor whether bending was involved in putting the parts in boxes or lifting them up from boxes. (T. 81) She said she did not consider those activities because Dr. VanFleet's restriction only was for lifting more than 15 pounds. (T. 81-82)

On March 3, 2018, the Petitioner saw Dr. Hyunchul Jung, a pain medicine specialist at Carle Clinic, who believed the Petitioner's pain was more likely coming from L5-S1 foraminal stenosis because her pain was radiating down the backs of her legs, she was hurting on the lateral

aspect of the foot, and she had numbness and tingling sensation in that area as well. (PX6) He prescribed pain medication and recommended epidural steroid injections. (PX6) His recommendations were not approved by the Respondent's insurer. (Id.)

Dr. Huler performed an extraforaminal discectomy of the left lumbar L4-5 disc on May 16, 2018. (PX9) At a follow-up with Dr. Huler on May 25, 2018, the Petitioner reported back pain at the surgical incision and left buttock, and the left leg pain was about 70 percent improved. (PX5) The Petitioner had discontinued narcotic medication and was walking two miles per day. (Id.) A straight-leg test was negative, and the footdrop on the left leg was gone completely. (Id.) Dr. Huler stated that because the Petitioner had been off work for so long, there was probably a less than 20 percent chance she would return to her same type of occupation. (Id.)

Dr. Huler authored a letter to the Petitioner's attorney on December 3, 2018, in which he said the lumbar disc herniation at L4-5 for which he treated the Petitioner resulted from repetitive bending, twisting on or about November 7, 2017, that required surgery. (PX30)

The Petitioner testified that she never returned to work. (T. 31) She acknowledged receiving holiday pay for 2018, 2019 and 2020. (T. 67) The Respondent submitted a check/deposit register summary for November 7, 2017, through December 31, 2019, purportedly showing short-term disability and holiday pay. (RX17)

The Petitioner said that after the surgery, she had back pain radiating down the left leg and both of her hips. (T. 32) She has been on Social Security disability since the surgery. (T. 33) She said she did not look for work and was unaware of an offer by the Respondent for a light-duty job. (T. 60-61) She did recall being offered a job outside her restrictions. (T. 72)

On June 29, 2018, the Petitioner reported that her left leg pain was better, and she no longer had radicular pain or weakness, but her left hip hurt. (Id.) Dr. Huler found her to be at maximum

medical improvement and gave permanent work restrictions of no lifting over 10 pounds and no repetitive lifting, twisting or bending. (Id.) He did not recommend a functional capacity evaluation because he thought there was too much risk of an injury. (Id.) He rated the Petitioner as having a whole-body impairment of 7 percent of the person based on lumbar disc surgery. (Id.) As to the hip issues, Dr. Huler diagnosed new onset of trochanteric bursitis (irritation of the tissues over the outside of the hip bone) of the left lateral. (Id.) He recommended that the Petitioner close out her workers' compensation claim to pursue treatment of the hip with physiatry evaluation and injections. (Id.)

On July 13, 2018, the Petitioner saw Dr. Nicholas Jasper, a pain management specialist and physiatrist at OrthoIndy, regarding left lateral hip pain that started in May 2018. (PX10) She rated her pain at 5-7/10 and described it as aching and sharp. (Id.) Dr. Jasper diagnosed trochanteric bursitis and low back pain, performed a steroid injection and recommended an anti-inflammatory. (Id.)

Dr. VanFleet testified consistently with his report on August 8, 2018. (RX2) He did not characterize any of the findings on the November 20, 2017, MRI as acute. (Id.) He said his examination was concerning for a great deal of exaggeration. (Id.) Dr. VanFleet testified that he reviewed an MRI from June 2014. (Id.) The Petitioner's counsel objected to this testimony because no opinion regarding the MRI was disclosed prior to the testimony. (Id.) This objection is addressed below. Dr. VanFleet testified that the January 2017 MRI was very similar to the June 2014 MRI and his review of the June 2014 MRI did not change his causation opinion but supported it. (Id.)

In explaining his causation opinion, Dr. VanFleet stated that the Petitioner had an established history of a back problem, two surgeries, multilevel degenerative disc disease and no

evidence of acute findings on the MRI, which would be consistent with the pre-existing condition that happened to be exacerbated on a temporary basis. (Id.) He said an aggravation is a condition whereby a state within the spine or somewhere in the body has been changed and essentially accelerated, while an exacerbation is a condition whereby it resorts back to its previous condition. (Id.) Dr. VanFleet did not feel the Petitioner was an appropriate surgical candidate because she was not treated non-operatively to any meaningful extent and because of his concern about exaggeration. (Id.) As to the MRI findings of a disc herniation at L4-L5 with left L4 nerve compression, Dr. VanFleet testified that these were not consistent with the Petitioner's complaints of pain down her buttocks and the posterior leg to her ankle because the L4 distribution does not give pain in the ankle but into the knee anteromedial leg. (Id.) He believed clumps of disc material outside the disc space – as Dr. Huler indicated – was consistent with a herniated disc. (Id.)

On cross-examination, Dr. VanFleet acknowledged that the June 2014 MRI preceded the August 8, 2014, surgery. (Id.) He did not recall seeing a note by Dr. Huler from August 26, 2014, stating that he was very pleased with the results of the surgery and released the Petitioner to full-duty work. (Id.) He also did not recall seeing a complaint of left lower extremity pain from after the 2014 surgery until the work accident. (Id.) He agreed that the symptoms the Petitioner described to her treating physicians – swelling, spasms, 10/10 low back pain and pain radiating down the left lower extremity – were consistent with an acute injury. (Id.)

On August 16, 2018, the Petitioner followed up with Dr. Jasper and reported 70 percent improvement after the injection, rating her pain at 4-6/10. (PX10) She denied radicular symptoms. (Id.) Dr. Jasper discussed performing a left sacroiliac (SI joint – joint linking the pelvis and lower spine) injection if her symptoms worsened. (Id.) On November 7, 2018, the Petitioner reported worsening symptoms in the low back and radiating into the bilateral buttocks and posterior thigh.

(Id.) Dr. Jasper diagnosed low back pain, lumbar spondylosis (age-related degeneration of the vertebrae and discs of the low back), lumbar foraminal stenosis and lumbar radiculitis (inflammation of a nerve root in the low back). (Id.) He prescribed oral steroids and recommended an epidural steroid injection. (Id.) The Petitioner continued to treat with Dr. Jasper, who prescribed nerve and pain medications. (Id.)

An MRI of the lumbar spine on November 20, 2018, showed: stable left L5-S1 discectomy without recurrent herniation or S1 impingement; foraminal narrowing at L4-5 with contact of the exiting left L4 nerve root; mild canal stenosis at L3-4 appearing stable without descending impingement; and multilevel annular bulge with no new herniation or focal impingement. (PX11)

The Petitioner underwent an L5 transforaminal epidural steroid injections on November 21, 2018, and December 19, 2018. (PX12) On January 4, 2019, Dr. Jasper referred her to a spine surgeon for a second opinion regarding possible surgical treatment options. (PX10) He performed another transforaminal epidural steroid injection on January 16, 2019, and left L4 selective nerve root block on January 30, 2019. (PX12) The Petitioner testified that the injections and oral steroid helped temporarily. (T. 32)

On January 25, 2019, the Petitioner saw Dr. Gregory Poulter, a spine surgeon at OrthoIndy, who voiced concern about the chronicity of the Petitioner's symptoms and her lack of desire to return to work. (PX13) He found mild to moderate stenosis in the lumbar spine that was not of a level where he could explain the Petitioner's symptoms. (Id.) He recommended nerve studies. (Id.) On February 7, 2019, Dr. Jasper performed electromyography and nerve conduction velocity tests (EMG/NCV) that suggested remote nerve injury but were otherwise normal. (PX10) On February 22, 2019, Dr. Poulter found the Petitioner was not a surgical candidate and referred her to a neurologist. (Id.)

The Petitioner saw Dr. Chad Meshberger, a neurologist at Witham Health Services, who diagnosed lumbar spondylosis, failed back surgical syndrome and chronic pain associated with significant psychosocial dysfunction. (PX14) He agreed with Dr. Poulter that the Petitioner's pain was incongruent with the mechanism of injury and limited anatomical pathology on recent imaging. (Id.) He did not see her as being a great surgical candidate and suspected a spinal cord stimulator would be her next likely step for pain control. (Id.) He wanted to get a myelogram (diagnostic imaging test using contract dye to look for problems in the spinal canal). (Id.) said drastic lifestyle choices were needed to train the Petitioner's brain to better modulate pain and would involve diligent mobility and physical exercise. (Id.)

The myelogram was performed on April 19, 2019, and showed multilevel disc degeneration and facet arthrosis, atherosclerotic calcifications, SI joint degenerative joint disease and multilevel formal narrowing. (PX15)

The Petitioner next saw Dr. Vinayak Belamkar, a pain management specialist at Witham Health Services, on May 1, 2019. (PX16) He diagnosed sacroiliitis (inflammation of the SI joint), chronic pain associated with significant psychosocial dysfunction, failed back surgical syndrome and neural foraminal stenosis of the lumbosacral spine. (Id.) He prescribed a nerve medication and recommended a psychological evaluation and a spinal cord stimulator (SCS) trial or intrathecal pump (surgically implanted device that delivers medication directly to the fluid surrounding the spinal cord). (Id.) The Petitioner received bilateral SI joint injections on May 9, 2019. (PX17) An SCS was implanted on July 17, 2019. (PX18)

Following a week with the SCS, the Petitioner reported 60-65 percent relief in the lower back and no tingling or sharp pains, but she still had numbness, constant ache in both buttocks radiating down to the right knee and left side of the back muscle, leg and outside of the shin.

(PX16) On July 24, 2019, Dr. Belamkar recommended a permanent SCS implant, which was performed on August 30, 2019. (PX16, PX19) On October 21, 2019, the Petitioner reported to Dr. Belamkar that the SCS was helping moderately but was having pain in both hips. (PX16) She received steroid injections to both hips. (Id) Dr. Belamkar performed right and left gluteal tenotomies (cutting or removal of tendon tissue) on December 9, 2019, and December 16, 2019. (PX20, PX21) Dr. Belamkar referred the Petitioner to rheumatology for further evaluation and continued prescribing oral steroids and pain and nerve medications through July 7, 2021. (PX16)

On June 9, 2020, the Petitioner saw Dr. Tehniat Haider, a rheumatologist at Witham Health Services, who diagnosed trochanteric bursitis of both hips and lumbar spondylosis and recommended physical therapy. (PX24) The Petitioner underwent physical therapy at Carle Health from June 24, 2020, through July 29, 2020, for a total of six visits. (PX25) The Petitioner testified that the physical therapy made her pain worse. (T. 36) She made the same report to Dr. Haider and her therapist. (PX24, PX25)

Upon referral by Dr. Belmakar, the Petitioner underwent another rheumatology evaluation on September 17, 2021, by Dr. Artur Kaluta at Indiana University Health. (PX29) He diagnosed fibromyalgia, depression, chronic back pain with no evidence of rheumatologic condition, chronic lumbar radiculopathy with no signs or symptoms suggestive of inflammatory myopathy and osteoarthritis of the hand. (Id.) He gave treatment options of exercise and psychotherapy. (Id.)

The Petitioner underwent another lumbar MRI on October 16, 2020, that showed multilevel degenerative changes most pronounced at L3-4 with moderate spinal canal stenosis and mild bilateral neural foraminal stenosis. (PX26)

On April 6, 2021, the Petitioner saw Dr. Paul Plattner, an orthopedic surgeon at Carle Health, diagnosed the Petitioner with chronic back pain with lumbar degenerative disc disease and

left sciatica/post-laminectomy syndrome. (PX27) He gave treatment options of medications, injections, a home exercise program, physical therapy and lifestyle changes. (Id.)

On May 31, 2023, Dr. VanFleet performed another Section 12 examination. (RX3) He reviewed updated medical records from Dr. Huler, Dr. Jasper, Dr. Poulter, Dr. Meshberger and Dr. Belamkar and the EMG studies and the myelogram. (Id.) He said the Petitioner's condition at that time was failed back syndrome with persistent spinal pain syndrome and was "by no means" related to the work accident. (Id.) He opined that the Petitioner's current hip condition was neither caused nor aggravated by the work accident. (Id.) He said the May 16, 2018, surgery, spinal cord stimulator and November 6, 2017, hip tenotomy were not reasonable, necessary or related to the accident, stating they were of no benefit to the Petitioner. (Id.) He said the Petitioner was at maximum medical improvement and thought a 15-pound restriction was reasonable because of her deconditioning over the past several years rather than the work injury. (Id.) Dr. VanFleet did not testify regarding this report.

None of the Petitioner's treating physicians testified.

The Petitioner underwent a vocational assessment. (PX39) She met with consultant David Patsavas on September 27, 2018, and January 25, 2023. (Id.) Mr. Patsavas reviewed medical records from November 7, 2018, through September 27, 2021, and the Petitioner's employment history. (Id.) Based on Dr. Huler's restrictions, Mr. Patsavas opined that the Petitioner's would be in a physical demands category of sedentary or less than sedentary. (Id.) Based on his records review, he stated that since his first meeting with the Petitioner, her medical condition had gotten worse. (Id.) Based on all of the above, Mr. Patsavas opined that a viable and stable labor market did not exist for the Petitioner, and she would not be a candidate for vocational rehabilitation services. (Id.)

The Petitioner testified that at the time of arbitration, she had no change in her lower back and lower extremity condition since 2021 and remains on the spinal cord stimulator and hydrocodone. (T. 28) She said her pain increased after activities from 4-5/10, to 10/10, and she has to take pain pills or lie down. (T. 38) She said she gardens by crawling, does not vacuum, cooks while sitting down, goes grocery shopping with her husband but has to have a cart to lean on. (T. 62) She said she was still treating with her family physician, from whom she was receiving medication for the back and leg pain. (T. 42)

For the 52 weeks preceding the work accident, the Petitioner earned straight time (including vacation pay but not including overtime) totaling $32,962.76. (RX14) During that time, the Petitioner missed seven days of work that was not paid as vacation time. (Id.)

CONCLUSIONS OF LAW

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

As a preliminary matter, the Petitioner objected to testimony of Dr. VanFleet as to the prior MRI that he reviewed after having authored his written opinion for failure to disclose failure to disclose an expert opinion at least 48 hours prior to hearing. As to disclosure of opinions, the Appellate Court has found that the 48-hour rule in Section 12 applies to the opinions of treating physicians. *Ghere v. Industrial Comm'n*, 278 Ill.App.3d 840, 845, 663 N.E.2d 1046, 215 Ill. Dec. 532 (4th Dist. 1996). In *Ghere*, the Court agreed with the Arbitrator that the opinion of a treating physician regarding causal connection between the accident and the claimant's condition was inadmissible for failure to properly disclose the opinion. (*Id*. at 846) If an undisclosed opinion is a natural continuation of a disclosed opinion, it is admissible. *Certified Testing v. Indus. Comm'n*, 367 Ill. App. 3d 938, 856 N.E.2d 602, 305 Ill. Dec. 797 (4th Dist. 2006). In this case, Dr. VanFleet's

statement that the prior MRI did not change his opinion is a natural continuation of his disclosed opinion. Therefore, the Arbitrator overrules the objection.

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

If an accident occurred how the Petitioner said it did, it would meet the criteria for arising out of an in the course of employment as set forth in *McAllister v. Ill. Workers' Comp. Com'n*, 2020 IL 12484. The Petitioner's testimony and reports to her medical providers were consistent. There was no contrary evidence. Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's low back injury occurred in the course of and arose out of her employment.

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n,* 371 Ill.App.3d 882, 888, 864 N.E.2d 266, 309 Ill.Dec. 400 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm.,* 92 Ill. 2d 30, 36, 440 N.E.2d 861, 65 Ill.Dec. 6 (1982).

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 a pre-existing low-back condition. Dr. VanFleet acknowledged that the Petitioner sustained an injury in the accident but classified it as a temporary exacerbation of her pre-existing condition. He admitted that the Petitioner's symptoms – both subjective and objective – were consistent with an acute injury.

The appellate courts have relied on Sisbro in affirming Commission decisions where doctors have opined that work accidents have exacerbated pre-existing conditions – especially when circumstantial evidence showed that a claimant was able to perform work duties before an accident but was unable to afterwards. E.g. *Corn Belt Energy Corp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 150311WC, ¶36-37, 56 N.E.3d 1101, 404 Ill. Dec. 688; *Boyd Elec. v. Dee*, 356 Ill. App. 3d 851, 861-862, 826 N.E.2d 493, 292 Ill. Dec. 352 (1st Dist. 2005); and *St. Elizabeth's Hosp. v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 889, 864 N.E.2d 266, 309 Ill. Dec. 400 (5th Dist. 2007).

The circumstantial evidence in this case supports a causation finding. Following her surgery of 2014, the Petitioner had been released to full duty. Aside from flare-ups treated with

chiropractic therapies, she was able to perform her job duties. After the accident, she had worsening symptoms plus pain radiating into her leg and was unable to perform her job duties.

The Arbitrator gives little weight to Dr. VanFleet's opinion that the Petitioner's injury was a "temporary" exacerbation. Despite surgery, her condition did not improve to the extent that she could return to her job.

As to the Petitioner's back, hip and leg complaints that developed after her surgery, there was no evidence that these resulted from the work accident, as opposed to the natural progression of her degenerative spine condition. None of the Petitioner's treating physicians testified, and there were no causation findings in their records, aside the letter from Dr. Huler linking the Petitioner's back condition that he treated to the work accident. Dr. VanFleet opined in his second report that the Petitioner's subsequent complaints were not related to the accident.

Based on all the above, the Arbitrator finds that the Petitioner's low back condition that resulted in surgery and permanent restrictions is causally related to the work accident on November 6, 2017. However, the Arbitrator finds that the Petitioner has not proved by a preponderance of the evidence that any of her conditions that arose after June 29, 2018, were causally related to the work accident.

Issue G: **What were the Petitioner's earnings?**

Section 10 of the Act provides that the earnings in the 52-week period preceding the date of injury, shall be divided by 52 ". . . but if the injured employee lost 5 or more calendar days during such periods, 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).

For the 52 weeks preceding the work accident, the Petitioner earned straight time (including vacation pay but not including overtime) totaling $32,962.76. During that time, she missed seven days of work that was not paid as vacation time. Dividing the total straight-time and vacation earnings by 51 weeks results in an AWW of $646.33.

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 medical services provided through June 29, 2018, were reasonable and necessary. The Arbitrator orders the Respondent to pay the medical expenses in Petitioner's Exhibits 32, 33, 34, 35 and 36 that were incurred on or before June 29, 2018. The Respondent shall receive credit for any amounts of those expenses it paid.

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

The parties dispute temporary total disability benefits from November 7, 2017, through June 29, 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). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

The Petitioner was taken off work for that period of time. Based on the causation findings above, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 33 and 4/7 weeks from November 7, 2017, through June 29, 2018. By agreement of the parties, the Respondent shall have credit for $6,762.74 for TTD paid, $6,000.00 for nonoccupational indemnity disability benefits paid and $336.60 for a permanent partial disability (PPD) advance – totaling $13,099.34.

As to the disputed holiday pay, the entries on check/deposit register summary for November 7, 2017, through December 31, 2019, clearly showed the short-term disability pay. However, it is unclear as to which of the other entries were "holiday" pay. There was no testimony explaining these entries. Therefore, the Arbitrator finds that the Respondent has not proven entitlement to this credit.

Issue (L): What is the nature and extent of the Petitioner's injury?

The Petitioner contends she is permanently and totally disabled. The Illinois Supreme Court has frequently held that an employee is totally and permanently disabled when he or she "is unable to make some contribution to the work force sufficient to justify the payment of wages." *Ceco Corp. v. Industrial Comm'n,* 95 Ill.2d 278, 286, 47 N.E.2d 842, 69 Ill.Dec. 407 (1985). However, an employee need not be reduced to total physical incapacity to be entitled to PTD benefits. *Id*. Rather, a person is totally disabled when he or she is incapable of performing services except those for which there is no reasonably stable market. *Id*. at 286-287. Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. *Id*. at 287.

If an employee's disability is limited so that it is not obvious that the employee is unemployable, or if there is no medical evidence to support a claim of total disability, the burden

is upon the claimant to establish the unavailability of employment to a person in his circumstances. *Id*. If the employee initially establishes obvious unemployability or presents medical evidence of such, he falls in what has been termed the "odd lot" category, and the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available. *Id*.

From a medical standpoint, Dr. Huler expressed serious doubts that the Petitioner would be able to return to her job, stating that because the Petitioner had been off work for so long, there was probably a less than 20 percent chance she would return to her same type of occupation. However, Dr. Huler did not find the Petitioner was incapable of any gainful employment. The Petitioner did not undergo a functional capacity evaluation and did not look for work. There was a vocational assessment in which Mr. Patsavas found no stable labor market for the Petitioner. However, this opinion was based in part on medical records for treatment of conditions that the Arbitrator has found to not be proven as causally related to the work accident. There were also no attempts to help the Petitioner find work within Dr. Huler's restrictions. Therefore Mr. Patsavas's opinions are given little to no weight.

For these reasons, the Arbitrator finds the did not establish obvious unemployability nor present medical evidence of such. Therefore, the Arbitrator finds that the Petitioner is not entitled to PTD benefits and awards PPD benefits instead.

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.** Dr. Huler provided an AMA impairment rating of 7 percent of the person as a whole. The Arbitrator places some weight on this factor.

(ii) **Occupation.** The Petitioner cannot work at her previous job due to the permanent restrictions from Dr. Huler. She is unemployed. The Arbitrator finds she has suffered a loss of occupation and places significant weight on this factor.

(iii) **Age.** The Petitioner was 57 years old at the time of the injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** The Petitioner's current earning capacity is unknown. She is now collecting Social Security disability benefits. The Arbitrator places some weight on this factor.

(v) **Disability.** Due to the permanent restrictions from Dr. Huler, the Petitioner has been unable to return to her former job. When Dr. Huler released her after surgery, her leg pain had improved by 70 percent. The Petitioner said there had been no change in her lower back and lower extremity condition since 2021, and she remains on the spinal cord stimulator and pain medication. She testified to inability to perform several activities of daily living. As to how much of this is due to the work accident as opposed to the subsequent deterioration of her degenerative spine condition is difficult to determine precisely. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 45 percent of the person as a whole as it relates to her low back condition.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC020618
Case Name	Charles Dorrough v. Fuyao
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0336
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Bruce J. Magnuson

DATE FILED: 7/18/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES DORROUGH,

Petitioner,

vs. NO: 15 WC 20618

FUYAO GLASS ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the 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 February 8, 2024 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,200.00. 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.

July 18, 2024

d: 07/11/24
CMD/jjm
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC020618
Case Name	Charles Dorrough v. Fuyao
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Bruce J. Magnuson

DATE FILED: 2/8/2024

/s/Adam Hinrichs, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 6, 2024 5.045%

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
NATURE AND EXTENT ONLY

Charles Dorrough
Employee/Petitioner

v.

Fuyao Glass Illinois
Employer/Respondent

Case # **15** WC **020618**

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 **Springfield**, on **01/18/2024**. By stipulation, the parties agree:

On the date of accident, **05/29/2015**, 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 $**29,556.80**, and the average weekly wage was $**568.40**.

At the time of injury, Petitioner was **48** years of age, ***single*** with **one (1)** 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.

FINDINGS of FACT

Charles Durrough ("Petitioner") testified that on May 29, 2015, he was employed at Fuyao Glass ("Respondent"). His job duties on that date involved performing a clean-up. Petitioner testified that the plant had just been purchased from PPG. The Petitioner testified that his job duties on that date involved blowing down and doing a cleaning job of the whole plant. (T. 10-11)

Petitioner testified that he was doing a "blow down" in a conveyor room. He had to blow the whole place down because the company was refurbishing it. He was working on top of a machine and had to blow sand down. Petitioner testified that the sand had built up for years. (T. 11-12)

Petitioner testified that while he was working, he passed out. (T. 12) He then noted that when he awakened, he looked up and saw a naked wire hanging from a light fixture. He testified that he had apparently come into contact with that wire. He noted that his head was dizzy. (T. 13) The Petitioner testified that he thought that the wire had touched him on the right side of his neck. He received an electrical shock. (T. 13-14)

Petitioner testified he then went to the office and spoke to the human resources officials. He reported what had happened and said that he was going to change clothes and take a shower in order to get "this stuff off of me". (T. 15) Petitioner showered, put his clothes back on and showed the HR officials where the wire had touched him. He testified that the HR people there then took him to an occupational medicine clinic. (T. 15-16)

Petitioner testified that at the time he went to occupational health, he felt symptoms in his neck all the way down his back. (T. 17) Petitioner then testified that he did not remember all the dates of his various medical visits, as they had taken place "a while back." (T. 17)

Petitioner was examined at the DMH Corporate Health Services in Decatur on May 29, 2015. Petitioner complained of a burning sensation and numbness located in the right ear. He also noted a burning sensation in his neck. He reported that he felt stable, and his pain level was 4 out of 10. A physical examination revealed that there was no swelling on the face and no open wound. The ear examination was normal, as Petitioner could hear soft whispers. The right ear showed the auditory canal to be clear with the tympanic membrane to be normal. Petitioner also heard a soft whisper. The neck revealed 2 by 3-millimeter circular superficial burn near Erb's point of the cervical plexus for neck sensation. The neurologic examination showed that the trapezius muscle elevation was normal. Arm and leg motion was normal. (PX 4, pp. 24-26) Petitioner was diagnosed with an electrical shock injury and skin burn due to electrical shock. An EKG was taken which produced normal results. He was released to full-duty work and could follow up with the first aid facility at the plant. (PX 4, pp. 24-26)

Petitioner returned to DMH Corporate Health Services on June 1, 2015. At that time, his complaints of pain were primarily located in the joints. He noted that the symptoms were accompanied by numbness. He reported blurry vision and unsteady walking. He claimed that hearing out of his right ear was muffled. He also reported a "cloud over my head," "both fingers are stiff," and "this ain't like me." A physical examination revealed that he was able to walk without difficulty. His face showed no paralysis. His left ear was examined, and the hearing threshold was similar for whispered numbers. He also heard a whispered voice for numbers in the right ear. The neck still showed the 2 by 3-millimeter superficial burn with no physical change. There was no infection. The left hand revealed normal range of motion. The right hand revealed some limited IP flexion from a past injury. Rib strength was 100 pounds and pinch strength was 18 pounds. The diagnoses included electric shock, soreness, fuzzy mentation by report, and fuzzy balance by report. Petitioner was provided with

medications and allowed to resume his regular work status. (PX 4, pp. 30-35)

Petitioner underwent an evaluation at Midwest Neurology in Decatur. Petitioner consulted with Dr. Anthony Collins on June 15, 2015. At that time, Petitioner complained of numbness in the right neck. He also complained of numbness in the hands. He complained of feeling off balance but no spinning sensation. He claimed no energy and a decreased appetite. He also claimed right ear hearing was muffled. Petitioner was examined by Dr. Collins who found him to be oriented by 3. Memory was functioning normally. His visual fields were full to confrontation. Motor examination on the right and left were all normal. The pupils were equal, round and reactive to light and accommodation. The remaining cranial nerves appeared to be normal. Petitioner's gait was normal. His reflexes were normal in both the upper and lower extremities. Other tests were negative. (PX 9, p. 414)

Dr. Collins assessed the various problems. With regard to the hearing loss in the right ear, the doctor noted that this seemed to be improving. He felt an MRI of the brain without contrast to check injury was appropriate. With regard to the paresthesia in the hands, the doctor recommended an MRI of the cervical spine to look for a herniated disc. He noted that if symptoms persisted in the hands, an EMG or nerve conduction study might be appropriate. With regard to Petitioner's claims of changes in personality, the doctor indicated that if this persisted, evaluation might be helpful by a trained neuropsychologist. (PX 9, p. 414) Dr. Collins did not take Petitioner off work.

Petitioner underwent a fit for duty examination at DMH Corporate Health Services on August 7, 2015. He was found to be fit for duty and no work restrictions were required. (RX 3)

Petitioner then commenced consultation with physicians at SIU Family Health on November 5, 2015. He had not seen a primary care physician for several years and established new patient care. According to the history, Petitioner reported that he continued to work at the Respondent. It was noted that Petitioner had been stabbed in 2006 at which time he sustained several stab wounds and had a left hemothorax and renal laceration. He also noted that while in prison in 2007, Petitioner had developed an small bowel obstruction ("SBO"). It was noted that during this hospitalization, a portion of his colon had been resected. Petitioner also reported to the doctor that he had a history of ethanol abuse but could not specifically state how much he used to drink. He stated that he used to drink several beers daily and heavily on weekends. He reported that he had not consumed any alcohol for the past six years. He reported that the main reason he was at the doctor's office was to follow up regarding his recent electric shock. The doctor then reviewed Petitioner's prior treatment. Petitioner complained that he still had a bit of numbness and tingling in his upper extremity. Petitioner noted that since his incident at work, he had been experiencing neck stiffness and paresthesia in the upper extremities. (PX 8, p. 333)

The physical examination showed that Petitioner's eyes were clear. His ears had normal form and location. His neck showed good range of motion on extension and lateral rotation. The musculoskeletal examination revealed normal muscle strength and tone. Reflexes were 2 plus and symmetric. The psychiatric evaluation showed normal mood and affect. Petitioner's assessments included history of SBO, electric shock, and ethanol abuse. The doctor told the Petitioner to follow up in one month. (PX 8, p. 333)

Petitioner consulted with Dr. Mark Scott at SIU on December 10, 2015. At this time, Petitioner complained of neck pain. He noted that he had right-sided neck pain and stiffness which radiated towards his shoulder. It was worse with movement. He denied the presence of numbing and tingling in the upper extremities. He also reported getting debris in his eye in August. This led him to an ophthalmological referral which reviewed an eye condition. Petitioner denied any blurry vision or loss of vision at this time. Following the examination, Petitioner was assessed with neck pain. He was to get x-rays and be considered for possible physical therapy. He was to follow up in one month. (PX 8, p. 331)

Petitioner was reevaluated at SIU Neurology on January 12, 2016. Petitioner continued to complain of right-sided neck pain with radiculopathy. He also claimed numbness and tingling that shot down the right arm into all five fingers. The assessment was neck pain and right-sided cervical radiculopathy. Petitioner was referred to get an EMG study and to undergo physical therapy. (PX 8, p. 329)

Petitioner underwent the EMG nerve conduction study by Dr. Rana Mahmood on January 15, 2016. The testing revealed a right moderate severe carpal tunnel syndrome with no evidence of any superimposed cubital tunnel syndrome, cervical radiculopathy, plexopathy or disease at the muscle level. (Petitioner's Exhibit 7 at 268) Petitioner then followed up again at SIU on February 18, 2016. He was examined by Dr. Dvivedi and Dr. Junker. The EMG was reviewed which revealed moderate to severe right carpal tunnel syndrome. Petitioner was reportedly referred to neurosurgery. The assessments on this date were carpal tunnel syndrome and neck pain. (PX 8, p. 327)

Petitioner next came under the care of Dr. Oliver Dold. Petitioner first was examined by the doctor on April 4, 2016. The note reflects that Petitioner's main complaint was neck pain and paresthesia. He reported the work injury, noting that he had been unconscious. It was noted that he did not hit his head. Petitioner reported that ever since this injury he had neck pain. He also noted a shock-like sensation in the right side of his chest with discomfort going down the right arm. He complained that numbness had been present since his injury. Dr. Dold examined Petitioner and noted that his neck range of motion was restricted with turning to the right. There was some give way weakness on the proximal and distal motor muscle testing in the right arm. Petitioner reported decreased appreciation for pin diffusely in both the forearms and hand. There was good sensation in the feet. Straight leg raising was negative. Tandem gait was normal. (PX 7, p. 264)

Dr. Dold reviewed the CT scan of the head performed on June 8, 2015, and noted that it was normal. He further noted that the cervical spine plain films performed on June 3, 2016, were effectively within normal limits. He then noted the results of the EMG nerve conduction study which showed a moderate severe right carpal tunnel syndrome. Dr. Dold noted that Petitioner had fairly widespread poorly localizing complaints. Dr. Dold noted he did not sense any ominous neurological features. The doctor stated that it was hard to know how the carpal tunnel finding would relate to this injury. He proposed no surgery. He noted that he did not intend to provide long-term pain management unless there was a surgical indication. The doctor did not disable Petitioner from work. (PX 7, p. 228)

Respondent then sent Petitioner for an Examination with Dr. David M. Peeples. This took place on April 18, 2016. Dr. Peeples examined the Petitioner and reviewed his medical records to date. According to the history provided to the doctor by the Petitioner, Petitioner was performing the wall blow down when he came into contact with two bare wires hanging from the ceiling. The contact site was at the right side of the neck. Petitioner told Dr. Peeples that there was no loss of consciousness. He reported having seen urgent care that day with symptoms of pain in the right ear, decreased hearing and fuzziness of the head. Petitioner reported that he missed no work and continued until he was terminated in November of last year for reasons unrelated to his reported work injury. Petitioner reported he had been off work since and was actively looking for a new job. (RX 1, p. 1)

Petitioner complained of some discomfort in his knees and arms upon awakening in the morning which resolved after he stood up and walked. He also complained of some neck and low back discomfort which was not associated with radicular symptoms. There were no other focal neurological complaints aside from numbness in the hands. Dr. Peeples noted that the workup related to the incident included x-rays of the cervical spine which revealed no significant pathology and an EMG/NCS which reported findings for carpal tunnel syndrome and no other abnormality. (RX 1, p. 1)

Upon examination, Dr. Peeples found that Petitioner's head and neck were normal. The range of motion was normal and there were no cervical neuroforaminal findings and no paracervical muscle spasm. Tinel's sign and Phalen's signs were negative at the wrists. Neurological examination revealed a normal mental status. Petitioner related a history with fluid speech, normal response time and no observed problems with memory or concentration. Mood and affect were appropriate. The cranial nerves were normal. Pupils were normal. Visual fields were full. Extraocular eye movements were intact. Facial sensation and strength were normal. Dr. Peeples found hearing and phonation to be intact. The motor examination revealed no abnormalities. Deep tendon reflexes were 2 plus at all levels. Sensory examination revealed no lateralized, myelopathic, radicular or peripheral nerve deficits. Coordination was normal. Gait was normal with no ataxia. (RX 1, p. 2)

Dr. Peeples noted that the neurological examination was normal, and Petitioner had no functionally limiting subjective neurologic symptoms. He also noted that Petitioner had demonstrated for more than six months after the incident his ability to work without restriction and felt that Petitioner continued to do so. The doctor noted that the treatment and diagnostic testing to this date have been appropriate and no additional diagnostic testing or treatment was needed referable to the May 29, 2015 injury. Dr. Peeples declared Petitioner at maximum medical improvement. (RX 1, p. 2).

Petitioner returned to Dr. Dold on April 20, 2016. Petitioner was seen in follow up with respect to his neck and right arm symptoms. During the physical examination, Dr. Dold noted that the Petitioner was somewhat expansive about his symptoms. He had some tenderness around the base of the neck and neck range of motion was restricted with turning the head to the right. Motor power was good. The doctor felt the pinprick examination was difficult to interpret. Strength, sensation and reflexes were otherwise normal. Dr. Dold felt that Petitioner had some neck and right arm pain. The symptoms were noted to be intractable. The doctor, therefore, recommended an MRI of the cervical spine. The doctor recommended over-the-counter medications and Petitioner was to return after the MRI was completed. (PX 7, p. 228)

Petitioner next saw Dr. Dold on September 15, 2016. The doctor noted Petitioner persisted with complaining of pain in the neck and noted that the paresthesia was ill-defined. The doctor noted Petitioner was complaining of severe pain in his neck and right arm. Again, the doctor noted Petitioner was "very expansive" about his symptoms. (PX 7, p. 226)

Dr. Dold noted that Petitioner had chronic neck pain with some ill-defined paresthesia. He stated that he really could not connect carpal tunnel syndrome to any of this. He was not inclined to recommend surgery as he saw nothing that demands it. The doctor noted that the MRI scan for practical purposes was normal as far as neurological problems were concerned. He stated there was nothing he could fix with a surgical approach. He, therefore, returned the Petitioner to the physicians at SIU to consider further treatment. The doctor found it difficult to formulate the complaints and noted that he did not see a strong indication for surgery. Dr. Dold suggested consultation with a pain clinic. (PX 7, p. 226)

Petitioner next saw Dr. Dold on November 9, 2016. Petitioner's main complaints seem to be on the right side of his neck near the area of the burn. Dr. Dold further noted that in the prior records there is confusion regarding whether Petitioner had lost consciousness or not. He noted that Dr. Collins' report of June 15, 2015, mentioned a loss of consciousness, which was not confirmed in Dr. Peeples' note from the evaluation of April 18, 2016. It was noted further that Petitioner had a CT scan of his head done on June 18, 2015, which was unremarkable. Dr. Dold again noted that Petitioner had nothing that would require surgery. The doctor again noted that the diagnosis of carpal tunnel syndrome did not correlate to the more widespread symptom complex, and a carpal tunnel release was not required at this time nor would it make a significant change in his status. The doctor again suggested consultation with a pain clinic. He did not see a surgical indication. (PX 7, p. 223)

Petitioner was eventually referred by the physicians at SIU to Millennium Pain Center. Petitioner began

treating there on January 10, 2015. Petitioner complained of pain in his neck, more on the right side, with pain radiating down the right side of the thoracic back and sometimes around the right side of the chest. Petitioner told nurse practitioner Cermak that he had numbness in the side and back of his head on the right side and numbness in his right hand. He complained that at times his arm and hand were so stiff he had difficulty moving it. He complained of pain since 2015. It was noted Petitioner had seen Dr. Dold and there were no surgical options. He reported he had received physical therapy within the last six months with no relief. There were no neck surgery or injections for neck pain. It was also noted that the cervical MRI from August 30, 2016, showed mild degenerative changes. Petitioner was assessed with neck pain and cervical spondylosis. Facet block injections were recommended for C2-3, C3-4 and C4-5. If there were no relief from injections, a brain MRI was suggested. (PX 7, p. 211)

Petitioner underwent a right C2 through C5 medial branch block on March 8, 2017. This was performed by Dr. Ricardo Vallejo. (PX 7 at 203)

Petitioner returned to the Millennium Pain Center on March 16, 2017. He reported that the injections did not provide relief in the neck. He now complained of pain in the back of his neck that radiated down to the middle back. The assessment remained unchanged. Petitioner was scheduled for a cervical epidural steroid injection. (PX 7, p. 203)

Petitioner followed up with Millennium Pain Center on March 21, 2017. Petitioner reported that the medial branch blocks had not provided relief. Physical examination revealed focal tenderness of multiple trigger points in the cervical region with palpable taut bands of muscle in the cervical point regions. Distribution pattern of pain was consistent with the referral pattern of the trigger points. Further trigger points were recommended. Petitioner's assessment remained unchanged. (PX 7, p. 200)

Petitioner followed up at Millennium Pain Center on April 17, 2017, after undergoing a cervical epidural steroid injection on March 27, 2017. He reported that he achieved approximately 80% of relief. He still had some stiffness on the right side of his neck. Petitioner reported that he had been taking Zanaflex, which was helping somewhat. Petitioner underwent another epidural steroid injection. (PX 7, p. 192-193)

Respondent returned the Petitioner to Dr. Peeples for a follow-up Examination on April 24, 2017. Petitioner claimed to Dr. Peeples that there had been basically no change in his symptoms since the last visit. He also related further that he had persistent neck pain for which he had received medications, therapy and injections. He reported that he was starting a labor job this week. He still reported numbness in his hands and was seeing a pain management specialist. He reported he was not driving due to a previous DWI which resulted in a lost license. He described his neck pain as mostly being on the right side with extension into the upper thoracic region. Dr. Peeples noted Petitioner did not describe any characteristic radicular, myelopathic or generalized neuropathic symptoms. (RX 1, p. 1)

During physical examination, Dr. Peeples found the head and neck to be normal. There was no tenderness of the greater occipital nerves. Range of motion of the cervical spine was normal. Dr. Peeples found no paracervical muscle spasm or cervical neuroforaminal findings. Neurologic examination revealed a normal mental status. He found that Petitioner related a history with fluid speech, normal response time and no observed problems with memory, concentration or flow of thought. He found no problems with the other aspect of higher cortical function. Cranial nerves were normal. The doctor found no problems with Petitioner's eyes. Facial sensation and strength were normal. Hearing and phonation were intact. The motor examination revealed no pronator drift or adventitious movements. Muscular bulk, tone, power was normal and symmetrical in the extremities. The doctor also found that Petitioner's coordination was normal. (Respondent's Exhibit 1 at 1) Deep tendon reflexes were present, equal and active. Sensory examination revealed no lateralized, myelopathic, radicular or peripheral neuropathic deficits. The doctor found Petitioner's gait was normal. He

was able to tandem walk forward and backward. (RX 1, p. 2)

Dr. Peeples noted that Petitioner reported persistent neck pain but had a normal neurologic examination. The doctor continued to feel that Petitioner was at maximum medical improvement and required no additional treatment relating to the reported work injury of April 29, 2015. He further was of the opinion Petitioner required no additional treatment or diagnostic testing. He was able to work full duty and was at maximum medical improvement. Dr. Peeples also opined that Petitioner's current medications were not indicated as needed as a result of the May 29, 2015, incident. (RX 2, p. 2)

Petitioner returned to Millennium Pain Center on May 1, 2017. Petitioner reported that he had received 90% relief from his injection. It was noted that he arrived ambulatory with a steady gait. Petitioner noted that he had just started a new job which agitates his neck. Petitioner stated that he was almost pain free when not working. He described pain in the neck radiating down the right arm. The nurse practitioner at Millennium Pain noted that injections were currently exhausted. Petitioner declined to take Gabapentin. Physical therapy was discussed but the Petitioner reported that he had just started the job and could not miss work. The cervical MRI was reviewed again. The nurse practitioner noted nothing further was seen on this MRI that would warrant further imaging. She noted that physical therapy can help after injections have calmed down the pain. Petitioner could be reassessed at the next visit. (PX 7)

Petitioner returned to Millennium Pain on July 5, 2017. He was seen by nurse practitioner Cermak. Petitioner reported that he had not yet been to physical therapy since he had just started a job. He continued to have the usual pain in the neck and denied any new neck pain at that time. The notes reflected that Petitioner did not want to request time off from work for physical therapy as he was in the 90-day probationary period. It was to be considered in the future. Petitioner was to continue Zanaflex and start taking Mobic. He was to follow up in two months. (PX 7, p. 189)

Petitioner returned to Millennium Pain on September 6, 2017. He complained of pain in his neck and in the right elbow. He had not started physical therapy because of his new job but the job had been terminated. The physical examination diagrams noted Petitioner made complaints of the neck and the right elbow. He was referred for physical therapy and was to continue taking Meloxicam. (PX 7, p. 185)

Petitioner followed up at Millennium Pain Center on November 11, 2017, and December 16, 2017. Petitioner denied the presence of any new pain. He received trigger point injections on this date. (PX 7 pp. 178, 182)

Petitioner returned to Millennium Pain Center on January 5, 2018. He reported receiving 80% to 90% relief from the trigger point injections. This had lasted until a couple of weeks ago. He stated headaches started back again. Petitioner was scheduled for a cervical epidural steroid injection. This was administered. He was to continue with his medications. (PX 7, p. 174)

On February 8, 2018, Petitioner reported that the cervical epidural steroid injection of January 15, 2018, had provided 75% relief. The pain was reportedly returning, and the right side felt tense. Petitioner reported that he was only taking Meloxicam on occasion. The review of symptoms showed that the musculoskeletal system was positive for neck pain, but all other symptoms were reviewed and negative. Petitioner was scheduled for another trigger point injection. (PX 1, p. 170) This trigger point injection was administered on February 22, 2018. (PX 7, p. 173)

When Petitioner followed up at Millennium on March 5, 2018, he reported 90% relief following the cervical trigger point injection. (PX 7, p. 167)

On June 4, 2018, Petitioner returned to Millennium Pain Center, again complaining of neck pain that radiated

into his right arm and to his low back. It was noted that the Petitioner had received 90% relief to the trigger point injection at the prior visit. He had received 75% relief from the cervical epidural steroid injection on January 15, 2018. The doctor discussed repeating the trigger points at the next visit. This took place on June 18, 2018. Petitioner underwent an interlaminar cervical epidural steroid injection administered by Dr. Atiq Rehman. (Petitioner's Exhibit 7 at 158) When Petitioner returned to Millennium Pain Center on July 6, 2018, he reported he had achieved 78% relief. He still complained of some stiffness and pain. Another injection was recommended. This was administered on July 10, 2018. Petitioner then returned to Millennium Pain Center on July 24, 2018. At that time, he reported no pain in the neck. He had achieved 100% relief. He reported some stiffness but no pain. Since Petitioner reported 100% relief, Petitioner was discharged to follow up as needed. (PX 7, p. 151)

Petitioner testified that as of the date of the Arbitration, he noted that his hands would not want to open up in the morning. He stated that he has a slight pull down the right side of the neck. He testified that to this day it was still painful to push his neck back. (T. 25-26) He claimed that his vision was leaving him, and he could not see. He noted that he could see all the parties present in the hearing room but had to put on glasses to see anything else. Petitioner also testified that his temperament had worsened following this injury. He testified that he would get quite upset. He also testified that he had suffered from a loss of sexual desire. (T. 28)

Petitioner testified that he worked in the forming utility department for Respondent, and the job cleaning up the room had been a special task. He testified that his final job title was a forming utility worker and he performed that job until he departed from the employer. (T. 29-30) Petitioner testified that he began treating at SIU family medicine in November 2015. (T. 32) He also testified that he saw doctors at Millennium Pain and Decatur Memorial Hospital. Petitioner could not recall consulting with Dr. Dold. The Petitioner testified he was no longer consulting with Dr. Dold or Millennium Pain Center as of the date of Arbitration. (T. 35) Petitioner also testified he had not undergone any surgery as a result of his accident at work and further noted that he did not want any surgery performed on him. (T. 36)

CONCLUSIONS of LAW

The parties stipulated that Petitioner sustained injury arising out of and in the course of his employment on May 29, 2015. Petitioner underwent conservative medical treatment for his injuries. Petitioner was not disabled from work by his treating physicians, and Petitioner claims no lost time. Petitioner is not claiming that medical expenses are unpaid. The sole issue to address is that of the nature and extent of the disability sustained by Petitioner.

The Arbitrator reviewed the evidence and applied it to the factors listed in Section 8.1b of the Act. The Arbitrator finds as follows:

With regard to subsection (i) of §8.1b(b); the Arbitrator notes that no AMA impairment report was submitted into evidence. The Arbitrator has considered this factor and lends it no weight.

With regard to subsection (ii) of §8.1b(b); the occupation of the employee; Petitioner is a laborer. He has no restrictions upon his activities. The Arbitrator places a significant weight on this factor;

With regard to subsection (iii) of §8.1b(b); Petitioner was 48 years old on the date of accident. The Arbitrator places some weight upon this factor;

With regard to subsection (iv) of §8.1b(b); no evidence was provided to establish Petitioner is unable to earn the same or greater wages than he could on the date of injury. The Arbitrator gives this factor significant weight;

With regard to subsection (v) of §8.1b(b); evidence of disability corroborated by the treating medical records; The Arbitrator finds that Petitioner came into contact with a live electrical wire on May 29, 2015. The wire touched his neck, which initially left a small burn mark on his neck. Petitioner testified that he became unconscious. The medical records are inconsistent in documenting whether Petitioner lost consciousness.

Petitioner testified at Arbitration to suffering from hearing loss. However, there is no audiological evidence to support that claim. Petitioner also testified to changes in vision as a result of the incident. There is no ophthalmological evidence to establish vision loss. There is no evidence to establish that any vision loss Petitioner has is related to the incident of May 29, 2015.

Petitioner also testified that he had a change in personality after May 29, 2015. The Arbitrator notes that there is no psychological or psychiatric evidence in the record to establish that this change is causally related to the incident of May 19, 2015. The Petitioner's medical records document that he has been imprisoned in the past and has a history of alcohol abuse. There is no evidence to clearly establish that Petitioner's personality changed or worsened after the incident of May 29, 2015.

The treating medical evidence establishes that Petitioner sustained a cervical injury arising out of and in the course of employment on May 29, 2015. This is the diagnosis that is consistently documented in the medical evidence. Petitioner complained of pain in the cervical region occasionally accompanied by radicular pain into the arms, primarily the right arm. Petitioner underwent numerous diagnostic tests to establish whether there was pathology in the cervical spine causing these symptoms. Petitioner underwent cervical x-rays on January 3, 2016, and these were found to be normal. The Petitioner underwent an EMG/nerve conduction study on January 14, 2016, which were performed by Dr. Rana Mahmood. The electrodiagnostic testing revealed no signs of cervical radiculopathy, plexopathy, or disease at the muscle level. The electrodiagnostic testing did not support Petitioner's claim of radicular symptoms. The electrodiagnostic testing revealed evidence of right moderately severe carpal tunnel syndrome. No physician has found this to be causally related to the incident of May 29, 2015.

Dr. Oliver Dold, a neurologist, noted, in his April 4, 2016, report, that Petitioner had a CT scan of his head performed on June 8, 2015, and that produced normal results. Dr. Dold also noted that cervical x-rays of June 13, 2015, were also found to be within normal limits.

The medical records reveal that Petitioner also underwent an MRI of the cervical spine on August 30, 2016. According to Dr. Dold, this testing produced relatively normal results, with some mild degenerative changes in several discs. There is no evidence to establish that these changes caused any of Petitioner's cervical symptoms.

The Arbitrator notes that none of the physicians who examined the Petitioner, including Dr. Collins, Dr. Dold, or any of the SIU physicians, found any basis upon which to recommend or perform surgery. Petitioner testified at Arbitration that he has not undergone any surgery to date.

Petitioner's treatment was conservative in nature. He ultimately underwent pain management treatment with Millennium Pain Center. Their records document that, as of July 24, 2018, Petitioner reported 100% relief of his cervical symptoms. He was released to follow up as needed.

Petitioner sustained an electric shock on May 29, 2015, which resulted in a focal entry burn in his neck with no acute organ system damage. He subsequently suffered from symptoms of a cervical strain, which was treated on a conservative basis. Petitioner has not had any permanent work restrictions imposed upon him by any of his medical providers. The Arbitrator gives this significant weight.

After considering the above factors, the Arbitrator finds that Petitioner sustained a 10% loss of use to his body

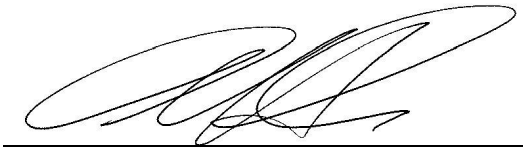
as a whole, pursuant to Section 8(d)2, as a result of the work accident occurring on May 29, 2015.

ORDER

Respondent shall pay Petitioner the sum of $**341.04**/week for a further period of **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **10% loss to Petitioner's body as a whole**.

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

February 8, 2024

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020901
Case Name	Charles Dorrough v. PPG DBA Fuyao Glass Americas, Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0337
Number of Pages of Decision	12
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Bruce J. Magnuson

DATE FILED: 7/18/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES DORROUGH,

Petitioner,

vs. NO: 16 WC 20901

FUYAO GLASS ILLINOIS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of the 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 February 8, 2024 is hereby affirmed and adopted.

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

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

Bond for 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.

July 18, 2024
d: 07/11/24
CMD/jjm
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC020901
Case Name	Charles Dorrough v. PPG DBA Fuyao Glass Americas, 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	Damon Young
Respondent Attorney	Bruce J. Magnuson

DATE FILED: 2/8/2024

/s/Adam Hinrichs, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 6, 2024 5.045%

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
NATURE AND EXTENT ONLY

Charles Dorrough
Employee/Petitioner

v.

Fuyao Glass Illinois
Employer/Respondent

Case # **16** WC **020901**

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 **Springfield**, on **01/18/2024**. By stipulation, the parties agree:

On the date of accident, **05/29/2015**, 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 $**29,556.80**, and the average weekly wage was $**568.40**.

At the time of injury, Petitioner was **48** years of age, ***single*** with **one (1)** 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.

FINDINGS of FACT

Charles Durrough ("Petitioner") testified that on May 29, 2015, he was employed at Fuyao Glass ("Respondent"). His job duties on that date involved performing a clean-up. Petitioner testified that the plant had just been purchased from PPG. The Petitioner testified that his job duties on that date involved blowing down and doing a cleaning job of the whole plant. (T. 10-11)

Petitioner testified that he was doing a "blow down" in a conveyor room. He had to blow the whole place down because the company was refurbishing it. He was working on top of a machine and had to blow sand down. Petitioner testified that the sand had built up for years. (T. 11-12)

Petitioner testified that while he was working, he passed out. (T. 12) He then noted that when he awakened, he looked up and saw a naked wire hanging from a light fixture. He testified that he had apparently come into contact with that wire. He noted that his head was dizzy. (T. 13) The Petitioner testified that he thought that the wire had touched him on the right side of his neck. He received an electrical shock. (T. 13-14)

Petitioner testified he then went to the office and spoke to the human resources officials. He reported what had happened and said that he was going to change clothes and take a shower in order to get "this stuff off of me". (T. 15) Petitioner showered, put his clothes back on and showed the HR officials where the wire had touched him. He testified that the HR people there then took him to an occupational medicine clinic. (T. 15-16)

Petitioner testified that at the time he went to occupational health, he felt symptoms in his neck all the way down his back. (T. 17) Petitioner then testified that he did not remember all the dates of his various medical visits, as they had taken place "a while back." (T. 17)

Petitioner was examined at the DMH Corporate Health Services in Decatur on May 29, 2015. Petitioner complained of a burning sensation and numbness located in the right ear. He also noted a burning sensation in his neck. He reported that he felt stable, and his pain level was 4 out of 10. A physical examination revealed that there was no swelling on the face and no open wound. The ear examination was normal, as Petitioner could hear soft whispers. The right ear showed the auditory canal to be clear with the tympanic membrane to be normal. Petitioner also heard a soft whisper. The neck revealed 2 by 3-millimeter circular superficial burn near Erb's point of the cervical plexus for neck sensation. The neurologic examination showed that the trapezius muscle elevation was normal. Arm and leg motion was normal. (PX 4, pp. 24-26) Petitioner was diagnosed with an electrical shock injury and skin burn due to electrical shock. An EKG was taken which produced normal results. He was released to full-duty work and could follow up with the first aid facility at the plant. (PX 4, pp. 24-26)

Petitioner returned to DMH Corporate Health Services on June 1, 2015. At that time, his complaints of pain were primarily located in the joints. He noted that the symptoms were accompanied by numbness. He reported blurry vision and unsteady walking. He claimed that hearing out of his right ear was muffled. He also reported a "cloud over my head," "both fingers are stiff," and "this ain't like me." A physical examination revealed that he was able to walk without difficulty. His face showed no paralysis. His left ear was examined, and the hearing threshold was similar for whispered numbers. He also heard a whispered voice for numbers in the right ear. The neck still showed the 2 by 3-millimeter superficial burn with no physical change. There was no infection. The left hand revealed normal range of motion. The right hand revealed some limited IP flexion from a past injury. Rib strength was 100 pounds and pinch strength was 18 pounds. The diagnoses included electric shock, soreness, fuzzy mentation by report, and fuzzy balance by report. Petitioner was provided with medications and allowed to resume his regular work status. (PX 4, pp. 30-35)

Petitioner underwent an evaluation at Midwest Neurology in Decatur. Petitioner consulted with Dr. Anthony Collins

on June 15, 2015. At that time, Petitioner complained of numbness in the right neck. He also complained of numbness in the hands. He complained of feeling off balance but no spinning sensation. He claimed no energy and a decreased appetite. He also claimed right ear hearing was muffled. Petitioner was examined by Dr. Collins who found him to be oriented by 3. Memory was functioning normally. His visual fields were full to confrontation. Motor examination on the right and left were all normal. The pupils were equal, round and reactive to light and accommodation. The remaining cranial nerves appeared to be normal. Petitioner's gait was normal. His reflexes were normal in both the upper and lower extremities. Other tests were negative. (PX 9, p. 414)

Dr. Collins assessed the various problems. With regard to the hearing loss in the right ear, the doctor noted that this seemed to be improving. He felt an MRI of the brain without contrast to check injury was appropriate. With regard to the paresthesia in the hands, the doctor recommended an MRI of the cervical spine to look for a herniated disc. He noted that if symptoms persisted in the hands, an EMG or nerve conduction study might be appropriate. With regard to Petitioner's claims of changes in personality, the doctor indicated that if this persisted, evaluation might be helpful by a trained neuropsychologist. (PX 9, p. 414) Dr. Collins did not take Petitioner off work.

Petitioner underwent a fit for duty examination at DMH Corporate Health Services on August 7, 2015. He was found to be fit for duty and no work restrictions were required. (RX 3)

Petitioner then commenced consultation with physicians at SIU Family Health on November 5, 2015. He had not seen a primary care physician for several years and established new patient care. According to the history, Petitioner reported that he continued to work at the Respondent. It was noted that Petitioner had been stabbed in 2006 at which time he sustained several stab wounds and had a left hemothorax and renal laceration. He also noted that while in prison in 2007, Petitioner had developed an small bowel obstruction ("SBO"). It was noted that during this hospitalization, a portion of his colon had been resected. Petitioner also reported to the doctor that he had a history of ethanol abuse but could not specifically state how much he used to drink. He stated that he used to drink several beers daily and heavily on weekends. He reported that he had not consumed any alcohol for the past six years. He reported that the main reason he was at the doctor's office was to follow up regarding his recent electric shock. The doctor then reviewed Petitioner's prior treatment. Petitioner complained that he still had a bit of numbness and tingling in his upper extremity. Petitioner noted that since his incident at work, he had been experiencing neck stiffness and paresthesia in the upper extremities. (PX 8, p. 333)

The physical examination showed that Petitioner's eyes were clear. His ears had normal form and location. His neck showed good range of motion on extension and lateral rotation. The musculoskeletal examination revealed normal muscle strength and tone. Reflexes were 2 plus and symmetric. The psychiatric evaluation showed normal mood and affect. Petitioner's assessments included history of SBO, electric shock, and ethanol abuse. The doctor told the Petitioner to follow up in one month. (PX 8, p. 333)

Petitioner consulted with Dr. Mark Scott at SIU on December 10, 2015. At this time, Petitioner complained of neck pain. He noted that he had right-sided neck pain and stiffness which radiated towards his shoulder. It was worse with movement. He denied the presence of numbing and tingling in the upper extremities. He also reported getting debris in his eye in August. This led him to an ophthalmological referral which reviewed an eye condition. Petitioner denied any blurry vision or loss of vision at this time. Following the examination, Petitioner was assessed with neck pain. He was to get x-rays and be considered for possible physical therapy. He was to follow up in one month. (PX 8, p. 331)

Petitioner was reevaluated at SIU Neurology on January 12, 2016. Petitioner continued to complain of right-sided neck pain with radiculopathy. He also claimed numbness and tingling that shot down the right arm into all five fingers. The assessment was neck pain and right-sided cervical radiculopathy. Petitioner was referred to get an EMG study and to undergo physical therapy. (PX 8, p. 329)

Petitioner underwent the EMG nerve conduction study by Dr. Rana Mahmood on January 15, 2016. The testing revealed a right moderate severe carpal tunnel syndrome with no evidence of any superimposed cubital tunnel

syndrome, cervical radiculopathy, plexopathy or disease at the muscle level. (Petitioner's Exhibit 7 at 268) Petitioner then followed up again at SIU on February 18, 2016. He was examined by Dr. Dvivedi and Dr. Junker. The EMG was reviewed which revealed moderate to severe right carpal tunnel syndrome. Petitioner was reportedly referred to neurosurgery. The assessments on this date were carpal tunnel syndrome and neck pain. (PX 8, p. 327)

Petitioner next came under the care of Dr. Oliver Dold. Petitioner first was examined by the doctor on April 4, 2016. The note reflects that Petitioner's main complaint was neck pain and paresthesia. He reported the work injury, noting that he had been unconscious. It was noted that he did not hit his head. Petitioner reported that ever since this injury he had neck pain. He also noted a shock-like sensation in the right side of his chest with discomfort going down the right arm. He complained that numbness had been present since his injury. Dr. Dold examined Petitioner and noted that his neck range of motion was restricted with turning to the right. There was some give way weakness on the proximal and distal motor muscle testing in the right arm. Petitioner reported decreased appreciation for pin diffusely in both the forearms and hand. There was good sensation in the feet. Straight leg raising was negative. Tandem gait was normal. (PX 7, p. 264)

Dr. Dold reviewed the CT scan of the head performed on June 8, 2015, and noted that it was normal. He further noted that the cervical spine plain films performed on June 3, 2016, were effectively within normal limits. He then noted the results of the EMG nerve conduction study which showed a moderate severe right carpal tunnel syndrome. Dr. Dold noted that Petitioner had fairly widespread poorly localizing complaints. Dr. Dold noted he did not sense any ominous neurological features. The doctor stated that it was hard to know how the carpal tunnel finding would relate to this injury. He proposed no surgery. He noted that he did not intend to provide long-term pain management unless there was a surgical indication. The doctor did not disable Petitioner from work. (PX 7, p. 228)

Respondent then sent Petitioner for an Examination with Dr. David M. Peeples. This took place on April 18, 2016. Dr. Peeples examined the Petitioner and reviewed his medical records to date. According to the history provided to the doctor by the Petitioner, Petitioner was performing the wall blow down when he came into contact with two bare wires hanging from the ceiling. The contact site was at the right side of the neck. Petitioner told Dr. Peeples that there was no loss of consciousness. He reported having seen urgent care that day with symptoms of pain in the right ear, decreased hearing and fuzziness of the head. Petitioner reported that he missed no work and continued until he was terminated in November of last year for reasons unrelated to his reported work injury. Petitioner reported he had been off work since and was actively looking for a new job. (RX 1, p. 1)

Petitioner complained of some discomfort in his knees and arms upon awakening in the morning which resolved after he stood up and walked. He also complained of some neck and low back discomfort which was not associated with radicular symptoms. There were no other focal neurological complaints aside from numbness in the hands. Dr. Peeples noted that the workup related to the incident included x-rays of the cervical spine which revealed no significant pathology and an EMG/NCS which reported findings for carpal tunnel syndrome and no other abnormality. (RX 1, p. 1)

Upon examination, Dr. Peeples found that Petitioner's head and neck were normal. The range of motion was normal and there were no cervical neuroforaminal findings and no paracervical muscle spasm. Tinel's sign and Phalen's signs were negative at the wrists. Neurological examination revealed a normal mental status. Petitioner related a history with fluid speech, normal response time and no observed problems with memory or concentration. Mood and affect were appropriate. The cranial nerves were normal. Pupils were normal. Visual fields were full. Extraocular eye movements were intact. Facial sensation and strength were normal. Dr. Peeples found hearing and phonation to be intact. The motor examination revealed no abnormalities. Deep tendon reflexes were 2 plus at all levels. Sensory examination revealed no lateralized, myelopathic, radicular or peripheral nerve deficits. Coordination was normal. Gait was normal with no ataxia. (RX 1, p. 2)

Dr. Peeples noted that the neurological examination was normal, and Petitioner had no functionally limiting subjective neurologic symptoms. He also noted that Petitioner had demonstrated for more than six months after the incident his ability to work without restriction and felt that Petitioner continued to do so. The doctor noted that the

treatment and diagnostic testing to this date have been appropriate and no additional diagnostic testing or treatment was needed referable to the May 29, 2015 injury. Dr. Peeples declared Petitioner at maximum medical improvement. (RX 1, p. 2).

Petitioner returned to Dr. Dold on April 20, 2016. Petitioner was seen in follow up with respect to his neck and right arm symptoms. During the physical examination, Dr. Dold noted that the Petitioner was somewhat expansive about his symptoms. He had some tenderness around the base of the neck and neck range of motion was restricted with turning the head to the right. Motor power was good. The doctor felt the pinprick examination was difficult to interpret. Strength, sensation and reflexes were otherwise normal. Dr. Dold felt that Petitioner had some neck and right arm pain. The symptoms were noted to be intractable. The doctor, therefore, recommended an MRI of the cervical spine. The doctor recommended over-the-counter medications and Petitioner was to return after the MRI was completed. (PX 7, p. 228)

Petitioner next saw Dr. Dold on September 15, 2016. The doctor noted Petitioner persisted with complaining of pain in the neck and noted that the paresthesia was ill-defined. The doctor noted Petitioner was complaining of severe pain in his neck and right arm. Again, the doctor noted Petitioner was "very expansive" about his symptoms. (PX 7, p. 226)

Dr. Dold noted that Petitioner had chronic neck pain with some ill-defined paresthesia. He stated that he really could not connect carpal tunnel syndrome to any of this. He was not inclined to recommend surgery as he saw nothing that demands it. The doctor noted that the MRI scan for practical purposes was normal as far as neurological problems were concerned. He stated there was nothing he could fix with a surgical approach. He, therefore, returned the Petitioner to the physicians at SIU to consider further treatment. The doctor found it difficult to formulate the complaints and noted that he did not see a strong indication for surgery. Dr. Dold suggested consultation with a pain clinic. (PX 7, p. 226)

Petitioner next saw Dr. Dold on November 9, 2016. Petitioner's main complaints seem to be on the right side of his neck near the area of the burn. Dr. Dold further noted that in the prior records there is confusion regarding whether Petitioner had lost consciousness or not. He noted that Dr. Collins' report of June 15, 2015, mentioned a loss of consciousness, which was not confirmed in Dr. Peeples' note from the evaluation of April 18, 2016. It was noted further that Petitioner had a CT scan of his head done on June 18, 2015, which was unremarkable. Dr. Dold again noted that Petitioner had nothing that would require surgery. The doctor again noted that the diagnosis of carpal tunnel syndrome did not correlate to the more widespread symptom complex, and a carpal tunnel release was not required at this time nor would it make a significant change in his status. The doctor again suggested consultation with a pain clinic. He did not see a surgical indication. (PX 7, p. 223)

Petitioner was eventually referred by the physicians at SIU to Millennium Pain Center. Petitioner began treating there on January 10, 2015. Petitioner complained of pain in his neck, more on the right side, with pain radiating down the right side of the thoracic back and sometimes around the right side of the chest. Petitioner told nurse practitioner Cermak that he had numbness in the side and back of his head on the right side and numbness in his right hand. He complained that at times his arm and hand were so stiff he had difficulty moving it. He complained of pain since 2015. It was noted Petitioner had seen Dr. Dold and there were no surgical options. He reported he had received physical therapy within the last six months with no relief. There were no neck surgery or injections for neck pain. It was also noted that the cervical MRI from August 30, 2016, showed mild degenerative changes. Petitioner was assessed with neck pain and cervical spondylosis. Facet block injections were recommended for C2-3, C3-4 and C4-5. If there were no relief from injections, a brain MRI was suggested. (PX 7, p. 211)

Petitioner underwent a right C2 through C5 medial branch block on March 8, 2017. This was performed by Dr. Ricardo Vallejo. (PX 7 at 203)

Petitioner returned to the Millennium Pain Center on March 16, 2017. He reported that the injections did not provide relief in the neck. He now complained of pain in the back of his neck that radiated down to the middle back.

The assessment remained unchanged. Petitioner was scheduled for a cervical epidural steroid injection. (PX 7, p. 203)

Petitioner followed up with Millennium Pain Center on March 21, 2017. Petitioner reported that the medial branch blocks had not provided relief. Physical examination revealed focal tenderness of multiple trigger points in the cervical region with palpable taut bands of muscle in the cervical point regions. Distribution pattern of pain was consistent with the referral pattern of the trigger points. Further trigger points were recommended. Petitioner's assessment remained unchanged. (PX 7, p. 200)

Petitioner followed up at Millennium Pain Center on April 17, 2017, after undergoing a cervical epidural steroid injection on March 27, 2017. He reported that he achieved approximately 80% of relief. He still had some stiffness on the right side of his neck. Petitioner reported that he had been taking Zanaflex, which was helping somewhat. Petitioner underwent another epidural steroid injection. (PX 7, p. 192-193)

Respondent returned the Petitioner to Dr. Peeples for a follow-up Examination on April 24, 2017. Petitioner claimed to Dr. Peeples that there had been basically no change in his symptoms since the last visit. He also related further that he had persistent neck pain for which he had received medications, therapy and injections. He reported that he was starting a labor job this week. He still reported numbness in his hands and was seeing a pain management specialist. He reported he was not driving due to a previous DWI which resulted in a lost license. He described his neck pain as mostly being on the right side with extension into the upper thoracic region. Dr. Peeples noted Petitioner did not describe any characteristic radicular, myelopathic or generalized neuropathic symptoms. (RX 1, p. 1)

During physical examination, Dr. Peeples found the head and neck to be normal. There was no tenderness of the greater occipital nerves. Range of motion of the cervical spine was normal. Dr. Peeples found no paracervical muscle spasm or cervical neuroforaminal findings. Neurologic examination revealed a normal mental status. He found that Petitioner related a history with fluid speech, normal response time and no observed problems with memory, concentration or flow of thought. He found no problems with the other aspect of higher cortical function. Cranial nerves were normal. The doctor found no problems with Petitioner's eyes. Facial sensation and strength were normal. Hearing and phonation were intact. The motor examination revealed no pronator drift or adventitious movements. Muscular bulk, tone, power was normal and symmetrical in the extremities. The doctor also found that Petitioner's coordination was normal. (Respondent's Exhibit 1 at 1) Deep tendon reflexes were present, equal and active. Sensory examination revealed no lateralized, myelopathic, radicular or peripheral neuropathic deficits. The doctor found Petitioner's gait was normal. He was able to tandem walk forward and backward. (RX 1, p. 2)

Dr. Peeples noted that Petitioner reported persistent neck pain but had a normal neurologic examination. The doctor continued to feel that Petitioner was at maximum medical improvement and required no additional treatment relating to the reported work injury of April 29, 2015. He further was of the opinion Petitioner required no additional treatment or diagnostic testing. He was able to work full duty and was at maximum medical improvement. Dr. Peeples also opined that Petitioner's current medications were not indicated as needed as a result of the May 29, 2015, incident. (RX 2, p. 2)

Petitioner returned to Millennium Pain Center on May 1, 2017. Petitioner reported that he had received 90% relief from his injection. It was noted that he arrived ambulatory with a steady gait. Petitioner noted that he had just started a new job which agitates his neck. Petitioner stated that he was almost pain free when not working. He described pain in the neck radiating down the right arm. The nurse practitioner at Millennium Pain noted that injections were currently exhausted. Petitioner declined to take Gabapentin. Physical therapy was discussed but the Petitioner reported that he had just started the job and could not miss work. The cervical MRI was reviewed again. The nurse practitioner noted nothing further was seen on this MRI that would warrant further imaging. She noted that physical therapy can help after injections have calmed down the pain. Petitioner could be reassessed at the next visit. (PX 7)

Petitioner returned to Millennium Pain on July 5, 2017. He was seen by nurse practitioner Cermak. Petitioner reported that he had not yet been to physical therapy since he had just started a job. He continued to have the usual pain in the neck and denied any new neck pain at that time. The notes reflected that Petitioner did not want to request time off from work for physical therapy as he was in the 90-day probationary period. It was to be considered in the future. Petitioner was to continue Zanaflex and start taking Mobic. He was to follow up in two months. (PX 7, p. 189)

Petitioner returned to Millennium Pain on September 6, 2017. He complained of pain in his neck and in the right elbow. He had not started physical therapy because of his new job but the job had been terminated. The physical examination diagrams noted Petitioner made complaints of the neck and the right elbow. He was referred for physical therapy and was to continue taking Meloxicam. (PX 7, p. 185)

Petitioner followed up at Millennium Pain Center on November 11, 2017, and December 16, 2017. Petitioner denied the presence of any new pain. He received trigger point injections on this date. (PX 7 pp. 178, 182)

Petitioner returned to Millennium Pain Center on January 5, 2018. He reported receiving 80% to 90% relief from the trigger point injections. This had lasted until a couple of weeks ago. He stated headaches started back again. Petitioner was scheduled for a cervical epidural steroid injection. This was administered. He was to continue with his medications. (PX 7, p. 174)

On February 8, 2018, Petitioner reported that the cervical epidural steroid injection of January 15, 2018, had provided 75% relief. The pain was reportedly returning, and the right side felt tense. Petitioner reported that he was only taking Meloxicam on occasion. The review of symptoms showed that the musculoskeletal system was positive for neck pain, but all other symptoms were reviewed and negative. Petitioner was scheduled for another trigger point injection. (PX 1, p. 170) This trigger point injection was administered on February 22, 2018. (PX 7, p. 173)

When Petitioner followed up at Millennium on March 5, 2018, he reported 90% relief following the cervical trigger point injection. (PX 7, p. 167)

On June 4, 2018, Petitioner returned to Millennium Pain Center, again complaining of neck pain that radiated into his right arm and to his low back. It was noted that the Petitioner had received 90% relief to the trigger point injection at the prior visit. He had received 75% relief from the cervical epidural steroid injection on January 15, 2018. The doctor discussed repeating the trigger points at the next visit. This took place on June 18, 2018. Petitioner underwent an interlaminar cervical epidural steroid injection administered by Dr. Atiq Rehman. (Petitioner's Exhibit 7 at 158) When Petitioner returned to Millennium Pain Center on July 6, 2018, he reported he had achieved 78% relief. He still complained of some stiffness and pain. Another injection was recommended. This was administered on July 10, 2018. Petitioner then returned to Millennium Pain Center on July 24, 2018. At that time, he reported no pain in the neck. He had achieved 100% relief. He reported some stiffness but no pain. Since Petitioner reported 100% relief, Petitioner was discharged to follow up as needed. (PX 7, p. 151)

Petitioner testified that as of the date of the Arbitration, he noted that his hands would not want to open up in the morning. He stated that he has a slight pull down the right side of the neck. He testified that to this day it was still painful to push his neck back. (T. 25-26) He claimed that his vision was leaving him, and he could not see. He noted that he could see all the parties present in the hearing room but had to put on glasses to see anything else. Petitioner also testified that his temperament had worsened following this injury. He testified that he would get quite upset. He also testified that he had suffered from a loss of sexual desire. (T. 28)

Petitioner testified that he worked in the forming utility department for Respondent, and the job cleaning up the room had been a special task. He testified that his final job title was a forming utility worker and he performed that job until he departed from the employer. (T. 29-30) Petitioner testified that he began treating at SIU family medicine in November 2015. (T. 32) He also testified that he saw doctors at Millennium Pain and Decatur Memorial Hospital. Petitioner could not recall consulting with Dr. Dold. The Petitioner testified he was no longer consulting with Dr.

Dold or Millennium Pain Center as of the date of Arbitration. (T. 35) Petitioner also testified he had not undergone any surgery as a result of his accident at work and further noted that he did not want any surgery performed on him. (T. 36)

CONCLUSIONS of LAW

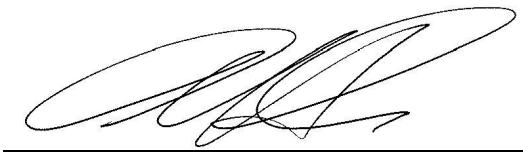
The parties stipulated that this matter is a duplicate filing for the same accident and accident date as the Petitioner's other claim, 15WC020618, which was also tried on January 18, 2024 in Springfield. Given the 10% loss of use of Petitioner's person as a whole award in 15WC020618, no further award or credit shall issue in this matter.

ORDER

Based upon the decision in the duplicate filing, 15WC020618, for the same incident, no further award or credit shall issue in this matter.

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

February 8, 2024

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC004225
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	22WC004227; 22WC011641;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0338
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 7/18/2024

/s/Christopher Harris, 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

MICHAEL AKERS,

Petitioner,

vs. NO: 22 WC 4225

SMITHFIELD FOODS, 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 causal connection, the reasonableness and necessity of the medical treatment and charges, prospective medical treatment, temporary total disability, and permanent partial disability, and being advised of the facts and law, clarifies the Arbitrator's award as stated below and affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

This claim was consolidated with claim numbers 22 WC 4227 and 22 WC 11641 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claims 22 WC 4227 and 22 WC 11641. There is only one bond comprising claims 22 WC 4227 and 22 WC 4225 as both claims share the same award.

The Commission clarifies the Arbitrator's order to indicate that Respondent shall authorize prospective medical care relative to Petitioner's tailbone and lumbar spine, specifically an EMG as recommended by Dr. Roberts. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2023 is clarified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize prospective medical care relative to Petitioner's tailbone and lumbar spine, specifically an EMG as recommended by Dr. Roberts.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,900.00. 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.

July 18, 2024

O: 7/11/24
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	22WC004225
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 10/30/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 30, 2023 5.32%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Akers
Employee/Petitioner

v.

Case # **22 WC 4225**

Consolidated cases:

Smithfield Foods, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **July 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. ☒ 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 the date of accident, **November 17, 2021,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the Petitioner's injury, Petitioner's average weekly wage was **$800.00.**

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

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

ORDER

- The Respondent shall pay **$ 6,350.00** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay the petitioner temporary total disability benefits of $ **572.60** /week for **42 & 5/7** weeks, from **March 9, 2022 through January 2, 2023** as provided in Section 8(b) of the Act, awarded under consolidated case # 22 WC 4227.

- The Respondent shall authorize prospective medical care relative to Petitioner's tailbone and lumbar spine, specifically the EMG recommended by Dr. Roberts, and follow up care, until Petitioner reaches a state of maximum medical improvement.

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

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

Bradley D. Gillespie OCTOBER 30, 2023

Signature of Arbitrator

ICArbDec

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL AKERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 22WC004225**
	)	
SMITHFIELD FOODS,	)	
	)	
Respondent.	)	

19(b) DECISION OF ARBITRATOR

On or about May 3, 2022, Michael Akers [hereinafter "Petitioner"] filed an Application for Adjustment of Claim alleging injuries to his left upper extremity while in the course of his employment with Smithfield Foods [hereinafter "Respondent"] (PX #1). This matter proceeded to hearing on July 19, 2022, in Peoria, Illinois along with Case Nos. 22WC004227 and 22WC011641 which were consolidated. (Arb. Ex. 1, *See also* Arb. Ex. 2 and Arb. Ex. 3). The following issues were in dispute in the instant case at arbitration:

- Causation;
- Medical Bills;
- TTD; and
- Prospective Medical Care.

STATEMENT OF FACTS

The parties stipulated that Petitioner was an employee of Respondent on August 13, 2021, November 17, 2021, and January 19, 2022. The parties stipulated Petitioner sustained accidents that arose out of and in the course of his employment by Respondent on November 17, 2021, and January 19, 2022, and that timely notice of those injuries was provided to Respondent. The parties stipulated that Petitioner's average weekly wage relative to his August 13, 2021, injury was $836.10, that his average weekly wage relative to his November 17, 2021, injury was $800.00, and that his average weekly wage relative to his January 19, 2022, injury was $858.90. The parties stipulated that Petitioner was 55 years of age at the time of his August 13, 2021, and November 17, 2021, injuries and 56 at the time of his January 19, 2022, injury, and that he was single, with no dependent children at the time of any of his injuries.

Petitioner testified that his date of birth is December 11, 1965. (Tr. p. 13) Petitioner testified that he began working for Respondent in April of 2020, initially as a temporary worker. *Id.* He worked as a temp for approximately three months before becoming a full-time employee of Respondent in October or November of 2020. (Tr. p. 14) Petitioner testified that

his position was called internal transport. *Id.* In that position, he drove a motorized pallet jack and a forklift. *Id.* He also performed some inventory, using a scan gun, and unloaded and loaded product from cooler. (Tr. pp. 14-15) He would also operate a standing forklift at times. (Tr. p. 15)

Petitioner testified that around August 13, 2021, he injured his left wrist. (Tr. p. 17) Petitioner testified that this was an acute injury that got worse. *Id.* He testified that a band machine needed to be moved. While assisting a co-worker in moving the machine, one of its wheels went into a drain and the machine started to fall. (Tr. pp. 17-18) Petitioner testified to catching it with his left arm, twisting his wrist back. (Tr. p. 18) Petitioner testified that he sought treatment with the plant nurse at Respondent on the day he bent his wrist back. (Tr. p. 19) He was provided with warm arm soaks by the nurse on a daily basis for approximately a month. (Tr. pp. 19-20) Petitioner testified that he reported the injury to the night superintendents, Chris and Laura, a blue hat supervisor. (Tr. p. 20) He did not lose any time from work related to this injury. *Id.*

On November 17, 2021, Petitioner sustained a second injury. While stepping down from his pallet jack, he was struck in the foot from behind by another pallet jack, causing him to fall onto his buttocks. (Tr. pp. 21-22) Petitioner believed he landed on the forks of the other pallet jack, but it could have been the floor. (Tr. p. 22) A supervisor attempted to help him to his feet and pulled his previously injured left wrist, causing him to scream. *Id.* Petitioner testified that he initially went to plant medical again and was provided with ice packs. (Tr. p. 23) Petitioner returned to work for his regular shift that night. *Id.* Over the next several days, Petitioner began to experience pain in his lower back. He had trouble stooping to pick up boxes and properly wrap them. *Id.* Petitioner stated that he reported this injury to Ann, the nurse in the medical department. *Id.*

On December 10, 2021, Petitioner was seen at OSF in Galesburg regarding his left wrist. (PX #5) The record noted that he does a lot of repetitive lifting and catching. He was assessed with left de Quervain tenosynovitis and provided an injection. On December 14, 2021, it was noted that the injection helped his wrist l and he was able to work. (PX #5)

On January 19, 2022, Petitioner was driving pallet jack when a wheel hit a drain, ejecting him from the pallet jack, and throwing him to the ground. (Tr. p. 28) Petitioner testified that he landed on his right hip, right shoulder, right elbow, and head. *Id.* He testified he was taken by ambulance to the hospital. *Id.* OSF Holy Family Medical Center records note that Petitioner had sustained an injury at work less than an hour ago when he fell from a height of three feet, landing on a concrete floor, on his right side, with blunt trauma to the right shoulder, elbow, lower back, and right posterior pelvis. (PX #6) Petitioner testified that he was called out to the plant and was sent to the OSF occupational facility in Galesburg. (Tr. p.

29) Petitioner testified that he was advised to be off work and follow up in four days. (Tr. pp. 29-30) Petitioner testified he was called into the plant the next morning for an investigation regarding the injury. (Tr. p. 30)

Petitioner testified he was off work for a short period of time before returning to work in the box room and the supply room. (Tr. p. 31) He reported he was experiencing deltoid pain, neck, right foot, right leg, back, and shoulder pains. (Tr. p. 32) Petitioner began treatment with Dr. Kramer, a chiropractor at Senara Health, on February 16, 2022. *Id.* Records reflect that Petitioner complained of four weeks of neck and back pain, noting that he had fallen at work when ejected forward about 3-4 feet, landing on his right side. (PX #4) Petitioner was referred to Midwest Ortho to evaluate a possible sacral fracture. *Id*.

Petitioner continued to work in the box room, a lighter duty position, for a period of time before being sent to the back where he was to drive a forklift. (Tr. p. 33) Petitioner testified that he was under restrictions that were not being followed. (Tr. pp. 33-34) He testified to push and pull restrictions that were violated by the position. (Tr. p. 34) Petitioner testified that he advised his supervisor, Ken Johnson, that his restrictions were not being accommodated, but continued to work. (Tr. pp. 34-35) On March 8, 2022, Petitioner was terminated. (Tr. p. 36) Petitioner testified that on or around March 3, 2022, he was moved to the shipping dock. While performing that position, he was suspended for sleeping on the job, though Petitioner disputes he was sleeping. (Tr. pp. 37-38) Petitioner testified that he was not offered work again by Respondent for months. (Tr. p. 38) When offered a position, it was not within his restrictions. (Tr. p. 39)

On March 9, 2022, Petitioner was again seen by Dr. Kramer. At that time, Dr. Kramer took Petitioner off work. (PX #4) Thereafter, Petitioner was seen by Dr. Roberts at Midwest Ortho on March 17, 2022. (PX #7) Dr. Roberts evaluated Petitioner regarding his tailbone. He noted Petitioner's November 17, 2021, injury when he was tripped by a pallet jack, landing on his tailbone, and his January 19, 2022, injury in which he was propelled to the cement. Dr. Roberts recommended a donut to sit on due to his difficulty sitting, medication, physical therapy, and chiropractic treatment. (PX #7)

On March 21, 2022, Dr. Kramer recommended evaluation regarding his neck pain. He took Petitioner off work for eight weeks and recommended physical therapy. Petitioner underwent physical therapy regarding his lower back at Senara Health from March 24, 2022, through April 13, 2022. (PX #4) On April 20, 2022, Dr. Kramer continued Petitioner off work until May 22, 2022, and recommended ongoing therapy.

On April 25, 2022, Petitioner was seen by Dr. Mulconrey, an orthopedic spine surgeon, at Midwest Ortho (PX #7) Dr. Mulconrey assessed Petitioner regarding his neck pain

following his January 19, 2022, injury. Dr. Mulconrey noted that Petitioner's attempts to return to work, wearing a helmet and driving a forklift, had severely increased his axial neck pain and headaches. *Id.* Dr. Mulconrey noted that x-rays showed severe cervical degenerative disease and recommended physical therapy as well as a cervical MRI. *Id*. Dr. Mulconrey also noted Petitioner should avoid driving fork trucks and wearing a helmet while at work. *Id.* He noted Petitioner could work light duty at most, but currently was off work. (PX #7)

On April 27, 2022, Petitioner was evaluated at Respondent's request by Dr. Van Fleet. (RX #3) Dr. Van Fleet reviewed videos of Petitioner's injuries. At the time of his report, Dr. Van Fleet assessed strains to Petitioner's cervical spine and lumbar spine. *Id.* He noted that Petitioner has degenerative changes within his neck and back which likely were somewhat exacerbated with the fall, temporarily. *Id.* Dr. Van Fleet agreed that formal spine evaluation of Petitioner's neck and back were reasonable. He recommended a lifting restriction of 25 pounds with no repetitive bending or twisting as well. *Id.* Dr. Van Fleet agreed that Petitioner would benefit from physical therapy for his cervical and lumbar spine for 6 weeks at which point he should be at MMI with no restrictions. (RX #3) Dr. Van Fleet was deposed on March 15, 2023. (RX #4) Dr. Van Fleet acknowledged he did not see any evidence that Petitioner was under any restrictions prior to his injuries with Respondent. *Id.* Dr. Van Fleet testified that in his opinion a degenerative cervical spine condition cannot be permanently aggravated by a trauma such as that experienced by Petitioner. *Id*.

Petitioner underwent physical therapy for his cervical and lumbar spine through June 21, 2022. (PX #4, PX #7) Respondent provided surveillance of Petitioner driving his car and walking into physical therapy on May 9, 2022. (RX #7, RX #8) On May 11, 2022, Dr. Mulconrey reviewed Petitioner's cervical spine MRI, noting right, greater than left central canal stenosis at C3-4, left greater than right foraminal stenosis at C4-5, as well as severe cervical spondylosis and cervical degenerative disk disease at C5-6 and C6-7. (PX #7) Dr. Mulconrey recommended ongoing physical therapy and consideration of epidural injections. *Id*.

Respondent submitted surveillance of Petitioner working a sample table at Schnucks grocery store on May 18, 2022. (RX #7) He testified it was a job he had done from time to time prior to working for Respondent. He would set up a table and pour and supply samples of beverages to customers. (Tr. p. 43) Surveillance of Petitioner on May 23, 2022 demonstrated him putting a lawnmower into his vehicle. (Tr. pp. 44-45) He stated the mower weighed between 35-40 pounds and that lifting it did not change his symptoms. *Id.*

On June 10, 2022, Petitioner was seen by Dr. Roberts at Midwest Ortho regarding his ongoing tailbone pain. (PX #7) Dr. Roberts noted that x-rays showed luxation of the

sacrococcygeal region. *Id.* Due to numbness in Petitioner's feet and legs, an EMG was recommended. *Id*. Petitioner testified the EMG was not approved. (Tr. p. 45)

Petitioner was seen by Dr. Bell at referral from Dr. Mulconrey on June 14, 2022. (PX #7) Dr. Bell recommended a cervical epidural steroid injection. *Id*. Petitioner testified that injection was not performed as it was not approved by the insurance company. (Tr. p. 46)

On June 27, 2022, Petitioner was seen by Dr. Kramer due to pain in both his feet. (PX #4) Dr. Kramer noted that Dr. Roberts had ordered an EMG and that Dr. Mulconrey had recommended an epidural. *Id*. On July 29, 2022, Dr. Mulconrey recommended Petitioner continue to work with Pain Management and physical therapy. (PX #7) On August 16, 2022, Dr. Bell prescribed Naproxen, Tylenol 3, Gabapentin, and a C7-T1 epidural steroid injection. *Id*.

Respondent submitted additional surveillance of Petitioner dated October 19, 2022. In the footage, Petitioner is shown moving cardboard boxes. (RX #7, RX #8) Petitioner testified the boxes were empty and weighed less than 2 pounds. (Tr. pp. 48-49) He had acquired a temporary position moving the boxes and worked that job for approximately a week or two. (Tr. p. 49)

On October 31, 2022, Dr. Mulconrey authored a narrative report, finding that Petitioner's current condition relative to his cervical spine was causally related to his January 19, 2022 injury. (PX # 8) Dr. Mulconrey noted that it is clear that Petitioner had degenerative changes that pre-dated his injury, but that it appears the work injury created a change in his underlying condition, which led to his inability to work. *Id.* Dr. Mulconrey opined that Petitioner was not able to return to full duty work as of July 29, 2022, and continued to recommend cervical epidural steroid injections and therapy. On March 13, 2023, Dr. Mulconrey was deposed regarding his opinions relative to Petitioner's injury. He stated that Petitioner could require surgery based on his MRI findings but such would not be considered until after he completed conservative treatment. (PX #8)

Petitioner acknowledged he had filed prior workers' compensation claims. (Tr. pp. 63-66) He testified he had experienced lower back pain previously. He had a prior claim involving the lower back in 2016 but had been cleared by the same doctors at OSF regarding that injury, prior to working for Respondent. (Tr. p. 75) He testified he had no treatment for his lower back, his tailbone, or his neck after starting for Respondent in early 2020 until his November 17, 2021, injury. (Tr. p. 76) He testified he had no symptoms in those areas and was working with no issues prior to the injuries with Respondent. (Tr. pp. 76-77)

Petitioner testified that he secured a full-time position at Walmart on January 3, 2023. He works overnight, in maintenance. (Tr. p. 50) Petitioner testified that he continues to perform the exercises he was taught in therapy on a daily basis. (Tr. p. 51-52) He also continues to take Naproxen and Ibuprofen. (Tr. pp. 50-52) Petitioner reported he continues to experience numbness in his feet, neck pain, and lower back pain. (Tr. p. 52) He continues to use ice packs when symptoms increase. (Tr. p. 53) Petitioner testified his current position at Walmart is light work. *Id.* Petitioner testified he continues to want to undergo the EMG and cervical epidural that were recommended. (Tr. p. 55)

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the Findings of Fact set forth in the foregoing paragraphs. The Arbitrator finds and concludes that Petitioner's current condition of ill-being is causally related to his November 17, 2021, injury. The Arbitrator relies upon the treating records and Petitioner's credible testimony.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was **a causative factor** in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981).

Petitioner's treatment records and his testimony establish a causal relationship exists between his November 17, 2021, injury, and his current condition of ill-being. Respondent does not dispute that Petitioner's November 17, 2021, injury occurred and arose out and in the course of his employment. At that time, Petitioner was struck from behind falling onto his buttocks. Petitioner testified that he initially treated with the nurse in Respondent's plant until sustaining another injury on January 19, 2022. Thereafter, he began treatment for the two injuries. On February 16, 2022, Dr. Kramer referred Petitioner to Midwest Ortho to evaluate him for a possible sacral fracture. He had that evaluation on March 17, 2022, with Dr. Roberts. Dr. Roberts noted Petitioner's difficulty sitting due to tailbone pain. A donut was recommended for sitting, as well as medications, chiropractic treatment, and physical therapy. Following x-rays, Dr. Roberts assessed a luxated tailbone. On June 10, 2022, Dr. Roberts noted that the gluteal region pain had improved, but that Petitioner was having some numbness in his legs and feet. Due to Petitioner's reported paresthesias, an EMG was recommended.

Petitioner testified that he continued to experience ongoing pain in his lower back and numbness in his feet and legs. There was no evidence presented that Petitioner had any symptoms relative to his lower back, his tailbone, or his legs/feet prior to hi November 17, 2021, injury. He has undergone treatment, including extensive physical therapy, with some improvement, but continues to have symptoms. The records support that those symptoms began as a result of Petitioner's November 17, 2021, injury. Therefore, his current condition of ill-being relative to his tailbone and lumbar spine remain causally related to his November 17, 2021, 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?

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injury he sustained on November 17, 2021. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are set forth in the Statement of Facts. The Arbitrator finds and concludes that Petitioner's treatment described in the statement of facts, including the chiropractic treatment and physical therapy at Senara Health from February 28, 2022 through July 8, 2022, were reasonable and necessary. Petitioner initially started treatment with Dr. Kramer at Senara Health for his neck and back pain on February 16, 2022. Dr. Kramer referred Petitioner to Midwest Orthopedic for orthopedic evaluation. Following that evaluation by Dr. Roberts, additional chiropractic treatment and physical therapy were recommended by Dr. Roberts. Respondent provided no opinion that the treatment at Senara Health from February 28, 2022, through July 8, 2022 was not reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to his injuries, Petitioner's treatment has been reasonable and necessary.

Wherefore, the Arbitrator finds and concludes that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 9, charges totaling $6,350.00 with Senara Health, pursuant to the medial fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds and concludes that Petitioner is owed Temporary Total Disability benefits from March 9, 2022 through January 2, 2023.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally

disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner was taken off work due to his injuries on March 9, 2022, by Dr. Kramer. He testified he had previously been working under restrictions provided by the nurse at Respondent's medical department. He was terminated around March 3, 2022. On March 17, 2022, Dr. Roberts noted Petitioner's difficulty sitting and recommended additional treatment. On March 21, 2022, Dr. Kramer kept Petitioner off work for eight weeks. Petitioner underwent physical therapy from March 24, 2022, through July 8, 2022 at Senara Health and Midwest Ortho. He was kept off work by Dr. Kramer on April 20, 2022. On April 27, 2022, Respondent's IME physician opined 25 pound lifting and no repetitive bending or twisting restrictions were appropriate. Additional treatment was recommended by Dr. Mulconrey, Dr. Roberts, and Dr. Bell in May and June of 2022.

Petitioner testified to very short duration, part-time work in May of 2022 and October of 2022. There was nothing in the surveillance to evidence that Petitioner was violating his restrictions. Additional treatment continued to be recommended, supporting that Petitioner has not reached maximum medical improvement. On January 3, 2023, Petitioner acquired a full-time position that he has been able to maintain despite his ongoing symptoms.

Petitioner's period of TTD relates both to his November 17, 2021, injury and his January 19, 2022, injury. As Petitioner was not taken off work until after his January 19, 2022, injury, the Arbitrator is awarding TTD benefits based on the January 19, 2022, injury.

Wherefore, the Arbitrator finds and concludes that Petitioner is entitled to temporary total disability benefits from March 9, 2022, through January 2, 2023, due to his November 17, 2021, and January 19, 2022 injuries at the weekly rate of $572.60 under case 22 WC 4227

O. Prospective Medical

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law set forth in the foregoing paragraphs.

As noted above, the Arbitrator has found that Petitioner's current condition of ill-being regarding his lower back and tailbone is causally related to his November 17, 2021, work injury. Having found his condition causally related, Petitioner is entitled to prospective medical treatment, specifically the EMG recommended by Dr. Roberts to assess Petitioner's paresthesia of the bilateral lower extremities. There is no indication that Petitioner had such issues with his legs/feet prior to his November 17, 2021, injury. The records do not support any limitations or symptoms in Petitioner's lower back or tailbone prior to his injury. Thereafter, he has experienced tailbone and lower back pain. The recommended EMG would assist in determining whether his lower extremity paresthesia is related to his lumbar spine or his luxated tailbone. It is reasonable for Petitioner to undergo the diagnostic given his ongoing and continued symptoms.

Therefore, the Arbitrator finds and concludes that Respondent is responsible for providing prospective medical treatment hereafter, specifically the EMG recommended by Dr. Roberts.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC004227
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	22WC004225; 22WC011641;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0339
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 7/18/2024

/s/Christopher Harris, 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

MICHAEL AKERS,

Petitioner,

vs. NO: 22 WC 4227

SMITHFIELD FOODS, 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 causal connection, the reasonableness and necessity of the medical treatment and charges, prospective medical treatment, temporary total disability, and permanent partial disability, and being advised of the facts and law, clarifies the Arbitrator's award as stated below and affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

This claim was consolidated with claim numbers 22 WC 4225 and 22 WC 11641 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claims 22 WC 4225 and 22 WC 11641. There is only one bond comprising claims 22 WC 4225 and 22 WC 4227 as both claims share the same award.

The Commission clarifies the Arbitrator's order to indicate that Respondent shall authorize prospective medical care relative to Petitioner's lumbar and cervical spine, specifically a cervical

epidural injection as recommended by Dr. Mulconrey and Dr. Bush and an EMG as recommended by Dr. Roberts. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2023 is clarified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize prospective medical care relative to Petitioner's lumbar and cervical spine, specifically a cervical epidural injection as recommended by Dr. Mulconrey and Dr. Bush and an EMG as recommended by Dr. Roberts.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,900.00. 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.

July 18, 2024

O: 7/11/24
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	22WC004227
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 10/30/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 24, 2023 5.32%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Akers
Employee/Petitioner

v.

Case # **22 WC 4227**

Consolidated cases:

Smithfield Foods, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, on **July 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. ☒ 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 the date of accident, **January 19, 2022,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the Petitioner's injury, Petitioner's average weekly wage was **$858.90.**

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

ORDER

- The Respondent shall pay **$ 6,350.00** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

- The Respondent shall pay the petitioner temporary total disability benefits of $ **572.60** /week for **42 & 5/7** weeks, from **March 9, 2022 through January 2, 2023** as provided in Section 8(b) of the Act.

- The Respondent shall authorize prospective medical care relative to Petitioner's lumbar and cervical spine, specifically the cervical epidural injection recommended by Doctors Mulconrey and Bush and the EMG recommended by Dr. Roberts, and follow up care, until Petitioner reaches a state of maximum medical improvement.

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

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

Bradley D. Gillespie OCTOBER 30, 2023

Signature of Arbitrator

ICArbDec

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL AKERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 22WC004227**
	)	
SMITHFIELD FOODS,	)	
	)	
Respondent.	)	

DECISION OF ARBITRATOR

On or about May 3, 2022, Michael Akers [hereinafter "Petitioner"] filed an Application for Adjustment of Claim alleging injuries to his left upper extremity while in the course of his employment with Smithfield Foods [hereinafter "Respondent"] (PX #2). This matter proceeded to hearing on July 19, 2022, in Peoria, Illinois along with Case Nos. 22WC004225 and 22WC011641 which were consolidated. (Arb. Ex. 2, *See also* Arb. Ex. 1 and Arb. Ex. 3). The following issues were in dispute in the instant case at arbitration:

- Causation;
- Medical Bills;
- TTD; and
- Prospective Medical Care.

STATEMENT OF FACTS

The parties stipulated that Petitioner was an employee of Respondent on August 13, 2021, November 17, 2021, and January 19, 2022. The parties stipulated Petitioner sustained accidents that arose out of and in the course of his employment by Respondent on November 17, 2021, and January 19, 2022, and that timely notice of those injuries was provided to Respondent. The parties stipulated that Petitioner's average weekly wage relative to his August 13, 2021, injury was $836.10, that his average weekly wage relative to his November 17, 2021, injury was $800.00, and that his average weekly wage relative to his January 19, 2022, injury was $858.90. The parties stipulated that Petitioner was 55 years of age at the time of his August 13, 2021, and November 17, 2021, injuries and 56 at the time of his January 19, 2022, injury, and that he was single, with no dependent children at the time of any of his injuries.

Petitioner testified that his date of birth is December 11, 1965. (Tr. p. 13) Petitioner testified that he began working for Respondent in April of 2020, initially as a temporary worker. *Id.* He worked as a temp for approximately three months before becoming a full-time employee of Respondent in October or November of 2020. (Tr. p. 14) Petitioner testified that

his position was called internal transport. *Id.* In that position, he drove a motorized pallet jack and a forklift. *Id.* He also performed some inventory, using a scan gun, and unloaded and loaded product from cooler. (Tr. pp. 14-15) He would also operate a standing forklift at times. (Tr. p. 15)

Petitioner testified that around August 13, 2021, he injured his left wrist. (Tr. p. 17) Petitioner testified that this was an acute injury that got worse. *Id.* He testified that a band machine needed to be moved. While assisting a co-worker in moving the machine, one of its wheels went into a drain and the machine started to fall. (Tr. pp. 17-18) Petitioner testified to catching it with his left arm, twisting his wrist back. (Tr. p. 18) Petitioner testified that he sought treatment with the plant nurse at Respondent on the day he bent his wrist back. (Tr. p. 19) He was provided with warm arm soaks by the nurse on a daily basis for approximately a month. (Tr. pp. 19-20) Petitioner testified that he reported the injury to the night superintendents, Chris and Laura, a blue hat supervisor. (Tr. p. 20) He did not lose any time from work related to this injury. *Id.*

On November 17, 2021, Petitioner sustained a second injury. While stepping down from his pallet jack, he was struck in the foot from behind by another pallet jack, causing him to fall onto his buttocks. (Tr. pp. 21-22) Petitioner believed he landed on the forks of the other pallet jack, but it could have been the floor. (Tr. p. 22) A supervisor attempted to help him to his feet and pulled his previously injured left wrist, causing him to scream. *Id.* Petitioner testified that he initially went to plant medical again and was provided with ice packs. (Tr. p. 23) Petitioner returned to work for his regular shift that night. *Id.* Over the next several days, Petitioner began to experience pain in his lower back. He had trouble stooping to pick up boxes and properly wrap them. *Id.* Petitioner stated that he reported this injury to Ann, the nurse in the medical department. *Id.*

On December 10, 2021, Petitioner was seen at OSF in Galesburg regarding his left wrist. (PX #5) The record noted that he does a lot of repetitive lifting and catching. He was assessed with left de Quervain tenosynovitis and provided an injection. On December 14, 2021, it was noted that the injection helped his wrist l and he was able to work. (PX #5)

On January 19, 2022, Petitioner was driving pallet jack when a wheel hit a drain, ejecting him from the pallet jack, and throwing him to the ground. (Tr. p. 28) Petitioner testified that he landed on his right hip, right shoulder, right elbow, and head. *Id.* He testified he was taken by ambulance to the hospital. *Id.* OSF Holy Family Medical Center records note that Petitioner had sustained an injury at work less than an hour ago when he fell from a height of three feet, landing on a concrete floor, on his right side, with blunt trauma to the right shoulder, elbow, lower back, and right posterior pelvis. (PX #6) Petitioner testified that he was called out to the plant and was sent to the OSF occupational facility in Galesburg. (Tr. p.

29) Petitioner testified that he was advised to be off work and follow up in four days. (Tr. pp. 29-30) Petitioner testified he was called into the plant the next morning for an investigation regarding the injury. (Tr. p. 30)

Petitioner testified he was off work for a short period of time before returning to work in the box room and the supply room. (Tr. p. 31) He reported he was experiencing deltoid pain, neck, right foot, right leg, back, and shoulder pains. (Tr. p. 32) Petitioner began treatment with Dr. Kramer, a chiropractor at Senara Health, on February 16, 2022. *Id.* Records reflect that Petitioner complained of four weeks of neck and back pain, noting that he had fallen at work when ejected forward about 3-4 feet, landing on his right side. (PX #4) Petitioner was referred to Midwest Ortho to evaluate a possible sacral fracture. *Id*.

Petitioner continued to work in the box room, a lighter duty position, for a period of time before being sent to the back where he was to drive a forklift. (Tr. p. 33) Petitioner testified that he was under restrictions that were not being followed. (Tr. pp. 33-34) He testified to push and pull restrictions that were violated by the position. (Tr. p. 34) Petitioner testified that he advised his supervisor, Ken Johnson, that his restrictions were not being accommodated, but continued to work. (Tr. pp. 34-35) On March 8, 2022, Petitioner was terminated. (Tr. p. 36) Petitioner testified that on or around March 3, 2022, he was moved to the shipping dock. While performing that position, he was suspended for sleeping on the job, though Petitioner disputes he was sleeping. (Tr. pp. 37-38) Petitioner testified that he was not offered work again by Respondent for months. (Tr. p. 38) When offered a position, it was not within his restrictions. (Tr. p. 39)

On March 9, 2022, Petitioner was again seen by Dr. Kramer. At that time, Dr. Kramer took Petitioner off work. (PX #4) Thereafter, Petitioner was seen by Dr. Roberts at Midwest Ortho on March 17, 2022. (PX #7) Dr. Roberts evaluated Petitioner regarding his tailbone. He noted Petitioner's November 17, 2021, injury when he was tripped by a pallet jack, landing on his tailbone, and his January 19, 2022, injury in which he was propelled to the cement. Dr. Roberts recommended a donut to sit on due to his difficulty sitting, medication, physical therapy, and chiropractic treatment. (PX #7)

On March 21, 2022, Dr. Kramer recommended evaluation regarding his neck pain. He took Petitioner off work for eight weeks and recommended physical therapy. Petitioner underwent physical therapy regarding his lower back at Senara Health from March 24, 2022, through April 13, 2022. (PX #4) On April 20, 2022, Dr. Kramer continued Petitioner off work until May 22, 2022, and recommended ongoing therapy.

On April 25, 2022, Petitioner was seen by Dr. Mulconrey, an orthopedic spine surgeon, at Midwest Ortho (PX #7) Dr. Mulconrey assessed Petitioner regarding his neck pain

following his January 19, 2022, injury. Dr. Mulconrey noted that Petitioner's attempts to return to work, wearing a helmet and driving a forklift, had severely increased his axial neck pain and headaches. *Id.* Dr. Mulconrey noted that x-rays showed severe cervical degenerative disease and recommended physical therapy as well as a cervical MRI. *Id*. Dr. Mulconrey also noted Petitioner should avoid driving fork trucks and wearing a helmet while at work. *Id.* He noted Petitioner could work light duty at most, but currently was off work. (PX #7)

On April 27, 2022, Petitioner was evaluated at Respondent's request by Dr. Van Fleet. (RX #3) Dr. Van Fleet reviewed videos of Petitioner's injuries. At the time of his report, Dr. Van Fleet assessed strains to Petitioner's cervical spine and lumbar spine. *Id.* He noted that Petitioner has degenerative changes within his neck and back which likely were somewhat exacerbated with the fall, temporarily. *Id.* Dr. Van Fleet agreed that formal spine evaluation of Petitioner's neck and back were reasonable. He recommended a lifting restriction of 25 pounds with no repetitive bending or twisting as well. *Id.* Dr. Van Fleet agreed that Petitioner would benefit from physical therapy for his cervical and lumbar spine for 6 weeks at which point he should be at MMI with no restrictions. (RX #3) Dr. Van Fleet was deposed on March 15, 2023. (RX #4) Dr. Van Fleet acknowledged he did not see any evidence that Petitioner was under any restrictions prior to his injuries with Respondent. *Id.* Dr. Van Fleet testified that in his opinion a degenerative cervical spine condition cannot be permanently aggravated by a trauma such as that experienced by Petitioner. *Id*.

Petitioner underwent physical therapy for his cervical and lumbar spine through June 21, 2022. (PX #4, PX #7) Respondent provided surveillance of Petitioner driving his car and walking into physical therapy on May 9, 2022. (RX #7, RX #8) On May 11, 2022, Dr. Mulconrey reviewed Petitioner's cervical spine MRI, noting right, greater than left central canal stenosis at C3-4, left greater than right foraminal stenosis at C4-5, as well as severe cervical spondylosis and cervical degenerative disk disease at C5-6 and C6-7. (PX #7) Dr. Mulconrey recommended ongoing physical therapy and consideration of epidural injections. *Id*.

Respondent submitted surveillance of Petitioner working a sample table at Schnucks grocery store on May 18, 2022. (RX #7) He testified it was a job he had done from time to time prior to working for Respondent. He would set up a table and pour and supply samples of beverages to customers. (Tr. p. 43) Surveillance of Petitioner on May 23, 2022 demonstrated him putting a lawnmower into his vehicle. (Tr. pp. 44-45) He stated the mower weighed between 35-40 pounds and that lifting it did not change his symptoms. *Id.*

On June 10, 2022, Petitioner was seen by Dr. Roberts at Midwest Ortho regarding his ongoing tailbone pain. (PX #7) Dr. Roberts noted that x-rays showed luxation of the

sacrococcygeal region. *Id.* Due to numbness in Petitioner's feet and legs, an EMG was recommended. *Id*. Petitioner testified the EMG was not approved. (Tr. p. 45)

Petitioner was seen by Dr. Bell at referral from Dr. Mulconrey on June 14, 2022. (PX #7) Dr. Bell recommended a cervical epidural steroid injection. *Id*. Petitioner testified that injection was not performed as it was not approved by the insurance company. (Tr. p. 46)

On June 27, 2022, Petitioner was seen by Dr. Kramer due to pain in both his feet. (PX #4) Dr. Kramer noted that Dr. Roberts had ordered an EMG and that Dr. Mulconrey had recommended an epidural. *Id*. On July 29, 2022, Dr. Mulconrey recommended Petitioner continue to work with Pain Management and physical therapy. (PX #7) On August 16, 2022, Dr. Bell prescribed Naproxen, Tylenol 3, Gabapentin, and a C7-T1 epidural steroid injection. *Id*.

Respondent submitted additional surveillance of Petitioner dated October 19, 2022. In the footage, Petitioner is shown moving cardboard boxes. (RX #7, RX #8) Petitioner testified the boxes were empty and weighed less than 2 pounds. (Tr. pp. 48-49) He had acquired a temporary position moving the boxes and worked that job for approximately a week or two. (Tr. p. 49)

On October 31, 2022, Dr. Mulconrey authored a narrative report, finding that Petitioner's current condition relative to his cervical spine was causally related to his January 19, 2022 injury. (PX # 8) Dr. Mulconrey noted that it is clear that Petitioner had degenerative changes that pre-dated his injury, but that it appears the work injury created a change in his underlying condition, which led to his inability to work. *Id.* Dr. Mulconrey opined that Petitioner was not able to return to full duty work as of July 29, 2022, and continued to recommend cervical epidural steroid injections and therapy. On March 13, 2023, Dr. Mulconrey was deposed regarding his opinions relative to Petitioner's injury. He stated that Petitioner could require surgery based on his MRI findings but such would not be considered until after he completed conservative treatment. (PX #8)

Petitioner acknowledged he had filed prior workers' compensation claims. (Tr. pp. 63-66) He testified he had experienced lower back pain previously. He had a prior claim involving the lower back in 2016 but had been cleared by the same doctors at OSF regarding that injury, prior to working for Respondent. (Tr. p. 75) He testified he had no treatment for his lower back, his tailbone, or his neck after starting for Respondent in early 2020 until his November 17, 2021, injury. (Tr. p. 76) He testified he had no symptoms in those areas and was working with no issues prior to the injuries with Respondent. (Tr. pp. 76-77)

Petitioner testified that he secured a full-time position at Walmart on January 3, 2023. He works overnight, in maintenance. (Tr. p. 50) Petitioner testified that he continues to perform the exercises he was taught in therapy on a daily basis. (Tr. p. 51-52) He also continues to take Naproxen and Ibuprofen. (Tr. pp. 50-52) Petitioner reported he continues to experience numbness in his feet, neck pain, and lower back pain. (Tr. p. 52) He continues to use ice packs when symptoms increase. (Tr. p. 53) Petitioner testified his current position at Walmart is light work. *Id.* Petitioner testified he continues to want to undergo the EMG and cervical epidural that were recommended. (Tr. p. 55)

CONCLUSIONS OF LAW

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

The Arbitrator incorporates by reference the Findings of Fact set forth in the foregoing paragraphs. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his January 19, 2022, injury. The Arbitrator relies upon the treating records, the opinions of Dr. Mulconrey, and Petitioner's credible testimony.

The Arbitrator relies upon the well-established rules set forth by the Illinois Supreme Court that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was **a causative factor** in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981).

Petitioner's treatment records and his testimony establish a causal relationship exists between his January 19, 2022, injury, and his current condition of ill-being. Respondent does not dispute that Petitioner's January 19, 2022, injury occurred and arose out and in the course of his employment. At that time, Petitioner was operating a motorized pallet jack that struck a floor drain and stopped suddenly, throwing Petitioner to the ground. Petitioner was taken to the Emergency Room and seen for pain in his neck, lower back, right shoulder, right elbow, and right pelvis. Thereafter, he began treatment for this injury and his prior injury of November 17, 2021. On February 16, 2022, Dr. Kramer referred Petitioner to Midwest Ortho to evaluate him for a possible sacral fracture. He had that evaluation on March 17, 2022, with Dr. Roberts. Dr. Roberts noted Petitioner's difficulty sitting due to tailbone pain. A donut was recommended for sitting, as well as medications, chiropractic treatment, and physical therapy. Following x-rays, Dr. Roberts assessed a luxated tailbone. On March 21, 2022, Petitioner was referred to an orthopedic regarding his neck symptoms. He saw Dr. Mulconrey on April 25, 2022. Dr. Mulconrey recommended physical therapy and an MRI. The MRI revealed degeneration that Dr. Mulconrey opined was aggravated by Petitioner's January 19, 2022,

injury. Petitioner underwent physical therapy relative to his lower back and neck pain for approximately four months. Dr. Mulconrey recommended Petitioner see Dr. Bell at Midwest Ortho for consideration of a cervical epidural injection. Dr. Bell recommended the injection on June 14, 2022, and again on August 16, 2022. However, due to lack of approval, it has not been performed.

Petitioner testified to ongoing pain in his lower back and his neck. There was no evidence presented that Petitioner had any symptoms relative to his neck or his lower back prior to his November 17, 2021, or January 19, 2022 injuries. He has undergone treatment, including extensive physical therapy, with some improvement, but continues to have symptoms. The records support that the symptoms in Petitioner's cervical spine began with his January 19, 2022, injury. The records support an aggravation of his lower back pain as well due to his January 19, 2022, injury. Dr. Mulconrey's opinions were supported by the records, noting a lack of symptoms prior to his injury, and consistent symptoms thereafter. As such, his current condition of ill-being relative to his cervical spine and lumbar spine remain causally related to his January 19, 2022, 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?

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injury he sustained on January 19, 2022. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Petitioner's treatment described in the statement of facts, including the chiropractic treatment and physical therapy at Senara Health from February 28, 2022, through July 8, 2022, were reasonable and necessary. Petitioner initially started treatment with Dr. Kramer at Senara Health for his neck and back pain on February 16, 2022. Dr. Kramer referred Petitioner to Midwest Orthopedic for orthopedic evaluations. Petitioner was evaluated by Dr. Roberts relative to his luxated tailbone and by Dr. Mulconrey and Dr. Bell relative to his cervical spine. Both Dr. Roberts and Dr. Mulconrey recommended physical therapy with Dr. Roberts also recommending chiropractic care. Respondent provided no opinion that the treatment at Senara Health from February 28, 2022, through July 8, 2022 was not reasonable and necessary. For the reasons stated above and having found that Petitioner's current condition of ill-being to be related to his injuries, Petitioner's treatment has been reasonable and necessary.

As such, the Arbitrator finds that the Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 9, charges totaling $6,350.00 with Senara Health, pursuant to the medial fee schedule.

K. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner is owed Temporary Total Disability benefits from March 9, 2022, through January 2, 2023.

The Supreme Court of Illinois has held that "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner was taken off work due to his injuries on March 9, 2022, by Dr. Kramer. He testified he had previously been working under restrictions provided by the nurse at Respondent's medical department. He was terminated around March 3, 2022. On March 17, 2022, Dr. Roberts noted Petitioner's difficulty sitting and recommended additional treatment. On March 21, 2022, Dr. Kramer kept Petitioner off work for eight weeks. Petitioner underwent physical therapy from March 24, 2022, through July 8, 2022 at Senara Health and Midwest Ortho. He was kept off work by Dr. Kramer on April 20, 2022. On April 27, 2022, Respondent's IME physician opined 25 pound lifting and no repetitive bending or twisting restrictions were appropriate. On April 25, 2022, Dr. Mulconrey advised Petitioner to avoid driving a fork truck or wearing a helmet at work. Additional treatment was recommended by Dr. Mulconrey, Dr. Roberts, and Dr. Bell in May and June of 2022 with notation in the records in August of 2022 that cervical epidural steroid injection was on hold pending insurance authorization.

Petitioner testified to very short duration, part-time work in May of 2022 and October of 2022. There was nothing in the surveillance to evidence that Petitioner was violating his restrictions. Additional treatment continued to be recommended, supporting that Petitioner has not reached maximum medical improvement. On January 3, 2023, Petitioner acquired a full-time position that he has been able to maintain despite his ongoing symptoms.

Therefore, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from March 9, 2022 through January 2, 2023 due to his November 17, 2021 and January 19, 2022 injuries at the weekly rate of $572.60.

O. Prospective Medical

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law set forth in the preceding paragraphs.

As noted above, the Arbitrator has found that Petitioner's current condition of ill-being regarding his lower back and neck is causally related to his January 19, 2022, work injury. Having found his condition causally related, Petitioner is entitled to prospective medical treatment, specifically the cervical epidural injection recommended by Doctors Mulconrey and Bell. There is no indication that Petitioner had any issue with his neck prior to his January 19, 2022, injury. The records do not support any limitations or symptoms in Petitioner's neck or lower back prior to his injury. Thereafter, he has experienced neck pain and treatment to alleviate his symptoms has been recommended but not authorized. The recommended cervical epidural injection is reasonable and necessitated by his January 19, 2022, injury. Further, Dr. Roberts' recommendation for an EMG to assess Petitioner's paresthesia in his lower extremities is also reasonable and necessary. Petitioner's January 19, 2022, injury aggravated his lower back condition as well and the EMG to assess the source of his lower extremity paresthesia is reasonable. While Petitioner initially injured his lower back on November 17, 2021, those symptoms were further aggravated by his January 19, 2022, injury and prospective medical care is reasonable.

Therefore, the Arbitrator finds that Respondent is responsible for providing prospective medical treatment, specifically the EMG recommended by Dr. Roberts and the cervical epidural steroid injection recommended by Doctors Mulconrey and Bell. Additional treatment would depend on the EMG results and Petitioner's response to the cervical epidural injection, until Petitioner reaches a state of maximum medical improvement.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC011641
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	22WC004225; 22WC004227;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0340
Number of Pages of Decision	14
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 7/18/2024

/s/Christopher Harris, 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

MICHAEL AKERS,

Petitioner,

vs. NO: 22 WC 11641

SMITHFIELD FOODS, 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 accident, notice, causal connection, the reasonableness and necessity of the medical treatment and charges, perspective medical treatment, 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.

This claim was consolidated with claim numbers 22 WC 4225 and 22 WC 4227 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claims 22 WC 4225 and 22 WC 4227.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 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 $2,200.00. 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.

July 18, 2024
O: 7/11/24
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	22WC011641
Case Name	Michael Akers v. Smithfield Foods, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Michael Brandow

DATE FILED: 10/30/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 24, 2023 5.32%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Akers
Employee/Petitioner

v.

Case # **22 WC 11641**

Consolidated cases:

Smithfield Foods, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Peoria**, 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

FINDINGS

On the date of accident, **August 13, 2021,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the Petitioner's injury, Petitioner's average weekly wage was **$836.10.**

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

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

ORDER

- The Respondent shall pay the Petitioner the sum of **$ 501.66** / week for a period of **4.1** weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused **2%** **loss of use of the left hand.**

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

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

Bradley D. Gillespie OCTOBER 30, 2023

Signature of Arbitrator

ICArbDec

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL AKERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 22WC011641**
	)	
SMITHFIELD FOODS,	)	
	)	
Respondent.	)	

DECISION OF ARBITRATOR

On or about May 3, 2022, Michael Akers [hereinafter "Petitioner"] filed an Application for Adjustment of Claim alleging injuries to his left upper extremity while in the course of his employment with Smithfield Foods [hereinafter "Respondent"] (PX #3). This matter proceeded to hearing on July 19, 2022, in Peoria, Illinois along with Case Nos. 22WC004225 and 22WC004227 which were consolidated. (Arb. Ex. 3, *See also* Arb. Ex. 1 and Arb. Ex. 2). The following issues were in dispute in the instant case at arbitration:

- Accident;
- Notice;
- Causation;
- Medical Bills; and
- Nature & Extent.

STATEMENT OF FACTS

The parties stipulated that Petitioner was an employee of Respondent on August 13, 2021, November 17, 2021, and January 19, 2022. The parties stipulated Petitioner sustained accidents that arose out of and in the course of his employment by Respondent on November 17, 2021, and January 19, 2022, and that timely notice of those injuries was provided to Respondent. The parties stipulated that Petitioner's average weekly wage relative to his August 13, 2021, injury was $836.10, that his average weekly wage relative to his November 17, 2021, injury was $800.00, and that his average weekly wage relative to his January 19, 2022, injury was $858.90. The parties stipulated that Petitioner was 55 years of age at the time of his August 13, 2021, and November 17, 2021, injuries and 56 at the time of his January 19, 2022, injury, and that he was single, with no dependent children at the time of any of his injuries.

Petitioner testified that his date of birth is December 11, 1965. (Tr. p. 13) Petitioner testified that he began working for Respondent in April of 2020, initially as a temporary worker. *Id.* He worked as a temp for approximately three months before becoming a full-

time employee of Respondent in October or November of 2020. (Tr. p. 14) Petitioner testified that his position was called internal transport. *Id.* In that position, he drove a motorized pallet jack and a forklift. *Id.* He also performed some inventory, using a scan gun, and unloaded and loaded product from cooler. (Tr. pp. 14-15) He would also operate a standing forklift at times. (Tr. p. 15)

Petitioner testified that around August 13, 2021, he injured his left wrist. (Tr. p. 17) Petitioner testified that this was an acute injury that got worse. *Id.* He testified that a band machine needed to be moved. While assisting a co-worker in moving the machine, one of its wheels went into a drain and the machine started to fall. (Tr. pp. 17-18) Petitioner testified to catching it with his left arm, twisting his wrist back. (Tr. p. 18) Petitioner testified that he sought treatment with the plant nurse at Respondent on the day he bent his wrist back. (Tr. p. 19) He was provided with warm arm soaks by the nurse on a daily basis for approximately a month. (Tr. pp. 19-20) Petitioner testified that he reported the injury to the night superintendents, Chris and Laura, a blue hat supervisor. (Tr. p. 20) He did not lose any time from work related to this injury. *Id.*

On November 17, 2021, Petitioner sustained a second injury. While stepping down from his pallet jack, he was struck in the foot from behind by another pallet jack, causing him to fall onto his buttocks. (Tr. pp. 21-22) Petitioner believed he landed on the forks of the other pallet jack, but it could have been the floor. (Tr. p. 22) A supervisor attempted to help him to his feet and pulled his previously injured left wrist, causing him to scream. *Id.* Petitioner testified that he initially went to plant medical again and was provided with ice packs. (Tr. p. 23) Petitioner returned to work for his regular shift that night. *Id.* Over the next several days, Petitioner began to experience pain in his lower back. He had trouble stooping to pick up boxes and properly wrap them. *Id.* Petitioner stated that he reported this injury to Ann, the nurse in the medical department. *Id.*

On December 10, 2021, Petitioner was seen at OSF in Galesburg regarding his left wrist. (PX #5) The record noted that he does a lot of repetitive lifting and catching. He was assessed with left de Quervain tenosynovitis and provided an injection. On December 14, 2021, it was noted that the injection helped his wrist l and he was able to work. (PX #5)

On January 19, 2022, Petitioner was driving pallet jack when a wheel hit a drain, ejecting him from the pallet jack, and throwing him to the ground. (Tr. p. 28) Petitioner testified that he landed on his right hip, right shoulder, right elbow, and head. *Id.* He testified he was taken by ambulance to the hospital. *Id.* OSF Holy Family Medical Center records note that Petitioner had sustained an injury at work less than an hour ago when he fell from a height of three feet, landing on a concrete floor, on his right side, with blunt trauma to the right shoulder, elbow, lower back, and right posterior pelvis. (PX #6) Petitioner testified that

he was called out to the plant and was sent to the OSF occupational facility in Galesburg. (Tr. p. 29) Petitioner testified that he was advised to be off work and follow up in four days. (Tr. pp. 29-30) Petitioner testified he was called into the plant the next morning for an investigation regarding the injury. (Tr. p. 30)

Petitioner testified he was off work for a short period of time before returning to work in the box room and the supply room. (Tr. p. 31) He reported he was experiencing deltoid pain, neck, right foot, right leg, back, and shoulder pains. (Tr. p. 32) Petitioner began treatment with Dr. Kramer, a chiropractor at Senara Health, on February 16, 2022. *Id.* Records reflect that Petitioner complained of four weeks of neck and back pain, noting that he had fallen at work when ejected forward about 3-4 feet, landing on his right side. (PX #4) Petitioner was referred to Midwest Ortho to evaluate a possible sacral fracture. *Id*.

Petitioner continued to work in the box room, a lighter duty position, for a period of time before being sent to the back where he was to drive a forklift. (Tr. p. 33) Petitioner testified that he was under restrictions that were not being followed. (Tr. pp. 33-34) He testified to push and pull restrictions that were violated by the position. (Tr. p. 34) Petitioner testified that he advised his supervisor, Ken Johnson, that his restrictions were not being accommodated, but continued to work. (Tr. pp. 34-35) On March 8, 2022, Petitioner was terminated. (Tr. p. 36) Petitioner testified that on or around March 3, 2022, he was moved to the shipping dock. While performing that position, he was suspended for sleeping on the job, though Petitioner disputes he was sleeping. (Tr. pp. 37-38) Petitioner testified that he was not offered work again by Respondent for months. (Tr. p. 38) When offered a position, it was not within his restrictions. (Tr. p. 39)

On March 9, 2022, Petitioner was again seen by Dr. Kramer. At that time, Dr. Kramer took Petitioner off work. (PX #4) Thereafter, Petitioner was seen by Dr. Roberts at Midwest Ortho on March 17, 2022. (PX #7) Dr. Roberts evaluated Petitioner regarding his tailbone. He noted Petitioner's November 17, 2021, injury when he was tripped by a pallet jack, landing on his tailbone, and his January 19, 2022, injury in which he was propelled to the cement. Dr. Roberts recommended a donut to sit on due to his difficulty sitting, medication, physical therapy, and chiropractic treatment. (PX #7)

On March 21, 2022, Dr. Kramer recommended evaluation regarding his neck pain. He took Petitioner off work for eight weeks and recommended physical therapy. Petitioner underwent physical therapy regarding his lower back at Senara Health from March 24, 2022, through April 13, 2022. (PX #4) On April 20, 2022, Dr. Kramer continued Petitioner off work until May 22, 2022, and recommended ongoing therapy.

On April 25, 2022, Petitioner was seen by Dr. Mulconrey, an orthopedic spine surgeon, at Midwest Ortho (PX #7) Dr. Mulconrey assessed Petitioner regarding his neck pain following his January 19, 2022, injury. Dr. Mulconrey noted that Petitioner's attempts to return to work, wearing a helmet and driving a forklift, had severely increased his axial neck pain and headaches. *Id.* Dr. Mulconrey noted that x-rays showed severe cervical degenerative disease and recommended physical therapy as well as a cervical MRI. *Id*. Dr. Mulconrey also noted Petitioner should avoid driving fork trucks and wearing a helmet while at work. *Id.* He noted Petitioner could work light duty at most, but currently was off work. (PX #7)

On April 27, 2022, Petitioner was evaluated at Respondent's request by Dr. Van Fleet. (RX #3) Dr. Van Fleet reviewed videos of Petitioner's injuries. At the time of his report, Dr. Van Fleet assessed strains to Petitioner's cervical spine and lumbar spine. *Id.* He noted that Petitioner has degenerative changes within his neck and back which likely were somewhat exacerbated with the fall, temporarily. *Id.* Dr. Van Fleet agreed that formal spine evaluation of Petitioner's neck and back were reasonable. He recommended a lifting restriction of 25 pounds with no repetitive bending or twisting as well. *Id.* Dr. Van Fleet agreed that Petitioner would benefit from physical therapy for his cervical and lumbar spine for 6 weeks at which point he should be at MMI with no restrictions. (RX #3) Dr. Van Fleet was deposed on March 15, 2023. (RX #4) Dr. Van Fleet acknowledged he did not see any evidence that Petitioner was under any restrictions prior to his injuries with Respondent. *Id.* Dr. Van Fleet testified that in his opinion a degenerative cervical spine condition cannot be permanently aggravated by a trauma such as that experienced by Petitioner. *Id*.

Petitioner underwent physical therapy for his cervical and lumbar spine through June 21, 2022. (PX #4, PX #7) Respondent provided surveillance of Petitioner driving his car and walking into physical therapy on May 9, 2022. (RX #7, RX #8) On May 11, 2022, Dr. Mulconrey reviewed Petitioner's cervical spine MRI, noting right, greater than left central canal stenosis at C3-4, left greater than right foraminal stenosis at C4-5, as well as severe cervical spondylosis and cervical degenerative disk disease at C5-6 and C6-7. (PX #7) Dr. Mulconrey recommended ongoing physical therapy and consideration of epidural injections. *Id*.

Respondent submitted surveillance of Petitioner working a sample table at Schnucks grocery store on May 18, 2022. (RX #7) He testified it was a job he had done from time to time prior to working for Respondent. He would set up a table and pour and supply samples of beverages to customers. (Tr. p. 43) Surveillance of Petitioner on May 23, 2022 demonstrated him putting a lawnmower into his vehicle. (Tr. pp. 44-45) He stated the mower weighed between 35-40 pounds and that lifting it did not change his symptoms. *Id.*

On June 10, 2022, Petitioner was seen by Dr. Roberts at Midwest Ortho regarding his ongoing tailbone pain. (PX #7) Dr. Roberts noted that x-rays showed luxation of the sacrococcygeal region. *Id.* Due to numbness in Petitioner's feet and legs, an EMG was recommended. *Id*. Petitioner testified the EMG was not approved. (Tr. p. 45)

Petitioner was seen by Dr. Bell at referral from Dr. Mulconrey on June 14, 2022. (PX #7) Dr. Bell recommended a cervical epidural steroid injection. *Id*. Petitioner testified that injection was not performed as it was not approved by the insurance company. (Tr. p. 46)

On June 27, 2022, Petitioner was seen by Dr. Kramer due to pain in both his feet. (PX #4) Dr. Kramer noted that Dr. Roberts had ordered an EMG and that Dr. Mulconrey had recommended an epidural. *Id*. On July 29, 2022, Dr. Mulconrey recommended Petitioner continue to work with Pain Management and physical therapy. (PX #7) On August 16, 2022, Dr. Bell prescribed Naproxen, Tylenol 3, Gabapentin, and a C7-T1 epidural steroid injection. *Id*.

Respondent submitted additional surveillance of Petitioner dated October 19, 2022. In the footage, Petitioner is shown moving cardboard boxes. (RX #7, RX #8) Petitioner testified the boxes were empty and weighed less than 2 pounds. (Tr. pp. 48-49) He had acquired a temporary position moving the boxes and worked that job for approximately a week or two. (Tr. p. 49)

On October 31, 2022, Dr. Mulconrey authored a narrative report, finding that Petitioner's current condition relative to his cervical spine was causally related to his January 19, 2022 injury. (PX # 8) Dr. Mulconrey noted that it is clear that Petitioner had degenerative changes that pre-dated his injury, but that it appears the work injury created a change in his underlying condition, which led to his inability to work. *Id.* Dr. Mulconrey opined that Petitioner was not able to return to full duty work as of July 29, 2022, and continued to recommend cervical epidural steroid injections and therapy. On March 13, 2023, Dr. Mulconrey was deposed regarding his opinions relative to Petitioner's injury. He stated that Petitioner could require surgery based on his MRI findings but such would not be considered until after he completed conservative treatment. (PX #8)

Petitioner acknowledged he had filed prior workers' compensation claims. (Tr. pp. 63-66) He testified he had experienced lower back pain previously. He had a prior claim involving the lower back in 2016 but had been cleared by the same doctors at OSF regarding that injury, prior to working for Respondent. (Tr. p. 75) He testified he had no treatment for his lower back, his tailbone, or his neck after starting for Respondent in early 2020 until his November 17, 2021, injury. (Tr. p. 76) He testified he had no symptoms in those areas and was working with no issues prior to the injuries with Respondent. (Tr. pp. 76-77)

Petitioner testified that he secured a full-time position at Walmart on January 3, 2023. He works overnight, in maintenance. (Tr. p. 50) Petitioner testified that he continues to perform the exercises he was taught in therapy on a daily basis. (Tr. p. 51-52) He also continues to take Naproxen and Ibuprofen. (Tr. pp. 50-52) Petitioner reported he continues to experience numbness in his feet, neck pain, and lower back pain. (Tr. p. 52) He continues to use ice packs when symptoms increase. (Tr. p. 53) Petitioner testified his current position at Walmart is light work. *Id.* Petitioner testified he continues to want to undergo the EMG and cervical epidural that were recommended. (Tr. p. 55)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator incorporates the Statement of Facts as detailed in the paragraphs above. The Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment by Respondent on August 13, 2021. Petitioner testified that on or around that date, he injured his left wrist while assisting a co-worker in moving a band machine. He testified that the machines started to fall and he caught it with his left hand, bending his wrist back. Petitioner testified that he was seen by the plant nurse at Respondent that day. Petitioner was provided warm arm soaks for approximately a month by the plant nurse. Respondent presented no contrary evidence.

Treatment records note that on December 10, 2021, Petitioner was seen at OSF Galesburg for left radial styloid pain. The record noted that he does a lot of repetitive lifting and catching. He was assessed with left de Quervain's tenosynovitis and provided an injection. On December 14, 2021, he was released from care as the injection helped his pain.

The Arbitrator finds that Petitioner sustained an injury to his left wrist on or around August 13, 2021, while working for Respondent.

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

The Arbitrator finds that Petitioner did provide timely notice to Respondent of his August 13, 2021, left wrist injury. Petitioner testified that he presented to the plant nurse at Respondent on the day of his injury and received warm arm soaks for approximately a month. He testified that he reported the injury to his supervisor as well. No testimony was provided that Petitioner did not report the injury to the plant nurse or the supervisor. As such, timely notice was provided.

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

The Arbitrator incorporates the Findings of Fact and Conclusions of Law set forth in the preceding paragraphs. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his August 13, 2021, injury. Petitioner testified that the injection on December 10, 2021, improved his symptoms. After the follow up visit, Petitioner has required no additional treatment relative to his left wrist. As such, the Arbitrator finds a causal relationship between Petitioner's August 13, 2021, injury and finds he reached maximum medical improvement as of December 14, 2021.

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

The Arbitrator incorporates by reference the Statement of Facts and Conclusions of Law stated above. In assessing the nature and extent of Petitioner's injury, the Arbitrator must consider the following five factors:

1) An impairment report prepared by a physician using the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment." An impairment rating was not offered by either party. Thus, no weight is given to this factor.

2) The occupation of the injured employee. Petitioner worked for Respondent for approximately 2 years in internal transport, using forklifts and pallet jacks to move merchandise. Petitioner continued working after his August 13, 2021, injury with no restrictions relative to his left wrist. Subsequent to his termination, Petitioner has obtained other employment. Therefore, little weight is given to this factor.

3) The age of the employee at the time of the injury. Petitioner was 55 years old at the time of his left wrist injury. Petitioner's age is given some weight in this calculus.

4) The employee's future earning capacity. Petitioner has been able to secure employment since his injury. Petitioner testified that he has been employed full-time at Walmart in maintenance since January 3, 2023. He has no restrictions relative to his left wrist and there is no documented loss of earning capacity related to his August 13, 2021, injury. Little weight is given to this factor.

5) Evidence of disability corroborated by the treating medical records. Petitioner testified to improved symptoms following the December 10, 2021, injection. He was released from care on December 14, 2021. Treatment records do not document ongoing symptoms in the left hand or wrist.

Based on the Factors listed above and the evidence as a whole, the Arbitrator finds and concludes that Petitioner has sustained a permanent injury to his left hand related to de Quervain tenosynovitis, which was treated conservatively with an injection. The injection improved his symptoms, and he has not had additional treatment related to the wrist since December 14, 2021. Petitioner's left wrist has not impacted his ability to work since December 14, 2021. As such, the Arbitrator finds that Petitioner has sustained permanent partial disability in the amount of 2% loss of use of the left hand, under Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007929
Case Name	James Haaksma v. Village of Savoy
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0341
Number of Pages of Decision	21
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Patrick Hanlon
Respondent Attorney	John Fassola

DATE FILED: 7/19/2024

/s/ Raychel Wesley, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES HAAKSMA,

Petitioner,

vs. NO: 22 WC 07929

VILLAGE OF SAVOY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, changes 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 remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

FINDINGS OF FACT

The Commission adopts the Findings of Fact in the Decision of the Arbitrator and incorporates such facts herein.

CONCLUSIONS OF LAW

Pertaining to the issue of accident, the Commission affirms the finding of accident by the Arbitrator. However, the Commission disagrees with a negative inference in the Decision of the Arbitrator in relation to Respondent's failure to call a co-worker, who was present at the time of accident, to testify as a witness. The Arbitrator found:

> "Lastly, the co-worker who was helping the Petitioner was in the best position to confirm whether an accident occurred. There was no evidence that the co-worker was not within the Respondent's control to call as a witness. The Arbitrator takes heed of the rule that if a witness within the control of a party does not testify, it can be assumed that the testimony would be adverse." *Decision of the Arbitrator*, p.11.

The Arbitrator inferred that Respondent's failure to call the co-worker as a witness led to a presumption that said testimony would have been adverse to Respondent's stance. Where a party fails to produce evidence in his control, the presumption arises that the evidence would be adverse to that party. *REO Movers, Inc. v. Industrial Commission*, 226 Ill. App. 3d 216, 223 (1st Dist. 1992). The appellate court in *REO Movers* went on to note its decision in *Singh v. Air Illinois,* Inc., 165 Ill. App. 3d 923, 933-34 (1st Dist. 1988), addressing Illinois Pattern Jury Instructions, Civ. 2d No. 5.01 (IPI No. 5.01) holding "that a jury should not be instructed on such a presumption where the evidence showed that there was a reasonable excuse for the failure to produce the evidence and that the evidence was equally available to the other side. *REO Movers, Inc.* at 223.

IPI No. 5.01 provides that if a party has failed to offer evidence within his power to produce, it may be inferred that the evidence would be adverse to that party if: (1) the evidence was under the control of the party and could have been produced by the existence of reasonable diligence; (2) the evidence was not equally available to an adverse party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him; and (4) no reasonable excuse for the failure has been shown.

We find that the procurement of the co-worker as a witness was an option for both parties, thus the second element required to make an adverse inference under either *REO Movers* or IPI No. 5.01 was not satisfied. Regardless, the Arbitrator correctly found accident based on the totality of evidence. However, we find the above adverse inference to be unnecessary and against the manifest weight of the evidence.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 22, 2023, as changed above, is hereby affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner has proven he sustained an accident on February 16, 2022 arising out of and in the course of his employment with Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current condition of ill-being is causally related to said accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the left shoulder surgery recommended by Dr. Tyler Neal, as provided in §8(a) of the Act.

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

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

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

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

July 19, 2024

/s/ *Raychel A. Wesley*

RAW/wde

O: 5/22/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC007929
Case Name	James Haaksma v. Village of Savoy
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Patrick Hanlon
Respondent Attorney	John Fassola

DATE FILED: 5/22/2023

THE INTEREST RATE FOR THE WEEK OF MY 16, 2023 4.98%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

James Haaksma — Employee/Petitioner
v.
Village of Savoy — Employer/Respondent

Case # **22 WC 07929**

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 **Urbana**, 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, 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*** 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, the Petitioner earned $**45,274.50**; the average weekly wage was $**870.66**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** children under 18.

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

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

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

ORDER

Respondent shall authorize and pay for medical treatment to the left shoulder, including surgery, as recommended by Dr. Neal as provided in Section 8(a) of the Act.

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

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

MAY 22, 2023

ICArbDec19(b)

PROCEDURAL HISTORY

This matter proceeded to trial on March 13, 2023, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's left shoulder condition; and 3) entitlement to prospective medical care to the Petitioner's left shoulder – specifically surgery.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 60 years old and employed by the Respondent in the public works department performing building maintenance, mowing, running equipment and other various duties. (AX1, T. 11-12) The Petitioner testified that on February 16, 2022, he was removing a snowplow off a truck and pulling up on a spring-loaded leg on the plow that would not release, causing him to pull up on it "real hard." (T. 12) He said he felt something give in his left shoulder and intense pain. (T. 12-13) After finishing removing the plow, he filled out an accident report. (T. 12) He said that at the time of the accident, his co-worker, Cory Poll, was assisting him and was at the other end of the building approaching him from behind. (T. 14) The accident report states that the accident occurred at 3:25 pm when he was removing the plow from truck #17, and he pulled his left shoulder out when doing so. (PXD)

On cross-examination, the Petitioner described removing the plow from the truck in more detail, stating that he first removed the electrical harnesses at the front of the truck, then was pulling the pins from the legs of the plow. (T. 27-29) He said he was standing on the side of the plow on the driver's side of the truck between the plow and the truck and pulling up on the handle on the

leg that would not release the pin. (T. 29-31) He said he was pulling the handle on the leg of the plow when he was injured. (T. 31)

Brian Marcotte, operations superintendent of public works, testified as to the procedure for removing a snowplow from a truck. (T. 43, 45-46) He said that how the Petitioner described pulling the pin with his left hand would involve reaching across his body because the pin on the driver's side of the vehicle towards and below the bumper of the truck on his right side. (T. 45-46) He stated that he had experienced pins getting stuck on plows. (T. 52-53) Mr. Marcotte testified that the Petitioner claimed injury at the very end of his shift, and that he was surprised that the Petitioner was removing a plow at the end of the shift because he generally was not seen doing much after 3:00 p.m. (T. 49-50)

Mr. Marcotte also testified that on the day of the accident, there was a meeting to discuss performance issues with a number of drivers regarding pushing snow on curb lines. (T. 46-47) He said that he didn't call out any specific drivers during the meeting, the Petitioner was one of the drivers with whom Mr. Marcotte had concerns. (T. 47-48) On cross-examination, Mr. Marcotte acknowledged that although he informed the workers they could be subject to discipline, he did not make any specific threats of discipline to the Petitioner. (T. 55) The Petitioner did not recall having a team meeting that day. (T. 34) He also denied previous discipline for not working as directed. (T. 34-35) Mr. Marcotte testified that the Petitioner had been disciplined with an oral warning six months prior for a variety of issues, including not working as directed. (T. 48-49, 56)

The Petitioner testified that before this accident, he had no problems with or treatment for his left shoulder. (T. 23) He stated that prior to the accident, he was unaware that he had arthritis in his shoulder. (T. 38) He denied having an X-ray of his shoulder in September 2021. (T. 35) Toby Koontz, operations supervisor for the Respondent, testified that on September 24, 2021, he

received a text message from the Petitioner that said: "Won't be in. To go get an x-ray on my shoulder." (T. 58, 60-61) He said the text did not say which shoulder was involved and that if the Petitioner ever told him which shoulder it was, he did not remember that. (T. 61) He vaguely remembered the Petitioner talking about a problem with his shoulder possibly in that time frame regarding putting in windows. (T. 61-62) The Petitioner did not recall sending the text, adding that he would not have said that in a text because an employee did not need to have a reason to call off work. (T. 36-37) No prior medical records were submitted at arbitration.

After the accident, the Petitioner sought treatment from the Christie Clinic Convenient Care and saw Nurse Practitioner Kelly Bryant. (T. 16) He reported that he was working with the plow, felt a pull in the left posterior shoulder and had significant pain after that. (PXB) An examination showed the Petitioner had full range of motion in the left shoulder, no reproducible tenderness to palpation to the left posterior shoulder or the trapezius musculature and equal strength to resistance in the upper extremities bilaterally. (Id.) NP Bryant diagnosed acute pain of the left shoulder and prescribed a muscle relaxant and anti-inflammatory. (Id.) The Petitioner testified that the medications did not really help. (T. 17)

The Petitioner returned to the clinic on February 28, 2022, and reported pain to the musculature on top of the left shoulder in the trapezius muscle and said the pain began after removing a plow from a truck. (PXB) This time, range of motion was decreased, and there was tenderness to palpation to the trapezius muscles on the left side. (Id.) X-rays were negative for bone injury. (Id.) Dr. Vicki Browder stated in the notes that the Petitioner would have further evaluation in the orthopedic department. (Id.)

On March 2, 2022, the Petitioner was seen at the clinic's department of orthopedics and sports medicine by Dr. Jared Willard, a primary care and sports medicine physician. (Id.) The

Petitioner reported that he was lifting a plow when he felt a deep pop in his shoulder and intense pain. (Id.) An examination showed tenderness to palpation along the superior border of the scapular spine and along the supraspinatus muscle body. (Id.) He had normal passive and active range of motion, normal strength with resisted external and internal rotation, slight weakness with restricted abduction, pain with shoulder shrug, negative Yergason's (test for biceps tendon pathology), negative Speed's (test for biceps pathology or SLAP (superior labrum anterior posterior) tear) and positive O'Brien's (test for SLAP tears). (Id.) Dr. Willard diagnosed acute pain of the left shoulder and suspected trapezius strain or partial tearing versus possible rotator cuff tearing – in particular, supraspinatus tearing. (Id.) He recommended an MRI. (Id.)

The Petitioner returned to the clinic on April 4, 2022. (Id.) Dr. Willard again recommended an MRI and stated he suspected the Petitioner's pain was due to rotator cuff tearing. (Id.) He performed a subacromial corticosteroid injection. (Id.)

The MRI was performed on May 2, 2022, and showed: 1) severe arthritis in the left acromioclavicular (AC) joint (where the collarbone and shoulder blade meet); 2) moderate tendinosis (degeneration of the tendon's collagen) and peritendinitis (inflammation of the tendon sheath where muscle connects to bone) in the supraspinatus and infraspinatus tendons (tendons in the rotator cuff) with a small, low-grade intrasubstance partial tear at the humeral head (top of the arm bone) insertion of the supraspinatus tendon; 3) biceps tenosynovitis (inflammation of the tendon and its sheath); 4) degenerative fraying in the superior glenoid labrum (cartilage on the portion of the shoulder blade that forms the shoulder joint) ; and mild degenerative, arthritic change of the glenohumeral (shoulder joint where the shoulder blade and humerus). (Id.)

The Petitioner saw Dr. Willard on May 4, 2022 with no change in his symptoms. (Id.) In addition to the prior examination findings, there was pain and weakness with the empty can test

(test for the integrity of the supraspinatus tendon). (Id.) Dr. Willard diagnosed acute pain of the left shoulder, tendinopathy of the rotator cuff, osteoarthritis of the AC joint, osteoarthritis of the glenohumeral joint, a degenerative tear of the glenoid labrum and biceps tendinopathy. (Id.) He recommended physical therapy. (Id.)

The Petitioner underwent physical therapy at the clinic from June 6, 2022, through June 29, 2022, for a total of four visits. (Id.) He told the therapist that he sustained an injury to the left shoulder while trying to lift a plow. (Id.) The Petitioner testified that neither the injection nor physical therapy provided any benefit. (T. 19-20) He said the physical therapy aggravated his shoulder and made it worse. (T. 20)

On July 6, 2022, the Petitioner returned to Dr. Willard, who determined that the petitioner failed conservative treatment of injections and physical therapy and referred him for surgical consideration with Dr. Tyler Neal, an orthopedic surgeon at the clinic. (Id.)

The Petitioner saw Dr. Neal, whose initial note on July 14, 2022, said: "Patient reports acute incident/discrete trauma leading to pain was at work and was pulling a heavy snow blower out of a truck and he felt something pop in his shoulder. They report pain with ROM, resting and feel limited due to their symptoms. Currently, they would rank their pain a 6 out of 10. They do endorse neck pain as well as numbness and tingling into his fingers. Previous treatment includes some anti-inflammatory medications for pain control, several sessions physical therapy, and 1 corticosteroid injections. Ultimately they would like they would like to return to pain-free activity." (Id.) The Petitioner denied saying he was pulling a snowblower out of a truck. (T. 38)

A physical examination showed palpable tenderness over the biceps groove and AC, discomfort and pain with range of motion testing, positive O'Brien's test and positive Neer's impingement test (for subacromial impingement of rotator cuff tendons). (PXB) Dr. Neal read

the MRI as demonstrating severe AC joint arthrosis, moderate tendinosis through the supraspinatus and infraspinatus with an interstitial partial tear of the supraspinatus, bicipital tenosynovitis and a likely SLAP tear. (Id.) Spinal X-rays showed degenerative changes. (Id.) Dr. Neal diagnosed left shoulder pain most consistent with partial rotator cuff tear, biceps tenosynovitis with SLAP tear, AC joint arthrosis, impingement syndrome, neck pain and cervical radiculopathy. (Id.) He said a reasonable option was left shoulder arthroscopy, subacromial decompression with acromioplasty, distal clavicle resection, open biceps tenodesis and possible rotator cuff repair. (Id.) He also said it was reasonable to obtain a cervical MRI to ensure there was no significant nerve impingement causing the Petitioner's trapezius pain and numbness and tingling into his hand. (Id.) He felt this could be related to the Petitioner's original injury. (Id.) In describing the treatment plan, Dr. Neal's notes said the Petitioner "is a field improve with standard conservative care." (Id.)

On September 16, 2022, the Petitioner underwent a Section 12 examination by Dr. Vijay Thangamani, an orthopedic surgeon at Duly Health and Care. (RX1, Deposition Exhibit 2) The Petitioner reported the accident as grasping the bottom edge of the plow footing to lift it up and feeling a sharp pain in the posterior aspect of his shoulder. (Id.) Dr. Thangamani performed a physical examination and found: mild AC joint tenderness to palpation; no bicipital groove tenderness to palpation; pain with cross-arm at the AC joint; no significant pain or weakness of the rotator cuff, supraspinatus, infraspinatus, teres minor or subscapularis (muscles of the rotator cuff) to resistive testing; negative O'Brien's; negative jerk (test for posteroinferior labral lesions); no apprehension; neurovascularly intact; good strength in the deltoid, biceps and triceps (upper arm muscles); some pain and stiffness with side-bending and twisting of the neck, particularly to the right; and no signs of myelopathy (injury to the spinal cord caused by compression) or

radiculopathy (damage to the nerve roots in the area where they leave the spine) of either upper extremity. (Id.) He reviewed the MRI scan and concurred with the radiologist's findings. (Id.)

Dr. Thangamani concluded that the Petitioner suffered from symptomatic AC joint arthrosis and shoulder impingement that he did not believe was causally related to the alleged workplace accident. (Id.) He said the Petitioner may have suffered a temporary exacerbation of his underlying arthritic condition at the AC joint and impingement on February 16, 2022, but there was no objective evidence to substantiate any permanent worsening, structural damage or abnormality that was caused by the accident. (Id.) He said a temporary exacerbation would not reasonably last longer than 6-12 weeks. (Id.) He said the mechanism the Petitioner described would not be a mechanism that he would expect to cause any serious damage to the shoulder or indicate a need for surgical intervention or that would cause symptoms that would persist for more than 6-12 weeks. (Id.) As to the workplace injury, he did not believe any further treatment was needed but said Dr. Neal's surgical recommendation was reasonable to treat the underlying condition of degenerative joint disease of the AC joint and impingement. (Id.) Lastly, he said there did not appear to be any discrepancies between the Petitioner's subjective complaints and objective findings or any other pain behaviors that he could pick up on. (Id.)

Dr. Thangamani testified consistently with his report at a deposition on November 3, 2022. (RX1) He stated that for the most part the MRI showed degenerative changes but there were some signs of acute injury or inflammation in that there was swelling noted in the joint. (Id.) Regarding his findings about the mechanism of injury, Dr. Thangamani said that the accident not a type of mechanism of injury that he would expect to cause any permanent damage, permanent worsening of an AC joint condition or permanent worsening of any type of impingement. (Id.)

As to his finding of temporary exacerbation of an underlying condition, Dr. Thangamani said that with significant degeneration of the AC joint, someone will have friction, rubbing and sometimes temporary pain and swelling with certain movements that otherwise would not have happened without the underlying arthrosis. (Id.) He said the Petitioner's ongoing complaints were related to the underlying symptomatic AC joint arthrosis and shoulder impingement. (Id.)

On cross-examination, he acknowledged that the MRI showed bone marrow edema that indicated acute swelling, which could be a physiological response to an injury. (Id.) He said that the intrastitial tear at the humeral head insertion of the supraspinatus was a relatively normal and common finding in 60-year-olds and that some patients with this condition can be symptomatic and may require surgery. (Id.) He agreed that a person with asymptomatic AC joint arthrosis and shoulder impingement could become symptomatic with lifting heavy objects. (Id.)

Dr. Neal testified consistently with his records at a deposition on November 28, 2022. (PXA) He said it was possible that the rotator cuff and SLAP tears seen on the MRI could be caused by lifting. (Id.) He felt that it was reasonable that the SLAP tear may have occurred from the workplace injury "lifting or pulling the snowblower from the truck." (Id.) He said a rotator cuff tear would be confirmed by the arthroscopic procedure he recommended because it is sometimes difficult to tell on an MRI whether it is truly a partial thickness tear or just a higher degree of tendinosis. (Id.) He said it was hard to tell if the tendinosis was caused or brought on by the work injury as it is a chronic inflammation. (Id.) He said it was reasonable that the Petitioner's pain complaints were related to the injury he sustained. (Id.) He said the rotator cuff symptoms were mild and the majority of the symptoms were coming from the biceps tendon and SLAP tear. (Id.) He agreed it was possible to have AC joint arthritis such as the Petitioner's that was asymptomatic and was caused to be symptomatic after a lifting accident. (Id.)

As to the history of injury, Dr. Neal later in his testimony agreed that the history was the Petitioner "pulling a heavy snowplow out of the back of a truck." (Id.) Although he acknowledged a distinction between a snowblower and a snowplow, he agreed that whether it was a snowplow or a snowblower, lifting a heavy object with his left hand, palm up, and feeling a sharp pain in the back of the shoulder or a pop was the type of mechanism of injury that could cause the findings he diagnosed. (Id.)

Dr. Neal said his surgical recommendation was based on the MRI evidence of a SLAP tear as well as positive physical exam findings and failure to improve with conservative treatment. (Id.) He said would recommend physical therapy after surgery. (Id.)

On cross-examination, Dr. Neal agreed that the history of how the accident occurred would be relevant in determining whether it would be a competent cause of a shoulder injury. (Id.) He acknowledged that an inaccurate might our could change his opinion on causation. (Id.) He did not recall if he asked the Petitioner to describe the specific motions he was doing at the time he alleged he was injured. (Id.)

The Petitioner testified that he told the same story about removing the plow to all of the medical providers. (T. 18) H wants to undergo the surgery. (T. 21) The Petitioner said he was still experiencing pain in his left shoulder when he puts pressure on it and had a hard time getting dressed. (T. 24) He said pushing, pulling, trying to put his hand behind his back and reaching overhead makes his symptoms worse. (T. 24-25) He takes ibuprofen, which he said takes the edge off a little bit. (T. 25)

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?

As to the initial issue of credibility of the Petitioner, the Arbitrator finds him to be generally credible. He consistently described the accident, with one exception that is addressed below. The areas in which he was not credible were whether he had previously been disciplined and whether he texted his supervisor that he was having a shoulder X-ray in the year prior to the accident. These credibility issues do not significantly affect the analysis herein, as there are other ways to verify the Petitioner's credibility as to whether an accident occurred – such as consistency in reporting the accident. Furthermore, none of the medical providers noted any evidence of dishonesty or malingering in their reports.

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of the claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n,* 2020 IL 12484, ¶ 32.

If an accident did occur as the Petitioner said it did, there is no reason for a risk analysis under *McAllister,* as it is apparent that the incident occurred in the course of and arose out of the Petitioner's employment. The only question is whether an incident occurred. The Petitioner consistently reported the accident to the Respondent and his medical providers and described it in his testimony. The one exception is the report to Dr. Neal that he was lifting a snowblower from the truck. The Petitioner denies saying this. Looking at Dr. Neal's records, it becomes apparent that there may have been a dictation error – especially considering that the Petitioner's other descriptions of the incident were consistent. There were several dictation errors in Dr. Neal's records, as quoted above. Dr. Neal cleared up the confusion by testifying that lifting a heavy object – snowplow or snowblower – with his left hand, palm up, was the type of mechanism of injury

that could cause the injury findings he made. For these reasons, the Arbitrator finds that whether the Petitioner described lifting a snowplow or a snowblower is a distinction without a difference.

As a reason to find the Petitioner was not truthful about the accident, the Respondent offered testimony that there had been a meeting that day regarding performance issues by the snowplow drivers, including the Petitioner, and that he previously was disciplined. To find that this was a reason for the Petitioner to fabricate an accident would be speculative. Other reasons to doubt the veracity of the Petitioner's story was Mr. Marcotte's testimony that reaching across the body to lift the handle to release the pin was somehow unusual and that the accident occurred at the end of the shift when the Petitioner ordinarily would be done working. The Arbitrator finds these reasons to be unpersuasive.

Lastly, the co-worker who was helping the Petitioner was in the best position to confirm whether an accident occurred. There was no evidence that the co-worker was not within the Respondent's control to call as a witness. The Arbitrator takes heed of the rule that if a witness within the control of a party does not testify, it can be assumed that the testimony would be adverse.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the Petitioner's injuries occurred in the course of and arose out of his employment.

Issue (F): Is Petitioner's current condition 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 AC joint arthrosis and impingement that was asymptomatic before the accident. This circumstantial evidence of the Petitioner being asymptomatic prior to the accident and symptomatic afterwards leads to an inference that the accident aggravated or accelerated the Petitioner's pre-existing conditions. Although there was some evidence that the Petitioner may have had a shoulder X-ray the year before the accident, there were no medical records to back this up, and it is unknown for which shoulder an X-ray would have been taken.

Although Dr. Thangamani concurred with the radiologist's findings on the MRI, he believed the Petitioner's symptoms were due to the pre-existing conditions and not from the work accident. He acknowledged that a rotator cuff tear and a SLAP tear could be acute and that the

Petitioner had an acute finding of bone edema. The exact mechanism of injury did not appear to be a crucial finding for Dr. Thangamani because he thought all the Petitioner's pathology was degenerative and pre-existing.

Dr. Neal believed the SLAP tear and possible rotator cuff tear were acute findings that reasonably could have been caused by a lifting incident. He also based his causation findings on the circumstances of the Petitioner becoming symptomatic after the accident. As Dr. Neal was the Petitioner's treating physician, his opinions also deserve greater weight.

The Arbitrator finds that Dr. Thangamani's statement that the accident may have caused only a temporary aggravation of the Petitioner's underlying conditions does not comport with the evidence that long after the time Dr. Thangamani expected the Petitioner to recover from this aggravation, he was still experiencing symptoms. There was no reason for the pre-existing conditions to remain symptomatic other than the accident.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his current left shoulder condition is causally related to the work accident.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner has continued to experience pain in her left shoulder despite undergoing conservative treatment. Dr. Thangamani agreed that surgery was appropriate for the Petitioner's

conditions but, because of his causation opinion, did not believe the need for surgery was related to the work incident.

Based on this and the findings above regarding causation, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically shoulder surgery and any follow-up care as recommended by Dr. Neal.

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	21WC013851
Case Name	Helene Cleckley v. Midwest Molding Solutions
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0342
Number of Pages of Decision	14
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Joseph LaRocco

DATE FILED: 7/19/2024

/s/ Raychel Wesley, 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 Permanent Disability/Penalties	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HELENE CLECKLEY,

Petitioner,

vs. NO: 21 WC 13851

MIDWEST MOLDING SOLUTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, nature and extent, 19(k) penalties, 19(l) penalties, 16 attorney fees, and the language provided in awarding medical expenses, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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. Nature and Extent

The Arbitrator awarded permanent partial disability benefits as follows:

(1) A 20% loss of use of an arm (distal *forearm* fractures with plate and screws);

(2) A 32.5% loss of use of a hand (wrist fractures with anchoring plate and screws ***and*** carpal tunnel surgery); and

(3) A 2.5% loss of a person as a whole (left shoulder partial rotator cuff tear).

The Commission's review of the evidence yields a different result. For the reasons detailed in our §8.1b(b) analysis, the Commission finds Petitioner's permanent partial disability award is to be assessed based on injuries to her wrist, carpal tunnel, and shoulder.

§8.1b(b)(i) – impairment rating

No impairment rating was provided by either party. Thus, no weight is given to this factor.

§8.1b(b)(ii) – occupation of the injured employee

Petitioner was employed as an office manager, and returned to work shortly after the accident. Great weight is given to this factor.

§8.1b(b)(iii) – age at the time of the injury

Petitioner was 64 years old at the time of accident. Presumably she only has minimal time left in the workforce with which to deal with the residual effects of her injuries. Moderate weight is given to this factor.

§8.1b(b)(iv) – future earning capacity

There was no evidence provided of a change in Petitioner's future earning capacity as a result of the instant accident. Great weight is given to this factor.

§8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner underwent an open reduction and internal fixation after suffering a left distal radius and ulnar fracture. Additionally, as a result of the accident, Petitioner developed acute carpal tunnel syndrome, which was also surgically repaired. She also underwent a left wrist arthroscopy with arthroscopic lysis of adhesions and manipulation, and suffered a partial rotator cuff tear, mild tendinosis and tenosynovitis of the biceps tendon, with evidence of a sprain or adhesive capsulitis. Her shoulder injury was treated with an injection and physical therapy.

At trial, Petitioner testified that she still has left shoulder pain with movement and difficulty reaching for items in the kitchen cabinet. She cannot do any left shoulder weight-bearing or above-head movement at the gym, and is impacted by weather. Regarding her left wrist, she cannot do pushups or use dumbbells. She testified she also suffers from stiffness, and performs home exercises given to her by her therapist. Regarding her forearm, she cannot do the things she used to. She is the primary for cooking, cleaning, and snow removal at her home, due to her husband's Alzheimer's condition. She still has a plate in her arm from the base of her palm to her forearm.

Petitioner last treated for her shoulder December 11, 2020. At that time, she indicated it was much better, but a therapy record three days later indicated ongoing stiffness. She last treated for her wrist December 2, 2021, when she still had stiffness and weakness.

Initially, the Commission can find that the award for loss of use of an arm was in error and should

be vacated. Although the July 14, 2020 operative report mentions screws being inserted distally *and proximally* to secure the inserted plate in Petitioner's left upper extremity, it is clear that the injury suffered by Petitioner was to her wrist rather than her forearm, as highlighted by the initial x-rays at OSF St. Joseph, where an impacted comminuted fracture of the **distal** radius and **distal** left ulna shaft was found. The Commission recognizes that the distal radius and distal ulna are located near the wrist. See *Krantz v. Industrial Commission*, 289 Ill. App. 3d 447, 450-51 (5th Dist. 1997) (The Commission is an administrative tribunal that hears only workers' compensation cases and deals extensively with medical issues) and *Long v. Industrial Commission*, 76 Ill. 2d 561, 566 (1979) (The Commission possesses inherent expertise regarding medical issues). This case is similar to *Wanda Vales v. Daimler Crysler*, 00 WC 22722, a persuasive case wherein the claimant suffered a comminuted distal radius and ulna fracture and underwent an open reduction and *external* fixation of her wrist fractures. Similar to the instant case, the claimant in *Vales* had forearm symptoms after surgery, but was awarded permanent partial disability benefits for the hand only, not her arm. The Commission finds *Vales* instructive on the instant case, and finds that Petitioner's award should be limited to her hand/wrist. Accordingly, we find the Arbitrator's award of a 20% loss of use of an arm for a distal forearm fracture to be in error and so vacate.

Additionally, the Commission finds Petitioner developed carpal tunnel syndrome as a sequela of her acute/traumatic wrist injury, which eventually required a carpal tunnel release.[1] We also note Petitioner underwent a left wrist arthroscopy with arthroscopic lysis of adhesions and manipulation surgery. Accordingly, we find that this is indicative of an increase of the permanent partial disability award, from a 32.5% loss of use of a hand up to a 37.5% loss of use of a hand.

Lastly, the Commission affirms the award of a 2.5% loss of a person as a whole for Petitioner's partial rotator cuff tear and sprain that was treated with an injection and therapy and resulted in residual range of motion issues.

B. Penalties and Fees

Regarding the awards for §19(k) penalties, §19(l) penalties, and §16 attorney fees, the Commission affirms the awards for §19(k) penalties and §16 attorney fees, but declines to award §19(l) penalties. Without written demand for payment of medical expenses, §19(l) penalties cannot be awarded. See *Theis v. Illinois Workers' Compensation Commission*, 2017 IL App (1st) 161237WC. In the instant case, there is no evidence in the record of a written demand for payment of medical expenses.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 25, 2023, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses outlined in Petitioner's Exhibit 7, pursuant to §8(a) and subject to §8.2 of the Act.

[1] Due to the acute nature of the injury, the nature and extent of the award including carpal tunnel syndrome shall be calculated using the 205-week impairment level.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $576.92 per week for a period of 76.875 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained a 37.5% loss of use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $576.92 per week for a period of 12.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 2.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the permanent partial disability award for a 20% loss of use of the left arm is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(k) penalties in the amount of $6,528.51.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §16 attorney fees in the amount of $1,305.70.

IT IS FURTHER ORDERED BY THE COMMISSION that the award for §19(l) penalties is vacated.

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 $72,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 19, 2024

/s/ *Raychel A. Wesley*

RAW/wde

O: 5/22/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC013851
Case Name	Helene Cleckley v. Midwest Molding Solutions
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Michelle LaFayette

DATE FILED: 1/25/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 24, 2023 4.68%

/s/Kurt Carlson, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Helene Cleckley
Employee/Petitioner

v.

Midwest Molding Solutions
Employer/Respondent

Case # **21** WC **13851**

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 **Peoria**, on **December 19, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **07-10-20**, 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 $ **50,000.00**; the average weekly wage was $ **961.54**.

On the date of accident, Petitioner was **64** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit for other benefits paid.

ORDER

- The Petitioner's condition of ill-being was causally related to the work injury of July 10, 2020.
- The Respondent shall pay all reasonable, necessary, and causally related medical and hospital bills from the date of the injury through the time of trial.
- The Respondent shall pay the Petitioner permanent partial disability benefits of $576.92/week for 129.725 weeks, because the injuries sustained are 20% loss of use of the left arm (forearm), 32.5% loss of use of the left hand (wrist) and 2.5% loss of use of the Person as A Whole (left supraspinatus).
- ARBITRATOR AWARDS PENALTIES PURSUANT TO SECTION 19(K) IN THE AMOUNT OF $6,528.51, THIS EQUALING 50% OF THE OUTSTANDING MEDICAL BILLS OF $13,057.02, $10,000 PURSUANT TO SECTION 19(L) OF THE ILLINOIS WORKERS' COMPENSATION ACT. THIS IS THE MAXIMUM AMOUNT ALLOWED FOR THE NUMBER OF DAYS IN WHICH THEY FAILED TO PAY THE RELATED MEDICAL BILLS. ADDITIONALLY, THE ARBITRATOR AWARDS THE PETITIONER'S ATTORNEY PURSUANT TO SECTION 16, $1,305.70 THAT BEING 20% OF THE PENALTIES AWARD UNDER SECTION 19(K).

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

Signature of Arbitrator

JANUARY 25, 2023

FINDINGS OF FACT

Testimony of Helene Cleckley

The Petitioner began her employment with the Respondent on November 11, 2013 as the office manager (AT 9). The Petitioner's job duties included administrative work, invoicing, making payments, payroll, shipping and receiving, dealing with insurance companies and human resources (AT 9-10).

The Petitioner testified that on July 10, 2020, she was talking to the production manager about a particular part they were making. As she stepped to show him the part, she tripped over an extension cord that was run behind her to a fan (AT 10). The Petitioner testified that she fell to the ground hitting her outstretched left arm (AT 10). The Petitioner immediately felt a sharp, shooting pain to her left arm (AT 11). The Petitioner testified that she hit her left arm on the ground so hard that her watch wristband broke and came off her wrist (AT 11).

The Petitioner testified that Wes Gaddes, the production manager, witnessed her accident (AT 11). The Petitioner sought immediate medical treatment at OSF St. Joseph Medical Center (AT 12). The doctors at OSF St. Joseph took x-rays of her left wrist and forearm and performed a partial setting, where they filled her left arm with fluid and pulled and twisted her it to make it more stable. The Petitioner was provided a splint for her left hand and forearm and was referred to an orthopedic surgeon (AT 13).

After her surgery, Ms. Cleckley noticed she was not making any progress with strength to her left arm, wrist, and elbow (AT 17). She testified that she could not move her left arm nor close her hand (AT 17).

The Petitioner testified that after her accident, she noticed pain with her left shoulder (AT 19). An MRI was performed which showed a partial supraspinatus tear. No surgery was performed.

The Petitioner testified that she has a scar on her left arm as a result of the surgery. The scar is characterized as a 4-inch scar traveling from the left forearm to the base of the palm, slightly veering to the left towards the thumb with eight screws and a plate (AT. 15). The Arbitrator notes that the "Hand Innovations DVR Plate" is located in the forearm and the majority of the anchoring screws are located in the wrist.

The Petitioner testified that she is aware that Dr. Li's medical bills total between $25,000.00 and $27,000.00, which have not been paid by workers' compensation and remain outstanding (AT 25).

The Petitioner testified that she worked right up until the first surgery with Dr. Li (AT 26). The Petitioner went back to work after the first surgery part-time (AT 26).

The Petitioner testified that at the time of trial she still has pain to her left shoulder. When she makes certain moves or if she reaches about her head, her left shoulder is in pain (AT 26-27). The Petitioner testified that weather impacts her left shoulder, and she is not allowed to do workouts that are weight bearing as it relates to her left shoulder and wrist (AT 27). The Petitioner testified that her left wrist is still stiff, and she has reduced range of motion (AT 27). The Petitioner testified that at the time of trial, she still has a metal plate in her left forearm (AT 28). The Arbitrator notes that the Petitioner's testimony about her left shoulder is rather surprising

as the overwhelming majority of the Petitioner's medical treatment has been focused on her left wrist and distal forearm.

The Petitioner testified that she is the primary caretaker at her household as her husband has Alzheimer's (AT 21). The Petitioner testified that she must perform all of the daily chores in her household but does these with caution and wears her left forearm brace (AT 21). The Petitioner testified that she is currently working full duty with the employer (AT. 28).

Medical Treatment

The Petitioner reported to the emergency room where she saw Dr. Fisher on July 10, 2020, after falling on an outstretched arm. She had no numbness or tingling. She had tenderness and swelling. X-rays showed a comminuted left distal radius fracture with left distal ulna fracture. This was partially reduced and splinted (Pet. Exh. 4).

The Petitioner saw Dr. Li on July 13, 2020, where Dr. Li diagnosed the Petitioner with a left displaced distal radius fracture with numbness and tingling, recommended ORIF. The following day, Dr. Li performed ORIF of the left distal radius and ulna fracture and placed the Petitioner in a splint (Pet. Exh 2).

The Petitioner returned to Dr. Li on July 23, 2020, where she was doing well, therapy was started (Pet. Exh 2).

The Petitioner returned to Dr. Li on August 19, 2020, it is noted that she had decreased range of motion. X-rays showed no change in alignment, and therefore therapy was continued (Pet. Exh 2).

The Petitioner had a follow up visit with Dr. Li on September 16, 2020. The Petitioner reported numbness and tingling in the ulnar distribution which she notes started postoperatively and was worsening. The Petitioner had wrist flexion and extension of 50 and 30 degrees respectively, supination of 50 degrees, decreased 2-point discrimination in the median distribution with positive Tinel's and Phalen's. Dr. Li did an ultrasound where there was abnormal median nerve and inflamed EPB and EPL tenons. Dr. Li diagnosed the Petitioner with carpal tunnel syndrome and recommended an EMG and continued therapy (Pet. Exh. 2).

The Petitioner underwent the EMG with Dr. Trudeau on October 1, 2020, which was read as having severe left carpal tunnel syndrome with motor changes in the APB. No change in the ulnar nerve (Pet. Exh. 5).

The Petitioner had a left shoulder MRI performed on October 9, 2020, which revealed partial supraspinatus tearing, possible calcific tendinitis, and biceps tendinitis. The Petitioner had no complaints regarding the left shoulder on that date (Pet. Exh. 2).

The Petitioner returned to Dr. Li on October 12, 2020. The Petitioner reported to Dr. Li with 4/5 strength and was given a cortisone injection to the shoulder under ultrasound guidance, and recommendation of a carpal tunnel release with arthroscopic lysis of adhesions was made (Pet. Exh 2).

On November 6, 2020, Dr. Li performed a left wrist arthroscopy with lysis of adhesions as well as a carpal tunnel release. Dr. Li's medical records notes the joint surfaces looked okay, and ligaments were intact (Pet. Exh. 2).

The Petitioner returned to Dr. Li November 3, 2020, with increased range of motion, no change in numbness and tingling. Ultrasound of the left wrist was once again performed with no abnormalities noted, therapy recommended (Pet. Exh 2).

The Petitioner followed up for physical therapy on January 4, 2021. The therapy notes, "I had to snow blow my driveway this weekend. I did not have any issues. I did wear my wrist brace though just in case I were to slip and fall" (Pet. Exh. 2)

The Petitioner followed up with Dr. Li on January 8, 2021, reporting a slight increased range of motion, no swelling, 50 degrees of flexion, 60 degrees of extension. Ultrasound was once again performed. The median nerve was normal and therapy was recommended (Pet. Exh. 2).

The Petitioner returned to Dr. Li on February 5, 2021. The medical records notes that her biggest issue was loss of wrist extension. Ultrasound was performed, and once again showed no abnormality. Therapy continued (Pet. Exh 2).

The Petitioner returned to see Dr. Li on March 3, 2021, where she is able to almost close to a full fist with increased wrist extension. Ultrasound is once again performed, and is normal median nerve and therapy recommended (Pet. Exh 2).

The Petitioner underwent a CT scan of the left wrist on May 15, 2021, which revealed incomplete healing of the distal radius on its volar aspect, i.e. about 50% healing (Pet. Exh 2).

On June 9, 2021, the Petitioner submitted to an independent medical examination of Dr. Cohen. Dr. Cohen noted that the Petitioner was complaining on intermittent numbness and tingling in her index, middle and ring fingers. Petitioner also had complaints of weakness in her left hand (Resp. Exh. 1).

Dr. Cohen felt that the Petitioner's condition of ill-being was related to a work injury. Dr. Cohen placed the Petitioner on a 15 lb. weight restriction. Dr. Cohen opined that the treatment up through that time was reasonable and necessary and related to the work injury. Dr. Cohen opined that the Petitioner was not at maximum medical improvement and recommended work hardening (Resp. Exh. 1).

The Petitioner followed up with Dr. Li after the examination with Dr. Cohen. Dr. Li did recommend that the Petitioner undergo a bone grafting from the hip to be placed into her left arm area (Pet. Exh. 2).

Dr. Li testified in this case on December 6, 2021. Dr. Li testified that as of that date, the Petitioner had reached maximum medical improvement and that the surgery he had recommended for the bone grafting had been reconsidered. The Petitioner was not scheduled for surgery as of the date of Dr. Li's deposition testimony (Pet. Exh. 6).

Dr. Li testified that the Petitioner had three different diagnoses. The Petitioner was suffering from left carpal tunnel syndrome which required surgery. Dr. Li also testified that the Petitioner had multiple fractures to her left wrist and forearm which required a metal plate and screws to hold them in place. Dr. Li testified that the Petitioner had eight screws placed into her left arm (Pet. Exh. 6, pgs. 10-11).

Dr. Li further testified that the Petitioner had suffered a partially torn rotator cuff adhesive capsulitis to her left shoulder as a result of the work injury (Pet. Exh. 6).

ARBITRATOR'S FINDINGS

Causal Connection

The evidence in this case establishes that the Petitioner's condition of ill-being is causally related to the work injury. Dr. Li testified that the Petitioner suffered from multiple fractures to her left forearm and required a plate and eight screws. Dr. Li's testimony further established that the Petitioner's left carpal tunnel diagnosis which required surgery was also related to the described work injury.

Dr. Li testified that the diagnosis of her partially torn supraspinatus with adhesive capsulitis was directly related to the July 10, 2020 work injury. He admitted that it could have been pre-existing, but in any event would have been aggravated by the fall.

The Respondent's own IME physician, Dr. Cohen, agreed that the Petitioner's condition of ill-being was causally related to the described work injury. Respondent offered no evidence to refute causation in this case.

Wherefore, the Arbitrator finds that the Petitioner's conditions of ill-being are directly related to the described work injury in this case.

Medical Services

The Petitioner testified that she was aware that Dr. Li had outstanding medical bills in this case totaling $27,000.00. Dr. Li testified that his care and treatment were reasonable and necessary to treat and to care for the work injuries the Petitioner sustained in this case.

The Respondent's own IME physician, Dr. Cohen, agreed that the care and treatment up to date of his examination was reasonable and necessary.

Wherefore, The Arbitrator orders the Respondent to pay all reasonable, necessary and causally related medical and hospital bills in this case. The Arbitrator finds that the Respondent is to pay the medical bills as outlined in Petitioner's Exhibit 7.

Penalties

The Arbitrator finds that the Respondent provided no evidence or reasoning for the non-payment of work-related medical bills. The Arbitrator has reviewed Petitioner's exhibit 7, containing the alleged outstanding medical bills.

The Arbitrator finds that the Petitioner is entitled to penalties on the medical bills that did not receive any payments. In doing so, the Arbitrator is giving the benefit of the doubt to the Respondent that partial payments were made pursuant to the Fee Schedule. After a review of Petitioner's Exhibit 7, the Arbitrator finds that there is a total of $13,057.02 in unpaid medical bills.

Wherefore, the Arbitrator awards penalties pursuant to Section 19(k) in the amount of $6,528.51, this equaling 50% of the outstanding medical bills of $13,057.02, $10,000 pursuant to Section 19(l) of the Illinois Workers' Compensation Act. This is the maximum amount allowed for the number of days in which they failed to pay the related medical bills. Additionally, the Arbitrator awards the Petitioner's attorney pursuant to Section 16, $1,305.70 that being 20% of the penalties award under Section 19(k).

Nature and Extent of the Injury

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. This factor will not be given any weight.

With regard to Sec. 8.1(b) (ii); the Arbitrator notes that the Petitioner was employed by the Respondent as an office manager.

With regard to Sec. 8.1(b) (iii); the Arbitrator notes that the Petitioner was 64 years old at the time of the injury. The Arbitrator places great weight on this fact, as the medical records show that he left wrist and forearm fracture has not completely healed.

With regard to Sec. 8.1(b) (iv); the Petitioner's future earning capacity, the Arbitrator notes that there was no evidence of loss of future earning capacity, thus this factor will be given no weight.

With regard to Sec 8.1(b) (v); The Petitioner underwent a ORIF of the left distal radius and ulna fracture. Additionally, Dr. Li performed a left wrist arthroscopy with lysis of adhesions as well as a carpal tunnel release. The Petitioner's diagnoses in this case are left carpal tunnel syndrome, torn rotator cuff adhesive capsulitis to her left shoulder and multiple fractures to her left arm which required a metal plate and screws to hold them in place.

The Petitioner testified that at the time of trial she still has pain to her left shoulder. When she makes certain moves or if she reaches about her head, her left shoulder is in pain (AT 26-27). The Petitioner testified that weather impacts her left shoulder, and she is not allowed to do workouts that are weight bearing as it relates to her left shoulder and wrist (AT 27). The Petitioner testified that her left wrist is still stiff, and she has reduced range of motion (AT 27). The Petitioner testified that at the time of trial, she still has a metal plate in her left forearm (AT 28).

The Petitioner testified that she is the primary caretaker at her household as her husband has Alzheimer's (AT 21). The Petitioner testified that she has to perform all of the daily chores in her household but

does these with caution and wears her left arm brace (AT 21). The Petitioner testified that she is currently working full duty with the employer (AT. 28).

Wherefore, the Arbitrator finds that the Petitioner is entitled an award of 20% loss of use of the left arm, (distal forearm fractures with plate and screws), 32.5% loss of use of the left hand (wrist fractures with anchoring plate and screws) + (carpal tunnel surgery) and 2.5% loss of use of the Person As A Whole (left shoulder partial cuff tear).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027299
Case Name	Adam Safaa v. Eagle Express Lines, Inc.
Consolidated Cases	20WC027300;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0343
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Christopher Jarchow

DATE FILED: 7/19/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0343

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

Adam Safaa,

Petitioner,

vs. NO: 20 WC 027299

Eagle Express Lines, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's overall findings of fact, however, adds the following language to the chronological medical history on page 3 of the Arbitrator's Decision, making the following paragraph the seventh full paragraph on the page:

> On February 7, 2022, Petitioner was re-examined by Dr. Singh at the request of the Respondent. Dr. Singh reviewed additional medical records, including those from Dr. Rhode and Dr. Mekhail, and performed an evaluation of Petitioner. He opined Petitioner had sustained a soft tissue muscular strain of the lumbar spine and an L5-S1 left herniated disk, which were causally connected to the work accident. Dr. Singh noted he had previously recommended Petitioner undergo an L5-S1 microdiscectomy if conservative treatment failed, but that Petitioner had instead undergone an L5-S1 fusion procedure. He did not recommend any additional surgery, including hardware removal, as there was no medical indication for such procedure. Dr. Singh recommended Petitioner undergo an FCE, then 2-4 weeks of work conditioning, in order to establish restrictions. Until then, he provided temporary restrictions of no lifting, pushing, or pulling greater than 20-pounds,

with minimal bending, kneeling, stooping, squatting, or twisting. (RX2; p. 5)

The Commission further modifies Section (f) of the Arbitrator's Decision on pages 5 and 6, containing the causal connection analysis, striking the narrative of that section in its entirety and replacing it with the following language:

> Respondent stipulated to both accidents of August 18, 2020 and October 28, 2020. There is no dispute that Petitioner sought and received medical care after each accident. The Commission relies on the persuasive opinion of Respondent's Section 12 examiner Dr. Singh. Dr. Singh was provided a consistent history with which Petitioner testified at trial.
>
> Dr. Singh opined on January 20, 2021 that Petitioner required an epidural steroid injection and potential microscopic discectomy. (RX1, p.4) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in February 2022 the Petitioner did not require the subsequent hardware removal surgery. (RX2, p. 5) Dr. Singh did not find Petitioner to be at maximum medical improvement and recommended a functional capacity evaluation followed by a course of work conditioning before a maximum medical improvement determination could be made. (RX2, p. 5)

The Commission modifies the period of temporary total disability awarded, adding the period from February 15, 2021 through August 13, 2021. The Commission finds the job offered by Respondent did not account for all of Dr. Singh's restrictions. On January 20, 2021, Dr. Singh restricted Petitioner from lifting, pushing, pulling greater than 10 pounds, with no bending, kneeling, stooping, squatting, or twisting. The jobs proffered to Petitioner only noted the assigned duties were within the restrictions of no lifting, pushing, pulling greater than 10 pounds.

The Commission further modifies the first paragraph of the Order section of the Decision, relating to the award of medical benefits, adding, "Respondent is to receive a credit for all medical bills paid." to the end of the paragraph.

The Commission corrects a scrivener's error in the Findings section of the Decision, relating to the credits afforded Respondent, striking the "$0" for total credit afforded Respondent and replacing it with "$55,018.07".

The Commission further corrects a scrivener's error in the last sentence of the last paragraph of Section (K), pertaining to the award of temporary total disability benefits, striking "$55,027.07" and replacing it with "$55,018.07".

The Commission further corrects a scrivener's error in the first paragraph of the "Findings of Fact and Conclusions of Law" section on the first page of the narrative, replacing all references to "August 19, 2020" and replacing them with "August 18, 2020".

The Commission further corrects a scrivener's error on the first page of the narrative, in the last sentence in the "Findings of Fact and Conclusions of Law" section, replacing the second "20 WC 27299" with "20 WC 27300".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 31, 2023, is modified as stated herein.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $766.26/week for a period of 99 2/7 weeks, commencing on August 21, 2020 through September 7, 2020, and November 12, 2020 through September 19, 2022, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $55,018.07 for temporary total disability benefits paid prior to hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $60,620.89, as provided in Section 8(a) of the Act. Specifically, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of: $32,311.25 to Orland Park Orthopedics, $19,023.26 to Dr. Blair Rhode, $47,810.00 to Persistent Labs, $1,269 to Persistent Rx, and $207.00 to Parkview Orthopaedic Group as provided in Sections 8(a) and Section 8.2 of the Act. Respondent is entitled to a credit for all medical bills paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for Petitioner's functional capacity evaluation and a four (4) week work conditioning program pursuant to Section 8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION, that 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.

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

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

July 19, 2024

o: 5/21/2024
AHS/kjj 051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027299
Case Name	Adam Safaa v. Eagle Express Lines, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Christopher Jarchow

DATE FILED: 8/31/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 29, 2023 5.35%

/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
CORRECTED ARBITRATION DECISION
19(b), 8(a)

Adam Safaa
Employee/Petitioner
v.
Eagle Express Lines, Inc.
Employer/Respondent

Case # **20** WC **027299**

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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, **8/19/20 and 10/28/20**, 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 $**59,768.28**; the average weekly wage was $**1,149.39**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **1** dependent children.

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

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

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

ORDER

Please see Order for 20 WC 27300.

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.

AUGUST 31, 2023

Signature of Arbitrator

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADAM SAFAA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 20 WC 27299 and 20 WC27300**
	)	
EAGLE EXPRESS LINES, INC.,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agree that on August 19, 2020 and October 28, 2020, Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act and their relationship was that of employee and employer. The parties agree that Petitioner gave Respondent notice of an August 19, 2020 and October 28, 2020 injury within the time limits stated in the Act. The parties agree that Petitioner's average weekly wage is $1,149.39. The parties agree that prior to trial Respondent paid $55,018.07 in TTD benefits for which it is entitled to a credit. (AX1)

Disputed issues include: (F) whether Petitioner's current condition of ill-being is causally connected to this injury or exposure; (J) whether Respondent paid all appropriate charges for all reasonable and necessary medical services; (K) the period in which petitioner is entitled to TTD, (0) prospective medical treatment, and (M) whether Petitioner is entitled to attorney's fees and penalties under sections 16, 19(k), and 19(l). (AX1).

The following decision applies to both 20 WC 27299 and 20 WC 27299.

STATEMENT OF FACTS

Petitioner testified he was employed by Eagle Express Lines, Inc. as a semi-truck driver. (Tx. 6-8). Petitioner testified he was injured on August 18, 2020 while pushing a cage at work (Tx. 8) Petitioner explained that a cage is a 500-pound loaded metal cage on wheels designed for pushing containing merchandise or recycled paper. (Tx. 8) Petitioner treated conservatively at Concentra through September 7, 2020 (Tx. 10). Petitioner testified he was paid benefits for his time off of work through September 7, 2020. (Tx. 10).

Petitioner sought initial medical treatment at Concentra Occupational Clinic on August 21, 2020. Petitioner reported that he injured his back by pushing BMCs. Petitioner was assessed with a lumbar and thoracic sprain. Petitioner was recommended to undergo physical therapy. Petitioner was placed on a 10-pound lifting restriction and 20-pound pushing/pulling restriction. (PX2)

Petitioner returned to Concentra on August 24, 2020. Petitioner's symptoms were improving. Petitioner was referred to physical therapy at the last visit, though Petitioner had not followed-up with physical therapy. Petitioner was kept on the same work restrictions. (PX2)

Petitioner followed-up with Concentra on August 31, 2020 and again on September 7, 2020. As of September 7, 2020, it was noted that the Petitioner had recovered. Petitioner's assessment of lumbar and thoracic sprain remained the same. Petitioner was cleared to return to work in an unlimited capacity as of September 7, 2020. (PX2)

Petitioner testified he did return to work for his employer, though sustained a second incident at work. Petitioner testified on October 28, 2020 he was again injured when he was "pushing cages of recycled paper [he] hurt [his] back." (Tx. 12) Petitioner testified it was a similar incident as the August 2020 injury. (Tx. 12) Petitioner estimated that the cages weighed about 500 pounds (Tx. 12). Petitioner testified following that second incident he followed up with his family doctor, Dr. Raad Rashan (Tx. 13).

Petitioner retained counsel for both of his dates of accident on October 30, 2020. (Tx. 33) Shortly thereafter, Petitioner began treatment with Dr. Blair Rhode of Orland Park Orthopedics on referral of his lawyer. (Tx. 32)

Petitioner saw Dr. Rhode on November 2, 2020. Petitioner reported to Dr. Rhode that he suffered a work-related injury on October 28, 2020. Petitioner reported "lifting trailer door which was rusty and experienced a sudden onset bandlike low back pain with radiation to his right posterolateral thigh." (PX3; p.255) Dr. Rhode noted"

> *This is the third event that the patient has experienced back pain while at his current employer. He states that approximately 2.5 months ago, he was performing similar activities when he experienced low back pain. His initial event occurred in October 2018.*
>
> PX3; p. 255

Dr. Rhode continued, "The patient sustained a work -related low back injury on October 28, 2020 while lifting a trailer door. The patient sustained *2 prior work-related injuries* while performing similar activity." (PX3; p. 256 – emphasis added) Dr. Rhode provided a generic diagnosis of "low back pain." Dr. Rhode kept Petitioner off work. Dr. Rhode recommended Petitioner undergo an MRI of the lumbar spine. (PX3; p.255-256)

Petitioner was seen by Dr. Mekhail on January 18, 2021 on referral of Dr. Rhode. Petitioner described that his back pain would radiate down the right leg. Dr. Mekhail indicated that Petitioner was injured on August 2, 2020 and again on October 28, 2020 "from moving the trailer sliding door, which gets stuck, and he felt a pop in his back." (PX4, p. 15). Dr. Mekhail recommended physical therapy and work restrictions.

On January 20, 2021 Dr. Singh performed and Independent Medical Examination and Diagnosed Petitioner with a lumbar muscular strain and herniated nucleus pulposus. Dr. Singh indicated that Petitioner would benefit from an epidural steroid injection. Singh recommended Petitioner return to work with a 10-pound lifting restriction and consider an epidural steroid

injection. In the event the ESI is not beneficial, Dr. Singh suggested Petitioner consider a possible microscopic discectomy. (RX1)

Petitioner underwent a series of injections with Dr. Rhode on February 23, 2021, April 27, 2021, and May 25, 2021. (PX3, p.259-263)

Petitioner was referred to Dr. Anis Mekhail of Parkview Orthopedic Group. On August 14, 2021, Petitioner underwent surgery with Dr. Mekhail in the form a right L5-S1 decompression with laminotomy, foraminotomy, partial vasectomy, right L5-S1 formal microdiscectomy, and right L5-S1 transforaminal lumbar interbody fusion. (PX3, p.257)

Petitioner had a Lumbar MRI at Homer Glen Imaging on December 15, 2021. The radiologist interpreted the MRI as showing "Lumbar spondylosis and scoliosis with multilevel disc disease. Previous surgical fusion at L5-S1. A soft tissue density obscures the normal signal in the right neural foramen at L5-S1 and can be further evaluated by postcontrast study." (PX3; p. 268)

Petitioner also underwent a CT scan of the Lumbar Spine without contrast on December 15, 2021. The radiologist interpreted the CT scan as showing, "Mild disc bulges seen at L4-5. Previous surgical fusion at L5-S1. Previous laminectomy at L5-S1. A soft tissue density is present adjacent to the laminectomy defect and can be further evaluated by postcontrast MR imaging, as clinically appropriate." (PX3; p.271)

Petitioner was reevaluated by Dr. Mekhail on January 24, 2022. The CT scan showed that Petitioner's screws were in a good position. An MRI scan showed some foraminal stenosis with some excessive bone formation in the foramen explaining the intermittent radiculopathy. This led Dr. Mekhail to speculate that the pain was caused by symptomatic hardware.

Petitioner was seen by Dr. Mekhail for a follow up on January 31, 2022. Petitioner had significant pain relief following his injection. Petitioner had discomfort with range of motion in his back. Dr. Mekhail recommended another surgery to explore the arthrodesis and remove the hardware. Dr. Mekhail recommended to do so at six months post-surgery. (PX4, p.4).

Petitioner returned to Dr. Mekhail on August 2, 2022. Petitioner reported back pain. Petitioner wanted hardware removal that was denied per the IME. Petitioner was kept off work. (PX4, p.3)

Petitioner testified that Dr. Mekhail recommended Petitioner use a walker and a brace for his low back though he no longer wears it (Tx. 30). Petitioner testified he was referred to Dr. Rhode by his lawyer (Tx. 32). Petitioner testified that he retained the services of his lawyer on October 30, 2020, just a few days before seeing Dr. Rhode (Tx. 33). Petitioner testified that he did not have any low back pain prior to August 2020 (Tx. 34). Petitioner testified that the fusion performed by Dr. Mekhail only helped "a little bit" (Tx. 39).

CONCLUSIONS OF LAW

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

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

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

Credibility is the quality of a witness which renders Petitioner's 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 Petitioner's testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evidence it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

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

The Arbitrator observed Petitioner's demeanor at trial. On direct exam, Petitioner appeared calm and answered questions at normal conversational speed. His body language was curious at times and seemed to be exaggerated when describing complaints of pain. On cross examination, Petitioner's tone and manner of speaking changed as did the amount and manner of eye contact. In sum, the Arbitrator had questions about credibility at this point.

The Arbitrator now turns to the totality of the record and finds there to be a few areas of concern.

First, petitioner's testimony regarding his mechanism of injury is inconsistent with the history outlined in the medical records. Petitioner testified he injured his back in August 2020 and October 2020 while pushing a 500-pound cage on three independent occasions during his testimony. (Tx. 8, 12, 35) This is inconsistent with the history in the medical records. Petitioner reported to Dr. Rhode he injured his back lifting a rusty trailer door. (PX3; p.255) Likewise, the medical records from Dr. Mekhail repeat the same history of a back injury resulting from "moving the trailer sliding door, which [got] stuck and he felt a pop in his back." (PX4, p.15) The Section 12 report of Dr. Singh indicates that Petitioner reported unloading and pushing and pulling 150-250 pounds of product on a cart on wheels in and out of the back of his truck. (RX1).

Second, Petitioner's testimony regarding back pain before August and October 2020, is inconsistent with the medical records. Petitioner denied ever having a back problem before August 2020 (Tx. 34) Dr. Rhode notes that the October 28, 2020 accident was Petitioner's third back injury, the initial one being October 2018. (PX3, p.255)

The discrepancy between these versions of events is considerable and casts a cloud over Petitioner's case. The two histories differ in a manner that cannot be explained by claiming there was an error or mistake, rather they are different stories. This combined with Arbitrator's observations of Petitioner while he answered questions at trial yields a finding that Petitioner was not credible.

The Arbitrator finds Dr. Singh, the Section 12 examiner to be more credible than Dr. Rhode and Dr. Mekhail for reasons that are discussed below.

In support of the Arbitrator's decision with respect to F (causal connection), the Arbitrator finds as follows:

The two accidents are not in dispute. Nor is there a dispute that Petitioner sought and received medical care after each one.

The credibility of Petitioner, particularly regarding the discrepant histories makes the issue of causation very difficult to decide. The versions of what exactly happened to Petitioner are different enough they could affect whether the mechanism was of sufficient cause to cause the condition of ill being at all. The opinions of the physicians are only reliable as the history upon which they rely on provided by the claimant. The weight to be assigned to a medical opinion by the trier of fact is determined by the factual basis underlying the opinion. *Snelson v. Kamm,* 204 Ill 2d 1, 27 (2003). In this case it is underminable what the actual history is. The arbitrator cannot

reconcile such different stories and is now in a position of being unable to determine what is fact versus what is not. The Arbitrator cannot know what Dr. Singh's causation opinion may have been had he been given the same the history that Petitioner gave to Dr. Rhode and been aware of the history of a prior 2018 back injury.

However, two undisputed accidents occurred for which medical care was rendered. Petitioner's treating physicians and Section 12 examiner Dr. Singh agree that there was a change in the condition of Petitioner's low back.

Dr. Singh opined on January 20, 2021 that Petitioner required an epidural steroid injection and potential microscopic diskectomy. (RX1) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in January 2022 that Petitioner did not require the subsequent hardware removal surgery and that Petitioner. (RX2). Dr. Singh did not find Petitioner to be at MMI and recommended an FCE followed by a course of work conditioning before an MMI determination could be made. (RX2).

Dr. Singh's opinions are most persuasive. Dr. Singh concluded Petitioner needed a microdiscectomy, a less invasive surgery than a fusion. Dr. Singh's opinions are corroborated by the fact that Petitioner never fully recovered from the fusion that Dr. Mekhail performed and that Dr. Mekhail wants to perform a hardware removal surgery. Dr. Singh did not find Petitioner to be at maximum medical improvement. (RX2). He opined that Petitioner would reach maximum medical improvement after an FCE and 2-4 weeks (5 days per week) and that no further surgery such as hardware removal would be medically indicated.

Petitioner proves a causal connection.

In support of the Arbitrator's decision with respect to J (medical), the Arbitrator finds as follows:

While there is a dispute as to whether Petitioner should have had a microdiscectomy or a fusion surgery, having found causation, there is no dispute that Petitioner required medical care for his injuries. The Arbitrator awards Petitioner's claim with respect to all medical services provided to the date of trial. Respondent shall be entitled to a credit for all medial bills paid prior to trial.

In support the Arbitrator's decision with respect to K (temporary total compensation), the Arbitrator finds follows:

An employee is temporarily and totally disabled from the time that an injury incapacitates her from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill.2d 107, 118, 149 Ill. Dec. 253, 561 N.E.2d 623 (1990). Our Supreme Court has held the dispositive inquiry for TTD benefits is whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n,* 236 Ill.2d 132, 142, 337 Ill. Dec. 707, 923 N.E.2d 266 (2010). There are, however, three recognized exceptions to this rule: (1) Petitioner refuses to submit to medical treatment essential to her recovery; (2) Petitioner refuses

to cooperate in good faith with rehabilitation efforts; or (3) Petitioner refuses work falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding, Inc.,* 236 Ill.2d at 146–47, 337 Ill. Dec. 707, 923 N.E.2d 266.

The Arbitrator finds Petitioner is not precluded from all work activities. The Arbitrator adopts the opinion of Dr. Kern Singh who opined on January 20, 2021 and February 7, 2022 that Petitioner could return to work within a 10 pound and 20 pound lifting restriction, respectively (RX1, RX2) Respondent offered to accommodate these restrictions in February 2021, (RX3, and RX4) though Petitioner refused. (Tx.38).

Based on the foregoing the Arbitrator finds that Petitioner was temporarily disabled for the period of August 21, 2020 through September 7, 2020 and November 12, 2020 through February 14, 2021, the date in which the claimant refused the light duty placement. The Arbitrator notes that Respondent stipulated to payment of TTD for the period of August 14, 2021 through September 19, 2022, and therefore awards TTD for that period as well. Respondent shall be entitled to a credit of $55,027.07 for TTD benefits paid prior to trial.

In support of the Arbitrator's decision with respect to M (Penalties and Attorney's Fees), the Arbitrator finds as follows:

The Arbitrator finds that Respondent had a reasonable basis to dispute causation because of the inconsistent medical histories given by Petitioner. The Arbitrator also finds Dr. Singh to be the most credible on the issue of prospective medical care and on the issue of whether Petitioner could work the light duty job provided by Respondent.

An employer's voluntarily payment of compensation to an injured employee prior to the Arbitration Hearing is not an admission of liability or that there is a causal connection between the employee's condition of ill-being and her employment. 820 ILCS 305/8(b)7; *RD Masonry, Inc. v. Industrial Commission*, 215 Ill. 2d 397, 408 (2005). Respondent voluntarily paid the claimant both TTD and medical benefits prior to the Arbitration Hearing but raised the issue of causal connection on the Request for Hearing form. It is well settled law that Respondent acted within its rights to do so.

Respondent paid all medical and TTD through the February 2021 return to work offer. In fact, Respondent even paid post IME TTD benefits, Not only was Respondent well within its rights to challenge the ongoing medical and TTD per the two reports of Dr. Singh, but it paid even more than was required of it under the Act. Petitioner continues to receive TTD through the trial date despite the various disputes.

Respondent has acted neither unreasonably nor vexatiously. Petitioner's claim for fees and penalties is denied.

In support of the Arbitrator's decision with respect to O (Prospective Medical), the Arbitrator finds as follows:

The Arbitrator adopts the opinions of Dr. Kern Singh. Dr. Singh opined on January 20, 2021 that the claimant required an epidural steroid injection and potential microscopic diskectomy. (RX1) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in January 2022 that Petitioner did not require the subsequent surgery. Dr. Singh did not find Petitioner to be at maximum medical improvement and opined an FCE and a course of work conditioning would be required for a final assessment of what MMI would be. (RX2)

Petitioner's claim for prospective surgery is denied. The Arbitrator finds Petitioner entitled to receive an FCE and a four week work conditioning program.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027300
Case Name	Adam Safaa v. Eagle Express Lines, Inc.
Consolidated Cases	20WC027299;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0344
Number of Pages of Decision	16
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Christopher Jarchow

DATE FILED: 7/19/2024

/s/Amylee Simonovich, Commissioner

Signature

21IWCC0344

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

Adam Safaa,

Petitioner,

vs. NO: 20 WC 027300

Eagle Express Lines, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's overall findings of fact, however, adds the following language to the chronological medical history on page 3 of the Arbitrator's Decision, making the following paragraph the seventh full paragraph on the page:

> On February 7, 2022, Petitioner was re-examined by Dr. Singh at the request of the Respondent. Dr. Singh reviewed additional medical records, including those from Dr. Rhode and Dr. Mekhail, and performed an evaluation of Petitioner. He opined Petitioner had sustained a soft tissue muscular strain of the lumbar spine and an L5-S1 left herniated disk, which were causally connected to the work accident. Dr. Singh noted he had previously recommended Petitioner undergo an L5-S1 microdiscectomy if conservative treatment failed, but that Petitioner had instead undergone an L5-S1 fusion procedure. He did not recommend any additional surgery, including hardware removal, as there was no medical indication for such procedure. Dr. Singh recommended Petitioner undergo an FCE, then 2-4 weeks of work conditioning, in order to establish restrictions. Until then, he provided temporary restrictions of no lifting, pushing, or pulling greater than 20-pounds,

with minimal bending, kneeling, stooping, squatting, or twisting. (RX2; p. 5)

The Commission further modifies Section (f) of the Arbitrator's Decision on pages 5 and 6, containing the causal connection analysis, striking the narrative of that section in its entirety and replacing it with the following language:

> Respondent stipulated to both accidents of August 18, 2020 and October 28, 2020. There is no dispute that Petitioner sought and received medical care after each accident. The Commission relies on the persuasive opinion of Respondent's Section 12 examiner Dr. Singh. Dr. Singh was provided a consistent history with which Petitioner testified at trial.
>
> Dr. Singh opined on January 20, 2021 that Petitioner required an epidural steroid injection and potential microscopic discectomy. (RX1, p.4) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in February 2022 the Petitioner did not require the subsequent hardware removal surgery. (RX2, p. 5) Dr. Singh did not find Petitioner to be at maximum medical improvement and recommended a functional capacity evaluation followed by a course of work conditioning before a maximum medical improvement determination could be made. (RX2, p. 5)

The Commission modifies the period of temporary total disability awarded, adding the period from February 15, 2021 through August 13, 2021. The Commission finds the job offered by Respondent did not account for all of Dr. Singh's restrictions. On January 20, 2021, Dr. Singh restricted Petitioner from lifting, pushing, pulling greater than 10 pounds, with no bending, kneeling, stooping, squatting, or twisting. The jobs proffered to Petitioner only noted the assigned duties were within the restrictions of no lifting, pushing, pulling greater than 10 pounds.

The Commission further modifies the first paragraph of the Order section of the Decision, relating to the award of medical benefits, adding, "Respondent is to receive a credit for all medical bills paid." to the end of the paragraph.

The Commission corrects a scrivener's error in the Findings section of the Decision, relating to the credits afforded Respondent, striking the "$0" for total credit afforded Respondent and replacing it with "$55,018.07".

The Commission further corrects a scrivener's error in the last sentence of the last paragraph of Section (K), pertaining to the award of temporary total disability benefits, striking "$55,027.07" and replacing it with "$55,018.07".

The Commission further corrects a scrivener's error in the first paragraph of the "Findings of Fact and Conclusions of Law" section on the first page of the narrative, replacing all references to "August 19, 2020" and replacing them with "August 18, 2020".

The Commission further corrects a scrivener's error on the first page of the narrative, in the last sentence in the "Findings of Fact and Conclusions of Law" section, replacing the second "20 WC 27299" with "20 WC 27300".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 31, 2023, is modified as stated herein.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $766.26/week for a period of 99 2/7 weeks, commencing on August 21, 2020 through September 7, 2020, and November 12, 2020 through September 19, 2022, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $55,018.07 for temporary total disability benefits paid prior to hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $60,620.89, as provided in Section 8(a) of the Act. Specifically, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of: $32,311.25 to Orland Park Orthopedics, $19,023.26 to Dr. Blair Rhode, $47,810.00 to Persistent Labs, $1,269 to Persistent Rx, and $207.00 to Parkview Orthopaedic Group as provided in Sections 8(a) and Section 8.2 of the Act. Respondent is entitled to a credit for all medical bills paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for Petitioner's functional capacity evaluation and a four (4) week work conditioning program pursuant to Section 8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION, that 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.

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

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

July 19, 2024
o: 5/21/2024
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027300
Case Name	Adam Safaa v. Eagle Express Lines, Inc.
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Christopher Jarchow

DATE FILED: 8/31/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 29, 2023 5.35%

/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
CORRECTED ARBITRATION DECISION
19(b), 8(a)

Adam Safaa
Employee/Petitioner
v.
Eagle Express Lines, Inc.
Employer/Respondent

Case # **20** WC **027300**

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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, **8/19/20 and 10/28/20**, 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 $**59,768.28**; the average weekly wage was $**1,149.39**.

On the date of accident, Petitioner was **40** 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 $**55,018.07** 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

Medical benefits
Respondent shall pay reasonable and necessary medical services of $60,620.89, as provided in Section 8(a) of the Act. Specifically, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $32,311.25 to Orland Park Orthopedics, $19,023.26 to Dr. Blair Rhode, $7,810.00 to Persistent Labs, $1,269.38 to Persistent Rx, and $207.00 to Parkview Orthopaedic Group as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $766.26/week for the period of August 21, 2020 through September 7, 2020 and November 12, 2020 through February 14, 2021, and August 14, 2021 through September 19, 2022, as provided in Section 8(b) of the Act.

Prospective Medical Care
Respondent shall authorize and pay for Petitioner's FCE and 4 week work conditioning program pursuant to Section 8(a) of the Act.

Penalties
No penalties are awarded.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

AUGUST 31, 2023

Signature of Arbitrator

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADAM SAFAA,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 20 WC 27299 and 20 WC27300**
	)	
EAGLE EXPRESS LINES, INC.,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties agree that on August 19, 2020 and October 28, 2020, Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act and their relationship was that of employee and employer. The parties agree that Petitioner gave Respondent notice of an August 19, 2020 and October 28, 2020 injury within the time limits stated in the Act. The parties agree that Petitioner's average weekly wage is $1,149.39. The parties agree that prior to trial Respondent paid $55,018.07 in TTD benefits for which it is entitled to a credit. (AX1)

Disputed issues include: (F) whether Petitioner's current condition of ill-being is causally connected to this injury or exposure; (J) whether Respondent paid all appropriate charges for all reasonable and necessary medical services; (K) the period in which petitioner is entitled to TTD, (0) prospective medical treatment, and (M) whether Petitioner is entitled to attorney's fees and penalties under sections 16, 19(k), and 19(l). (AX1).

The following decision applies to both 20 WC 27299 and 20 WC 27299.

STATEMENT OF FACTS

Petitioner testified he was employed by Eagle Express Lines, Inc. as a semi-truck driver. (Tx. 6-8). Petitioner testified he was injured on August 18, 2020 while pushing a cage at work (Tx. 8) Petitioner explained that a cage is a 500-pound loaded metal cage on wheels designed for pushing containing merchandise or recycled paper. (Tx. 8) Petitioner treated conservatively at Concentra through September 7, 2020 (Tx. 10). Petitioner testified he was paid benefits for his time off of work through September 7, 2020. (Tx. 10).

Petitioner sought initial medical treatment at Concentra Occupational Clinic on August 21, 2020. Petitioner reported that he injured his back by pushing BMCs. Petitioner was assessed with a lumbar and thoracic sprain. Petitioner was recommended to undergo physical therapy. Petitioner was placed on a 10-pound lifting restriction and 20-pound pushing/pulling restriction. (PX2)

Petitioner returned to Concentra on August 24, 2020. Petitioner's symptoms were improving. Petitioner was referred to physical therapy at the last visit, though Petitioner had not followed-up with physical therapy. Petitioner was kept on the same work restrictions. (PX2)

Petitioner followed-up with Concentra on August 31, 2020 and again on September 7, 2020. As of September 7, 2020, it was noted that the Petitioner had recovered. Petitioner's assessment of lumbar and thoracic sprain remained the same. Petitioner was cleared to return to work in an unlimited capacity as of September 7, 2020. (PX2)

Petitioner testified he did return to work for his employer, though sustained a second incident at work. Petitioner testified on October 28, 2020 he was again injured when he was "pushing cages of recycled paper [he] hurt [his] back." (Tx. 12) Petitioner testified it was a similar incident as the August 2020 injury. (Tx. 12) Petitioner estimated that the cages weighed about 500 pounds (Tx. 12). Petitioner testified following that second incident he followed up with his family doctor, Dr. Raad Rashan (Tx. 13).

Petitioner retained counsel for both of his dates of accident on October 30, 2020. (Tx. 33) Shortly thereafter, Petitioner began treatment with Dr. Blair Rhode of Orland Park Orthopedics on referral of his lawyer. (Tx. 32)

Petitioner saw Dr. Rhode on November 2, 2020. Petitioner reported to Dr. Rhode that he suffered a work-related injury on October 28, 2020. Petitioner reported "lifting trailer door which was rusty and experienced a sudden onset bandlike low back pain with radiation to his right posterolateral thigh." (PX3; p.255) Dr. Rhode noted"

> *This is the third event that the patient has experienced back pain while at his current employer. He states that approximately 2.5 months ago, he was performing similar activities when he experienced low back pain. His initial event occurred in October 2018.*
>
> PX3; p. 255

Dr. Rhode continued, "The patient sustained a work -related low back injury on October 28, 2020 while lifting a trailer door. The patient sustained *2 prior work-related injuries* while performing similar activity." (PX3; p. 256 – emphasis added) Dr. Rhode provided a generic diagnosis of "low back pain." Dr. Rhode kept Petitioner off work. Dr. Rhode recommended Petitioner undergo an MRI of the lumbar spine. (PX3; p.255-256)

Petitioner was seen by Dr. Mekhail on January 18, 2021 on referral of Dr. Rhode. Petitioner described that his back pain would radiate down the right leg. Dr. Mekhail indicated that Petitioner was injured on August 2, 2020 and again on October 28, 2020 "from moving the trailer sliding door, which gets stuck, and he felt a pop in his back." (PX4, p. 15). Dr. Mekhail recommended physical therapy and work restrictions.

On January 20, 2021 Dr. Singh performed and Independent Medical Examination and Diagnosed Petitioner with a lumbar muscular strain and herniated nucleus pulposus. Dr. Singh indicated that Petitioner would benefit from an epidural steroid injection. Singh recommended Petitioner return to work with a 10-pound lifting restriction and consider an epidural steroid

injection. In the event the ESI is not beneficial, Dr. Singh suggested Petitioner consider a possible microscopic discectomy. (RX1)

Petitioner underwent a series of injections with Dr. Rhode on February 23, 2021, April 27, 2021, and May 25, 2021. (PX3, p.259-263)

Petitioner was referred to Dr. Anis Mekhail of Parkview Orthopedic Group. On August 14, 2021, Petitioner underwent surgery with Dr. Mekhail in the form a right L5-S1 decompression with laminotomy, foraminotomy, partial vasectomy, right L5-S1 formal microdiscectomy, and right L5-S1 transforaminal lumbar interbody fusion. (PX3, p.257)

Petitioner had a Lumbar MRI at Homer Glen Imaging on December 15, 2021. The radiologist interpreted the MRI as showing "Lumbar spondylosis and scoliosis with multilevel disc disease. Previous surgical fusion at L5-S1. A soft tissue density obscures the normal signal in the right neural foramen at L5-S1 and can be further evaluated by postcontrast study." (PX3; p. 268)

Petitioner also underwent a CT scan of the Lumbar Spine without contrast on December 15, 2021. The radiologist interpreted the CT scan as showing, "Mild disc bulges seen at L4-5. Previous surgical fusion at L5-S1. Previous laminectomy at L5-S1. A soft tissue density is present adjacent to the laminectomy defect and can be further evaluated by postcontrast MR imaging, as clinically appropriate." (PX3; p.271)

Petitioner was reevaluated by Dr. Mekhail on January 24, 2022. The CT scan showed that Petitioner's screws were in a good position. An MRI scan showed some foraminal stenosis with some excessive bone formation in the foramen explaining the intermittent radiculopathy. This led Dr. Mekhail to speculate that the pain was caused by symptomatic hardware.

Petitioner was seen by Dr. Mekhail for a follow up on January 31, 2022. Petitioner had significant pain relief following his injection. Petitioner had discomfort with range of motion in his back. Dr. Mekhail recommended another surgery to explore the arthrodesis and remove the hardware. Dr. Mekhail recommended to do so at six months post-surgery. (PX4, p.4).

Petitioner returned to Dr. Mekhail on August 2, 2022. Petitioner reported back pain. Petitioner wanted hardware removal that was denied per the IME. Petitioner was kept off work. (PX4, p.3)

Petitioner testified that Dr. Mekhail recommended Petitioner use a walker and a brace for his low back though he no longer wears it (Tx. 30). Petitioner testified he was referred to Dr. Rhode by his lawyer (Tx. 32). Petitioner testified that he retained the services of his lawyer on October 30, 2020, just a few days before seeing Dr. Rhode (Tx. 33). Petitioner testified that he did not have any low back pain prior to August 2020 (Tx. 34). Petitioner testified that the fusion performed by Dr. Mekhail only helped "a little bit" (Tx. 39).

CONCLUSIONS OF LAW

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

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

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

Credibility is the quality of a witness which renders Petitioner's 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 Petitioner's testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission*, 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission*, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission*, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evidence it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

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

The Arbitrator observed Petitioner's demeanor at trial. On direct exam, Petitioner appeared calm and answered questions at normal conversational speed. His body language was curious at times and seemed to be exaggerated when describing complaints of pain. On cross examination, Petitioner's tone and manner of speaking changed as did the amount and manner of eye contact. In sum, the Arbitrator had questions about credibility at this point.

The Arbitrator now turns to the totality of the record and finds there to be a few areas of concern.

First, petitioner's testimony regarding his mechanism of injury is inconsistent with the history outlined in the medical records. Petitioner testified he injured his back in August 2020 and October 2020 while pushing a 500-pound cage on three independent occasions during his testimony. (Tx. 8, 12, 35) This is inconsistent with the history in the medical records. Petitioner reported to Dr. Rhode he injured his back lifting a rusty trailer door. (PX3; p.255) Likewise, the medical records from Dr. Mekhail repeat the same history of a back injury resulting from "moving the trailer sliding door, which [got] stuck and he felt a pop in his back." (PX4, p.15) The Section 12 report of Dr. Singh indicates that Petitioner reported unloading and pushing and pulling 150-250 pounds of product on a cart on wheels in and out of the back of his truck. (RX1).

Second, Petitioner's testimony regarding back pain before August and October 2020, is inconsistent with the medical records. Petitioner denied ever having a back problem before August 2020 (Tx. 34) Dr. Rhode notes that the October 28, 2020 accident was Petitioner's third back injury, the initial one being October 2018. (PX3, p.255)

The discrepancy between these versions of events is considerable and casts a cloud over Petitioner's case. The two histories differ in a manner that cannot be explained by claiming there was an error or mistake, rather they are different stories. This combined with Arbitrator's observations of Petitioner while he answered questions at trial yields a finding that Petitioner was not credible.

The Arbitrator finds Dr. Singh, the Section 12 examiner to be more credible than Dr. Rhode and Dr. Mekhail for reasons that are discussed below.

In support of the Arbitrator's decision with respect to F (causal connection), the Arbitrator finds as follows:

The two accidents are not in dispute. Nor is there a dispute that Petitioner sought and received medical care after each one.

The credibility of Petitioner, particularly regarding the discrepant histories makes the issue of causation very difficult to decide. The versions of what exactly happened to Petitioner are different enough they could affect whether the mechanism was of sufficient cause to cause the condition of ill being at all. The opinions of the physicians are only reliable as the history upon which they rely on provided by the claimant. The weight to be assigned to a medical opinion by the trier of fact is determined by the factual basis underlying the opinion. *Snelson v. Kamm,* 204 Ill 2d 1, 27 (2003). In this case it is underminable what the actual history is. The arbitrator cannot

reconcile such different stories and is now in a position of being unable to determine what is fact versus what is not. The Arbitrator cannot know what Dr. Singh's causation opinion may have been had he been given the same the history that Petitioner gave to Dr. Rhode and been aware of the history of a prior 2018 back injury.

However, two undisputed accidents occurred for which medical care was rendered. Petitioner's treating physicians and Section 12 examiner Dr. Singh agree that there was a change in the condition of Petitioner's low back.

Dr. Singh opined on January 20, 2021 that Petitioner required an epidural steroid injection and potential microscopic diskectomy. (RX1) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in January 2022 that Petitioner did not require the subsequent hardware removal surgery and that Petitioner. (RX2). Dr. Singh did not find Petitioner to be at MMI and recommended an FCE followed by a course of work conditioning before an MMI determination could be made. (RX2).

Dr. Singh's opinions are most persuasive. Dr. Singh concluded Petitioner needed a microdiscectomy, a less invasive surgery than a fusion. Dr. Singh's opinions are corroborated by the fact that Petitioner never fully recovered from the fusion that Dr. Mekhail performed and that Dr. Mekhail wants to perform a hardware removal surgery. Dr. Singh did not find Petitioner to be at maximum medical improvement. (RX2). He opined that Petitioner would reach maximum medical improvement after an FCE and 2-4 weeks (5 days per week) and that no further surgery such as hardware removal would be medically indicated.

Petitioner proves a causal connection.

In support of the Arbitrator's decision with respect to J (medical), the Arbitrator finds as follows:

While there is a dispute as to whether Petitioner should have had a microdiscectomy or a fusion surgery, having found causation, there is no dispute that Petitioner required medical care for his injuries. The Arbitrator awards Petitioner's claim with respect to all medical services provided to the date of trial. Respondent shall be entitled to a credit for all medial bills paid prior to trial.

In support the Arbitrator's decision with respect to K (temporary total compensation), the Arbitrator finds follows:

An employee is temporarily and totally disabled from the time that an injury incapacitates her from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill.2d 107, 118, 149 Ill. Dec. 253, 561 N.E.2d 623 (1990). Our Supreme Court has held the dispositive inquiry for TTD benefits is whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n,* 236 Ill.2d 132, 142, 337 Ill. Dec. 707, 923 N.E.2d 266 (2010). There are, however, three recognized exceptions to this rule: (1) Petitioner refuses to submit to medical treatment essential to her recovery; (2) Petitioner refuses

to cooperate in good faith with rehabilitation efforts; or (3) Petitioner refuses work falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding, Inc.,* 236 Ill.2d at 146–47, 337 Ill. Dec. 707, 923 N.E.2d 266.

The Arbitrator finds Petitioner is not precluded from all work activities. The Arbitrator adopts the opinion of Dr. Kern Singh who opined on January 20, 2021 and February 7, 2022 that Petitioner could return to work within a 10 pound and 20 pound lifting restriction, respectively (RX1, RX2) Respondent offered to accommodate these restrictions in February 2021, (RX3, and RX4) though Petitioner refused. (Tx.38).

Based on the foregoing the Arbitrator finds that Petitioner was temporarily disabled for the period of August 21, 2020 through September 7, 2020 and November 12, 2020 through February 14, 2021, the date in which the claimant refused the light duty placement. The Arbitrator notes that Respondent stipulated to payment of TTD for the period of August 14, 2021 through September 19, 2022, and therefore awards TTD for that period as well. Respondent shall be entitled to a credit of $55,027.07 for TTD benefits paid prior to trial.

In support of the Arbitrator's decision with respect to M (Penalties and Attorney's Fees), the Arbitrator finds as follows:

The Arbitrator finds that Respondent had a reasonable basis to dispute causation because of the inconsistent medical histories given by Petitioner. The Arbitrator also finds Dr. Singh to be the most credible on the issue of prospective medical care and on the issue of whether Petitioner could work the light duty job provided by Respondent.

An employer's voluntarily payment of compensation to an injured employee prior to the Arbitration Hearing is not an admission of liability or that there is a causal connection between the employee's condition of ill-being and her employment. 820 ILCS 305/8(b)7; *RD Masonry, Inc. v. Industrial Commission*, 215 Ill. 2d 397, 408 (2005). Respondent voluntarily paid the claimant both TTD and medical benefits prior to the Arbitration Hearing but raised the issue of causal connection on the Request for Hearing form. It is well settled law that Respondent acted within its rights to do so.

Respondent paid all medical and TTD through the February 2021 return to work offer. In fact, Respondent even paid post IME TTD benefits, Not only was Respondent well within its rights to challenge the ongoing medical and TTD per the two reports of Dr. Singh, but it paid even more than was required of it under the Act. Petitioner continues to receive TTD through the trial date despite the various disputes.

Respondent has acted neither unreasonably nor vexatiously. Petitioner's claim for fees and penalties is denied.

In support of the Arbitrator's decision with respect to O (Prospective Medical), the Arbitrator finds as follows:

The Arbitrator adopts the opinions of Dr. Kern Singh. Dr. Singh opined on January 20, 2021 that the claimant required an epidural steroid injection and potential microscopic diskectomy. (RX1) Instead, Dr. Mekhail performed a fusion in August 2021. Dr. Singh concluded in January 2022 that Petitioner did not require the subsequent surgery. Dr. Singh did not find Petitioner to be at maximum medical improvement and opined an FCE and a course of work conditioning would be required for a final assessment of what MMI would be. (RX2)

Petitioner's claim for prospective surgery is denied. The Arbitrator finds Petitioner entitled to receive an FCE and a four week work conditioning program.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011770
Case Name	Bethanie Clark v. Dollar General
Consolidated Cases	19WC021512;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0345
Number of Pages of Decision	22
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Peter Sink

DATE FILED: 7/19/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ 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

BETHANIE CLARK,

Petitioner,

vs.

No. 19 WC11770

DOLLAR GENERAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 26, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court

July 19, 2024

SJM/sj
o-5/22/2024
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011770
Case Name	Bethanie Clark v. Dollar General
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Peter Sink

DATE FILED: 4/26/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 25, 2023 4.84%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **St. Clair**)

☐ 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

Bethanie Clark
Employee/Petitioner

v.

Dollar General
Employer/Respondent

Case # **19** WC **011770**

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 AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **12/13/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/8/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**45,000.00**; the average weekly wage was $**875.00**.

On the date of accident, Petitioner was **37** 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

Respondent shall pay medical expenses of Thomas H. Boyd Memorial Hospital, MRI Partners of Chesterfield and Multicare Specialists from April 11, 2019, through May 9, 2019, (except for treatment related to ulnar neuropathy, bilateral plantar fasciitis, internal impingement of both shoulders, protrusions of lumbar and cervical discs and right hip pain) as contained in Petitioner's Exhibit 12 pursuant to Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$583.33**/week for **7 5/7** weeks, commencing 4/11/19 through 6/3/19 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $**525.00**/week for a further period of **25.125** weeks, as provided in Section 8(e)9 and 8(e)10 of the Act, because the injuries sustained caused the 3% loss of use of Petitioner's right hand and 7.5 % loss of use of the right arm.

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 26, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on December 13, 2022. The issues in dispute are: 1) the causal connection between the accident on April 8, 2019, and the Petitioner's right hand conditions; 2) liability for medical bills; 3) entitlement to temporary total disability benefits as to compensability only and 4) the nature and extent of the Petitioner's injury. This case was consolidated for trial with 19WC21512 – a repetitive trauma case involving bilateral hands with a manifestation date of July 3, 2019.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 37 years old, was employed by the Respondent as a store manager. (AX1, T. 12) Official job duties included: facilitating the efficient staging, stocking and storage of merchandise by following defined company work processes; ensuring that all merchandise is presented according to established practices and utilizing merchandise fixtures property, including presentation, product pricing and signage; maintaining accurate inventory levels; and maintaining a clean, well-organized store. (RX1) Working conditions and physical requirements included frequent handling of merchandise and equipment, frequent and proper lifting of up to 40 pounds and occasional lifting up to 55 pounds. (Id.) The Petitioner testified that staging, stocking and storage of merchandize included carrying, lifting and opening boxes and carrying products to the appropriate location and tearing down boxes. (T. 16) The Petitioner said she worked six or seven days per week and would work from a normal eight-hour shift to a shift from 2:00 am or 3:00 am until close until close because the store was short-staffed. (T. 15) She said that 90 percent of the time, she unloaded trucks on Saturdays by herself, and it would take most of a shift. (T. 42) On cross-examination, the Petitioner acknowledged that she lifted various items of differing weights. (T. 37-38)

On April 8, 2019, the Petitioner was lifting cardboard and trash into a Dumpster when she felt a pain shoot through her hand and a pop. (T. 12) She said she thought the pain would go away and worked a couple more hours, but the pain did not go away, so she reported the accident. (T. 12-13)

The Petitioner testified that in the six months prior to the work incident, she experienced numbness and tingling in her hands but did not report those symptoms before the work incident. (T. 17) She said the symptoms after the April 8, 2019, accident were worse, in that she felt like her hand wasn't there, kept popping and her general pain was worse. (T. 26) She said she did not have any hobbies that involved repetitive gripping, was not diabetic or had gout, but she did smoke less than a quarter pack of cigarettes per day. (T. 26-27) She said job duties that caused or aggravated her hand symptoms were using a utility knife, opening boxes, lifting, manipulating the plastic apparatus that displayed the pricing on the shelves and bagging customer purchases. (T. 18-19) On cross-examination, she acknowledged that at the time of the accident, she smoked less than a pack a day. (T. 39)

On April 8, 2019, the Petitioner went to the emergency room at Thomas Boyd Memorial hospital and was diagnosed with a wrist sprain, given a splint and told to use ice, heat and elevation and avoid heavy lifting. (PX1) She was allowed to return to work on April 11, 2019. (Id.)

The Petitioner next saw Dr. Ashley Eavenson, a chiropractor at Multicare Specialists on April 11, 2019, complaining of pain and weakness in her wrist. (PX2) X-rays were taken that were unremarkable (Id.) Dr. Eavenson diagnosed a possible tear of the triangular fibrocartilage complex (TFCC – ligaments and cartilage connecting the ulna bone to the wrist and hand), ordered an MRI, ordered the Petitioner off work and began physical therapy. (Id.) Therapy consisted of electrical stimulation, ultrasound, heat, manual mobilization, stretching techniques and a home

exercise program. (Id.) The Petitioner had another therapy session on April 15, 2019. (Id.) At that time, the Petitioner also complained of pain throughout her body over the past eight months to a year, including bilateral shoulder and elbow pain into both hands, left hand numbness and bilateral hip and foot pain. (Id.) Dr. Evanson also diagnosed her with cervical and lumbar disc protrusion, bilateral plantar fasciitis, bilateral shoulder impingement and ulnar neuropathy. (Id.)

The MRI was performed on April 16, 2019, and revealed persistent tendinitis (inflammation of the tendons) and accompanying peritenditinis/tenosynovitis (inflammation of the sheath that surrounds the tendon). (PX2, PX3) Dr. Eavenson reported that the MRI showed extensor carpi ulnaris (ECU) tendinopathy (inflammation of the tendon that connects the wrist to the ECU muscle running down the forearm) or a partial tear with tendinitis. (PX2) Dr. Eavenson took the Petitioner off work until June 3, 2019, while she continued physical therapy. (Id.) During therapy, the Petitioner had persistent right wrist pain and reported bilateral elbow pain. (Id.) The Petitioner testified that although she was off work and on restrictions after the accident, her left hand was worsening because she was favoring the other side. (T. 34)

The Petitioner also had evaluation and treatment at Multicare Specialists for her cervical spine and hip. (PX2) The Petitioner testified that the evaluation and treatment was to determine why she was not getting better, and medical providers were taking steps to determine the cause of her symptoms. (T. 31) On May 6, 2019, in connection with treatment for the neck, feet, shoulders and hip, Dr. Eavenson ordered MRIs of Petitioner's brain, cervical spine and lumbar spine. (PX2) The cervical spine MRI revealed degenerative disc disease. (Id.) Chiropractor Jonathan Brooks ordered electromyography and nerve conduction studies (EMG/NCV). (Id.) On May 28, 2019, he allowed the Petitioner to return to work with restrictions of wearing her brace and only using her left upper extremity. (Id.) On June 10, 2019, Dr. Eavenson gave restrictions of light duty with

no lifting more than 10 pounds. (Id.) On June 24, 2019, the Petitioner reported that on her second day back to work, she fell onto her right side and wrist, causing increased pain. (Id.) Dr. Eavenson ordered an MR arthrogram of the right wrist. (Id.)

The MR arthrogram of the right wrist performed on June 26, 2019, revealed persistent tendonitis and accompanying peri-tendinitis/tenosynovitis but no tears. (Id.) Dr. Daniel Phillips performed the EMG/NCV on July 3, 2019, that revealed severe bilateral carpal tunnel syndrome (CTS). (PX4) Ulnar nerve studies were unremarkable. (Id.) Also on that day, the Petitioner saw Dr. Eavenson, who referred her to Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (PX2) On July 8, 2019, the Petitioner informed Dr. Eavenson that her right wrist was about the same and she noticed a sharp, shooting pain into her left hand. (Id.) On July 15, 2019, Dr. Eavenson added restrictions of no pushing, pulling or climbing. (Id.) The Petitioner had 45 visits to Multicare Specialists from April 11, 2019, through August 27, 2019, and reported occasional minimal improvement in her right wrist. (Id.)

On July 11, 2019, the Petitioner underwent a Section 12 examination by Dr. Lawrence Li, an orthopedic surgeon at the Orthopedic & Shoulder Center. (RX2, Deposition Exhibit 2) He reviewed medical records, interviewed the Petitioner and examined her. (Id.) Although the Petitioner denied any previous injuries to her wrists, she admitted that her hands had been going numb for at least a year. (Id.) Dr. Li diagnosed right wrist strain of the ECU and said this was related to the work incident the Petitioner described. (Id.) He said the ECU tendinopathy shown on the MRI made the wrist more easily strained. (Id.) He said the conditions reported to Dr. Eavenson of bilateral shoulder pain, bilateral elbow and hand pain, numbness, bilateral hip and foot pain and popping in her right hip were unrelated to the work accident and were pre-existing conditions because the Petitioner had them for eight months to a year prior to the injury. (Id.)

Dr. Li said the treatment by Multicare Specialists was excessive, noting that the Petitioner admitted that the therapy made her symptoms worse. (Id.) He said it was reasonable to do physical therapy, and a reasonable course of therapy initially would have been three times a week for four weeks. (Id.) He said that if the symptoms were made worse by the therapy, continuing therapy was unreasonable. (Id.) He said some of the visits to Dr. Eavenson were reasonable and appropriate, specifically the initial evaluation and MRI follow-ups, but there appeared to be an excessive number of visits as it appeared the Petitioner sought chiropractic care almost every other day, which was not reasonable or appropriate. (Id.)

For prospective treatment, Dr. Li recommended anti-inflammatory medication and corticosteroid injection due to the MRI findings and ineffectiveness of physical therapy. (Id.) He said the Petitioner had not reached maximum medical improvement. (Id.) When asked about symptom magnification, Dr. Li reported that symptoms of the other diagnoses by Dr. Eavenson that the Petitioner had for 8-12 months suddenly coming to light on April 15, 2019, was statistically impossible and suggested the Petitioner had symptom magnification. (Id.)

The Petitioner saw Dr. Paletta on July 22, 2019, and told him that for a year, she had gradual onset of pain and intermittent numbness and tingling involving her hands and the symptoms had been more significant for about three months. (PX5) She told Dr. Paletta that she noticed the symptoms in conjunction with some of her work activities – gipping lifting and other hand-intensive activities. (Id.) She complained of a sense of popping in the palms. (Id.) She also described the work accident on April 8, 2019. (Id.) The Petitioner testified that she described her job duties to Dr. Paletta. (T. 23) After a physical examination and review of the EMG/NCS, Dr. Paletta diagnosed bilateral CTS. (PX5) He gave an option of night splints and injections but was not optimistic that would resolve the Petitioner's symptoms, given her severe electrophysiologic

abnormalities. (Id.) He recommended carpal tunnel releases and allowed the Petitioner to return to work full duty. (Id.)

Dr. Paletta performed a right CTS release on September 3, 2019. (PX7) Dr. Paletta ordered the Petitioner off work and allowed her to return to work beginning September 9, 2019, with restrictions of clerical or sedentary work only, primarily one-handed work with the injured hand assisting on light tasks and no lifting. (PX5) On September 23, 2019, Dr. Paletta gave work restrictions of no use of vibratory tools and no pushing, pulling or lifting more than 5 pounds, with a full-duty release scheduled for October 14, 2019. (Id.) The Petitioner had post-surgical physical therapy at Multicare Specialists for her right wrist from September 24, 2019, through October 17, 2019, for a total of 11 visits and reported continuing pain. (PX2)

Dr. Paletta performed the left carpal tunnel release on October 1, 2019, and gave work restrictions of clerical or sedentary work only, primarily one-handed work with the injured hand assisting on light tasks and no lifting. (PX7, PX5) On October 21, 2019, the Petitioner reported to Dr. Paletta that she had some recurrent numbness in the tips of the third and fourth fingers on her right hand and pain shooting up her right arm "like a line" up the posterior aspect of the forearm up to the posterior aspect of the shoulder. (PX5) Dr. Paletta recommended observation and released the Petitioner to full duty regarding the right side but found she was not yet at maximum medical improvement. (Id.) For the left side, Dr. Paletta gave work restrictions of no reaching/overhead work and no pushing, pulling or lifting more than 5 pounds, with a full-duty release scheduled for November 11, 2019. (PX5) The Petitioner underwent post-surgical physical therapy for the left hand at Multicare Specialists from October 22, 2019, through November 7, 2019, for a total of five visits and reported improvement. (PX2)

Also on October 21, 2019, Dr. Li issued another report stating that the Petitioner could return to her regular job duties, based on the Petitioner being six months post-injury for a wrist strain. (RX2, Deposition Exhibit 3) It did not appear that he reviewed any additional medical records. (Id.)

At a follow-up visit with Dr. Paletta on December 3, 2019, the Petitioner reported complete resolution of her left-sided symptoms but recurrent symptoms on the right – numbness and tingling in the lateral three fingers, some discomfort in the trapezius region of the shoulder, some neck pain and some symptoms radiating down the arm. (PX5) Dr. Paletta released her to full activities regarding the left hand but recommended EMG/NCS for the right. (Id.)

Dr. Paletta testified consistently with his records at a deposition on December 18, 2019. (PX6) He said that by the time he saw the Petitioner, most of her symptoms related to the acute wrist injury from the work accident had resolved, so his treatment focused mainly on the bilateral hand complaints that ended up being CTS. (Id.) He opined that the Petitioner's bilateral CTS was caused by her work activities – based on the history the Petitioner provided that correlated the onset or worsening of symptoms to activities that, in his opinion, were hand-intensive and could cause or contribute to CTS. (Id.) Dr. Paletta said he had no reason to question the veracity of the history the Petitioner related to him. (Id.) When asked about specific activities – bagging items for customers and pushing carts weighing several hundred pounds – he said those can cause CTS. (Id.) He said CTS can develop or be aggravated by job duties even if they are varied, noting that different people tolerate different levels of activities differently. (Id.) He agreed with Dr. Li that the carpal tunnel symptoms were not related to the incident on April 8, 2019. (Id.)

As to the Petitioner's post-surgical symptoms in the Petitioner's right hand, Dr. Paletta explained how the severity of CTS can affect the recovery after surgery. (Id.) He said the

Petitioner had severe involvement and if the Petitioner's EMG/NCS studies showed abnormalities with the median nerve in the carpal tunnel, then her symptoms would likely be related to the work condition. (Id.)

Dr. Phillips performed the studies on January 10, 2020, that demonstrated findings consistent with probable traction neuritis (inflammation or irritation of a nerve due to stretching) or entrapment of the nerve with scar tissue at the distal border of the carpal tunnel due to postoperative scarring. (Id.) There was no evidence of abnormality of the ulnar nerve, which classically would be associated with the alternated sensation of the third, fourth and fifth fingers of which the Petitioner was complaining. (Id.) Dr. Paletta found the Petitioner to be at maximum medical improvement for her left wrist and recommended consultation for her right wrist with Dr. Robert Hagan, a plastic surgeon at STL Plastic & Hand Surgery. (Id.)

The Petitioner saw Dr. Hagan on February 24, 2020, and complained of numbness and tingling in the fingertips and palm region of the right hand. (PX9) She also reported recently developing a feeling in her thumb as if it was out of socket as well as headaches. (Id.) After a physical examination, Dr. Hagan diagnosed persistent right CTS, right prenator syndrome/proximal median nerve compression (compression of the median nerve by the muscle in the forarm), right trigger thumb and right-side occipital (eye) nerve syndrome. (Id.) He recommended revision carpal tunnel release, decompression of the right proximal median nerve and right thumb trigger release. (Id.)

On April 1, 2020, Dr. Hagan performed these procedures, along with creating a vascularized tissue flap to protect the median nerve. (PX10) The operative report stated that the median nerve was encased in fibrosis (scar tissue), (Id.) Dr. Hagan found more scar tissue in the wrist at the carpal tunnel. (Id.) On the thumb, he noted a very large trigger nodule and the pulley

was very thickened. (Id.) On April 23, 2020, the Petitioner reported that her symptoms were 100 percent gone. (PX9) The Petitioner testified that she felt immediate relief after surgery. (T. 24)

On June 18, 2020, Dr. Li performed another Section 12 examination. (RX2, Deposition Exhibit 4) He reviewed updated medical records and diagnostics, interviewed the Petitioner and examined her. (Id.) The Petitioner reported no problems anywhere in her wrist, forearm or elbow. (Id.) He said the current diagnosis was resolved carpal tunnel syndrome, which he said would not have developed as the result of a one-time injury on April 8, 2019. (Id.) He said the carpal tunnel releases were reasonable and necessary, but the right pronator syndrome release was not supported by the EMG findings. (Id.) He recommended no additional treatment and said there was no evidence of symptom magnification, inconsistency or exaggerated pain response at that time. (Id.) He said that because his recommendations for an injection and medications were not followed, he would set the maximum medical improvement date as his examination date of July 11, 2019. (Id.)

On March 20, 2021, Dr. Hagan authored a letter in response to a request from the Petitioner's attorney regarding a causation finding. (PX9) He felt it was "very clear" that the CTS, pronator syndrome and trigger thumb were related to the work injury. (Id.) He reviewed Dr. Li's report and addressed his conclusion that the pronator syndrome was not supported by the EMG findings and therefore the treatment was not reasonable or necessary. (Id.) Dr. Hagan stated that less than 3 percent of the time, the study findings are positive for a true pronator syndrome. (Id.) He said those who specialize in peripheral nerve surgery understand there are significant limitations with the studies and the pronator syndrome diagnosis. (Id.) He said the diagnosis was supported by symptoms that were consistent with the more proximal compression – palmar cutaneous numbness and focal tenderness over the pronator with reproducible testing. (Id.) He believed the pronator syndrome was related to the original forearm strain. (Id.) Regarding the

trigger thumb, Dr. Hagan noted that the Petitioner did not give any history that it existed prior to her injury or prior to the first surgery. (Id.) He said both the mechanism of injury as well as surgical intervention could have converted the trigger finger into a more symptomatic problem and, therefore, was related to or flowed from and was certainly aggravated by the work accident. (Id.) As to Dr. Li noting that the Petitioner did not have any residual symptoms or pain, Dr. Hagan took that as proof that his surgical treatment and intervention were helpful. (Id.)

Dr. Hagan testified consistently with his records at a deposition on September 24, 2021. (PX11) He explained that his examination of the Petitioner was positive for proximal median compression, also known as pronator syndrome. (Id.) He said a strain in the extensor or flexor compartments can result in proximal forearm compressions. (Id.) He said medical literature supports that pronator syndrome is only picked up by an electrodiagnostic study 3 percent of the time. (Id.) He agreed that his opinion was that the revisionary right carpal tunnel surgery was related to the repetitive trauma Dr. Paletta identified, but the pronator syndrome was due to the April 8, 2019, work accident. (Id.) He said that what initially presented as wrist pain could have developed over time to the proximal median nerve compression. (Id.) Regarding the trigger thumb, Dr. Hagan explained that the condition can manifest symptomatically from trauma or surgery. (Id.) On cross-examination, Dr. Hagan testified that for treating carpal tunnel syndrome, a six-week trial of physical therapy may be beneficial, but the length of physical therapy depended on how the patient progressed. (Id.)

Dr. Li testified consistently with his reports at a deposition on October 4, 2021. (RX2) He clarified that his diagnosis was strain of the ECU tendon and explained that the tendinopathy seen on the MRI was age-related degeneration of the tendon that made the tendon more easily strained. (Id.) Regarding treatment, he said there was no way to surgically fix degenerative tendinopathy.

(Id.) As to the other conditions of which the Petitioner complained, Dr. Li said it was his interpretation of the records that the Petitioner was connecting them to the work accident.

Regarding pronator syndrome, Dr. Li said an EMG/NCS would diagnose that condition, but the studies performed on the Petitioner did not show that. (Id.) He said the condition was exclusively a repetitive trauma injury in the absence of a major fracture. (Id.) He said the condition is so rare that no one knows the etiology. (Id.) He was unaware of any medical literature showing that less than 3 percent of the time, EMG/NCS studies find positive pronator syndrome. (Id.)

On cross-examination, Dr. Li acknowledged that he was not given a list of job duties for the Petitioner nor asked whether the repetitive movements could cause a repetitive trauma injury, like CTS. (Id.) He also acknowledged that hand-intensive movements could aggravate the degenerative condition of tendinopathy. (Id.) He clarified that the Petitioner showed no signs of symptom magnification when he saw her. (Id.) He said that when he gave his opinion that the Petitioner was at maximum medical improvement, he was unaware that the Petitioner had undergone carpal tunnel releases. (Id.) He said all three carpal tunnel releases were reasonable. (Id.) He did not believe the pronator syndrome surgery should have been performed at the same time as the carpal tunnel release revision because only one surgery was needed, which he believed was the carpal tunnel revision. (Id.)

The Petitioner testified that at the time of arbitration, her hands were great, but weak. (T. 28) She said she was no longer working for the Respondent but was working full time as an educational assistant/bus monitor. (T. 39-40)

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?

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)

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).

From looking at all the evidence, the Arbitrator can piece together the progression of the Petitioner's injuries. It appears that the Petitioner likely had CTS at the time of the April 8, 2019, accident. While treating for her acute injury of an ECU strain, the Petitioner disclosed all the problems she was having – including the numbness in her hands. From that, testing showed she had CTS, and the treatment focus shifted to that, with the Petitioner eventually undergoing CTS

releases by Dr. Paletta and the carpal tunnel revision and trigger thumb surgery by Dr. Hagan. As to the pronator syndrome, this appeared to be related to the original work accident.

The Arbitrator agrees with Dr. Li that the Petitioner strained her ECU. Regarding Dr. Li's finding of symptom magnification, it does not appear to the Arbitrator that the other complaints the Petitioner made to Multicare Specialists – aside from hand pain and numbness – were being connected to the Petitioner's work accident, despite Dr. Li's interpretation. There was no evidence that these conditions were work-related and none of the treating physicians appeared to make that connection.

In addition to the strain, Dr. Hagan believed the pronator syndrome was caused by the work accident on April 8, 2019. He sufficiently explained how the ECU strain could cause pronator syndrome and how that may not have shown up on the EMG/NCS. Dr. Li said pronator syndrome was a repetitive trauma injury. He did not address whether it could have been caused by the ECU strain. For these reasons and because Dr. Hagan was the Petitioner's treating physician, the Arbitrator gives his opinions greater weight than those of Dr. Li.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proving by a preponderance of the evidence that the accident of April 8, 2019, was a contributing factor to her suffering a strain of the right ECU and pronator syndrome.

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, the Arbitrator finds the diagnostics and treatment to the Petitioner's right wrist to be reasonable and necessary, with exceptions.

As to treatment by Multicare Specialists for conditions other than those relating to the Petitioner's wrists – ulnar neuropathy, bilateral plantar fasciitis, internal impingement of both shoulders, protrusion of lumbar intervertebral disc, right hip pain and protrusion of cervical intervertebral disc – there was no evidence linking these to the Petitioner's work. Furthermore, the Arbitrator agrees with Dr. Li that this treatment was not reasonable or necessary to treat an injury caused by the Petitioner's employment.

As to whether the treatment by Multicare Specialists was excessive, no one from Multicare Specialists testified as to the reasonableness and necessity of 45 physical therapy visits over more than four months. Dr. Li said four weeks of physical therapy would have been appropriate for the wrist strain. This testimony was unrebutted. Therefore, the Arbitrator finds The reasonableness and necessity of physical therapy for CTS is addressed in 19WC21512. Because Dr. Hagan's treatment of the Petitioner's pronator syndrome is intertwined with the treatment for CTS, those expenses will be awarded in 19WC21512.

Therefore, the Respondent is ordered to pay the medical expenses of Thomas H. Boyd Memorial Hospital, MRI Partners of Chesterfield and Multicare Specialists from April 11, 2019, through May 9, 2019, (except for treatment related to ulnar neuropathy, bilateral plantar fasciitis, internal impingement of both shoulders, protrusions of lumbar and cervical discs and right hip pain) as contained in Petitioner's Exhibit 12 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules.

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

According to the Request for Hearing (AX1), the parties dispute the compensability of temporary total disability benefits for the periods of April 11, 2019, through June 3, 2019; September 4, 2019, through September 9, 2019; October 2, 2019; through October 14, 2019; and April 2, 2020, through April 23, 2020.

Due to the stipulation of the parties and the fact that the Arbitrator has found the injuries from the April 8, 2019, accident to be compensable, the Arbitrator finds that the Petitioner was entitled to TTD benefits from April 11, 2019, through May 29, 2019.

TTD benefits associated with treatment by Dr. Paletta and Dr. Hagan will be addressed in 19WC21512.

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 has changed occupations. Her current job does not appear does not appear to put the same stresses on her hands as her job with the Respondent. Therefore, the Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 37 years old at the time of the injury. She has many work years left during which time she 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 of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner experienced excellent results from the surgery by Dr. Hagan for pronator syndrome, although she still has some weakness. She does not appear to be suffering any disability from the ECU strain. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 3 percent of the hand for the ECU strain and 7.5 percent of the arm for the pronator syndrome, as that relates to the median nerve in the forearm.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021512
Case Name	Bethanie Clark v. Dollar General
Consolidated Cases	19WC011770;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0346
Number of Pages of Decision	23
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Peter Sink

DATE FILED: 7/19/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☐ 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

BETHANIE CLARK,

Petitioner,

vs.

No. 19 WC 21512

DOLLAR GENERAL,

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, date, medical expenses, temporary total disability, causal connection, and nature and extent of disability, and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the clerical error in the Arbitrator's Findings on Decision number 19 WC 21512, to state the date of accident was July 3, 2019, not July 3, 2022. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator 19 WC 21512, filed April 26, 2023, is hereby corrected as stated herein and otherwise 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 19, 2024
SJM/msb
o-5/22/2024
44

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

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

/s/ *Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021512
Case Name	Bethanie Clark v. Dollar General
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Peter Sink

DATE FILED: 4/26/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 25, 2023 4.84%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **St. Clair**)

☐ 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

Bethanie Clark
Employee/Petitioner

v.

Dollar General
Employer/Respondent

Case # **19** WC **21512**

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 AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **12/13/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/3/22**, 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 $**45,000.00**; the average weekly wage was $**875.00**.

On the date of accident, Petitioner was **37** 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

Respondent shall pay medical expenses of Neurological & Electrodiagnostic Institute, Dr. Paletta, Frontenac Surgery & Spine Care Center. Dr. Hagan, St. Louis Surgical Center, Metro-West Anesthesia Group, Goldsmith MediCenter Pharmacy, Ballas Anesthesia, Advanced Imaging Consultants and Multicare Specialists from September 24, 2019, through October 17, 2019, and from October 22, 2019, through November 7, 2019, as contained in Petitioner's Exhibit 12 pursuant to Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$583.33**/week for **5 5/7** weeks, for the periods of 9/4/19 through 9/9/19, 10/2/19 through 10/14/19 and 4/2/20 through 4/23/20 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $**525.00**/week for a further period of **53.2** weeks, as provided in Section 8(e)9 and 8(e)1 of the Act, because the injuries sustained caused the 10% loss of use of Petitioner's left hand, 12% loss of use of the right hand and 15% loss of use of the right thumb.

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 26, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on December 13, 2022. The issues in dispute are: 1) whether an accident arose out of and in the course of employment; 2) the causal connection between the Petitioner's work and her bilateral hand conditions; 3) liability for medical bills; 3) entitlement to total temporary disability benefits as to compensability only; and 3) the nature and extent of the Petitioner's injury. This case was consolidated for trial with 19WC11770 involving an accident that occurred on April 8, 2019.

FINDINGS OF FACT

At the time of the accident, the Petitioner, who was 37 years old, was employed by the Respondent as a store manager. (AX1, T. 12) Official job duties included: facilitating the efficient staging, stocking and storage of merchandise by following defined company work processes; ensuring that all merchandise is presented according to established practices and utilizing merchandise fixtures property, including presentation, product pricing and signage; maintaining accurate inventory levels; and maintaining a clean, well-organized store. (RX1) Working conditions and physical requirements included frequent handling of merchandise and equipment, frequent and proper lifting of up to 40 pounds and occasional lifting up to 55 pounds. (Id.) The Petitioner testified that staging, stocking and storage of merchandize included carrying, lifting and opening boxes and carrying products to the appropriate location and tearing down boxes. (T. 16) The Petitioner said she worked six or seven days per week and would work from a normal eight-hour shift to a shift from 2:00 am or 3:00 am until close until close because the store was short-staffed. (T. 15) She said that 90 percent of the time, she unloaded trucks on Saturdays by herself, and it would take most of a shift. (T. 42) On cross-examination, the Petitioner acknowledged that she lifted various items of differing weights. (T. 37-38)

On April 8, 2019, the Petitioner was lifting cardboard and trash into a Dumpster when she felt a pain shoot through her hand and a pop. (T. 12) She said she thought the pain would go away and worked a couple more hours, but the pain did not go away, so she reported the accident. (T. 12-13)

The Petitioner testified that in the six months prior to the work incident, she experienced numbness and tingling in her hands but did not report those symptoms before the work incident. (T. 17) She said the symptoms after the April 8, 2019, accident were worse, in that she felt like her hand wasn't there, kept popping and her general pain was worse. (T. 26) She said she did not have any hobbies that involved repetitive gripping, was not diabetic or had gout, but she did smoke less than a quarter pack of cigarettes per day. (T. 26-27) She said job duties that caused or aggravated her hand symptoms were using a utility knife, opening boxes, lifting, manipulating the plastic apparatus that displayed the pricing on the shelves and bagging customer purchases. (T. 18-19) On cross-examination, she acknowledged that at the time of the accident, she smoked less than a pack a day. (T. 39)

On April 8, 2019, the Petitioner went to the emergency room at Thomas Boyd Memorial hospital and was diagnosed with a wrist sprain, given a splint and told to use ice, heat and elevation and avoid heavy lifting. (PX1) She was allowed to return to work on April 11, 2019. (Id.)

The Petitioner next saw Dr. Ashley Eavenson, a chiropractor at Multicare Specialists on April 11, 2019, complaining of pain and weakness in her wrist. (PX2) X-rays were taken that were unremarkable (Id.) Dr. Eavenson diagnosed a possible tear of the triangular fibrocartilage complex (TFCC – ligaments and cartilage connecting the ulna bone to the wrist and hand), ordered an MRI, ordered the Petitioner off work and began physical therapy. (Id.) Therapy consisted of electrical stimulation, ultrasound, heat, manual mobilization, stretching techniques and a home

exercise program. (Id.) The Petitioner had another therapy session on April 15, 2019. (Id.) At that time, the Petitioner also complained of pain throughout her body over the past eight months to a year, including bilateral shoulder and elbow pain into both hands, left hand numbness and bilateral hip and foot pain. (Id.) Dr. Evanson also diagnosed her with cervical and lumbar disc protrusion, bilateral plantar fasciitis, bilateral shoulder impingement and ulnar neuropathy. (Id.)

The MRI was performed on April 16, 2019, and revealed persistent tendinitis (inflammation of the tendons) and accompanying peritenditinis/tenosynovitis (inflammation of the sheath that surrounds the tendon). (PX2, PX3) Dr. Eavenson reported that the MRI showed extensor carpi ulnaris (ECU) tendinopathy (inflammation of the tendon that connects the wrist to the ECU muscle running down the forearm) or a partial tear with tendinitis. (PX2) Dr. Eavenson took the Petitioner off work until June 3, 2019, while she continued physical therapy. (Id.) During therapy, the Petitioner had persistent right wrist pain and reported bilateral elbow pain. (Id.) The Petitioner testified that although she was off work and on restrictions after the accident, her left hand was worsening because she was favoring the other side. (T. 34)

The Petitioner also had evaluation and treatment at Multicare Specialists for her cervical spine and hip. (PX2) The Petitioner testified that the evaluation and treatment was to determine why she was not getting better, and medical providers were taking steps to determine the cause of her symptoms. (T. 31) On May 6, 2019, in connection with treatment for the neck, feet, shoulders and hip, Dr. Eavenson ordered MRIs of Petitioner's brain, cervical spine and lumbar spine. (PX2) The cervical spine MRI revealed degenerative disc disease. (Id.) Chiropractor Jonathan Brooks ordered electromyography and nerve conduction studies (EMG/NCV). (Id.) On May 28, 2019, he allowed the Petitioner to return to work with restrictions of wearing her brace and only using her left upper extremity. (Id.) On June 10, 2019, Dr. Eavenson gave restrictions of light duty with

no lifting more than 10 pounds. (Id.) On June 24, 2019, the Petitioner reported that on her second day back to work, she fell onto her right side and wrist, causing increased pain. (Id.) Dr. Eavenson ordered an MR arthrogram of the right wrist. (Id.)

The MR arthrogram of the right wrist performed on June 26, 2019, revealed persistent tendonitis and accompanying peri-tendinitis/tenosynovitis but no tears. (Id.) Dr. Daniel Phillips performed the EMG/NCV on July 3, 2019, that revealed severe bilateral carpal tunnel syndrome (CTS). (PX4) Ulnar nerve studies were unremarkable. (Id.) Also on that day, the Petitioner saw Dr. Eavenson, who referred her to Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis. (PX2) On July 8, 2019, the Petitioner informed Dr. Eavenson that her right wrist was about the same and she noticed a sharp, shooting pain into her left hand. (Id.) On July 15, 2019, Dr. Eavenson added restrictions of no pushing, pulling or climbing. (Id.) The Petitioner had 45 visits to Multicare Specialists from April 11, 2019, through August 27, 2019, and reported occasional minimal improvement in her right wrist. (Id.)

On July 11, 2019, the Petitioner underwent a Section 12 examination by Dr. Lawrence Li, an orthopedic surgeon at the Orthopedic & Shoulder Center. (RX2, Deposition Exhibit 2) He reviewed medical records, interviewed the Petitioner and examined her. (Id.) Although the Petitioner denied any previous injuries to her wrists, she admitted that her hands had been going numb for at least a year. (Id.) Dr. Li diagnosed right wrist strain of the ECU and said this was related to the work incident the Petitioner described. (Id.) He said the ECU tendinopathy shown on the MRI made the wrist more easily strained. (Id.) He said the conditions reported to Dr. Eavenson of bilateral shoulder pain, bilateral elbow and hand pain, numbness, bilateral hip and foot pain and popping in her right hip were unrelated to the work accident and were pre-existing conditions because the Petitioner had them for eight months to a year prior to the injury. (Id.)

Dr. Li said the treatment by Multicare Specialists was excessive, noting that the Petitioner admitted that the therapy made her symptoms worse. (Id.) He said it was reasonable to do physical therapy, and a reasonable course of therapy initially would have been three times a week for four weeks. (Id.) He said that if the symptoms were made worse by the therapy, continuing therapy was unreasonable. (Id.) He said some of the visits to Dr. Eavenson were reasonable and appropriate, specifically the initial evaluation and MRI follow-ups, but there appeared to be an excessive number of visits as it appeared the Petitioner sought chiropractic care almost every other day, which was not reasonable or appropriate. (Id.)

For prospective treatment, Dr. Li recommended anti-inflammatory medication and corticosteroid injection due to the MRI findings and ineffectiveness of physical therapy. (Id.) He said the Petitioner had not reached maximum medical improvement. (Id.) When asked about symptom magnification, Dr. Li reported that symptoms of the other diagnoses by Dr. Eavenson that the Petitioner had for 8-12 months suddenly coming to light on April 15, 2019, was statistically impossible and suggested the Petitioner had symptom magnification. (Id.)

The Petitioner saw Dr. Paletta on July 22, 2019, and told him that for a year, she had gradual onset of pain and intermittent numbness and tingling involving her hands and the symptoms had been more significant for about three months. (PX5) She told Dr. Paletta that she noticed the symptoms in conjunction with some of her work activities – gipping lifting and other hand-intensive activities. (Id.) She complained of a sense of popping in the palms. (Id.) She also described the work accident on April 8, 2019. (Id.) The Petitioner testified that she described her job duties to Dr. Paletta. (T. 23) After a physical examination and review of the EMG/NCS, Dr. Paletta diagnosed bilateral CTS. (PX5) He gave an option of night splints and injections but was not optimistic that would resolve the Petitioner's symptoms, given her severe electrophysiologic

abnormalities. (Id.) He recommended carpal tunnel releases and allowed the Petitioner to return to work full duty. (Id.)

Dr. Paletta performed a right CTS release on September 3, 2019. (PX7) Dr. Paletta ordered the Petitioner off work and allowed her to return to work beginning September 9, 2019, with restrictions of clerical or sedentary work only, primarily one-handed work with the injured hand assisting on light tasks and no lifting. (PX5) On September 23, 2019, Dr. Paletta gave work restrictions of no use of vibratory tools and no pushing, pulling or lifting more than 5 pounds, with a full-duty release scheduled for October 14, 2019. (Id.) The Petitioner had post-surgical physical therapy at Multicare Specialists for her right wrist from September 24, 2019, through October 17, 2019, for a total of 11 visits and reported continuing pain. (PX2)

Dr. Paletta performed the left carpal tunnel release on October 1, 2019, and kept the Petitioner off work until October 7, 2019, with work restrictions of clerical or sedentary work only, primarily one-handed work with the injured hand assisting on light tasks and no lifting beginning October 7, 2019. (PX7, PX5) On October 21, 2019, the Petitioner reported to Dr. Paletta that she had some recurrent numbness in the tips of the third and fourth fingers on her right hand and pain shooting up her right arm “like a line” up the posterior aspect of the forearm up to the posterior aspect of the shoulder. (PX5) Dr. Paletta recommended observation and released the Petitioner to full duty regarding the right side but found she was not yet at maximum medical improvement. (Id.) Dr. Paletta gave work restrictions of no reaching/overhead work and no pushing, pulling or lifting more than 5 pounds, with a full-duty release scheduled for November 11, 2019. (PX5) The Petitioner underwent post-surgical physical therapy for the left hand at Multicare Specialists from October 22, 2019, through November 7, 2019, for a total of five visits and reported improvement. (PX2)

Also on October 21, 2019, Dr. Li issued another report stating that the Petitioner could return to her regular job duties, based on the Petitioner being six months post-injury for a wrist strain. (RX2, Deposition Exhibit 3) It did not appear that he reviewed any additional medical records. (Id.)

At a follow-up visit with Dr. Paletta on December 3, 2019, the Petitioner reported complete resolution of her left-sided symptoms but recurrent symptoms on the right – numbness and tingling in the lateral three fingers, some discomfort in the trapezius region of the shoulder, some neck pain and some symptoms radiating down the arm. (PX5) Dr. Paletta released her to full activities regarding the left hand but recommended EMG/NCS for the right. (Id.)

Dr. Paletta testified consistently with his records at a deposition on December 18, 2019. (PX6) He said that by the time he saw the Petitioner, most of her symptoms related to the acute wrist injury from the work accident had resolved, so his treatment focused mainly on the bilateral hand complaints that ended up being CTS. (Id.) He opined that the Petitioner's bilateral CTS was caused by her work activities – based on the history the Petitioner provided that correlated the onset or worsening of symptoms to activities that, in his opinion, were hand-intensive and could cause or contribute to CTS. (Id.) Dr. Paletta said he had no reason to question the veracity of the history the Petitioner related to him. (Id.) When asked about specific activities – bagging items for customers and pushing carts weighing several hundred pounds – he said those can cause CTS. (Id.) He said CTS can develop or be aggravated by job duties even if they are varied, noting that different people tolerate different levels of activities differently. (Id.) He agreed with Dr. Li that the carpal tunnel symptoms were not related to the incident on April 8, 2019. (Id.)

As to the Petitioner's post-surgical symptoms in the Petitioner's right hand, Dr. Paletta explained how the severity of CTS can affect the recovery after surgery. (Id.) He said the

Petitioner had severe involvement and if the Petitioner's EMG/NCS studies showed abnormalities with the median nerve in the carpal tunnel, then her symptoms would likely be related to the work condition. (Id.)

Dr. Phillips performed the studies on January 10, 2020, that demonstrated findings consistent with probable traction neuritis (inflammation or irritation of a nerve due to stretching) or entrapment of the nerve with scar tissue at the distal border of the carpal tunnel due to postoperative scarring. (PX5) There was no evidence of abnormality of the ulnar nerve, which classically would be associated with the alternated sensation of the third, fourth and fifth fingers of which the Petitioner was complaining. (Id.) Dr. Paletta found the Petitioner to be at maximum medical improvement for her left wrist and recommended consultation for her right wrist with Dr. Robert Hagan, a plastic surgeon at STL Plastic & Hand Surgery. (Id.)

The Petitioner saw Dr. Hagan on February 24, 2020, and complained of numbness and tingling in the fingertips and palm region of the right hand. (PX9) She also reported recently developing a feeling in her thumb as if it was out of socket as well as headaches. (Id.) After a physical examination, Dr. Hagan diagnosed persistent right CTS, right prenator syndrome/proximal median nerve compression (compression of the median nerve by the muscle in the forearm), right trigger thumb and right-side occipital (eye) nerve syndrome. (Id.) He recommended revision carpal tunnel release, decompression of the right proximal median nerve and right thumb trigger release. (Id.)

On April 1, 2020, Dr. Hagan performed these procedures, along with creating a vascularized tissue flap to protect the median nerve. (PX10) The operative report stated that the median nerve was encased in fibrosis (scar tissue), (Id.) Dr. Hagan found more scar tissue in the wrist at the carpal tunnel. (Id.) On the thumb, he noted a very large trigger nodule and the pulley

was very thickened. (Id.) On April 23, 2020, the Petitioner reported that her symptoms were 100 percent gone. (PX9) The Petitioner testified that she felt immediate relief after surgery. (T. 24)

On June 18, 2020, Dr. Li performed another Section 12 examination. (RX2, Deposition Exhibit 4) He reviewed updated medical records and diagnostics, interviewed the Petitioner and examined her. (Id.) The Petitioner reported no problems anywhere in her wrist, forearm or elbow. (Id.) He said the current diagnosis was resolved carpal tunnel syndrome, which he said would not have developed as the result of a one-time injury on April 8, 2019. (Id.) He said the carpal tunnel releases were reasonable and necessary, but the right pronator syndrome release was not supported by the EMG findings. (Id.) He recommended no additional treatment and said there was no evidence of symptom magnification, inconsistency or exaggerated pain response at that time. (Id.) He said that because his recommendations for an injection and medications were not followed, he would set the maximum medical improvement date as his examination date of July 11, 2019. (Id.)

On March 20, 2021, Dr. Hagan authored a letter in response to a request from the Petitioner's attorney regarding a causation finding. (PX9) He felt it was "very clear" that the CTS, pronator syndrome and trigger thumb were related to the work injury. (Id.) He reviewed Dr. Li's report and addressed his conclusion that the pronator syndrome was not supported by the EMG findings and therefore the treatment was not reasonable or necessary. (Id.) Dr. Hagan stated that less than 3 percent of the time, the study findings are positive for a true pronator syndrome. (Id.) He said those who specialize in peripheral nerve surgery understand there are significant limitations with the studies and the pronator syndrome diagnosis. (Id.) He said the diagnosis was supported by symptoms that were consistent with the more proximal compression – palmar cutaneous numbness and focal tenderness over the pronator with reproducible testing. (Id.) He believed the pronator syndrome was related to the original forearm strain. (Id.) Regarding the

trigger thumb, Dr. Hagan noted that the Petitioner did not give any history that it existed prior to her injury or prior to the first surgery. (Id.) He said both the mechanism of injury as well as surgical intervention could have converted the trigger finger into a more symptomatic problem and, therefore, was related to or flowed from and was certainly aggravated by the work accident. (Id.) As to Dr. Li noting that the Petitioner did not have any residual symptoms or pain, Dr. Hagan took that as proof that his surgical treatment and intervention were helpful. (Id.)

Dr. Hagan testified consistently with his records at a deposition on September 24, 2021. (PX11) He explained that his examination of the Petitioner was positive for proximal median compression, also known as pronator syndrome. (Id.) He said a strain in the extensor or flexor compartments can result in proximal forearm compressions. (Id.) He said medical literature supports that pronator syndrome is only picked up by an electrodiagnostic study 3 percent of the time. (Id.) He agreed that his opinion was that the revisionary right carpal tunnel surgery was related to the repetitive trauma Dr. Paletta identified, but the pronator syndrome was due to the April 8, 2019, work accident. (Id.) He said that what initially presented as wrist pain could have developed over time to the proximal median nerve compression. (Id.) Regarding the trigger thumb, Dr. Hagan explained that the condition can manifest symptomatically from trauma or surgery. (Id.) On cross-examination, Dr. Hagan testified that for treating carpal tunnel syndrome, a six-week trial of physical therapy may be beneficial, but the length of physical therapy depended on how the patient progressed. (Id.)

Dr. Li testified consistently with his reports at a deposition on October 4, 2021. (RX2) He clarified that his diagnosis was strain of the ECU tendon and explained that the tendinopathy seen on the MRI was age-related degeneration of the tendon that made the tendon more easily strained. (Id.) Regarding treatment, he said there was no way to surgically fix degenerative tendinopathy.

(Id.) As to the other conditions of which the Petitioner complained, Dr. Li said it was his interpretation of the records that the Petitioner was connecting them to the work accident.

Regarding pronator syndrome, Dr. Li said an EMG/NCS would diagnose that condition, but the studies performed on the Petitioner did not show that. (Id.) He said the condition was exclusively a repetitive trauma injury in the absence of a major fracture. (Id.) He said the condition is so rare that no one knows the etiology. (Id.) He was unaware of any medical literature showing that less than 3 percent of the time, EMG/NCS studies find positive pronator syndrome. (Id.)

On cross-examination, Dr. Li acknowledged that he was not given a list of job duties for the Petitioner nor asked whether the repetitive movements could cause a repetitive trauma injury, like CTS. (Id.) He also acknowledged that hand-intensive movements could aggravate the degenerative condition of tendinopathy. (Id.) He clarified that the Petitioner showed no signs of symptom magnification when he saw her. (Id.) He said that when he gave his opinion that the Petitioner was at maximum medical improvement, he was unaware that the Petitioner had undergone carpal tunnel releases. (Id.) He said all three carpal tunnel releases were reasonable. (Id.) He did not believe the pronator syndrome surgery should have been performed at the same time as the carpal tunnel release revision because only one surgery was needed, which he believed was the carpal tunnel revision. (Id.)

The Petitioner testified that at the time of arbitration, her hands were great, but weak. (T. 28) She said she was no longer working for the Respondent but was working full time as an educational assistant/bus monitor. (T. 39-40)

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

CONCLUSIONS OF LAW

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)

From looking at all the evidence, the Arbitrator can piece together the progression of the Petitioner's injuries. It appears that the Petitioner likely had CTS at the time of the April 8, 2019, accident. While treating for her acute injury of an ECU strain, the Petitioner disclosed all the problems she was having – including the numbness in her hands. From that, testing showed she had CTS, and the treatment focus shifted to that condition, with the Petitioner eventually undergoing CTS releases by Dr. Paletta and the carpal tunnel revision and trigger thumb surgery by Dr. Hagan. As to the pronator syndrome, this appeared to be related to the original work accident, according to Dr. Hagan.

The Petitioner alleges that she developed CTS as a result of her work duties. The only expert to testify as to whether the Petitioner's work activities caused her bilateral CTS was Dr. Paletta. Based on the history and nature of job duties that the Petitioner gave him, he opined that

the work activities was a causative factor for her developing the condition. There were no opinions to the contrary.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her bilateral CTS arose out of and in the course of her employment.

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

As stated above, the Petitioner's bilateral carpal tunnel syndrome has been found to be causally related to the Petitioner's work activities. In addition is the question of causation as to the Petitioner's condition after Dr. Paletta's surgery that necessitated the revision carpal tunnel surgery and trigger thumb release performed by Dr. Hagan.

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),

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

Dr. Paletta testified that post-surgical CTS would be related to the original CTS due to the severity of the condition. Dr. Hagan testified that the trigger thumb could be caused by the carpal tunnel surgery. There were no contrary opinions.

Therefore, the Arbitrator finds that the Petitioner has met her burden of proving by a preponderance of the evidence her work activities were a contributing factor to her bilateral CTS and trigger thumb conditions.

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, the Arbitrator finds the diagnostics and treatment to the Petitioner's bilateral hands to be reasonable and necessary, with exceptions.

As to treatment by Multicare Specialists for conditions other than those relating to the Petitioner's wrists – ulnar neuropathy, bilateral plantar fasciitis, internal impingement of both shoulders, protrusion of lumbar intervertebral disc, right hip pain and protrusion of cervical intervertebral disc – there was no evidence linking these to the Petitioner's work.

As to whether the treatment by Multicare Specialists was excessive, no one from Multicare Specialists testified as to the reasonableness and necessity of 45 physical therapy visits over more than four months. Dr. Hagan testified that six weeks of physical therapy would have been appropriate for carpal tunnel syndrome. However, the Multicare Specialists treatment notes show no difference in treatment methods after the CTS diagnosis on July 3, 2019, and the Petitioner's left hand was never treated. Therefore, the Multicare Specialists expenses from July 3, 2019,

through August 27, 2019, are found to not be reasonable or necessary for treatment of the Petitioner's CTS. Multicare Specialists also performed physical therapy services after the surgeries by Dr. Paletta. Because this was ordered by Dr. Paletta, the Arbitrator finds these to be reasonable and necessary.

Lastly, in 19WC 11770, the Arbitrator found Dr. Hagen's treatment of the Petitioner's pronator syndrome to be reasonable and necessary. Because that treatment is intertwined with the carpal tunnel revision and trigger thumb surgery, those expenses are awarded herein.

The Arbitrator notes that a lien from Teamsters & Employers Welfare Trust of Illinois was submitted with the medical bills in Petitioner's Exhibit 12. It appears to be a lien by the Petitioner's husband's insurance. Because the medical expenses themselves are being awarded, the Petitioner shall pay this lien from the award below and hold the Respondent harmless.

Therefore, the Respondent is ordered to pay the medical expenses of Neurological & Electrodiagnostic Institute, Dr. Paletta, Frontenac Surgery & Spine Care Center. Dr. Hagan, St. Louis Surgical Center, Metro-West Anesthesia Group, Goldsmith MediCenter Pharmacy, Ballas Anesthesia, Advanced Imaging Consultants and Multicare Specialists from September 24, 2019, through October 17, 2019, and from October 22, 2019, through November 7, 2019, as contained in Petitioner's Exhibit 12 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall also reimburse the Petitioner for out-of-pocket costs paid to St. Louis Surgical Center.

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

According to the Request for Hearing (AX1), the parties dispute the compensability of temporary total disability benefits for the periods of April 11, 2019, through June 3, 2019;

September 4, 2019, through September 9, 2019; October 2, 2019; through October 14, 2019; and April 2, 2020, through April 23, 2020. The first period of TTD was addressed in 19WC11770.

Due to the stipulation of the parties and the fact that the Arbitrator has found the injuries from repetitive injuries and resulting trigger thumb condition to be compensable, the Arbitrator finds that the Petitioner was entitled to TTD benefits from September 4, 2019, through September 9, 2019; October 2, 2019; through October 14, 2019; and April 2, 2020, through April 23, 2020.

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 has changed occupations. Her current job does not appear does not appear to put the same stresses on her hands as her job with the Respondent. Therefore, the Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 37 years old at the time of the injury. She has many work years left during which time she 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 of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner experienced excellent results from the left carpal tunnel surgery by Dr. Paletta and from the surgery by Dr. Hagan, although she still has some weakness. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 10 percent of the left hand, 12 percent of the right hand and 15 percent of the right thumb.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC011032
Case Name	Stephen J Walsh v. Austin Tyler Construction Company
Consolidated Cases	
Proceeding Type	***Remand of the Appellate Court***
Decision Type	Commission Decision
Commission Decision Number	24IWCC0347
Number of Pages of Decision	23
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Bryan Shell, Thomas Cowgill
Respondent Attorney	Kenneth Smith

DATE FILED: 7/22/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0347

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen J. Walsh,

Petitioner,

vs. NO: 15 WC 011032

Austin Tyler Construction Co.,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to a remand from the Appellate Court in *Walsh v. Ill. Workers' Comp. Comm'n*, 2023 IL App (3rd) 230174WC-U, entered on December 21, 2023, which upheld the decision of the 12th Judicial Circuit of Will County, 21-MR-1523..

Findings of Fact

The Commission hereby incorporates by reference the findings of fact contained in the Arbitration Decision to the extent it does not conflict with the Illinois Appellate Court's opinion dated December 21, 2023. The Commission also incorporates by reference the Illinois Appellate Court and the Will County Circuit Court opinions, which delineate the relevant facts and analysis, attached hereto and made a part hereof. Any additional findings of fact in this Decision and Opinion on Remand will be specifically identified in the discussion of particular issues.

Conclusions of Law

Pursuant to the directive of the Circuit Court, the Commission sets the amount and period of said benefits for the reasons stated herein and modifies the Decision of the Arbitrator as stated below. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

A. Temporary Total Disability Benefits (TTD)

Petitioner sought medical treatment immediately after his accident on October 18, 2014. Dr. Serna and Dr. Hickombottom both determined Petitioner was not medically able to return to work for Respondent immediately following his injury on October 18, 2014. PX4. Petitioner was

eventually brought back to work light duty in December 2014. T.69. Petitioner worked light duty for one day and then declined further light duty as he felt he was doing pointless paperwork. T.69-70. He suggested Respondent lay him off for the season, which they did. *Id*. Both parties agreed upon this initial period of temporary total disability, commencing on October 19, 2014 and ending on December 2, 2014. AX1, p.2.

On May 19, 2016, Petitioner underwent surgery for his right ankle injury and was taken off work. His treating physician, Dr. Kelikian, eventually released him with light duty restrictions on June 23, 2017. PX5, p. 128. Petitioner testified he provided his restrictions to his employer. T.93. Respondent's witness, Gary Schumal testified that he was never aware of the June 2017 work restrictions. T.15-A. He testified it wasn't until November 2017 that Respondent was made aware of Petitioner's work restrictions and attempted to accommodate Petitioner's said restrictions. *Id*. Petitioner ultimately returned to work for Respondent on November 2, 2017. *Id*. The Circuit Court did not find Respondent's testimony that they did not have any contact with Petitioner until October or November 2017 to be reliable. The Circuit Court found it was apparent that TTD should have been paid through October 31, 2017, the point at which the Court found the Petitioner's work restrictions were finally accommodated. T.96. Accordingly, the Commission concludes that Petitioner was entitled to TTD benefits from October 19, 2014 through December 2, 2014 and from May 19, 2016 through October 31, 2017.

B. Wage Differential Benefits

The Circuit Court reversed the Commission's award of permanent partial disability benefits and remanded this case to the Commission with instructions to calculate and award 8(d)(1) benefits.

According to Section 8(d)(1), an employee who, as a result of an accidental injury, becomes partially incapacitated and cannot pursue his "usual and customary line of employment" is entitled to receive a wage differential award "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." 820 ILCS 305/8(d)(1).

Thus, the first determination the Commission must make is what Petitioner would legitimately have been expected to earn in the full performance of his duties as a truck driver with Respondent. Petitioner introduced evidence of the Teamsters wage scale beginning on June 1, 2017 through May 31, 2018, which demonstrated an hourly wage of $39.05 for Group 3, semi-drivers. PX13C. Petitioner's position as a semi-driver for Respondent was well documented throughout the hearing. T.43, 127, 6-A, RX45. Accordingly, the Commission finds that at the time of the hearing, Petitioner would have been able to earn $1,562.00 per week in the full performance of his duties with Respondent.

The second determination the Commission must make in order to calculate wage differential benefits is what Petitioner would be capable of earning now that he was unable to perform his usual and customary occupation. The Circuit Court relied upon Kari Stafseth's testimony that Petitioner could be capable of finding a position earning $13-$17 per hour and that

after a job search, Petitioner was able to find work at Circle K and Speedway. At the time of trial, Petitioner was employed at Speedway, ringing up customers as a cashier, earning $9/hour. Petitioner submitted his paystubs from Speedway, which showed an average of $174.75 per week over the twenty-five (25) weeks worked.

"Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity." *United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (1st) 121136WC, quoting *Cassens Transport Co. v. Indus. Comm'n,* 218 Ill. 2d 519, 531. In this case, Petitioner's education was limited to a high school education and a few classes in college. T.40, PX17, p.18. He had no other certifications or special licenses. PX17, p.18-19. He underwent a vocational rehabilitation evaluation at the hands of Kari Stafseth, MS, CRC, who opined Petitioner had lost access to his usual and customary employment, as the physical demand requirements of his prior position exceeded the physical abilities he demonstrated at the time of the functional capacity evaluation. PX17, p. 27-28. She noted Petitioner had no transferable skills and limited computer skills. PX17, p. 26. While she estimated Petitioner had an earning capacity between $13-$19 (PX17, p. 28), she had not performed a labor market survey for the area to determine whether the recommended positions were even available within Petitioner's area of residence. PX17, p. 42.

Following the Circuit Court's instruction to calculate and award 8(d)(1) benefits, the Commission finds Petitioner is able to earn $9/hour in suitable employment. This equates to weekly earnings of $360/week in suitable employment post injury.

As part of the calculation of 8(d)(1) benefits, the Commission must determine the start date for wage differential benefits. The Commission finds Petitioner's disability reached a state of permanency as of the last date of treatment with Dr. Kelikian on November 6, 2017. He was given permanent restrictions of medium level activity, no climbing truck or trailer, no clutch driving and no shoveling over 100 pounds. PX9. That was the last time Petitioner was seen for his injury by any physician. T.119-120.

Accordingly, and in conformity with the Circuit Court's directive, the Commission finds Petitioner is entitled to wage differential benefits of $801.33/week, 66 2/3% of the difference between the $1,562.00 a week Petitioner would have been able to earn in the full performance of his duties with Respondent and the $360.00 a week he was able to earn in suitable employment after the accident. The wage differential benefits are payable from November 6, 2017, through the date of hearing, continuing for the duration of Petitioner's disability until he reaches 67 years of age, or five years from the date this award becomes final, whichever is later, pursuant to Section 8(d)(1) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 7, 2019, is reversed as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $982.67/week for 82 2/7 weeks, commencing October 19, 2014, through December 2, 2014, and from May 19, 2016 through October 31, 2017, as provided in Section 8(b)

of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner wage differential benefits of $801.33/week commencing on November 6, 2017, through the date of hearing and for the duration of his disability, until Petitioner reaches the age of 67 years old, or five years from the date this award becomes final, whichever is later, pursuant to Section 8(d)(1) of the Act.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $66,451.09. 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.

July 22, 2024
O: 6/11/24
AHS/kjj
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

24IWCC0347

WALSH, STEPHEN J
Employee/Petitioner

Case# **15WC011032**

AUSTIN TYLER CONST CO
Employer/Respondent

On 3/7/2019, 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 2.46% 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:

2687 COWGILL & CERNUGEL LAW OFFICE
THOMAS E COWGILL
1000 ESSINGTON RD SUITE 108
JOLIET, IL 60435

0532 HOLECEK & ASSOCIATES
KENNETH F SMITH
PO BOX 64093
ST PAUL, MN 55164

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

Stephen J. Walsh
Employee/Petitioner

v.

Austin Tyler Const. Co.
Employer/Respondent

Case # **15** WC **11032**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Ottawa**, on **August 24, 2018** and proofs were closed on **September 17, 2018**. After reviewing all of the evidence presented, the undersigned 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 18, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $76,648.00; the average weekly wage was $1,474.00.

On the date of accident, Petitioner was 46 years of age, *single* with no 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 $63,733.17 for TTD, $0 for TPD, $0 for maintenance, and $39,866.75, for other benefits (i.e., medical bills paid by the workers' compensation insurance carrier), for a total credit of $103,599.92.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $982.67/week for 63 & 5/7th weeks, commencing October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through June 23, 2017, as provided in Section 8(b) of the Act. Respondent shall receive a credit for temporary total disability payments made in the amount of $63,733.17. *See* AX1.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, based on the factors delineated in Section 8.1b of the Act and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 50.1 weeks, because the injuries sustained caused the 30% loss of use of left foot (ankle), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

March 7, 2019
Date

MAR 7 - 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Stephen J. Walsh
Employee/Petitioner

v.

Case # **15** WC **11032**

Consolidated cases: **N/A**

Austin Tyler Const. Co.
Employer/Respondent

FINDINGS OF FACT

A hearing was held in the above-captioned case. The issues in dispute in this case include causal connection, Petitioner's entitlement to temporary total disability benefits commencing on October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through October 31, 2017, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Stephen J. Walsh (Petitioner) testified that he worked for Austin Tyler Const. Co. (Respondent) on October 18, 2014. Prior to that time, Petitioner had graduated from Plainfield High School in 1985. He then took a couple courses at Joliet Junior College. Petitioner's work experience since high school includes work in the grocery business for several years and ultimately construction work, particularly driving dump trucks as of April of 1995. Petitioner bought his own semi-truck and worked for a broker for a few short months at T & T Transport, which would find him jobs and broker out his services. Petitioner then went to work for Gallagher Asphalt in January of 1996 and became a member of the Teamsters Local 179. He worked for Gallagher Asphalt until November of 2011 when he was let go from the position.

Petitioner testified that he did not work for about a year and a half and then returned to work for Respondent around July of 2013. He also testified that he no longer had his own truck as of approximately November of 2005. Petitioner testified that he began working for Respondent as a company driver. As of the fall of 2018, Petitioner explained that Bill (Mr. Krizmanic) would typically schedule him for 6:30 or 6:35 a.m., which varied every day. Mr. Krizmanic would have recorded message with all the drivers' start times. Drivers would call into a phone number and press a certain digit to access a voicemail box and wait to hear his name and would then know what time to show up to work the following day. Petitioner testified that shortly after his surgery in 2016, Respondent began texting this information.

Petitioner explained that there was a procedure that he ordinarily followed, and which he followed on October 18, 2014, in order to get his truck ready to go on the first job. He explained that he would check in with Mr. Krizmanic who would quickly give him his assignment. Petitioner would then grab some keys and start preparing the truck. He engaged in an inspection process that included checking fluids, motor oil, water, lights, and ensure that all 18 tires had the proper amount of air. Petitioner testified that this process also required him to climb into and out of the rig several times before he left to get his gloves and put his lunch box in the truck.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Petitioner identified the specific truck that he drove, number 1102, for most of the year, including on the date of accident. PX14.

Once he completed the inspection, Petitioner would start preparing his paperwork including a daily timesheet and safety sheet. *See e.g.*, PX42. He testified that he did not know how many jobs he would do each day because it varied from load to load. Petitioner explained that if he did multiple loads, he would put in a job number on the sheet identifying what he was hauling in the lower corner. He testified that "surface" and "binder" are two different types of asphalt, "CA6" and "CA7" are two different types of stone from the quarry, "grindings" are asphalt grindings, and "PG" is a larger rock from the quarry.

To load asphalt, Petitioner testified that he had to get inside the trailer of the dump truck with a small bottle and pour a slight amount of diesel fuel to lubricate the bowl-shaped interior of the trailer. Petitioner explained that asphalt does not stick to diesel fuel, and the lubrication must be significant. *See* PX14-PX15. To apply the lubricant, Petitioner testified that he would put his left foot on the rear axle of the trailer, his right foot on the tire, and then pull himself up with his hands on the ladder. He explained that he then places his left foot on the small lower foot peg and slides his body over the side of the dump trailer to spray the lubricant in the bed of the trailer. Petitioner testified that there is no other way to perform this task because there is a tailgate on the right side of the truck, so he must climb in on the left side.

October 18, 2014

On October 18, 2014, Petitioner testified that he was injured. He explained that he went to load asphalt, had checked the motor oil, and got in and started truck. Petitioner testified that he then came down from the truck several feet with his left foot on the top rail and came down wrong into a pothole. He explained that he experienced a severe amount of pain on the outside of his left ankle, but continued to load asphalt. Petitioner testified that this only required him to go to the parking lot, make a left turn and only drive maybe a few seconds and make another left turn before arriving at the asphalt plant. *See* PX18.

Petitioner testified that he could not lubricate the bed of the dump trailer on October 18, 2014 because he was in a severe amount of pain. Instead, he just drove through the automatic sprayer, but explained that it "does a very, very poor job," and that he did not ordinarily use the automatic sprayer for this reason. Petitioner explained that the automatic sprayer does not spray underneath the tarp and it is also on a timer and often shuts off before reaching the back end of the trailer. He testified that the whole trailer must have lubrication. If there is lubricant that does not reach all parts of the trailer Petitioner testified that his "day would be an absolute disaster[and he] would have a lot of shoveling to do." Petitioner testified that asphalt sticks to the cold, dry steel in the metal trailer, which must later be removed.

Once the load has been released by the dump truck, Petitioner testified that he would have to climb down from the truck and scrape all the remaining asphalt that is stuck to the "spread pan." Then, before Petitioner got to the job site, he would have to climb down from the truck and spray the back of the trailer with diesel fuel so that the asphalt hopefully did not stick quite as much. Petitioner testified that every time he dumped a load of asphalt, dirt or stone, he had to clean off the back end of the trailer. He also testified that when he accepted grindings, which would have totaled several thousand times throughout his employment, he had to climb in and out of the truck. *See* PX33. Petitioner testified that he experienced extreme pain while climbing up and down from the truck. On cross-examination, Petitioner testified that Respondent had "absolutely" no policies prohibiting drivers from going into the trailer.

Medical Treatment

On the date of accident, Petitioner presented to the Quick Care department of Meridian Medical Associates, where he saw Dr. Serna, who referred him for x-rays of the left ankle. X-ray taken on October 18, 2014 demonstrated "marked swelling" over the lateral malleolus but no fracture. Dr. Serna diagnosed a left ankle sprain. He returned to see Dr. Hickombottom on October 20, 2014, complaining of ankle pain of 9 out of 10. He was diagnosed with a grade II ankle sprain and referred for an ankle MRI. That same day Petitioner underwent an MRI of his left ankle which indicated superficial swelling around the ankle and a partial tear of the peroneous longus tendon. Hickombottom noted that Petitioner's ankle swelling prevented him from detecting a dorsalis pedis pulse. He kept Petitioner off work and ordered physical therapy. PX4.

Petitioner returned to see Dr. Hickombottom on October 31, 2014, reporting ankle pain of 7-8 out of 10. The doctor noted marked decrease in range of motion with inversion, eversion and dorsiflexion. He diagnosed Petitioner with a second-degree ankle sprain and partial tear of the peroneous longus tendon. He was kept off work. He returned to Hickombottom on 11/14/2014 reporting a pain level of 5 out of 10 and indicating the physical therapy was "very beneficial." Dr. Hickombottom noted that his range of motion was improved and maintained the same diagnoses. He kept him off work because, according to the medical note, the employer had not indicated that light duty work was available. PX4.

Petitioner returned on December 1, 2014, reporting very little improvement and pain of 6 out of 10. Hickombottom noted pain and weakness on inversion and eversion and kept him off work due to no light duty being offered by the employer. Diagnosis remained the same. Hickombottom referred him to an orthopedist, Dr. Dorning. Petitioner saw Dorning on December 4, 2014, complaining of continued pain in the ankle and the left knee. Dr. Dorning ordered an MRI of the knee and diagnosed him with a left ankle strain. The physician kept Petitioner off work, although he had already (at his request) been laid off from the light duty work that Austin Tyler had arranged for him. MRI taken of the left knee was unremarkable except for "minimally increased joint fluid." In the meantime, on December 14, 2014 the physical therapist issued a report that indicated that Petitioner had "improved greatly in therapy" and that active range of motion was normal except for dorsiflexion and inversion. PX4.

Work Restrictions

Petitioner testified that he returned to work in December of 2014 with duties other than driving the truck. He explained that he was placed in a cold, dry mechanics office doing paperwork. Petitioner testified that he had a conversation with Gary Shumal (Mr. Shumal), Respondent's owner, and Mr. Krizmanic concerning continuing to perform this type of office work. Petitioner had done this before when the season was ending, and he explained that Mr. Krizmanic would instruct drivers to apply for unemployment on those occasions. During this conversation in 2014, Petitioner testified that he told Mr. Shumal that it was fairly obvious that he was doing pointless paperwork, which he was sure cost Mr. Shumal quite a bit of money. So, Petitioner suggested that they could lay him off, which Respondent did.

On cross-examination, Petitioner acknowledged signing a letter declining a light duty job after working for Respondent for only one day. RX7. Petitioner acknowledged that he stated that he would rather collect unemployment, but explained that he did so because there was pointless paperwork.

Continued Medical Treatment

Petitioner returned to Meridian Medical Associates on December 23, 2014, where he saw Dr. Bailey. He told Bailey that his ankle was 50% to 60% improved and that he "took a lay off at work." Diagnosis was left peroneous longus injury and left peroneal tenosynovitis. Dr. Bailey referred him for 12 more sessions of physical therapy and restricted his activity to sedentary duty and minimal ambulation. The physical therapist issued a report on January 20, 2015, wherein Petitioner indicated a 65% improvement since starting therapy, but he still had pain with inversion. The therapist reported normal ROM other than inversion, normal strength and mild swelling. PX4.

Petitioner returned to Dr. Bailey on January 22, 2015, complaining of persistent ankle pain on inversion. Earlier that day Bailey had discussed Petitioner's case with the therapist, who felt that the patient had plateaued in his physical therapy. Dr. Bailey ordered another MRI scan. Follow-up MRI on January 27, 2015 demonstrated a split tear of the peroneal brevis tendon, partial tear of the peroneal longus tendon, and partial subluxation of the split peroneal brevis tendon. When Dr. Bailey reviewed the MRI findings with Petitioner on January 30, 2015, he also noted a superior peroneal retinaculum rupture. He recommended that Petitioner consider surgery to correct the tears. Petitioner told him that he did not want to consider surgery, but thought he was still making progress in therapy and would like to continue with it. On February 4, 2015, Dr. Bailey discussed Petitioner's treatment with Dr. Hickombottom and the therapist, and the agreed to try three more weeks of physical therapy. PX4.

On March 2, 2015, the therapist issued his report, indicating that Petitioner told him " he feels he is close to being done with physical therapy." Active range of motion was normal, except for 35degrees inversion on the left ankle as opposed to 50 degrees on the right. The therapist recommended discharge from PT. PX4.

Petitioner returned to Dr. Bailey on March 24, 2015, requesting that he return to work full duty. Bailey's physical exam disclosed normal ROM except for limitation of inversion. However, Petitioner did request "quantification of the amount of tearing present to his peroneal retinaculum," and he requested the approximate cost of surgery. PX4.

Return to Work

In the spring of 2015, Petitioner returned to work for Respondent. He testified that he felt a terrible amount of pain while engaged in all his work activities including climbing in and out of the truck and trailer, using the clutch up to 500 times per day, etc. Petitioner testified that he typically went in and out of the truck 50-100 times per day, in and out of the trailer 2-10 times per day and shoveling 500 to 2000 pounds of remnant materials out from the trailer. He explained that his left ankle would swell up daily and worsen every day. Petitioner testified that it was all a tremendous amount of pressure on the left ankle.

Petitioner testified that he asked Mr. Krizmanic several times if he could drive an automatic transmission truck. He testified that he drove an automatic maybe a handful of days while they rented an automatic transmission truck. Petitioner testified that he was not under medical treatment in 2015. After the season in 2015, Petitioner was laid off. Petitioner acknowledged that he worked the entire construction season in 2015 from March 2015 to December 2015. He then returned at the beginning of the season of 2016 and testified that his ankle was even worse and getting worse every day. Petitioner also acknowledged that his employment was not terminated in 2016 after he went to get additional treatment.

Continued Medical Treatment

Petitioner testified that he was referred to Dr. Kelikian. The medical records reflect that Petitioner saw Dr. Kelikian for the first time on February 22, 2016. He diagnosed Petitioner with a left peroneal tendon tear. He recommended surgery with peroneal tendon repair and retinacular repair. Petitioner saw him again on May 9, 2016 for a pre-op physical, and then submitted to surgery on May 19, 2016. At the surgery, Dr. Kelikian performed the repairs and deepened the pereosteum groove. PX5-PX6.

Petitioner returned for a post-op visit on June 3, 2016. He was placed in a short walking cast and crutches were ordered. On his next visit on July 1, 2016, he was referred to physical therapy. He was evaluated by the therapist at Brightmore Physical Therapy on July 7, 2016. He next returned to Kelikian on August 5, 2016, at which point he could weight bear with a Sweda brace. Dr. Kelikian noted calf swelling at that visit and ordered venous imaging to rule out a blood clot in the lower leg. The next visit on September 15, 2016 was unremarkable except that examination revealed a clicking on dorsiflexion. On October 18, 2016, Brightmore's therapist noted that Petitioner made "very little improvement overall." He was complaining of numbness and tingling intermittently throughout the foot and ankle. PX5.

On November 10, 2016, the therapist reported that "patient continues to have swelling and redness in ankle/foot. ROM good despite swelling. Strength limited by pain...Patient has made no significant progress since his return to PT." On the next visit to Dr. Kelikian on November 11, 2016, he complained of " lateral discomfort" of the foot and Kelikian ordered " NO work uses clutch on truck." He further ordered an ultrasound scan to check on whether there were recurrent peroneal tears. The ultrasound performed on December 15, 2016 disclosed that "the peroneal retinaculum is scar remodeled and thickened, but is intact." There was mild tendinosis of the peroneus longus and peroneus brevis tendons and the anterior talofibular ligament was mildly attenuated but intact. PX5.

On January 16, 2017, Dr. Kelikian referred him to physical therapy and allowed weight bearing with a shoe. He also referred him for a functional capacity evaluation. Petitioner appeared for the functional capacity evaluation on February 28, 2017, but the evaluation was aborted because his blood pressure was too high for the test to proceed (BP 172/101). The functional capacity evaluation was ultimately performed on June 23, 2017. PX5; PX7.

In the interim, on March 6, 2017, Petitioner presented to Dr. Snydersmith at Physicians Immediate Care. Snydersmith took his blood pressure and did an EXG. He diagnosed Walsh with essential hypertension and a right bundle-branch block. He released him to see a cardiologist. PX12.

Petitioner returned on June 23, 2017; having undergone a functional capacity evaluation. Dr. Kelikian issued work restrictions which stated "RTW per FCE medium not heavy duty photos job site reviewed." Petitioner returned on November 6, 2017 and Dr. Kelikian noted that his "restrictions were not followed." There was no further indication of follow-up for further medical care. PX5.

Petitioner testified that before his 2017 functional capacity evaluation, his left ankle had not gotten any better. Petitioner testified that he was in an extreme amount of pain after the evaluation, having given 100 percent effort, and it took him three weeks to recover.

On November 2, 2017, Petitioner returned to Dr. Snydersmith, complaining of increased ankle pain, swelling, and loss of feeling. Dr. Snydersmith directed Petitioner to follow up with his orthopedic surgeon and, at Petitioner's request, issued a duty restriction slip specifying no climbing or heavy lifting for two days. PX9.

Petitioner acknowledged that he has not returned for further treatment since November of 2017.

Work Restrictions

Petitioner offered documents reflecting text messages dated September 12, 2017 and October 10, 2017 sent to his cell phone saying that he was off work. PX39-PX40. Petitioner testified that he attempted to return to work for Respondent in the fall of 2017 on or about November 1, 2017 as soon as he received permanent work restrictions. Petitioner testified that he took photographs of his foot before and after work, and that he experienced a severe amount of pain that day. He testified that he dry-hauled asphalt chips from the quarry to the plant and his duties required him to get in and out of the cab of the truck. Petitioner did not get into the bed of the trailer. Petitioner testified that his ankle "blew up" and he sought medical attention after work. He returned to work the following day doing paperwork and did not otherwise return to work for Respondent.

Deposition Testimony – Dr. Kelikian

Petitioner called Armen Kelikian, M.D. (Dr. Kelikian) as a witness and he gave testimony at an evidence deposition. PX28. He is board certified in orthopedics specializing in feet and ankles. *Id.* Dr. Kelikian gave testimony regarding his treatment of Petitioner's left ankle condition. *See generally, Id.* He opined that the accident caused Petitioner's ankle condition, and that "it was a permanent condition, but it was surgically repaired". He was asked about his 12/15/16 notation of "scar remodeling" and he stated that "we had to surgically cut his retinaculum and tighten it up again like a hernia, so there's going to be a scar deep and it looks good and it's stable and he's not popping out of the socket." *Id.*, at 17-18.

On cross-examination, Dr. Kelikian stated that "the only thing that was bothering [Petitioner] was swelling. It was swollen like an inch more... he could wear a compression stocking to kind of abate that." PX28 at 22. When questioned about the simulated work around a truck that was performed as part of Petitioner's functional capacity evaluation, and Dr. Kelikian pointed out the fact that for simulating the clutch the evaluation is marked "avoid." *Id.*, at 26. Although it was the only FCE restriction he saw was operating a clutch, Dr. Kelikian "did put a climbing limitation on him based on his symptoms." *Id.*, at 28. Dr. Kelikian was presented with the Teamsters job description, and he agreed that Petitioner could handle the duties described in that description, but he did not "see the thing about the clutch[.]" *Id.*, at 31. In further testifying about the job description, Dr. Kelikian stated, if Petitioner "brought this into my office, I'd say, 'Hey, you know, other than you're able to climb based on the FCE and there's no clutch- there's nothing mentioned about a clutch here, you only have to lift ten pounds.' I'd say that would be okay." *Id.*, at 34.

Donald Kinsella

Petitioner called Donald Kinsella (Mr. Kinsella) as a witness. He is employed as a local real estate developer consultant and had previously engaged in the business of driving trucks, particularly construction related dump trucks. Mr. Kinsella testified that he has owned 10 semi-trucks and has hired thousands of trucking companies for local development areas. He testified that he has approximately 35 years of experience driving dump trucks. *See* PX14.

Mr. Kinsella testified that he had previously contracted with Respondent to complete several jobs for him. He explained that in 2008 Respondent did a large sewer and water extension on a six-acre piece of commercial piece of property among other jobs between 2007 and 2011. Mr. Kinsella testified that where he hired Respondent, he was able to observe the drivers of those rigs when they were doing their work. He testified that they would accept or deposit loads of asphalt, stone, or dirt. Mr. Kinsella testified that the drivers "would get out of the trucks. They would have to back up to where they were going to dump and we would inspect what they were dumping, their procedures at that time, how noisy they were, how much dirt they were using or leaving behind and the procedures they used to clean and do, deliver what they had to do." After a load was delivered, Mr. Kinsella testified that drivers "were responsible for cleaning the truck, cleaning the back of the trailer, making sure there are no debris or spoils on top of the trailers or their spread pans and their tailgates were working correctly so no debris were left illegally on the road or endangering anybody within that area." He testified that drivers did have to get into the actual bed of the dump truck.

On April 30, 2018, Mr. Kinsella testified that he saw some of Respondent's trucks on Route 52 and 59 on a construction site from the Anderson family near his home. He testified that he observed the driver cleaning the back of his trailer of dirt material or spoils on the corner with a shovel in the back of his truck.

On cross-examination, Mr. Kinsella testified that he has not supervised any job site where Respondent has been since 2011. He also testified that he never supervised Petitioner in his employment for Respondent. Mr. Kinsella acknowledged that he has known Petitioner since his early 20s and is a close friend.

William Krizmanic

Respondent called William Krizmanic (Mr. Krizmanic) as a witness. He is currently employed by Respondent and has been since 2006, a company that performs roadwork, underground work, and construction, as its Superintendent. In this position, he supervises various employees including truck drivers and, specifically, semi drivers. He was Petitioner's supervisor in October of 2014.

Mr. Krizmanic testified that semi drivers haul various materials, depending on the job, including asphalt, stone, dirt, gravel, broken concrete, and grindings. Approximately 80% is asphalt. He reviewed a job description for a truck driver. Petitioner's position with Respondent at the time of his accident was a semi driver. He could not recall if the job description was in effect in October of 2014 or through 2016.

Mr. Krizmanic testified Petitioner's job duties as a driver did not require him to climb into the back of the truck at the beginning of his shift and clean out the trailer portion of his truck. He explained that a driver did not have to get in the truck to see inside. When there was debris
inside the truck at the beginning of a shift, Petitioner needed to inform him of it and he would have a laborer or shop person take care of it. Mr. Krizmanic testified that truck drivers were not allowed to climb into the trailer of the truck to clean it out because it was unsafe. He also explained that Respondent has company rules against it, which were posted on the key box where drivers grab their keys every morning.

Mr. Krizmanic also testified that he has not seen Mr. Kinsella at any job sites at which Respondent has worked in the last five years. He testified that Mr. Kinsella has not supervised any of Respondent's employees during his time with Respondent since 2006. Only Mr. Krizmanic or the foreman would supervise employees. He testified that it is possible for others to see people in the back of trucks, but it would be laborers not drivers.

Mr. Krizmanic reviewed Respondent's Exhibit 10, which shows a truck driver, Josh Kramer, spraying diesel fluid on his tailgate. He explained that it requires the driver to use a little one-gallon spray bottle. Mr. Krizmanic also agreed that there is a 10-pound lifting restriction for drivers.

Mr. Krizmanic testified that Respondent currently has about 10 trucks that require the driver to operate a clutch. When Petitioner tried to return back to work in November of 2017, he worked one day and was returned to a truck that was automatic. Mr. Krizmanic testified that Petitioner sent him work restrictions in June or July of 2017 via text message on November 2, 2017. *See* RX9. Mr. Krizmanic did not recall Petitioner faxing his restrictions or calling him.

Mr. Krizmanic testified that Petitioner returned to Respondent and worked full time during the 2015 construction season. Mr. Krizmanic testified that Petitioner did not complain that he was unable to do his job. He testified that Petitioner did not call in sick, report being unable to operate a clutch, or report any difficulty getting in and out of the cab of his truck.

On cross-examination, Mr. Krizmanic did not recall who prepared the written rule regarding drivers being unable to get into the bed of the truck or when it was prepared or posted. He acknowledged that when drivers are on a job site they did have to shovel from time to time. However, Mr. Krizmanic testified that when a laborer is not on site to remove dirt or debris stuck in the back of the truck, the driver is supposed to call him and he will direct the driver where to go with the truck to have it removed.

Gary Shumal

Respondent called Gary Shumal (Mr. Shumal) as a witness. Mr. Shumal testified that he is employed by Respondent as President. He explained that Respondent is a heavy highway construction company employing approximately 130 employees including approximately 30 drivers per season hired through the union.

Mr. Shumal reviewed Respondent's Exhibit 2 and testified that it is a teamster's job description representing the job that Petitioner was hired to do or performed for Respondent. If Petitioner were to return to work for Respondent, the job description would be an accurate depiction of his job duties. Mr. Shumal also testified that the job description was in place in 2017 when Petitioner returned back to work.

Mr. Shumal testified that Petitioner would not have to climb in or onto the trailer of the truck to perform inspections or to clean out the truck as it was not allowed for safety regulations. He explained that he instituted this policy because of previous experiences with fellow drivers. Mr. Shumal reviewed Respondent's Exhibit 11, which is a photograph of the rules placed on the key box in the shop where the drivers get their keys to the trucks. It states that "[d]rivers are not permitted to climb in or near the trailer any time. No employee is allowed to use cell phone while operating a company vehicle." RX11. Mr. Shumal was unsure whether this rule was in place in 2017.

Mr. Shumal testified that Mr. Kinsella has never worked as a supervisor on Respondent's job sites. He did not recall Mr. Kinsella working on a Respondent job, but testified that Respondent did do work on a Lincoln cemetery site in 2010.

Mr. Shumal testified that Respondent hires people to clean out the trailers of cabs and trucks, either laborers or operators.

At some point in time in November of 2017, Mr. Shumal testified that Petitioner attempted to return back to work for one day. Mr. Shumal testified that when Petitioner returned to work in 2015, he worked the entire 2015 construction season. He also reviewed Respondent's Exhibit 5, a report which showed drivers' equipment usage and showed that Petitioner's assigned truck (Equipment No. 0910) did have a clutch. Mr. Shumal testified that Respondent did not have any automatic transmission trucks in 2015.

Mr. Shumal testified that when Petitioner returned to work in 2015 he never told him (Mr. Shumal) that he could not perform his job as a truck driver, or had difficulty performing his job as a truck driver in 2015.

Mr. Shumal testified that in the summer of 2017 text messages regarding being off work were sent by his computer to the drivers. He testified that the text messages from October and November of 2017 showing Petitioner off work were sent because Respondent was not notified that he was available to come back to work. Mr. Shumal was not aware of any permanent work restrictions sent by Petitioner to Respondent in June or July of 2017. He became aware of Petitioner's evaluation when Petitioner attempted to return back to work on November 2, 2017.

Mr. Shumal reviewed Respondent's Exhibit 9 and testified that Respondent can still offer or accommodate Petitioner's work restrictions to operate a truck without a clutch.

Respondent offered its Exhibit 10 with video footage of someone getting into a truck and driving, the pre-driving inspection, which Mr. Shumal testified that does not involve climbing up onto the trailer. Mr. Shumal testified that it was inaccurate that drivers had to lift or shovel 500 to 2000 pounds of asphalt as part of their job duties. He explained that if this was an issue he would have the driver park the truck and grab another truck. Moreover, Mr. Shumal testified that there was normally not 500 to 2000 pounds of asphalt remaining in the truck.

Mr. Shumal testified that if a driver has issues with the bed of his truck, he must call the supervisor and get directions on what to do per Respondent's policy. He testified that Respondent's current company policy was that a driver was not allowed to get into the bed of the truck.

On cross-examination, Mr. Shumal testified that Respondent's policy prohibiting employees from jumping from the cab or bed of a truck was in effect in 2015 through 2017. He was unsure whether it was in effect in 2014. Mr. Shumal testified that lubricant must be sprayed on the surface of the bed of the tucks before asphalt is deposited or it will stick. He testified that if there is an instance where a driver feels that his truck bed cannot be cleaned he needs to notify the superintendent. Drivers are not to get into the bed of the truck. Mr. Shumal testified that laborers can get into the truck beds because they get paid to shovel whereas drivers get paid to drive.

Mr. Shumal testified that he understood per Petitioner's physician, Dr. Kelikian, that Petitioner had no climbing restrictions, and he could lift up to 50 pounds per the results of his functional capacity evaluation. He maintained that Petitioner's job description fell within these restrictions and that Respondent could offer Petitioner such work.

Ronald Chester

Respondent called Ronald Chester (Mr. Chester) as a witness. Mr. Chester testified that he is currently employed by Respondent as a Driver and he works out of the Teamsters 179 union hall. He has been employed by Respondent for approximately five-and-a-half years.

Mr. Chester testified that during his employment with Respondent, there has been a policy prohibiting drivers from getting into the trailer of the trucks at all. He also testified that it is pretty much the industry standard regarding truck drivers that they do not climb into the trailers of their trucks. He also testified that there are signs posted all over places like quarries that drivers are not allowed out of the truck "period on their premises." Mr. Chester testified that this is a safety precaution.

Mr. Chester testified that he performs a daily inspection and those duties include checking oil, looking at all fluids, steering, checking belts, checking tires, making sure that the box is coupled correctly or outlines are hooked correctly. He testified that this inspection does not require him to climb the ladder on the trailer to see what is inside of the trailer. Mr. Chester explained that he can lift the box completely straight up, set the parking brakes, and walk through the yard and take a visual by looking straight up into the box. *See* PX31.

Mr. Chester estimated that he would get in and out of his truck approximately 2-10 times per day depending on the job. He testified that if for some reason there is some sediment in the truck after delivery, he would first inform his foreman and then would either go back to a job site where there is a piece of equipment that they are using to load the truck and have them scrape it out and remove it, or he would probably be directed to go and bring it back to the shop where there is equipment there or a laborer that would get inside there and remove it. Mr. Chester testified that there is no time when he must go into the trailer and shovel out asphalt.

Mr. Chester testified that he has seen the sign posted on the drivers' key box stating that absolutely no one is to get in, climb on or get into the trailers of the truck, and it also says there is no cell phone use.

Tina Wildrick

Respondent called Tina Wildrick (Ms. Wildrick) as a witness. She testified that she is employed by Respondent as the Office Manager and was so employed in 2014.

Ms. Wildrick testified that Petitioner returned to work for Respondent one day in December of 2014. At that time, Petitioner was doing timesheets. Ms. Wildrick testified that the following day Petitioner talked to Gary and said he would rather be on unemployment than have light duty work in the office.

Vocational Rehabilitation

At his attorney's request, Petitioner met with a vocational rehabilitation counselor, Kari Stafseth (Ms. Stafseth). PX1-PX2. Petitioner called Ms. Stafseth as a witness and she provided testimony at an evidence deposition. PX17.

Ms. Stafseth is certified as a vocation rehabilitation counselor in 2009 PX5 at 5; PX1. She interviewed Petitioner on August 25, 2017 and prepared an initial evaluation report and a rehabilitation plan. PX2-PX3. During the initial interview Petitioner recounted the circumstances of his injury, and he indicated that his work with Austin Tyler amounted to 50% driving and 50% laboring. He told her that the "laboring" part of his job amounted to "removing crud" and shoveling asphalt. He told her that driving for Austin Tyler required him to

exert 70 pounds of pressure on a clutch 500 times per day. He told her he could lift 20 pounds comfortably and 40 pounds "at one time." He had difficulty climbing stairs and worse difficulty descending. PX2; PX17.

In preparing her report, Ms. Stafseth reviewed medical records of Petitioner's treating physicians and his functional capacity evaluation. She noted that the FCE found that he could perform at the "medium" physical demand level and could climb stairs and ladders on an "occasional" basis. She noted the FCE's restriction on operating a clutch. She consulted the Department of Labor Guidelines which determine that "occasional" means up to a third of the working day. She considered Dr. Kelikian's return-to-work slip of June 23, 2017 where he specified medium duty work in accordance with the FCE and stated on the slip that the work at Austin Tyler was "heavy." She noted no formal education beyond high school and three credits at Joliet Junior college, and that he had no specialized skills beyond that of a driver. The only job experience she found beyond driving was work in the grocery trade out of high school up to and including assistant manager. She testified that during the interview, Petitioner had not been looking for work because" he was unsure at the time if Austin Tyler Construction was going to contact him regarding work and so he felt that he was in limbo " PX2; PX17.

Ms. Stafseth consulted the Dictionary of Occupational Titles and determined that a driver is considered to be under the "medium" demand level, while work done as a laborer would be considered under the "very heavy" demand level and work in the grocery trade would be considered under the "heavy" demand level. With respect to transferable skills, she noted that as of the interview Petitioner was approaching 50 years old, and "would be considered to be an individual approaching advanced age, which could impact his ability to adjust to other types of employment." Her opinion was that he did not have any transferable skills beyond driving in some capacity. She opined that he still had access to some driving positions and other positions such as packer, assembly work, shipping and receiving, and parts delivery driver. Her opinion was that Petitioner had lost access to his usual and customary job. PX2; PX17.

Ms. Stafseth's opinion was that Petitioner's wage-earning potential was between $13 and $17 per hour, based upon her consultation with the Department of Labor statistics for wages. She believed that he could undergo vocational testing, looking toward an assessment of his aptitudes, computer training, job search training and preparing for interviews. The end result would be assisted searching for work with "a goal of 40 to 60 contacts on a weekly basis." PX2; PX17.

Additional Information

Petitioner offered a variety of photographs into evidence. *See generally* Petitioner's Exhibits. He also offered video footage that he took of work being performed on a job site by Respondent on April 30, 2018. PX38.

Petitioner testified that he sought employment outside of Respondent by searching on Monster.com and Indeed.com. He ultimately secured employment at the Circle K in Plainfield, Illinois for about five weeks as a light duty cashier, which only required him to stand and ring up customers. However, after a few hours of standing his left ankle would definitely swell up and he felt pain. Petitioner also testified that at its very best he has about 30-40% percent loss of feeling in the front part of his foot. Thereafter, Petitioner found employment at several different places and ended up at Speedway gas station where he currently works. He testified that his duties are very similar, and he rings up customers. *See also* PX41 (Speedway paystubs).

Regarding his current condition of ill-being, Petitioner testified that he experiences swelling every single day. He has never had a day without swelling since the date of the accident. On the first date of the hearing, Petitioner requested to show his left ankle, which was more swollen than the right ankle on the outside portion.

In rebuttal testimony, Petitioner testified that a backhoe, is located at the sewer and water jobs. However, it cannot reach up into the corners of the box to scrape out all the debris and he maintained that it has to be shoveled out by hand. Petitioner also testified that when he worked for Respondent in November of 2017, there was no notice located on the key box prohibiting drivers from getting in the bed of the trailers.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In careful consideration of the record as a whole, including the testimony of Petitioner, six additional witnesses, two expert witnesses, medical records, and dozens of other exhibits including video footage, photographs, and employment policies and records, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on October 18, 2014. Petitioner testified about his left ankle injury, which resulted from an undisputed accident.

Contemporaneous medical records from the date of the accident through December of 2014 corroborate that Petitioner sustained a second degree left ankle sprain and partial tear of the peroneous longus tendon. The last physical therapy note reflects that Petitioner had improved greatly in therapy. Petitioner returned to work for Respondent with restrictions that were accommodated. Then, at Petitioner's suggestion because he was performing "pointless paperwork" Respondent laid Petitioner off.

Petitioner worked the entirety of the construction season in 2015. He did not undergo any medical treatment during this period, and he was able to perform all the duties of his job, albeit with subjectively reported severe symptoms during which time he operated a truck with a clutch.

Petitioner then undertook additional medical treatment with Dr. Kelikian in February of 2016 ultimately resulting in a surgery consisting of peroneal tendon repair, retinacular repair, and deepening of the pereosteum groove. He underwent post-operative care and ultimately underwent a functional capacity evaluation. Petitioner was released back to work per the results of the valid evaluation within the job description understood by the physical therapist. He was evaluated thereafter by his treating physician, Dr. Kelikian, who imposed one work restriction preventing Petitioner from operating manual transmission trucks with a clutch.

Petitioner and the many witnesses at the hearing disagreed over the job requirements of a truck driver. The parties also submitted dozens of exhibits to refute claims of the inclusion or exclusion of certain duties of a driver. Specifically, whether Petitioner was required to or did: (1) climb into the bed of the trailer to shovel out hundreds of pounds-to-tons of debris including asphalt; (2) climb into the bed of the trailer many times to spray down the bed of the truck with diesel fuel to prevent asphalt from sticking; (3) climb in and out of the cab of the truck many times per day; and/or (4) drive a truck with a clutch.

Overall, Petitioner's testimony is not reliable. The testimony of his close friend, Mr. Kinsella, does little to buttress Petitioner's claim about his job duties given that he last observed any work on Respondent's job sites as a contractor, not an employee of Respondent, in 2011 per his own testimony. Moreover, the testimony of Respondent's owner and office manager, Petitioner's supervisor, and a current truck driver controvert Petitioner's testimony and insistence that drivers were required, as of the time of his permanent work restrictions post-FCE, to perform the disputed job duties. Petitioner's contention to this end are further controverted by the opinions of the evaluating physical therapist from a valid FCE based on his representations to that physical therapist as well as the opinions of his own physician and his chosen vocational rehabilitation expert to whom he explained these disputed job duties in detail.

Moreover, taking Petitioner's version of events as true, he asserts that his left ankle condition was so subjectively severe that he was barely able to perform the disputed job duties pre- or post-operatively, which are controverted by the job description created by his union hall, not Respondent. He also asserts that his subjectively severe left ankle condition worsened exponentially throughout his treatment, including during the 2015 construction season when he drove a truck with a clutch and during which time he sought no medical treatment for 11 months. Petitioner maintains that after his surgery his condition was subjectively without remedy. In contradiction, Petitioner's treating physician, Dr. Kelikian, testified that Petitioner could perform all the job duties that Petitioner described—including those disputed by Respondent—except for driving a manual transmission truck. Respondent offered the testimony of three witnesses and inventory documents to establish that it was able to accommodate the no-clutch restriction given that its truck fleet had transitioned to mostly automatic transmission by the time Petitioner was released by Dr. Kelikian in 2017.

Based on the foregoing, the Arbitrator finds that the medical evidence as a whole supports a causal connection finding between Petitioner's left ankle condition and his accident at work limited by his release back to work by Dr. Kelikian with one restriction of no-clutch driving that fell within Petitioner's job duties and that could be accommodated by Respondent.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits and temporary partial disability benefits, the Arbitrator finds the following:

"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 MMI. *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 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996.

As explained more fully above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work. During this period, Petitioner was either placed off work by his physician, but he was not restricted from performing the full duties of his job with restrictions that Respondent could not or did not accommodate until after June 23, 2017 per Dr. Kelikian. Thus, the Arbitrator finds that Petitioner has established his entitlement to temporary total disability benefits from October 19, 2014 through December 2, 2014 and commencing on May 19, 2016 through June 23, 2017.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to Subsection (i) of Section 8.1b (b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to Subsection (ii) of Section 8.1b (b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Driver with years of anticipated employment ahead of him. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iii) of Section 8.1b (b), the Arbitrator notes the parties' stipulation that Petitioner was 46 years old at the time of accident. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iv) of Section 8.1b (b), the Petitioner's future earning capacity, and Subsection (v) of Section8.1b (b), evidence of disability corroborated by treating medical records, the Arbitrator notes that no credible evidence was proffered regarding any loss Petitioner's future earning capacity as a result of this injury resulting in any loss of trade or wage differential loss. The Arbitrator notes that Petitioner has established that he sustained an injury resulting in extended conservative treatment with a proposed surgery followed by an 11-month gap in treatment during which time Petitioner returned to work for Respondent and was able to drive a truck with a clutch throughout the 2015 season prior to the time that he had surgery. Petitioner then undertook further medical treatment with Dr. Kelikian. He underwent surgery to the left ankle including peroneal tendon repair, retinacular repair, and deepening of the pereosteum groove. After post-operative care, Petitioner's symptoms continued required some treatment, but Petitioner obtained no medical after his last visit to Dr. Kelikian in November of 2017. Dr. Kelikian released Petitioner back to work with permanent restrictions that he testified fell within Petitioner's Teamster's job description with the exception of driving a truck with a clutch. Respondent established it could accommodate the restriction given that a majority of its truck fleet in 2017 was of automatic transmission trucks. Petitioner continued to experience severe subjective symptoms that are not corroborated by the findings of his physician, Dr. Kelikian, but also were not discounted as valid by Dr. Kelikian the only physician to evaluate Petitioner regarding the subjective nature of his symptoms at maximum medical improvement. No Section 12 examination was submitted into evidence. The Arbitrator therefore gives these factors greater weight.

Based on the above factors, and the totality of the record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of left foot pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC012145
Case Name	INSURANCE COMPLIANCE v. SOLARES SCRAP METAL
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	24IWCC0348 [20INC00186]
Number of Pages of Decision	5
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Chris Zarek
Respondent Attorney	

DATE FILED: 7/22/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
)
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ILLINOIS DEPARTMENT OF INSURANCE,

Petitioner,

vs. No: 22 WC 12145
20 INC 186

SOLARES SCRAP METAL,

Respondent.

OPINION AND DECISION ON PETITION FOR PENALTIES FOR INSURANCE NON-COMPLIANCE FILED BY THE ILLINOIS ATTORNEY GENERAL ON BEHALF OF THE ILLINOIS DEPARTMENT OF INSURANCE

This matter comes before the Commission on the Petition of the Illinois Attorney General against Respondent, Solares Scrap Metal, for Non-Compliance with the requirement to maintain Workers' Compensation insurance. A hearing was held in Chicago on March 7, 2024 before Commissioner Simpson. An Assistant Illinois Attorney General was present and a record was taken *ex parte*.

Findings of Fact

Antonio Smith testified he was currently an investigator with the Illinois Department of Insurance. On March 24, 2022, he sent a notice of non-compliance with the requirement to maintain Workers' Compensation insurance to Respondent, on May 1, 2022 he sent notice of an informal hearing, and on March 7, 2024 he sent notice of the instant hearing. That notice specified a period of non-compliance between October 28, 2009, to May 10, 2016 and from May 12, 2017 to the date of hearing, March 7, 2024. Records of the Illinois Secretary of State showed the registered agent/President, Rafael Solares, to whom the notices were sent. Nobody appeared on behalf of Respondent at the conference on May 1st or at the instant hearing on March 7, 2024. The Attorney General presented documentary evidence verifying Mr. Smith's testimony.

Mr. Smith also testified Respondent was subject to the act because it uses sharp instruments and cutting tools. He requested insurance information from NCCI and whether Respondent was self-insured from the IWCC. The search showed that Respondent neither had Workers' Compensation insurance nor was a registered self-insured entity for the period in question.

Records of the Illinois Department of Employment Security indicated that Respondent had about three employees. After his investigation, Mr. Smith concluded that Respondent did not have Workers' Compensation insurance that it was required to have, nor was it an official self-insured entity under the Act. The Attorney General was asking for the maximum penalties of $500 per day for non-compliance, plus whatever Respondent saved in not paying for Workers' Compensation insurance.

The following exhibits were submitted into evidence:

PX1 – Notice of Non-Compliance dated 3/24/22

PX2 – Notice dated 3/24/22 of an Informal Insurance Compliance Conference on May 10, 2024, at 10:30 a.m., at the Daley Center in Chicago.

PX3 – Notice dated 1/30/24 of the Insurance Compliance Hearing set for March 7, 2024, at 10:00 a.m., at the Daley Center in Chicago. The exhibit also includes copies of the certified mail receipts.

PX4 – Secretary of State records indicting Respondent was incorporated on 8/21/08, dissolved on 8/14/09, it was reincorporated on 10/28/09, its registered agent was initially Rafael Solares and changed to VMR Financial Strategies upon reincorporation, its President was Rafael Solares, and its Secretary was Alma Solares at the same address as Rafael.

PX5 – Articles of Incorporation of Solares Scrap Metal and some annual reports

PX6 – Records of NCCI indicating that Respondent, Solares Scrap Metal, had no workers' compensation insurance from 3/21/08 to 5/10/16, had an active workers' compensation policy from 5/11/16 to 5/11/17, and became uninsured again from 5/12/17 to 3/30/23.

PX7 – Records of the Illinois Compensation Commission indicting that Solares Scrap Metal was not registered by the Commission as a self-insured entity as of 3/30/23.

PX8 – Records of the Illinois Department of Insurance representing annual tax returns of Solares Scrap Metal.

PX9 – Records of the Illinois Department of Employment Security showing in the quarter ending on 9/30/21 and the quarter ending 12/31/21, Respondent had three employees, Rafael Solares, Alma Solares, and Derrick Solares. In the quarter ending on 3/31/22, Respondent only had two employees, Rafael Solares and Alma Solares.

Conclusions of Law

The Commission concludes that from the evidence before us that Respondent was uninsured for 625&4/7 weeks or 4,379 days. Pursuant to our statute, Respondent can be fined up to a maximum of $500 per day of noncompliance with the requirement to maintain Workers' Compensation insurance. Accordingly, Respondent could be fined up to $2,189,500.00 and the

Attorney General is seeking the maximum fine as well as whatever Respondent saved by not obtaining the required insurance.

The Commission notes that, according to records of the Illinois Department of Employment Security, Respondent had only either two or three employees, apparently a husband, a wife, and for a time, another relative likely a child. Respondent clearly appears to be small family-owned business. In addition, although the statute allows fines of up to $500 per day for violation of the insurance requirement, the minimum penalty is $10,000.00. Under these circumstance, the Commission does not believe imposition of the maximum fine is appropriate. The Commission believes it unlikely that Respondent would be able to pay the maximum fine of $2,189,500.00, and if it did it could likely force it to go out of business. The Commission must remain vigilant about employers' failure to comply with insurance requirements. Strict enforcement of those requirements is not only critical for employees, it is critical for other employers which comply with these requirements.

Under the circumstances of this matter, the Commission believes that a fine of $10,000.00 per year of non-compliance is appropriate. 4,379 days translates to almost exactly 12 years. Therefore, the Commission imposes a fine of $120,000.00 for Respondent's 12-year non-compliance with the requirement to maintain Workers' Compensation insurance.

THEREFORE, IT IS ORDERED BY THE COMMISSION that Respondent shall pay a fine in the amount of $120,000.00 for its non-compliance with the requirement to maintain Workers' Compensation insurance for 4,379 days or 12 years.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to Commission Rule 9100.90, once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: I) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission; 2) payment shall be mailed or presented within 30 days after the final Order of the Commission or the order of the court on review after final adjudication to:

Workers Compensation Commission
69 W. Washington St., Floor 9
Chicago, IL 60602

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.

July 22, 2024

DLS/dw
R-3/7/24
46

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027207
Case Name	Scott Howard v. City of Carmi
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0349
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Stephen Stone
Respondent Attorney	Patrick Keefe

DATE FILED: 7/22/2024

/s/ Deborah Simpson, 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: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT HOWARD,

Petitioner,

vs. NO: 20 WC 27207

CITY OF CARMI,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and the nature and extent of Petitioner's permanent partial disability, and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator, as specified below, and otherwise affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

In a prior Decision dated September 27, 2021, issued by Arbitrator Gallagher pursuant to §§8(a)/19(b), the Arbitrator found accident and causation of a current condition of ill-being of Petitioner's lumbar spine, awarded medical expenses submitted into evidence, awarded 55&6/7 weeks of temporary total disability benefits, and ordered Respondent to authorize and pay for lumbar fusion surgery recommended by Dr. Gornet. No review was taken on that decision. Thereafter, on March 1, 2023 Arbitrator Cantrell issued another Decision, also purportedly pursuant to §§8(a)/19(b), which she submitted in this file even though it had a different caption. Ironically, the second claimant was named Howard as well and the decision awarded prospective lumbar surgery recommended by Dr. Gornet.

The next day, Arbitrator Cantrell issued a Corrected Decision "Nature and Extent Only" in which she analyzed the statutory factors and awarded Petitioner 150 weeks of permanent partial disability benefits representing loss of 30% of the person-as-a-whole. Respondent preserved the issues of duration of temporary total disability and nature and extent of Petitioner's permanent partial disability.

On the issue of temporary total disability benefits, Respondent preserved the issue of the duration of temporary total disability. However, in this instance, the Arbitrator did not award temporary total disability. Nevertheless, Respondent argues it should receive credit for $1,399.95 in overpayment of temporary total disability benefits. Petitioner argues it was improper for Respondent to bring up the issue because it was not addressed at arbitration and the stip sheet indicated that temporary total disability benefits was not an issue. We agree with Petitioner, we decline to address the issue of temporary total disability benefits and the Commission makes no modification to the Decision of the Arbitrator on the issue of temporary total disability benefits.

On the issue of permanent partial disability benefits, the Arbitrator awarded Petitioner 150 weeks of permanent partial disability benefits, representing loss of 30% of the person-as-a-whole. In so doing she gave greater weight to the fact that Petitioner changed jobs and was earning considerably less income than he did in his previous job. She also gave greater weight to his relatively youthful age of 40, and some weight to the potential loss of earning capacity noting he was earning less. Finally, the Arbitrator gave greater weight to the evidence of disability corroborated by the record noting Petitioner's testimony about continuing stiffness and difficulty driving for more than two hours.

Respondent argues the permanent partial disability, award is excessive. It stresses that the Arbitrator should not have considered the factors of changing jobs and reduction of earning capacity because Petitioner was released to return to work at his prior job without limitations, he testified that he could physically return to work at his prior job, and he took the lower paid job voluntarily in order to support his pension.

In looking at previous Commission decisions it seems that an award of more than 25% of the person-as-a-whole for such an injury generally involves some permanent work restrictions. Here, Petitioner had an excellent recovery, he was released to return to work without restrictions at a heavy-type job of lineman, and even though he technically had two surgeries, they were both to the same disc. In looking at the entire record before us, the Commission concludes that an award of 125 weeks representing loss of the use of 25% of the person-as-a-whole is appropriate in this claim. Therefore, the Commission modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator dated March, 2, 2023 is hereby modified as specified above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.36 per week for 125 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused permanent partial disability to the extent of 25% of the person-as-a-whole.

IT ISFURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from 12/8/22 through 1/18/23, and shall pay the remainder of the award, if any, in weekly payments.

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.

July 22, 2024

DLS/dw
O-5/22/24
46

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027207
Case Name	Scott Howard v. City of Carmi
Consolidated Cases	
Proceeding Type	
Decision Type	CORRECTED Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Stephen Stone
Respondent Attorney	Patrick Keefe

DATE FILED: 3/2/2023

/s/ Linda Cantrell, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 28, 2023 4.94%

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
"CORRECTED" ARBITRATION DECISION
NATURE AND EXTENT ONLY

SCOTT HOWARD
Employee/Petitioner

v.

CITY OF CARMI
Employer/Respondent

Case # **20** WC **027207**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **1/18/23**. By stipulation, the parties agree:

On the date of accident, **7/22/20**, 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 $**43,971.20**, and the average weekly wage was $**845.60**.

At the time of injury, Petitioner was **38** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been **or will be** provided by Respondent. Respondent stipulates to liability for the following medical expenses: CT Partners of Chesterfield-$4,653.63; MRI Partners of Chesterfield-$6,511.00; Orthopedic Ambulatory Surgery Center-$4,896.44; Orthopedic Center of St. Louis-$128,122.85; St. Louis Spine & Orthopedic Surgery Center-$37,460.62; and United Physicians Group-$3,013.00. Respondent further stipulates to reimbursement of Petitioner's out-of-pocket expenses for prescription medications in the amount of $116.93. The parties stipulate that Respondent shall receive credit for any and all medical expenses paid through its group medical plan, as provided by Section 8(j) of the Act

Respondent shall be given a credit of $**any and all paid** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**any and all paid**, pursuant to the stipulation of the parties.

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

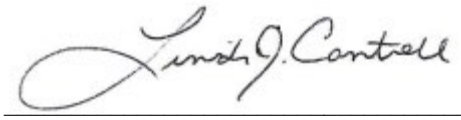
ORDER

Respondent shall pay Petitioner the sum of $**507.36**/week for a period of **150** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **30%** loss of Petitioner's body as a whole.

Respondent shall pay Petitioner compensation that has accrued from **12/08/22** through **1/18/23**, and shall pay the remainder of the award, if any, in weekly payments.

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

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



Arbitrator Linda J. Cantrell

March 2, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
Nature and Extent Only

SCOTT HOWARD,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-027207
	)	
CITY OF CARMI,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on January 18, 2023. On September 27, 2021, Arbitrator William Gallagher entered a Decision in the above-captioned case pursuant to Section 19(b) of the Act which was admitted into evidence as Arbitrator's Exhibit 3 and incorporated herein by reference. Arbitrator Gallagher found Petitioner's condition of ill-being was causally connected to the work accident of 7/22/20 and awarded medical bills, temporary total disability benefits, and prospective medical care.

Respondent stipulates to liability for the following medical expenses:

CT Partners of Chesterfield	$ 4,653.63
MRI Partners of Chesterfield	$ 6,511.00
Orthopedic Ambulatory Surgery Center	$ 4,896.44
Orthopedic Center of St. Louis	$128,122.85
St. Louis Spine & Orthopedic Surgery Center	$ 37,460.62
United Physicians Group	$ 3,013.00

Respondent further stipulates to reimbursement of Petitioner's out-of-pocket expenses for prescription medications in the amount of $116.93. The parties stipulate that Respondent shall receive credit for any and all medical expenses paid through its group medical plan, as provided under Section 8(j) of the Act, and a credit for any and all temporary total disability benefits paid. The sole issue in dispute is the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 38 years old, single, with no dependent children at the time of accident. Petitioner testified he underwent two lumbar surgeries by Dr. Gornet following the Section 19(b)

hearing. He testified that Dr. Gornet told him he would have nerve pain in his leg due to the extent of the first surgery. Petitioner began physical therapy in June 2022.

Petitioner testified that at the time of his accident he was a lineman/tree trimmer. He completed the first of four labs required to become a certified lineman at the time he was injured. He earned $43,971.20 during the year preceding his injury. Petitioner testified that Dr. Gornet released him to return to work without restrictions, but Respondent fired him for absenteeism. Respondent told him his position was filled and they did not offer him a position. Petitioner testified that Respondent did not offer him a light duty position while he was off work receiving medical treatment. Petitioner obtained a Class B CDL and became a full-time bus driver for Carmi School District on 1/18/23. He anticipates his earnings will be between $20,000 to $25,000 a year. Petitioner testified he chose to work for the school district in order to continue contributing to the two pensions he had with the City of Carmi for 13 years.

Petitioner testified he just recently returned to the gym. He wakes several times a night due to back pain. His bus driving duties are typically limited to two hours, but when he drives a 3 to 4-hour route he has increased back pain. Petitioner testified he has gained weight due to inactivity from his injury. His back is stiff, and he performs home exercises to gain flexibility. Petitioner does not take prescription medication for his symptoms or use assistive devices.

MEDICAL HISTORY

Following the Section 19(b) hearing on 8/17/21, Petitioner returned to Dr. Gornet who continued to recommend surgery. Dr. Gornet performed a two-step surgery on 12/8/21 and 12/10/21. The 12/8/21 procedure involved an anterior decompression and fusion at L4-5 with the insertion of a cage and allograft bone. Dr. Gornet described the procedure as difficult due to unusual anatomy. His post-operative diagnosis was isthmic spondylolisthesis at L4-5 with discogenic low back pain. On 12/10/21, Dr. Gornet performed a posterior laminotomy at L4-5 on the right and posterior fusion with hardware fixation on both sides at L4-5. His post-operative diagnosis was again isthmic spondylolisthesis at L4-5 with discogenic low back pain.

Petitioner followed up post-operatively with Dr. Gornet's office and underwent physical therapy through September 2022. On 8/1/22, Dr. Gornet's assistant noted severe stenosis bilaterally at L4-5 that was not symptomatic. Petitioner was ordered to continue physical therapy for four weeks and return to work without restrictions effective 9/6/22.

On 12/8/22, Petitioner reported to Dr. Gornet that his activity level had decreased, and he gained 40 pounds since his injury. Petitioner reported he just recently returned to a gym where he has begun to lift weights. Petitioner complained of stiffness in his back and difficulty sleeping, but he was much improved overall. Petitioner stated he was reliant on and consistently performed stretching exercises to maintain the benefits of his surgery and therapy. Dr. Gornet noted Petitioner had an excellent result and he was motivated to return to full duty work. Dr. Gornet released Petitioner at MMI without restrictions.

CONCLUSIONS OF LAW

Issue (L): What is the nature and extent of the injury?

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

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

(ii) **Occupation**: Petitioner was released to return to full duty work without restrictions on 9/6/22. Petitioner testified unrebutted that Respondent terminated his employment due to absenteeism from his work-related injury. Petitioner was in the process of becoming a certified lineman at the time of his accident. Petitioner obtained a Class B CDL and became a full-time bus driver for Carmi School District on 1/18/23. He anticipates his earnings will be between $20,000 to $25,000 a year, resulting in a loss of earnings between approximately $19,000 to $24,000 per year. Petitioner testified he chose to work for the school district in order to continue contributing to his pensions with the City of Carmi, which he had done for 13 years prior to the accident. Petitioner testified he is able to perform his full job duties as a bus driver but has increased back pain when driving routes that last longer than two hours. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 40 years of age at the time of arbitration. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: Respondent terminated Petitioner's employment due to absenteeism as a result of his work-related injuries. Petitioner was in the process of becoming a certified lineman and earned $43,971.20 in the year preceding his accident. Petitioner obtained a Class B CDL and became a full-time bus driver for Carmi School District on 1/18/23. He anticipates his earnings will be between $20,000 to $25,000 a year, resulting in a loss of earnings between approximately $19,000 to $24,000 per year. Petitioner testified he chose to work for the school district in order to continue contributing to his pensions with the City of Carmi, which he had done for 13 years prior to the accident, and it had nothing to do with his physical condition. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of his accident, Petitioner underwent two lumbar spine surgeries. On 12/8/21, Dr. Gornet performed an anterior decompression and fusion at L4-5 with the

insertion of a cage and allograft bone. On 12/10/21, Dr. Gornet performed a posterior laminotomy at L4-5 on the right and posterior fusion with hardware fixation on both sides at L4-5. Petitioner underwent physical therapy from June through September 2022. Repeat diagnostic studies revealed severe stenosis bilaterally at L4-5 that was not symptomatic. He was released to return to work without restrictions effective 9/6/22 and released at MMI without restrictions on 12/8/22. At his final visit with Dr. Gornet, Petitioner reported stiffness in his back for which he routinely performs home exercises to increase flexibility. Petitioner had returned to the gym to lose 40 pounds he gained since his injury. Dr. Gornet noted Petitioner had an excellent result and he was motivated to return to full duty work.

Petitioner testified he wakes several times a night due to back pain. His symptoms increase with sitting for periods longer than two hours. He has stiffness in his back and continues to perform home exercises to gain flexibility. Petitioner does not take prescription medication for his symptoms or use assistive devices. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of Petitioner's body as a whole, under Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 12/8/22 through 1/18/23, and shall pay the remainder of the award, if any, in weekly payments.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

March 2, 2023

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020270
Case Name	INSURANCE COMPLIANCE v. MIDWEST PROPERTIES CONSTRUCTION
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Corrected Commission Decision (originally issued as an Order)
Commission Decision Number	24IWCC0350 [18INC0037]
Number of Pages of Decision	6
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Chris Zarek
Respondent Attorney	

DATE FILED: 7/22/2024

/s/ Deborah Simpson, Commissioner

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)
- ☐ PTD/Fatal denied
- ☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE
INSURANCE COMPLIANCE DEPARTMENT,

Petitioner,

vs. NO. 19 WC 20270
18 INC 37

MIDWEST PROPERTIES CONSTRUCTION,

Respondent.

CORRECTED DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

This matter comes before the Commission on Petitioner's action for penalties for willful failure to comply with the requirement to maintain workers' compensation insurance pursuant to Section 4(d) of the Illinois Workers' Compensation Act (hereinafter, the "Act"). Petitioner, the State of Illinois Insurance Compliance Department, represented by the Office of the Illinois Attorney General, brought its motion before Commissioner Deborah Simpson in Chicago on March 7, 2024. Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance for 1,057 days from January 6, 2011 to November 27, 2013. Proper and timely notice was provided to Respondent. (Px 11). Respondent did not appear in person or through counsel. A record was made.

Findings of Fact

1. Petitioner called Antonio Smith, an investigator with the Illinois Department of Insurance, to testify. Mr. Smith has been an investigator for 27 years. His position requires him to investigate whether business entities comply with the Act. Mr. Smith investigated Respondent's alleged non-compliance for failure to maintain proper workers' compensation insurance in accordance with the Act.

2. In his investigation, Mr. Smith obtained documents from the National Council of Compensation Insurance (hereinafter, "NCCI"). Mr. Smith testified that NCCI acts as an agent for the State of Illinois and concludes whether a company is covered by workers' compensation insurance for a requested time period. The NCCI certification that Mr. Smith requested concerning Respondent's company was admitted as Px 4 and shows that Respondent did not hold a workers' compensation insurance policy from January 6, 2011 to November 27, 2013.

3. Mr. Smith's investigation further revealed that Respondent was not self-insured during the period of alleged non-compliance. Mr. Smith explained that a company is considered self-insured when it does not have a workers' compensation insurance policy, but instead puts up a bond and insures themselves with the State. Px 5 is a certification from the State of Illinois' Office of Self-Insurance Administration dated April 9, 2018. This certification indicates that Respondent was not self-insured from January 6, 2011 to November 27, 2013.

4. Mr. Smith testified that the Act requires employers who fall under the Act, like Respondent, to provide workers' compensation insurance for their employees. The Commission took judicial notice of the arbitration decision in the matter of Byron Gomez v. Midwest Properties Construction, Inc. and the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund, 13 WC 40695. (Px 7). In this decision, which was filed on April 2, 2018, the Arbitrator found that Respondent was operating under and subject to the provisions of the Act as of September 28, 2013. Specifically, the Arbitrator found that Respondent's activities fell within the purview of Section 3 of the Act, because the claimant credibly testified that Respondent's business was engaged in residential construction tasks, including electrical work and using tools to cut wood. The Arbitrator further found that the claimant was an employee of Respondent's business as of September 28, 2013, at which time Respondent failed to hold workers' compensation insurance for said employee. Px 8 shows the check paid in the amount of $136,754.04 by Comptroller Susana A. Mendoza on behalf of the Illinois Injured Workers' Benefit Fund to claimant Byron Gomez related to this matter.

5. Mr. Smith testified that his search of the Illinois Department of Employment Insurance database also confirmed that Petitioner had one employee during the period of alleged non-compliance.

6. Through inquiries he made with the Illinois Secretary of State's Office, Mr. Smith was able to identify Alura Ortiz as Respondent's registered agent and obtain Ms. Ortiz's addresses. Px 1 and Px 2 shows the results of corporation/LLC searches on the Secretary of State's website for Midwest Properties Construction, Inc. and Midwest Properties Construction LLC respectively. Px 1 establishes that Midwest Properties Construction, Inc. was incorporated on January 6, 2011 and voluntarily dissolved on November 27, 2013.

7. Using the addresses he obtained through the Secretary of State's Office, Mr. Smith mailed a Notice of Non-Compliance to Ms. Ortiz on February 1, 2018. The Notice of Non-Compliance communicated to Ms. Ortiz that the Commission's records had shown that

Respondent was not in compliance with the requirements of Section 4(a) of the Act from the period of January 6, 2011 to November 27, 2013. (Px 9). It instructed Respondent to submit evidence of compliance or otherwise respond in writing to the Commission within 30 days of its receipt of the notice.

8. Also on February 1, 2018, Mr. Smith mailed Respondent at Ms. Ortiz's address a Notice of Informal Conference scheduled for March 6, 2018 related to its period of alleged non-compliance. (Px 10). Respondent failed to appear at the informal conference on that date.

9. Mr. Smith testified that based on his entire investigation, he determined that Respondent did not have a workers' compensation policy during the period of alleged non-compliance.

Conclusions of Law

Pursuant to Section 3 of the Act, certain employers are automatically subject to the provisions of the Act if they engage in specific business activities. The Respondent in this matter was engaged in residential construction tasks that involved electrical work and using tools to cut wood. As such, the Commission finds that Respondent's business falls within the automatic coverage sub-sections of Section 3(1), (2), and (8). 820 ILCS 305/3(1), (2), (8). In so finding, the Commission takes judicial notice of and relies upon the findings made by the Arbitrator in this regard contained in the decision rendered in 13 WC 40695. (Px 7). Accordingly, the Commission finds that the work Respondent engaged in automatically subjected it to the provisions of the Act.

Section 4 of the Act requires that all employers who fall within the provisions of Section 3 provide workers' compensation insurance for the protection of their employees. 820 ILCS 305/4. The Commission finds that Respondent violated the Act by failing to maintain proper workers' compensation insurance for a period of 1,057 days from January 6, 2011 to November 27, 2013. Both Mr. Smith's testimony and the NCCI certification establish that Petitioner did not hold workers' compensation insurance during this time period, which spans from the date Respondent was incorporated to the date in which it was voluntarily dissolved. The arbitration decision in 13 WC 40695 further establishes that at a point during this time period, specifically on September 28, 2013, Respondent had an employee who sustained a work injury while engaging in hazardous construction tasks covered under Section 3 of the Act yet failed to maintain workers' compensation insurance to cover said employee's injury.

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

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this Section, … the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000. Each day of such failure or refusal shall constitute a separate offense. The Commission may assess the civil penalty personally and individually against the corporate officers and directors of a

> corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal or failure of each such named corporate officer, director, partner, or member to comply with this Section. The liability for the assessed penalty shall be against the named employer first, and if the named employer refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the named corporate officers, directors, partners, or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty." 820 ILCS 305/4(d).

The Commission finds that Respondent knowingly and willfully failed to maintain workers' compensation insurance through the entire period it was operating as a residential construction business, and therefore, the Commission is permitted under Section 4(d) to assess a fine up to $500 per day for each day of the 1,057 days of its non-compliance from January 6, 2011 to November 27, 2013. Within its discretion, the Commission finds that 55% of the maximum penalty permitted under Section 4(d) against Respondent, which equates to $290,675.00, is appropriate in this matter. Additionally, pursuant to Section 9100.85(a)(1) of the Illinois Workers' Compensation Commission Rules, the Commission is entitled to obtain reimbursement from Respondent in the amount of $136,754.04, representing the compensation obligations paid by the Injured Workers' Benefit Fund in 13 WC 40695.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent, Midwest Properties Construction, pay to the Illinois Workers' Compensation Commission the sum of $427,429.04 pursuant to Section 4(d) of the Act and Commission Rule 9100.85(a)(1).

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to Commission Rule 9100.90, once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: 1) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission; 2) payment shall be mailed or presented within 30 days after the final Order of the Commission or the Order of the court on review after final adjudication to:

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

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.

July 22, 2024

DLS/mek
R: 3/7/24
46

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC009938
Case Name	Brian Ferrill v. U S Steel Corporation
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0351
Number of Pages of Decision	20
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	Andrew Keefe

DATE FILED: 7/22/2024

/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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Ferrill,

Petitioner,

vs. No. 22 WC 009938

U.S. Steel Corporation,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees that the opinions of Dr. Dy, Petitioner's treating physician, are more persuasive than those of Respondent's Section 12 expert, Dr. Rotman. However, Dr. Dy expressly opined that whether or not Petitioner has right carpal tunnel syndrome, that condition would not be causally related to his February 21, 2022 accident. Accordingly, the Commission strikes the Arbitrator's prospective medical care award of a possible right carpal tunnel release, and further modifies that award to be only for a right ulnar shortening osteotomy and a right wrist arthroscopy, with possible TFCC debridement versus repair, and all reasonable and necessary attendant care. All other Findings of Fact and Conclusions of Law in the Arbitrator's Decision are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2023 is modified as stated herein, and otherwise affirmed and adopted.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,000.00. 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.

July 22, 2024

MP/mcp
o-07/11/24
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC009938
Case Name	Brian Ferrill v. U S Steel Corporation
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	David Galanti
Respondent Attorney	Andrew Keefe

DATE FILED: 6/14/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/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)

BRIAN FERRILL,
Employee/Petitioner

v.

U.S.STEEL CORPORATION,
Employer/Respondent

Case # **22** WC **9938**

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 **5/25/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/21/22**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,726.24**; the average weekly wage was $**1,398.58**.

On the date of accident, Petitioner was **51** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and **credit for Sickness and Accident benefits, less state and federal tax deductions, for the period 1/13/23 through 5/25/23 in the amount of $10,149.69**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits for 14-4/7 weeks, commencing 1/13/23 through 5/25/23, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services to petitioner's right wrist from 2/21/22 through 5/25/23, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay reasonable and necessary medical services for a follow-up visit with Dr. Dy, and if Dr. Dy's surgical recommendation remains the same after that visit, respondent shall pay all reasonable and necessary medical services for the right ulnar shortening osteotomy, wrist arthroscopy with possible TFCC debridement versus repair, and possible right carpal tunnel release to be performed by Dr. Dy 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.

Maureen D. Pulia

_____ **JUNE 14, 2023**

Signature of Arbitrator

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 51 year old millwright and mobile maintenance worker, sustained an accidental injury to his right wrist that arose out of and in the course of his employment by respondent on 2/21/22. The issues in dispute are causal connection, past medical expenses, temporary total disability benefits, and prospective medical expenses. On the date of injury petitioner had worked for respondent for about 11 years. Petitioner testified that his duties included fixing water lines and pumps, welding, fabrication, pipefitting, building repairs, and working on furnaces.

On 2/21/22 petitioner was running ½ inch PVC pipe to carry bleach to the reservoir to keep the fish contents down. Petitioner was building a PVC line by connecting the PVC to different connectors with glue. Petitioner testified that to connect the PVC pipe to the connector, glue would be placed on the end of the PVC pipe and the PVC pipe would be inserted into the connector. Petitioner testified that after the glue is applied to the pipe you have about 4-5 seconds to flex or manipulate the pipe into the connector. He further testified that after that time period, any additional attempts to flex or manipulate the pipe become more difficult as the glue begins to set. He stated that after about 30-45 seconds following the application of the glue, any flex or manipulation of the pipe would result in increased resistance.

Petitioner testified that while he was running the PVC line he had to connect one piece between two connectors that were not lined up. As a result, when he connected the piece of PVC to the open connector, the pipe had to be turned so that it lined up. This required petitioner to turn the pipe approximately a quarter of an inch. As he was doing this, the glue began to set and petitioner needed to use extreme force in an effort to turn the pipe. As a result, petitioner experienced greater resistance and heard a pop in his right wrist. He had immediate pain. Petitioner testified that when this happened, he told his co-worker Bill Sander that he would need to takeover because he injured his right wrist.

Following the accident petitioner reported the injury to his supervisor Jamie Rezabek. Rezabek was the maintenance supervisor over petitioner since about 2017, and had been working for respondent for 23 years. Rezabek testified that he has never connected PVC pipe while working for respondent, but has laid some PVC pipe at home. He testified that although he has never connected PVC pipe at work, he is familiar with the job and the PVC pipe used by petitioner on 2/21/22.

Rezabek testified that the worker has about 4-5 seconds to flex and manipulate the PVC pipe into another piece while the glue still acts as a lubricant. He agreed that thereafter, the glue starts to set. He testified that partially set glue makes it more difficult to rotate and move the PVC pipe. He also stated that 30-45 seconds after the glue is applied making adjustments could result in some resistance.

Rezabek testified that he was not present when the injury occurred. He stated petitioner reported the injury to him after it occurred, but he did not recall the petitioner stating that any adjustments had to be made. Rezabek described petitioner as an 'honest employee", and testified that nothing petitioner said was inaccurate.

Following the injury, petitioner was seen in the Veeder Clinic at U.S. Steel. Petitioner gave a history of right wrist pain that began suddenly that day as he glued, inserted, and twisted/rotated a PVC pipe. He rated his pain in the ulnar aspect at 10/10 at the time of injury, and 8/10 currently. Following an examination petitioner was assessed with right wrist pain. RICE and use of an ACE bandage was recommended. He was released to work on 2/22/22 without restrictions.

Petitioner was then sent to Gateway Regional Medical Center where x-rays of his right wrist were taken. The impression was no acute fracture of the right wrist; old healed fracture of the right 5th metacarpal shaft and neck with shortening and volar angulation; question of an old healed fracture of the distal radial metaphysis versus artificial appearance; round calcifications between the distal ulna and triquetrum; mild osteoarthritis of the radial aspect of the wrist; and a suggestion of old ligamentous injury about the 1st MCP.

When questioned regarding these x-rays findings petitioner testified that he had never sought any prior treatment for any problems with his right hand/wrist, but did state that his work is heavy and he has had many things happen for which he never sought any treatment.

On 2/22/22 petitioner returned to the Veeder Clinic. He still rated his pain at a 7/10, worse with movement. He stated that he was unable to apply the ACE bandage at home because he lives alone. An examination revealed limited range of motion of the right wrist with decreased grip strength. Mild swelling was noted. There was no contusion or abrasion. An ACE wrap was applied. RICE was again recommended with OTC medications. He was released to return to work with no use of the right upper extremity.

On 2/28/22 and 3/8/22 petitioner followed up at Veeder Clinic. His condition remained unchanged. Petitioner reported that he was wearing the ACE wrap and icing, but still had pain at a 7/10. Petitioner testified that he was not taking Tylenol or NSAID because he does not like taking medication. Petitioner's examination remained unchanged. It was noted that petitioner's right wrist sprain remained symptomatic. His was instructed to continue the same treatment options and same restrictions. On 3/8/22 petitioner an MRI of the right wrist was ordered.

On 3/11/22 petitioner underwent an MRI of the right wrist. The impression was mild bone marrow edema of the proximal medial aspect of the lunate that may be due to a bone bruise from recent trauma with a partial tear of the TFCC; mild tenosynovitis of the extensor carpi radialis brevis, extensor carpi radialis longus, extensor digitorum, and abductor pollicis longus tendons; loculated 19 mm ganglion cyst volar to the right distal radius possibly extending from the radioscaphoid or radiolunate articulation; calcific intra-articular loose bodies medially; and, small effusions about the right wrist.

On 3/14/22 petitioner returned to Veeder Clinic. Petitioner rated his pain at 6/10. The results of the MRI were reviewed and the possibility of a referral to an orthopedic surgeon was discussed. Petitioner indicated that he wanted to choose his own surgeon. Petitioner's current restrictions and treatment plan were continued.

Petitioner testified that he took the MRI to Dr. Penn. Dr. Penn examined petitioner and told him he needed surgery that he could not perform. As a result, Dr. Penn referred petitioner to Dr. Christopher Dy.

On 4/4/22 petitioner presented to Dr. Christopher Dy, an orthopedic surgeon at Washington University in St. Louis, for evaluation of his right wrist pain. Petitioner reported that while twisting pieces of PVC pipe on 2/21/22 he suddenly felt a pop. He complained of substantial pain along the ulnar side of his wrist with any sort of rotation. He described the pain as sharp and aching. He denied any prior right wrist issue. He was of the opinion that the edema along the base of the lunate suggested impaction. He also noted signal irregularity around the TFCC, as well as the volar ganglion cyst. An examination revealed limited supination, wrist flexion, wrist extension and pain during end range of all these motions. Following an examination and review of the MRI, Dr. Dy's impression was right wrist injury, TFCC. Dr. Dy performed a steroid injection. He also ordered a course of occupational therapy. He restricted petitioner from lifting, gripping, or pulling at work. Dr. Dy also ordered updated x-rays of the wrist that were performed that day. The impression was no acute osseous abnormality involving the right wrist. Dr. Dy allowed petitioner to return to work with no lifting of the right arm.

On 4/4/22 petitioner was also seen at Veeder Clinic and reported his visit with Dr. Dy. He presented with a brace in place and restrictions from Dr. Dy of no lifting with the right arm at work. Petitioner was again instructed to continue OTC NSAIDS and he again indicated that he preferred not to take medication. Petitioner was told to follow-up after next visit with Dr. Dy.

On 4/12/22 petitioner called Dr. Dy and reported that he felt his right wrist pop while taking a shower. He complained of severe pain. Petitioner testified that he felt the pop when he was washing his hair. Dr. Dy recommended petitioner wear a wrist brace. He also prescribed Meloxicam.

On 4/12/12 Sarah Harig, occupational therapist at Athletico, drafted an email to Dr. Dy. It noted that petitioner was able to perform all exercises for his initial evaluation, but when he came in that day he reported that he heard another pop at work while showering. He reported a lot of pain, and that it hurt to move it at all, put on his socks, etc. She noted that she gave petitioner some heat, and attempted soft tissue massage, which was painful. Harig told Dr. Dy that she sent petitioner home.

On 5/2/22 petitioner followed-up with Dr. Dy. Petitioner reported that the steroid injection did not help overall. He stated that his right wrist continued to hurt with twisting and holding any type of weight. He reported some numbness and tingling. Following an examination, Dr. Dy discussed operative and non-operative treatments for his ulnocarpal impaction and TFCC tear. Dr. Dy noted that petitioner had failed nonoperative treatment. Dr. Dy discontinued therapy. Petitioner reported some numbness and tingling in his right hand, and stated that if he was going to have surgery for his right wrist he would like to have his presumed carpal tunnel syndrome addressed at the same time. Dr. Dy recommended a right ulnar shortening osteotomy, wrist arthroscopy with possible TFCC debridement versus repair, and carpal tunnel release for his presumed carpal tunnel syndrome. An EMG/NCV was ordered to confirm diagnosis of carpal tunnel syndrome and determine severity. Dr. Dy released petitioner to work with no use of the right hand.

On 5/3/22 petitioner returned to Veeder Clinic and informed them that Dr. Dy was recommending surgery pending work comp authorization. (The first page of notes from this visit was not included in the exhibit)

On 6/6/22 petitioner underwent a Section 12 examination performed by Dr. Mitchel Rotman, an orthopedic surgeon, at The Orthopedic Center of St. Louis, for his right hand and wrist. Petitioner complained of ulnar sided wrist pain related to twisting a ½ inch brand new PVC pipe on 2/21/22. Petitioner reported that he needed to get another 90 degrees of turn on the pipe that he was holding with the right hand and basically flexed his wrist to make the twist. He did not supinate or pronate his forearm, and did not ulnar deviate his right wrist. He reported that he felt a pop followed by immediate pain. He reported no relief since the injury. He even reported a significant amount of pain just showering the other day. Petitioner complained of stiffness, as well as night pain and weakness. Following a record review that included a review of the MRI of the right wrist, Dr. Rotman's nurse performed a physical examination. Tests were negative for cubital and carpal tunnel. Petitioner testified that Dr. Rotman did not perform an examination of his right hand. Dr. Rotman did not agree with the findings of the radiologist on the MRI. He noted that petitioner had wrist discomfort, and loss of flexion, which attributed to wearing the brace. Dr. Rotman heard a few clicks, but did not specifically feel that

they were coming from the TFCC. He noted full pronation and supination, and no signs of ulnar impaction. He identified more pain with radial deviation than ulnar deviation. He noted that petitioner's pain was generally around the fovea and TFCC. He noted petitioner was able to make a fist without difficulty, but his right grip strength was decreased by 40 degrees (90 vs 130), and his right pinch strength was decreased by 4 degrees (19 vs 23). Dr. Rotman did not appreciate any volar radial ganglions on examination, nor did he note any tenderness over the volar radial wrist.

Dr. Rotman was of the opinion that petitioner's symptoms were quite magnified if he truly had TFCC lesion on the MRI, which was not too impressive. He was of the opinion that having a lot of wrist pain taking a shower was not typical of one with a TFCC lesions. He was of the opinion that people with TFCC lesions have trouble with pushups and or getting up from an extended wrist. He also did not believe the mechanism of injury would cause a TFCC lesion, or aggravate one. He was of the opinion that the mechanism that would aggravate a TFCC tear would include a significate torquing maneuver, but in a supination or pronation type direction, not in just a flexion direction. Dr. Rotman was of the opinion that it did not take any more force to twist this pipe than any other pipe he may have been using. He was of the opinion that the mechanism of injury was not one that could have caused or aggravated a lesion in his TFCC, if he has it. He saw no reason for any work restrictions. He believed petitioner would have only benefited from the use of an occasional wrist brace, based on the minor irregularities in the area of the ulnar side of his right wrist that he saw on the MRI. He also saw no reason for therapy. Based on his review of the MRI he was not convinced that there was a significant lesion in the TFCC.

Dr. Rotman recommended petitioner return to full duty work with or without the use of a brace. He recommended an MR arthrogram of the right wrist. He was not in favor of surgical intervention at that time.

On 7/7/22 petitioner underwent a repeat MR arthrogram of the right wrist at the request of Dr. Rotman. The impression was complex tear of the mid and central fibers of the triangular fibrocartilage; multiple intra-articular loose bodies within the pisotriquetral recess, the largest being 5 mm; no abnormal bone marrow signal throughout the wrist; and, no acute tendon injury about the wrist.

On 7/25/22 Dr. Rotman drafted an addendum report after reviewing the results of the MR arthrogram. Dr. Rotman noted that he could not see one flexion maneuver of the wrist causing or aggravating someone with a TFCC tear. Dr. Rotman noted that the MR arthrogram showed a complex lesion of the central portion of the TFCC consistent with a degenerative TFCC lesion, among other findings consistent with the prior MRI.

Dr. Rotman was of the opinion that petitioner had chronic issues with his right wrist. He was of the opinion that petitioner had a lot of loose bodies right in the pisotriquetral recess which is tight in the area of the fovea where he was tender. He noted no evidence of ulnar impaction. He saw no edema in the bones, and was of the opinion that there was no evidence of a lunotriquetral tear. He was of the opinion that the TFCC lesion was an age-related lesion with loose bodies which may have come from his old fracture in the past. He was further of the opinion that all the findings on the MRI were preexisting, chronic and degenerative, and have nothing to do with one bending incident of the wrist. He was of the opinion that TFCC lesions like those seen on the MR arthrogram are unrepairable. He did not see any reason to shorten the ulna because there was no evidence of ulnar impaction. He was of the opinion that petitioner could have an arthroscopic debridement of his TFCC tear, but does not generally do anything other than make the hole bigger. He was also of the opinion that petitioner could have removal of the loose bodies if they are a source of pain, which he did not believe they were. Dr. Rotman could not relate any further treatment such as a TFCC debridement with an arthroscopic removal of loose bodies to the injury on 2/21/22.

On 9/19/22 Dr. Dy drafted a note in his records that indicated that he believed petitioner's pain in his right wrist is related to the incident that occurred at work on 2/21/22. He further noted that the petitioner has a right wrist TFCC tear, and he believed that the best course of treatment would include the surgery that he recommended during his last visit with him. On 9/23/22 Dr. Dy told petitioner that he could not see him until his workers' compensation case had been resolved.

On 2/22/23 the evidence deposition of Christopher Dy, an orthopedic surgeon, was taken on behalf of the petitioner. Dr. Dy's practice is 90% related to treatment of the upper extremities, with 50% of that related to the hand surgery. Dr. Dy was of the opinion that he had not seen petitioner since 5/2/22 and if his presentation to him the next time he saw him was the substantially similar he would still be recommending the surgery. Dr. Dy testified that if petitioner's symptoms were substantially the same as at the time of his last appointment he would not need to see him in the office before surgery, but typically he would see patients before surgery.

Dr. Dy opined that the cause or aggravation of petitioner's wrist condition (TFCC tear) was that it was aggravated by the injury that occurred from his work-related incident. Dr. Dy was of the opinion that the ulnar impaction could be just the way petitioner's anatomy is, and as a result he may be predisposed to having more symptoms from a TFCC issue. Dr. Dy testified that he would only require an EMG/NCV before surgery if required by the workers' compensation adjuster, because he does not always obtain studies before performing a carpal tunnel release. Dr. Dy could not recall if petitioner was under

any current restrictions from it at the time of his deposition. Dr. Dy was of the opinion that petitioner was not at maximum medical improvement on 5/2/22.

Dr. Dy reviewed Dr. Rotman's IME and the MR-arthrogram. He stated that Dr. Rotman's IME and the MR-arthrogram did not change his opinions in any way. He was of the opinion that Dr. Rotman had a different interpretation of the MRI, as well as the petitioner's examinations and complaints.

On cross examination Dr. Dy testified that he did not review any injury reports, or medical plant dispensary reports from respondent for petitioner's injury on 2/21/22. He also testified that he did not review any photographs of the PVC pipes petitioner was manipulating. He had no idea what the size of the pipe or the amount of pressure needed to manipulate them was. Dr. Dy was of the opinion that in general it would be very hard to manipulate something as heavy and big as a PVC pipe without any element of supination or pronation of the forearm and wrist. Dr. Dy could not recall if petitioner demonstrated how the injury occurred when he examined him. Dr. Dy noted that as of 4/4/22 petitioner denied any numbness or tingling in his hands or fingers, and he had no suspicion of a carpal tunnel condition. Dr. Dy testified that he did not impose any restrictions as to what he was doing at home. He testified that the restrictions he imposed were with respect to work. Dr. Dy reported that he was confident that petitioner's pain was coming from the TFCC. Dr. Dy opined that the cause of petitioner's TFCC injury to his hand or wrist was the injury on 2/21/22. He further opined that the carpal tunnel syndrome and ulnar impaction were not caused by the injury on 2/21/22. Dr. Dy noted that he did not identify any symptom magnification with petitioner. Dr. Dy agreed that TFCC tears can be of a degenerative nature, and it is possible that that is what happened in this case. Dr. Dy had no opinion as to whether or not petitioner was capable of working since he had not seen him since 5/2/22.

On redirect examination Dr. Dy was of the opinion that it is possible that a tear appears to be degenerative on MRI can occur secondary to trauma or insult, and the ultimate assessment of that tear would be arthroscopic.

On 1/13/23 petitioner testified that he reported to Veeder and was told that his light duty was being terminated and he would have to return to full duty work. Petitioner did not return to full duty work given that he did not have a full duty release from Dr. Dy, and he could not perform all the duties of a millwright.

On 3/16/23 the evidence deposition of Dr. Rotman, an orthopedic hand surgeon, was taken on behalf of the respondent. Dr. Rotman has a subspecialty in treatment of the upper extremity. He testified that 50% of his work involves the hand. Dr. Rotman reviewed RX2, which was a picture of some PVC

pipes petitioner was supposedly working with. Dr. Rotman testified that petitioner was a recently diagnostic diabetic taking medication, and he also had high blood pressure for which he was taking medication. Dr. Rotman opined that petitioner did not have ulnar impaction because he did not see it on the MRI; had chronic issues with his wrist from old injuries; and, wasn't sure if there was a lesion of the TFCC. Dr. Rotman opined that petitioner's pain complaints were not consistent with a TFCC lesion, and his mechanism of injury was not the type that would cause or aggravate a TFCC tear. Dr. Rotman opined that petitioner's treatment was not due to an injury on 2/21/22, but rather to chronic issues. Dr. Rotman opined that petitioner's complex TFCC is unrepairable, is degenerative, and associated with the loose bodies in the area next to the ligament right next to the fovea. He then indicated that an arthroscope could be performed to clean up the edges, but nothing would be done to the TFCC. Given Dr. Rotman's opinion that petitioner did not have an injury, he opined that even this procedure would not be causally related to the injury on 2/21/22. Dr. Rotman opined that petitioner did not sustain a work injury on 2/21/22; that there is no acute injury; and, that petitioner would not require any work restrictions.

On cross examination Dr. Rotman testified that 10% of his time is spent on Section 12 examinations, and he has had a relationship with respondent doing Section 12 examinations for about 10 years and does about one Section 12 examination a month. Irrespective of causation, Dr. Rotman testified that if he was going to go into petitioner's right wrist he would clean up the edges and take out some of the inflammation. He further testified that if he could not get the loose bodies out arthroscopically, he would open the petitioner up to get then. He testified that this is not a repair, but rather a clean up of the area. Dr. Rotman testified that if petitioner was his patient, these are the possible procedures he would perform. Dr. Rotman was of the opinion that the loose bodies were causing petitioner pain. Dr. Rotman testified that he never so many loose bodies, or nest of eggs, that he saw on petitioner's MR arthrogram. He was of the opinion that since they were round and calcified that they were there for a while. Dr. Rotman was of the opinion that petitioner was experiencing pain mainly in the fovea. Which is on the ulnar side.

Respondent offered into evidence a photograph of PVC pipe. (RX2) Petitioner testified that it did not accurately represent any of the work he was doing on 2/21/22.

Respondent has made medical payments consistent with RX4. Petitioner did not object to the admission of this evidence. Therefore, respondent is entitled to credit for these payments if petitioner is claiming any of these payments as unpaid bills in PX4.

Petitioner testified that at rest his pain is a 3/10, and with activity of the wrist is increased. Petitioner testified that his wrist pops about 1-2 times a week with activity. After the pop, the pain is

severe, and then goes back to baseline. Petitioner testified that he always has pain and stiffness in his right wrist, and cannot turn it. He also testified that his grip strength is reduced, and he does not have full range of motion. He reported pain with flexion, pronation and supination. Petitioner wears his brace all the time, unless sleeping. He testified that he cannot do pushups. Petitioner denied any problems like this before 2/21/22. He testified that he uses his right hand as little as possible.

Petitioner testified that he wants to undergo the surgery recommended by Dr. Dy. He testified that he wants his life back and wants to work. Petitioner reported that he no longer golfs, rides his bike, or does wood working. Petitioner testified that he used to buy golf carts, refurbish them with his friend, and then sell them. He stated that since 2/21/22 he has only worked on 1 golf cart, and has not bought or sold any golf carts since 5/22.

Petitioner testified that he demonstrated to Dr. Rotman how he manipulated the pipe. He was not sure if his hand was on top or the bottom when he hurt his wrist. He thought it was on top, but was not sure because he was not thinking about it until he had the pain. Petitioner testified that with the glue setting much force was needed to turn the pipe to line up with the other pipe up.

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

Petitioner consistently testified that he injured his right wrist when he was attempting to turn and adjust a piece of PVC pipe into another PVC pipe connector when the glue beginning to set. Rezabeck testified that 30-45 seconds after the glue is applied, making adjustments to PVC pipes can result in some resistance. Petitioner credibly testified that it was about 30-40 seconds after the glue was applied, while he was trying to turn the pipe an additional ¼ inch, that he experienced resistance in his right wrist and felt an immediate pop, followed by immediate pain. Thereafter, petitioner reported the injury, and sought immediate treatment. Although Rezabek is familiar with connecting PVC pipe, he admitted that in the 23 years he worked for respondent he had never worked a job for respondent where he was required to connect any PVC pipe. The arbitrator finds it significant that Rezabeck described petitioner as an "honest employee", and testified that nothing petitioner said was inaccurate.

Petitioner gave a consistent history of the injury to all healthcare providers, and was very honest when he stated that he could not recall the exact position his right wrist was in because he was not thinking about it until after he felt the pain in his wrist. Petitioner admitted that he was not sure if his hand was on the top of the pipe, or the bottom of the pipe, when he injured it.

The arbitrator also finds it significant that although petitioner had preexisting issues with his right wrist, for which he could not specifically recall a specific incident where he injured it and had to seek

treatment, he was able to perform his full duty work without incident prior to the injury on 2/21/22. Petitioner stated that his work is heavy and he has had many things happen to his wrist in the past for which he never sought any treatment. The arbitrator also finds it significant that the picture respondent offered into evidence of the PVP pipes petitioner was supposedly working on when he was injured on 2/21/22, do not accurately represent the work petitioner was doing when he was injured on 2/21/22.

Specifically, as to the issue of causation, both Dr. Dy and Dr. Rotman offered opinions on whether or not petitioner's current condition of ill-being as it relates to his right wrist is causally related to the injury he sustained on 2/21/22.

Dr. Dy is petitioner's treater. Petitioner first saw him on 4/4/22. Dr. Dy examined petitioner and reviewed the MRI of the right wrist and noted that the edema along the base of the lunate suggested impaction, and some signal irregularity around the TFCC as well as the volar ganglion cyst. He assessed a right wrist injury, and provided petitioner with conservative treatment that provided no lasting relief. On 5/5/22 he recommended surgery to petitioner's right wrist. Dr. Dy opined that the injury on 2/21/22 caused or aggravated the petitioner's wrist condition. He further opined that the ulnar impaction could just be the petitioner's anatomy, and as a result he could be predisposed to having more symptoms from a TFCC tear. Dr. Dy noted no symptom magnification with petitioner.

Dr. Rotman was respondent's Section 12 examiner. Dr. Rotman interpreted the MRI of the right wrist different than Dr. Dy and the radiologist, and was of the opinion that petitioner did not have ulnar impaction, and was not even sure if there was a lesion of the TFCC. But even if there was, petitioner's complaints were not consistent with a TFCC lesion, and his mechanism of injury would not cause or aggravate a TFCC. Dr. Rotman believed petitioner's condition in his right wrist was chronic and not due to the injury on 2/21/22. However, Dr. Rotman does not address how petitioner was able to work full duty without incident following up to the injury on 2/21/22, and unable to work full duty thereafter. Dr. Rotman also did not address whether or not the injury could have exasperated or aggravated his preexisting chronic condition in petitioner's right wrist.

Dr. Rotman was of the opinion that petitioner had many loose bodies in his wrist and since they were round and calcified they had to have been there for a while. Dr. Rotman testified that he did note some clicks on examination, but did not specifically feel that they were coming from the TFCC. He also noted decreased grip and pinch strength in petitioner's right wrist. Dr. Rotman believed petitioner's symptoms were quite magnified if he truly had a TFCC lesion. The arbitrator finds it significant that petitioner stated that it was Dr. Rotman's nurse that examined him, and not Dr. Rotman.

Dr. Rotman did not think having a lot a pain when showering was typical for someone with a TFCC lesion. The arbitrator finds this opinion not based on the credible record given that petitioner only testified to one instance where her felt a pop in his right wrist when showering, not that he was having a lot of pain when he showers.

Dr. Rotman also noted that petitioner had no bone edema. However, the arbitrator finds it significant that the original MRI of the right wrist showed mild bone marrow edema of the proximal medial aspect of the lunate that may be due to a bone bruise from recent trauma with a partial tear of the TFCC.

Based on his (or his nurse's) examination of petitioner, and review of records and imaging, Dr. Rotman was of the opinion that the petitioner's mechanism of injury was not one that could have caused or aggravated a lesion on petitioner's TFCC, if he has on. He was also of the opinion that it would not take any more force to twist the pipe petitioner was twisting when he was injured, than any other pipe. The arbitrator finds this understanding of the mechanism of injury inconsistent with the credible history that petitioner provided all his healthcare providers. The arbitrator finds the credible record clearly shows that petitioner was not merely putting two pieces of pipe together when he injured his right wrist, but rather he was attempting to rotate a pipe ¼ of an inch after the glue had already begun to harden, thus providing the petitioner with much greater resistance than simply putting two pipes together.

When considering the causal connection opinions of both Dr. Dy and Dr. Rotman, the arbitrator finds the opinions of Dr. Dy more persuasive than those of Dr. Rotman. The arbitrator notes that Dr. Rotman is unable to opine one way or the other whether or not petitioner has a TFCC tear, where Dr. Dy is not. Additionally, the arbitrator finds it significant that Dr. Rotman was of the opinion that there was no bone edema, when in fact mild bone marrow edema was noted on the MRI of the right wrist taken 3/11/22. The arbitrator also finds it significant that Dr. Rotman's opinion that it would not take any more force to twist the pipe petitioner was twisting when he was injured than any other pipe, shows that Dr. Rotman clearly did not understand the mechanism of injury on 2/21/22. The arbitrator notes that the credible testimony of petitioner clearly supports a finding that petitioner was not simply turning any pipe, but was attempting to manipulate one pipe into another after the glue had begun set, thus resulting in increased resistance on his right wrist.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being as it relates to his right wrist is causally related to the injury he sustained on 2/21/22. The arbitrator finds it significant that although petitioner was able to work his heavy duty job without incident before 2/21/22 despite his

preexisting conditions in his right wrist, it was not until after the injury on 2/21/22 that petitioner has been unable to work his fully duty job. The arbitrator also finds Dr. Rotman's opinions that petitioner's symptoms were quite magnified inconsistent with the findings of all the other medical providers.

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 right wrist is causally related to the injury he sustained on 2/21/22, the arbitrator finds the medical services that were provided to petitioner for his right wrist through 5/25/23 were reasonable and necessary to cure or relieve petitioner from the effects of his injury to his right wrist on 2/21/22.

Respondent shall pay reasonable and necessary medical services to petitioner's right wrist from 2/21/22 through 5/25/23, as provided in Sections 8(a) and 8.2 of the Act.

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

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Petitioner claims he is entitled to prospective medical care in the form of a right ulnar shortening osteotomy, wrist arthroscopy with possible TFCC debridement versus repair, and possible right carpal tunnel release.

With respect to the right ulnar shortening osteotomy, wrist arthroscopy with possible TFCC debridement versus repair surgery, and possible right carpal tunnel release recommended by Dr. Dy, the arbitrator finds this treatment is reasonable and necessary to cure or relieve petitioner from the effects of his injury on 2/21/22. The arbitrator finds it significant that Dr. Dy was confident that petitioner's pain was coming from his TFCC, and both the MRI and MR arthrogram of the right wrist indicate problems with the TFCC. In the alternative, although Dr. Rotman could not be sure if there were problems in the TFCC area, he did offer an alternative procedure whereby an arthroscope could be performed to clean up the edges, with nothing being done to the TFCC, since he believed it was unrepairable. However, he did not believe this surgery would be related to the injury on 2/21/22, only petitioner's preexisting chronic right wrist condition, which the arbitrator has already determined was at least aggravated by the injury on 2/21/22, and therefore causally related to the injury on 2/21/22.

Since Dr. Dy has not seen petitioner since 5/2/22, and Dr. Dy indicated that he typically would examine patients before surgery, the arbitrator finds the petitioner, prior to surgery with Dr. Dy, would

need to present for a follow-up visit. If Dr. Dy's surgical recommendation remains essentially the same after that visit, the arbitrator finds the surgery recommended by Dr. Dy is reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 2/21/22.

Respondent shall pay reasonable and necessary medical services for a follow-up visit with Dr. Dy, and if Dr. Dy's surgical recommendation remains essentially the same after that visit, respondent shall pay all reasonable and necessary medical services for the right ulnar shortening osteotomy, and wrist arthroscopy with possible TFCC debridement versus repair, and possible right carpal tunnel release, to be performed by Dr. Dy, as provided in Sections 8(a) and 8.2 of the Act.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims he was temporarily total disabled from 1/13/23 through 5/25/23, the period respondent refused to allow him to continue working within the light duty restrictions placed on him by Dr. Dy. The arbitrator notes that respondent's decision to terminate petitioner's light duty status was based solely on Dr. Rotman's opinion that petitioner was capable of working full duty without restrictions.

Having found Dr. Dy's opinions and findings more persuasive than those of Dr. Rotman, the arbitrator adopts the opinions of Dr. Dy and finds the petitioner is entitled to temporary total disability benefits from 1/13/23 through 5/25/23, a period of 14-4/7 weeks. The arbitrator further finds the respondent is entitled to a stipulated credit of $10,149.69 in Sickness and Accident payments made during the period 1/13/23 through 5/25/23.

Respondent shall pay Petitioner temporary total disability benefits for 14-4/7 weeks, commencing 1/13/23 through 5/25/23, as provided in Section 8(b) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC030656
Case Name	Shane Walters v. State of Illinois - Graham Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0352
Number of Pages of Decision	13
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 7/22/2024

/s/Christopher Harris, Commissioner

Signature

24IWCC0352

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)
SPRINGFIELD		☐ PTD/Fatal denied
	☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHANE WALTERS,

Petitioner,

vs. NO: 21 WC 30656

STATE OF ILLINOIS,
GRAHAM CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, and permanent partial disability ("PPD"), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the PPD award and finds that the Petitioner is entitled to 12.5% loss of use of each hand and each arm. The Petitioner testified that he still experiences symptoms as a result of his injuries. Specifically, he testified to sensitivity in his elbows, that his hands fall asleep, that his strength is still weak, and that he notices symptoms in his thumb and index fingers daily. Petitioner reported to Dr. Bradley on January 11, 2023 that his pre-operative symptoms of numbness, tingling and burning have mostly resolved. Dr. Bradley noted that Petitioner's strength and range of motion and/or function may improve over time without further intervention. Based upon its analysis of the foregoing facts under Section 8.1b of the Act, the Commission finds that the evidence of disability contained within the record supports an award of 12.5% loss of use of each hand and each arm. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2023 is hereby modified as stated above and otherwise affirmed and

adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $937.11 per week for a period of 110.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 12.5% loss of use of the right hand, 12.5% loss of use of the left hand, 12.5% loss of use of the right arm, and 12.5% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $116,845.20 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

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, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

July 22, 2024

O: 7/11/24
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	21WC030656
Case Name	Shane Walters v. State of IL/Graham C. C.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 11/13/2023

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 7, 2023 5.26%

/s/ William Gallagher, Arbitrator
Signature

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

November 13, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Shane Walters
Employee/Petitioner

v.

State of IL/Graham C.C.
Employer/Respondent

Case # 21 WC 30656

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 Springfield, on September 26, 2023. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 1, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $127,529.18; the average weekly wage was $2,452.48.

On the date of accident, Petitioner was 49 years of age, single with 2 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, for medical services provided to Petitioner in respect to his right hand/arm and left hand/arm conditions, but not in respect to his left shoulder condition, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $937.11 per week for 62.02 weeks because the injury sustained caused the eight percent (8%) loss of use of the right hand; eight percent (8%) loss of use of the right arm; six percent (6%) loss of use of the left hand; and six percent (6%) loss of use of the left arm, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher

NOVEMBER 13, 2023

William R. Gallagher, Arbitrator
ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent. The Application alleged a date of accident (manifestation) of November 1, 2021, and that Petitioner sustained an injury to "Bi-lateral wrist/bi-lateral elbows/bi-lateral arms/bi-lateral hands" as a result of "Repetitive duties" (Arbitrator's Exhibit 2). Respondent denied liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent on March 1, 1991, as a Correctional Officer. Petitioner worked for Respondent for approximately 31 years and progressed up the ranks. When he retired in 2022, Petitioner held the rank of Major.

Petitioner began working as a Correctional Officer in March, 1991, at the Stateville Correctional Center which Petitioner said was a maximum security facility. Petitioner worked at Stateville Correctional Center for approximately seven years as a gallery Officer. Petitioner testified he used his hands/arms on a daily basis and unlocked doors with Folger Adams keys, cuffed/uncuffed inmates, operated cranks, moved property boxes and engaged in bar rapping. After approximately five to six years, Petitioner was promoted to Correctional Sergeant.

Petitioner testified the doors at Stateville Correctional Center were very heavy and difficult to open because there were problems with the locks. Petitioner said there were occasions in which he would have to lift the door up and shake it while attempting to key it at the same time. While bar rapping, Petitioner said he experienced some feeling of numbness as a result of the vibration.

Petitioner subsequently transferred to the Lawrenceville Correctional Center which he described as a medium/maximum security facility. Petitioner worked at Lawrenceville Correctional Center for approximately 10/11 years. During his time there, Petitioner worked primarily as a segregation Officer. Projector had to lock/unlock chuckholes and cell doors 600 to 700 times per day. Petitioner also had to cuff/uncuff inmates; however, Petitioner did not have to do any bar rapping. Petitioner was also part of the tactical team and participated in training staff members to perform cell extractions. Even though Petitioner was a Sergeant, he was required to fill in for Correctional Officers because of staff shortages.

Petitioner then transferred to the Vandalia Correctional Center, where he was eventually promoted to the rank of Major. Petitioner testified his job duties required him to use his hands/arms to perform inspections, open doors, search property boxes, do data entry and write reports. Petitioner testified the locks/doors at Vandalia Correctional Center were "awful" and required additional force to open them because of the age of the facility. He said the locksmith was not able to keep up with all of the required maintenance. Petitioner worked at Vandalia Correctional Center for 19 months, at which time he was transferred to the Graham Correctional Center.

At Graham Correctional Center, Petitioner briefly worked as a Shift Commander. He was then transferred to Southwestern Correctional Center where he worked as an Assistant Warden. Petitioner only worked at Southwestern Correctional Center for a limited period of time, and he subsequently returned to Graham Correctional Center, where he continued to hold the rank of Major.

Petitioner testified he continued to use his hands/arms to lock/unlock cells, open gatehouse doors, perform inspections, and complete reports. Petitioner said a lot of the locks would stick and the facility only had one locksmith. Petitioner testified the lock to his office door was extremely difficult to operate and required a significant amount of force.

Petitioner testified that Respondent's examiner (referring to Dr. Stewart, Respondent's Section 12 examiner) had toured the facility. In regard to his testing of cell locks, Petitioner said that the locksmith was directed to fix the locks and grease everything so the locks would open easy when he conducted the inspection.

Major Trevor Wright, Respondent's representative, was present during Petitioner's testimony in its entirety. He testified that there was nothing about Petitioner's testimony regarding his job duties at Graham Correctional Center that was not truthful. However, Major Wright testified that, to his knowledge, no one went around and greased the locks prior to Dr. Stewart's tour of the facility, but that Dr. Stewart did get some "misleading information."

Petitioner initially sought medical treatment on November 1, 2021 (the alleged date of accident/manifestation) from Dr. Matthew Bradley, an orthopedic surgeon. At that time, Petitioner informed Dr. Bradley he had a six month or more history of bilateral hand numbness/tingling as well as decreased grip strength and sleep disruption because of pain/burning. Petitioner attributed the symptoms to repetitive use of his hands as a Correctional Officer, Sergeant and Major over a period of 30 years (Petitioner's Exhibit 3).

Dr. Bradley diagnosed Petitioner with bilateral carpal tunnel and cubital tunnel syndrome conditions which he opined related to Petitioner's chronic repetitive use of his hands while at work. Dr. Bradley ordered EMG/nerve conduction studies (Petitioner's Exhibit 3).

EMG/nerve conduction studies were performed on November 29, 2021. The tests were positive for severe median neuropathy across the right carpal tunnel; moderate median neuropathy across the left carpal tunnel; and mild ulnar neuropathy across the left elbow (Petitioner's Exhibit 4).

Dr. Bradley evaluated Petitioner on November 29, 2021, and he reviewed the EMG/nerve conduction studies. He opined Petitioner had bilateral carpal tunnel and cubital tunnel syndrome conditions. He recommended Petitioner undergo surgery consisting of a right open carpal tunnel release and a right ulnar nerve release at the elbow (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Dr. Bradley on May 26, 2022; however, the primary reason for this visit was left shoulder pain. Petitioner informed Dr. Bradley that he injured his left shoulder while attempting to move a speaker at a wedding reception (Petitioner's Exhibit 3). Petitioner did not claim that his left shoulder condition was work-related.

Dr. Bradley opined Petitioner had sustained a left rotator cuff tear and he reaffirmed his prior diagnoses of bilateral carpal tunnel and cubital tunnel syndrome conditions. Dr. Bradley recommended Petitioner undergo left rotator cuff surgery and left carpal tunnel and cubital tunnel release procedures at the same time (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Patrick Stewart, a hand surgeon, on May 17, 2022. In connection with his examination of Petitioner, Dr. Stewart reviewed medical records provided to him by Respondent. In respect to Petitioner's work duties, Dr. Stewart obtained information from Petitioner and noted Petitioner held the rank of Major, and worked in a supervisory capacity. Dr. Stewart diagnosed Petitioner with bilateral carpal tunnel syndrome, severe on the right; left cubital tunnel syndrome; and possible right cubital tunnel syndrome. Dr. Stewart opined the treatment provided to Petitioner to date was reasonable, but he questioned the number of x-rays that were performed of the upper extremities (Respondent's Exhibit 5).

In regard to causality, Dr. Stewart opined there was not a causal relationship between Petitioner's upper extremity conditions and his work activities. This was based on Dr. Stewart's opinion that Petitioner's work activities were not sufficiently repetitive and they did not require significant force. In respect to the etiology, Dr. Stewart noted that 50% of compression neuropathies do not have a specific etiology and are idiopathic (Respondent's Exhibit 5).

Dr. Bradley performed surgery on Petitioner's left hand/arm and left shoulder on June 17, 2022. Dr. Bradley performed a left open carpal tunnel decompression and a left cubital tunnel release, as well as arthroscopic rotator cuff surgery on Petitioner's left shoulder (Petitioner's Exhibit 5).

When Dr. Bradley saw Petitioner on July 7, 2022, he noted Petitioner was doing "exceptionally well" in regard to his left wrist/elbow surgery and most of the numbness, tingling and burning symptoms had resolved (Petitioner's Exhibit 3).

Dr. Bradley again saw Petitioner on September 19, 2022. At that time, Petitioner advised he continued to experience right upper extremity symptoms and wanted to proceed with right carpal and cubital tunnel surgeries (Petitioner's Exhibit 3).

Dr. Bradley performed surgery on Petitioner's right hand and elbow on December 7, 2022. The procedure consisted of and open right carpal tunnel release and an open right cubital tunnel release (Petitioner's Exhibit 5).

Dr. Bradley evaluated Petitioner on December 19, 2022. At that time, Petitioner advised that all of the numbness/tingling symptoms had "significantly improved." Dr. Bradley observed some drainage from the elbow; however, there were no signs of an infection (Petitioner's Exhibit 3).

Dr. Bradley conducted a teleconference with Petitioner on July 11, 2023. Petitioner again informed Dr. Bradley his symptoms of numbness, tingling and burning had mostly resolved and he was working full duty without restrictions. Petitioner stated he was "…very happy with his outcome" (Petitioner's Exhibit 3).

Dr. Stewart was deposed on May 2, 2023, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Stewart's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Stewart agreed Petitioner had bilateral carpal tunnel syndrome, right greater than left, and likely bilateral cubital tunnel syndrome and that Petitioner was right hand dominant. In respect to the medical treatment Petitioner had been provided with to date,

Dr. Stewart testified the x-rays were not necessary because there was no injury to any of the joints (Respondent's Exhibit 6; pp 38-42).

In regard to causality, Dr. Stewart testified Petitioner was at risk for development of compression neuropathies because of his elevated BMI, age, thyroid dysfunction and hypertension. Dr. Stewart stated that Petitioner's employment did not cause or aggravate his upper extremity conditions. Dr. Stewart testified Petitioner was not subjected to much forceful activity because when he toured Graham Correctional Center, he personally opened several doors, locks and chuckholes and none were difficult to open. He also stated the keys were of a normal size and not cumbersome/heavy. Dr. Stewart also stated that, because Petitioner had moved up the ranks, most of his locking/unlocking duties would have been performed when he was at a lower rank (Respondent's Exhibit 6; pp 31-39).

On cross-examination, Dr. Stewart testified that, in respect to causality, he only referenced Petitioner's positions as a Major, Shift Supervisor and Warden, even though his opinion was based on Petitioner's "…employment history in general." He stated Petitioner's work prior to his becoming a supervisor was not relevant to his opinion in respect to causality and that the only work performed that was relevant to that issue was the work performed contemporaneous to the onset of symptoms (Respondent's Exhibit 6; pp 62-64).

Dr. Stewart testified Petitioner's co-morbidities were the likely source of Petitioner's upper extremity conditions. However, he also stated that a significant number of compression neuropathies are idiopathic (Respondent's Exhibit 6; p 84).

Dr. Bradley was deposed on May 3, 2023, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's upper extremity conditions, Dr. Bradley's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to causality, Dr. Bradley testified that Petitioner's job duties while employed by Respondent contributed to the development of his carpal tunnel and cubital tunnel syndrome conditions. Specifically, he noted Petitioner had worked for Respondent for 31 years in various jobs and, when Petitioner worked in segregation, he would turn in excess of 1,000 locks per day. He noted Petitioner had advanced in rank to where in the six months preceding his first visit with him, Petitioner was not engaging in as much repetitive activity as he did previously; he also noted the conditions took many years to develop (Petitioner's Exhibit 8; pp 17-18).

Dr. Bradley testified Petitioner did not have any significant non-occupational risk factors for the development of carpal or cubital tunnel syndrome. When questioned about Petitioner having a BMI of 31, having hypothyroidism and previously being an active weightlifter, Dr. Bradley agreed these could have been contributing factors to the development of Petitioner's upper extremity conditions. However, Dr. Bradley also stated the cause of the conditions was "multifactorial" and there were many things which could have contributed to it (Petitioner's Exhibit 8; pp 19-21).

Dr. Bradley testified Dr. Stewart's description of Petitioner's working conditions in respect to the problems with locks and doors was contrary to that of the Petitioner as well as dozens of other correctional staff that he had treated for upper extremity conditions. He said none of the correctional staff he previously treated ever informed him that the locks were easy to open and close (Petitioner's Exhibit 8; pp 34-35).

On cross-examination, Dr. Bradley conceded his records noted some potential non-occupational risk factors. However, he stated these factors, including Petitioner's history of a thyroid disorder controlled by medication, were insignificant and did not diminish the effect of Petitioner's 31 year work history with Respondent (Petitioner's Exhibit 8; pp 59-62).

Dr. Bradley testified that when he examined Petitioner on July 7, 2022, the numbness, tingling and burning in his left hand was "significantly better," but Petitioner was still experiencing left shoulder pain. When Dr. Bradley saw Petitioner on December 19, 2022, Petitioner had no complaints at all in respect the left, and the numbness/tingling on the right hand was significantly improved (Petitioner's Exhibit 8; pp 25, 29).

At trial, Petitioner testified he had retired. When questioned about the current condition of his hands/elbows, Petitioner testified he is still experiencing difficulties with his hands/elbows. While he is happy he underwent the surgeries, Petitioner stated he has significant sensitivity in both of his elbows and when he puts them on an armrest, his hands will fall asleep. Petitioner also complained that he has diminished grip strength in both of his hands, in particular, the left hand even though he is right hand dominant. He specifically described his left hand as being "very weak." However, Petitioner has not sought any further treatment from Dr. Bradley in respect to his upper extremities.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained a repetitive trauma injury to his right hand/elbow and left hand/elbow arising out of and in the course of his employment by Respondent which manifested itself on November 1, 2021, and his current condition of ill-being in regard to his right hand/elbow and left hand/elbow is causally related to his work activities, but Petitioner's left shoulder condition is not related to Petitioner's work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner injured his left shoulder in an accident which was not work-related. Petitioner did not claim his left shoulder condition was work-related.

Petitioner's testimony regarding his work activities while employed by Respondent over a period of 31 years was credible and unrebutted.

Respondent's representative, Major Trevor Wright, was present during Petitioner's testimony in its entirety and testified Petitioner's testimony regarding his work activities was accurate.

Major Wright’s testimony was he had no knowledge that the locksmith fixed and greased everything so the locks which operate easier; however, he also stated Dr. Stewart did get some "misleading information."

Petitioner's treating physician, Dr. Bradley, opined Petitioner's repetitive use of his upper extremities over a period of 31 years contributed to the development of his bilateral carpal tunnel and cubital tunnel syndrome conditions. Dr. Bradley testified the condition developed over a period of many years.

Dr. Bradley agreed Petitioner had some non-occupational risk factors which could have contributed to the development of his upper extremity conditions; however, he testified the cause of same was "multifactorial" and the fact Petitioner had some non-occupational risk factors did not diminish the effect of Petitioner's work activities while employed by Respondent.

Dr. Bradley also disputed Dr. Stewart's assertion that the locks and doors at Graham Correctional Center were easy to open as this was contrary to what Petitioner told him as well as what numerous other correctional staff that he had treated advised.

Respondent's Section 12 examiner, Dr. Stewart, opined there was not a causal relationship between Petitioner's upper extremity condition and his work activities while employed by Respondent. This opinion was based, in part, on Dr. Stewart only considering Petitioner's work activities from the time his condition became symptomatic and not all of Petitioner's work history with Respondent.

Dr. Stewart's opinion was also based, in part, on his tour of the Graham Correctional Center wherein he keyed various locks/doors and found them easy to open. As noted herein, it is possible various locks/doors were subject to maintenance shortly before Dr. Stewart conducted his tour.

Dr. Stewart also based his opinion on Petitioner's non-occupational risk factors, but also noted the condition may have been idiopathic.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bradley be more persuasive than that of Dr. Stewart in regard to causality.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner in regard to his right hand/arm and left hand/arm conditions was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, for medical services provided to Petitioner in respect to his right hand/arm and left hand/arm conditions, but not in respect to his left shoulder condition, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of this conclusion the Arbitrator notes the following:

As stated herein, Petitioner's left shoulder condition was not related to his work activities.

The Arbitrator was not persuaded by Dr. Stewart's opinion in respect to the reasonableness and necessity of the x-rays ordered by Dr. Bradley.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of eight percent (8%) loss of use of the right hand; eight percent (8%) loss of use of the right arm; six percent (6%) loss of use of the left hand; and six percent (6%) loss of use of the left arm.

In support of this conclusion the Arbitrator notes the following:

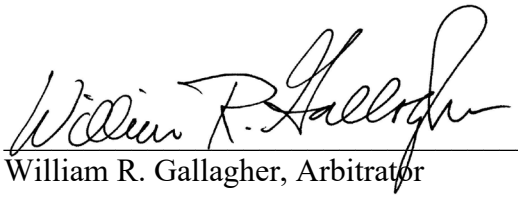
Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time Petitioner sustained repetitive trauma, he had worked for Respondent for a period in excess of 31 years and moved up the ranks from Correctional Officer to Major. During this period of time, Petitioner's job duties required the active and repetitive use of both of his hands and arms, but, to somewhat lesser extent when Petitioner had attained higher rank. The Arbitrator gives this factor moderate weight.

Petition was 49 years old at the time he sustained the repetitive trauma and 51 years old at the time of trial. While Petitioner is presently retired, he will have to live with the effects of the injury for the remainder of his natural life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. While the Petitioner is presently retired, he was able to return to work to his regular job without restrictions. The Arbitrator gives this factor moderate weight.

Petitioner sustained a repetitive trauma injury to both his right hand/arm and left hand/arm which required bilateral carpal tunnel and cubital tunnel surgeries. When Petitioner was evaluated by Dr. Bradley subsequent to both surgeries, virtually all of his hands/arms complaints had resolved. However, at trial, Petitioner had ongoing complaints in respect to both hands and elbows. The complaints Petitioner had at the time of trial were not corroborated by the medical treatment records. In spite of his continued complaints, Petitioner did not seek any further medical treatment from Dr. Bradley. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034307
Case Name	Michael Dunn v. State of Illinois - Graham Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0353
Number of Pages of Decision	12
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 7/22/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUNN,

Petitioner,

vs. NO: 21 WC 34307

STATE OF ILLINOIS/GRAHAM CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits, and being advised of the facts and applicable 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.

With respect to the nature and extent of Petitioner's disability, and based upon the Commission's analysis of the facts contained in the record under Section 8.1b of the Act, the Commission finds that the evidence of disability contained within the record supports an increased award of seven-and-a-half percent (7.5%) loss of use of each hand and seven-and-a-half percent (7.5%) loss of use of each arm with due consideration given to Petitioner's continued complaints in both elbows.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 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 permanent partial disability benefits of $912.82 per week for 68.70 weeks because the injuries sustained caused seven-and-a-half percent (7.5%) loss of use of each hand and seven-and-a-half percent (7.5%) loss of use of each arm pursuant to Section 8(e) of the Act.

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

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

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.

July 22, 2024

CAH/pm
O: 7/11/24
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	21WC034307
Case Name	Michael Dunn v. SOI/Graham C.C.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 11/6/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 31, 2023 5.32%

/s/ William Gallagher, Arbitrator
Signature

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

November 6, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Dunn
Employee/Petitioner

v.

SOI/Graham C.C.
Employer/Respondent

Case # 21 WC 34307

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 Springfield, on September 26, 2023. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 18, 2021, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $79,111.16; the average weekly wage was $1,521.37.

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

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid 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 $912.82 per week for 36.7 weeks because the injury sustained caused the extent of three percent (3%) loss of use of the right hand; three percent (3%) loss of use of the left hand; five percent (5%) loss of use of the right arm; and five percent (5%) loss of use of the left arm, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

NOVEMBER 6, 2023

ICArbDec p. 2

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent. The Application alleged a date of accident (manifestation) of November 18, 2021, and that Petitioner sustained an injury to "Bilateral hands, wrists and elbows" as a result of "Repetitive job duties" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner has been employed by Respondent for approximately 23 years, 19 of which he has worked at the Graham Correctional Center. Petitioner was hired by Respondent in July, 2000, and worked as a Correctional Officer at Pontiac Correctional Center. Petitioner subsequently transferred to the Graham Correctional Center, and he was promoted to Correctional Sergeant, in March, 2019.

Prior to being employed by Respondent, Petitioner worked as a bottle packer and technician for 10 years. He also worked at a fertilizer plant for one year. Neither of these jobs required the extensive/repetitive use of his hands/arms.

Petitioner testified Pontiac Correctional Center was a maximum security facility and he worked in the gallery houses. Petitioner used his hands/arms on a daily basis for repeatedly locking/unlocking cell doors with Folger Adams keys, opening/closing cell doors, bar rapping, cuffing/uncuffing inmates, moving/searching property boxes and restraining combative prisoners. Petitioner testified the bar rapping caused him to experience vibration and tingling in his hands.

When Petitioner transferred to Graham Correctional Center, he continued to work as a Correctional Officer. He testified the keys used there were smaller than the keys used at Pontiac Correctional Center, but that some of the locks were still difficult to operate. Petitioner also stated that some of the doors were difficult to open because they were warped. Petitioner estimated he opened/closed doors 50 to 100 times per day. Petitioner said he did not have to do as much cuffing/uncuffing of inmates as he did previously and only did bar rapping occasionally.

When Petitioner was promoted to Sergeant in March, 2019, he was still required to perform the duties of a Correctional Officer, but he had the added responsibilities of writing/completing reports. When Petitioner was promoted, he was assigned to healthcare for nine months, but was subsequently moved to segregation. Petitioner testified that, when he was moved to segregation, his job duties were more intense because Respondent was short staffed. Petitioner had to lock/unlock doors which he said were much heavier in the segregation unit and the locks were not as easy to turn. Further, the inmates in segregation were also restrained with a waist belt whenever they left the unit. Petitioner said his job duties while in segregation increased during the Covid lockdown.

Major Trevor Wright, Respondent's representative, was present and heard Petitioner's testimony in its entirety. Major Wright testified at the request of Petitioner's counsel. He testified that Petitioner's testimony regarding his job duties was accurate and Petitioner was a good employee. Major Wright also said there was no such thing as a "normal day" in prison.

Petitioner testified that he began experiencing symptoms in his hands/arms sometime in late 2018. The symptoms were primarily tingling/numbness in both of his hands which increased with activities.

In late 2020/early 2021, the symptoms began to interfere with his job and he dropped objects because of same. Petitioner acknowledged that he was treated for diabetes and high blood pressure, both of which were controlled with medication. Petitioner said he was never diagnosed with hyperthyroidism. Petitioner had a motorcycle which he rode occasionally on weekends, but ceased doing so when his symptoms worsened. Petitioner said he had no hobbies/activities which were hand/arm intensive like his job duties.

On November 18, 2021, Petitioner was evaluated by Dr. Matthew Bradley, an orthopedic surgeon. At that time, Petitioner complained of bilateral hand, wrist and elbow pain, right worse than left which had increased in the preceding two to three months. Petitioner also complained of significant weakness of his grip strength. Petitioner informed Dr. Bradley he had worked as a Correctional Officer/Sergeant for the preceding 21 years and his job duties included the repetitive use of his hands including the locking/unlocking of cells (Petitioner's Exhibit 3).

Dr. Bradley opined the character had bilateral carpal tunnel and cubital tunnel syndrome conditions for which he ordered EMG/nerve conduction studies. He opined the conditions were related to Petitioner's chronic repetitive use of his upper extremities for the preceding 21 years while working for Respondent (Petitioner's Exhibit 3).

EMG/nerve conduction studies were performed on December 1, 2021. The diagnostic studies revealed bilateral carpal tunnel syndrome, moderate on the left and mild on the right; and bilateral cubital tunnel syndrome, moderate on both the left and right (Petitioner's Exhibit 4).

Dr. Bradley performed surgery on Petitioner's right upper extremity on January 5, 2022. The procedure consisted of both a right carpal tunnel and cubital tunnel release (Petitioner's Exhibit 5).

Following surgery, Dr. Bradley evaluated Petitioner on January 20, 2022. At that time, Petitioner advised Dr. Bradley his right sided symptoms had significantly improved, but he continued to experience left sided symptoms (Petitioner's Exhibit 3).

Dr. Bradley performed surgery on Petitioner's left upper extremity on January 26, 2022. The procedure consisted of both a left carpal tunnel release and left cubital tunnel decompression (Petitioner's Exhibit 5).

Petitioner last saw Dr. Bradley on February 10, 2022. At that time, Petitioner informed Dr. Bradley his left sided symptoms had significantly improved. Dr. Bradley authorized Petitioner to return to work without restrictions effective February 13, 2022, but he directed Petitioner to continue with his home exercises (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Patrick Stewart, a hand surgeon, on May 24, 2022. In connection with his examination of Petitioner, Dr. Stewart reviewed medical records and a job description which were provided to him by Respondent. Dr. Stewart agreed with the diagnosis of bilateral carpal tunnel and cubital tunnel syndrome conditions and that the treatment provided to Petitioner in regard to Petitioner's bilateral carpal tunnel syndrome was appropriate. Dr. Stewart noted Petitioner was not treated conservatively with cubital tunnel braces and questioned the number of x-rays performed on Petitioner's upper extremities; however, he did not specifically opined

that either the bilateral cubital tunnel surgery or number of x-rays were medically unnecessary (Respondent's Exhibit 5).

In regard to causality, Dr. Stewart opined Petitioner's repetitive activities at work were not sufficient to cause his upper extremity conditions. Specifically, he noted Petitioner's key turning was limited to 120 key turns in a day and the locks did not require significant force to open them. He attributed Petitioner's upper extremity conditions to Petitioner being at increased risk because Petitioner was diabetic, had hypertension and had an elevated BMI (Respondent's Exhibit 5).

Dr. Bradley was deposed on September 30, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bradley's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to causality, Dr. Bradley testified he reviewed a job description completed by Petitioner and noted that, over a period of 21 years, Petitioner used his hands repetitively pushing, pulling, lifting and twisting to open doors, turn keys, cuff/uncuff inmates and move/search property boxes. Dr. Bradley opined Petitioner's job duties contributed to his condition, but that the cause was "multifactorial" and developed over a period of years (Petitioner's Exhibit 7; pp 15-17, 26-32).

On cross-examination, Dr. Bradley agreed he did not review any job descriptions provided to him by Respondent and he had never been inside the facility. Dr. Bradley agreed he had no personal knowledge as to how much force was required to turn keys and open cell doors and he could not testify as to how often Petitioner would have to lock/unlock doors (Petitioner's Exhibit 7; pp 44-50).

Dr. Stewart was deposed on July 11, 2023, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Stewart's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to causality, Dr. Stewart testified Petitioner's job duties did not cause, contribute to, aggravate or accelerate his compression neuropathy diagnoses. He based this upon Petitioner's job duties not requiring sufficient force and only involving limited repetition. He stated that there was no forceful grasping, flexion/extension, or hyperextension required, especially in regard to the cubital tunnel (Respondent's Exhibit 6; pp 27-30).

In respect to the treatment provided to Petitioner by Dr. Bradley, Dr. Stewart testified there was no indication to order 18 x-rays. He based this on the fact there was no joint injury or any bony complaints (Respondent's Exhibit 6; p 30).

On cross-examination, Dr. Stewart was interrogated about his tour of the Graham Correctional Center. Dr. Stewart testified he opened one chuckhole and one cell door in the segregation unit. Dr. Stewart also testified that, because Petitioner was a Sergeant, he would not have been primarily responsible for moving/transferring inmates because this task would be performed by Correctional Officers (Respondent's Exhibit 6; pp 37-38, 44).

Dr. Stewart testified Petitioner's bilateral carpal tunnel and cubital tunnel syndrome conditions were solely related to the other multiple risk factors. He described these as Petitioner being over 50 years

of age, having diabetes and hypertension, even though both were controlled with medication, and Petitioner having an elevated BMI. He agreed the cause of the conditions could be "multifactorial," but completely excluded Petitioner's work history with Respondent (Respondent's Exhibit 6; pp 60-62).

At trial, Petitioner testified he had no issues in respect to his hands. Petitioner's hand symptoms of pain, numbness and tingling totally resolved. In regard to his elbows, Petitioner testified he still experiences some occasional issues with hypersensitivity since undergoing surgery. Petitioner acknowledged he was able to return to work at full duty and he has not sought any further medical treatment since he was last seen by Dr. Bradley in February, 2022.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained a repetitive trauma injury to both of his upper extremities arising out of and in the course of his employment by Respondent which manifested itself on November 18, 2021, and his current condition of ill-being is causally related to his work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding his job duties was credible and unrebutted.

Respondent's representative, Major Trevor Wright, was present during Petitioner's testimony in its entirety and testified that Petitioner's testimony regarding his job duties was accurate.

Petitioner's treating physician, Dr. Matthew Bradley, testified Petitioner's repetitive work activities over a period of 21 years contributed to the development of his upper extremity conditions. He acknowledged Petitioner had other contributing factors, but that the cause of Petitioner's upper extremity conditions was "multifactorial."

Respondent's Section 12 examiner, Dr. Stewart, testified Petitioner's job duties did not cause, contribute to, aggravate or accelerate Petitioner's upper extremity conditions. Dr. Stewart opined Petitioner's upper extremity conditions were related to contributing factors, including Petitioner being diabetic and having hypertension while both conditions were controlled. Even though Dr. Stewart agreed the cause of carpal tunnel and cubital tunnel syndrome could be "multifactorial," he completely excluded Petitioner's work history with Respondent.

The Arbitrator notes that, while Dr. Stewart toured the Graham Correctional Center, he operated just one chuckhole lock in one cell door lock.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bradley to be more persuasive than that of Dr. Stewart in respect to causality.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay for medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of this conclusion the Arbitrator notes the following:

The only dispute there was in respect to the reasonableness and necessity of the medical services provided to Petitioner was for the x-rays ordered by Dr. Bradley. The Arbitrator was not persuaded by Dr. Stewart's opinion that the x-rays ordered by Dr. Bradley were not medically reasonable and necessary.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of three percent (3%) loss of use of the right hand; three percent (3%) loss of use of the left hand; five percent (5%) loss of use of the right arm; and five percent (5%) loss of use of the left arm.

In support of this conclusion the Arbitrator notes the following:

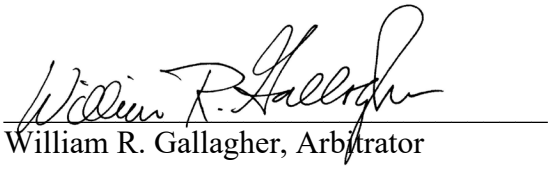
Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time Petitioner sustained the accident, he worked as a Correctional Sergeant, a job which requires the active and repetitive use of both of his upper extremities. The Arbitrator gives this factor moderate weight.

Petitioner was 51 years old at the time he sustained the accident and 53 years old at the time of trial. He presently has approximately 14 years before he will attain normal retirement age. Petitioner will have to live with the effects of the injury for the remainder of his working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity as Petitioner was able to return to work to his normal job. The Arbitrator gives this factor moderate weight.

As a result of the injury, Petitioner was diagnosed with bilateral carpal tunnel syndrome and cubital tunnel syndrome, which required both right and left hand/elbow surgeries. Petitioner made a full recovery from the bilateral carpal tunnel syndrome surgery and had no residual complaints. Petitioner had some sensitivity issues in respect to both of his elbows following the bilateral cubital tunnel surgeries. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021847
Case Name	Marcos Arroyo v. Total Staffing Solutions
Consolidated Cases	21WC021848;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0354
Number of Pages of Decision	21
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jack R Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 7/23/2024

/s/Christopher Harris, Commissioner

Signature

24IWCC0354

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARCOS ARROYO,

Petitioner,

vs. NO: 21 WC 21847

TOTAL STAFFING SOLUTIONS,

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 accident, causal connection, the reasonableness and necessity of the medical treatment and charges, prospective medical care, and temporary total disability (TTD) benefits, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission additionally 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).

This claim was consolidated with claim number 21 WC 21848 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claim 21 WC 21848. There is only one bond comprising both claims in the amount of $75,000.00.

FINDINGS OF FACT

The Petitioner began working at Assemblers through Total Staffing on May 24, 2021 as a sanitation employee. (T.9.) He was responsible for cleaning the equipment, which he described as a heavy duty position. (T.12.) He has alleged a work accident on May 26, 2021 and a second work accident on June 15, 2021. Of the two accidents, he stated that the May 26, 2021 accident caused the most pain. (T.61.) Petitioner denied any issues performing his job duties prior to the accidents and further denied any prior issues with his legs, knees, back or elbows. (T.13.)

On May 26, 2021, Petitioner was washing utensils when he was struck in the back and elbows by a cart. (T.14-15.) He stated that the accident was caused by Maria, one of the supervisors. (T.16.) The Petitioner testified that he reported the accident to another supervisor who was known as "Padrino" or the "Godfather." He did not know his real name. (T.14.) He asked Padrino if he could see a doctor as he had back and elbow pain but was told they would talk the next day. (T.17.) He was not instructed to report the incident. (T.14.)

Petitioner returned to work the next day and provided a statement to Padrino. Padrino informed him that there nothing he could do as Maria was not present. (T.18.) Padrino again denied his request to see a doctor. (T.19.) Petitioner worked through June 4, 2021 despite his back and elbow pain. An end of assignment/quit form was completed June 11, 2021 confirming Petitioner last worked on June 4, 2021. (RX.1.)

Petitioner subsequently returned to work with Assemblers and sustained a second work accident on June 15, 2021 at 11:45 p.m. He was moving large metal trays when he slipped on water and fell to the floor. (T.20.) He told Padrino that he fell and his knee and back hurt. (T.21.) Padrino told him to go home and rest and come back to work the next day. (T.22.) He asked Padrino to send him to the doctor; Padrino refused his request. (*Id.*) Petitioner returned to work the next day and his request to see a doctor was again ignored by Padrino. (T.23.) Petitioner took two pictures of the area where the accidents occurred. (PX.9. T.26-27.)

Petitioner testified that he took some days off work following the accidents. He bought a knee brace after the second accident due to pain. He also bought Epsom salt and pain patches for his back. (T.31.) He continued to work until July 8, 2021 at which time he stopped because of the pain. (T.37.) He spoke with Padrino and Patricia, the second general manager, and told them his pain was too great and he needed treatment. (T.36.)

Petitioner stated that he waited to see a doctor as he had to work out of necessity. (T.58.) Petitioner eventually contacted an attorney as his request for treatment was continually denied. He was referred to Midwest Anesthesia & Pain Specialists ("MAPS"). (T.39-40.)

Petitioner completed a questionnaire for MAPS on July 13, 2021. The form is written in Spanish and indicates that the Petitioner was injured on May 27, 2021 at 1:15 a.m. (RX.3.)

Petitioner was seen by PA-C William Hayduk ("PA Hayduk") of MAPS on July 13, 2021 for a work related disability examination. A Spanish translator was present during the examination. He was currently not working. He complained of low back and bilateral elbow pain following a work injury on June 3, 2021 and June 15, 2021. A cart struck his arms on June 3, 2021, which caused him to extend his hips and jerk forward. He then slipped while carrying trays on June 15, 2021, which caused him to jerk forward. He reported the injuries immediately. Examination revealed bilateral lumbar paraspinal tenderness and a positive bilateral facet loading test. He had tenderness over the olecranon bursa of both elbows. The assessment was low back pain, bilateral elbow pain and radiculopathy in the lumbar region. Physical therapy was recommended. (PX.1.)

A second end of assignment/quit form was completed July 16, 2021. It was noted that as of July 8, 2021, Petitioner would not be available to work for 4 weeks due to health. (RX.2.)

Naimary Ramirez ("Ms. Ramirez") is a recruiter for Total Staffing Solutions and testified on behalf of the Respondent. (T.77.) She translated the end of assignment/quit form for the Petitioner on July 16, 2021. (T.82.) Ms. Ramirez offered no testimony regarding the accident.

Petitioner was seen by Dr. Adarsh Shukla ("Dr. Shukla") of MAPS on September 24, 2021 for low back and bilateral elbow pain. Petitioner reported that he was informed that therapy could not start until he had an MRI. His low back and bilateral elbow pain was constant and sharp and a 10 out of 10. He had radiating pain to the bilateral lower extremities with numbness and tingling. Examination revealed bilateral lumbar paraspinal tenderness and a positive facet loading. There was sensory loss at L5 bilaterally to light touch. An MRI was recommended. Dr. Shukla noted that the injuries were casually related to the injuries sustained during the accident. (PX.1.)

Petitioner underwent an MRI of the left elbow on October 6, 2021. The MRI demonstrated a 7mm ganglion versus synovial cyst deep to the anconeus, chronic tendinosis of the common extensor tendon insertion and mild joint effusion. Petitioner also underwent an MRI of the right elbow that demonstrated moderate insertional tendinosis of the common extensor tendon with low to moderate grade insertional intrasubstance partial thickness tear prosthesis insertion. There was moderate common flexor tendon insertional tendinosis with intrasubstance fraying and an 8mm synovial versus ganglion cyst deep to the anconeus. (PX.1.)

Petitioner was seen by Dr. Shukla on November 5, 2021. He had continued low back and bilateral elbow pain that was constant and sharp and a 10 out of 10. He reported that his pain radiated into both legs and he was experiencing numbness, tingling and weakness. He was referred to an orthopedic doctor for his elbows and he was taken off work. Dr. Shukla again stated that the injuries were causally related to the accidents. (PX.1.)

Petitioner was seen by Dr. Shukla on December 3, 2021. The lumbar MRI and physical therapy was denied by the workers' compensation carrier. His low back and bilateral elbow pain was constant and a 10 out of 10. He was to remain off work. (PX.1.)

Petitioner underwent an MRI of the lumbar spine on February 23 2022. The MRI demonstrated abnormal discs most prominent at L5-SI. At L5-SI, there was a loss of disc height, disc osteophyte complex and endplate changes. There was multilevel spinal canal and neuroforaminal stenosis most prominent at L5-SI where there was moderate to severe bilateral neuroforaminal stenosis. (PX.1.)

Petitioner underwent a Section 12 examination with Dr. Thomas Gleason ("Dr. Gleason") of Illinois Bone & Joint Institute on March 8, 2022. Dr. Gleason was asked to address the alleged May 26, 2021 and June 15, 2021 accidents. Petitioner complained of low back pain and bilateral elbow pain with tingling going up and down the arms both increasing since the accident. He had tenderness, even on gentle palpation, diffusely over the entire spine with withdrawal by the examinee to touch. There was no paraspinal spasm, tenderness, or asymmetry. He had a negative Tinel's at the wrist, and tenderness to palpation over the cubital tunnel, and the medial and lateral epicondyles over the olecranon bilaterally. Dr. Gleason noted Petitioner was able to use his elbows in a partially flexed position without complaints to move himself in a seated position up and down the table as requested. He was unable to bend or extend his lower back. Dr. Gleason found no

objective findings with respect to the low back or elbows and noted the subjective complaints were not support by the record. Dr. Gleason noted Petitioner exhibited findings that could suggest symptom magnification. Specifically, he had diffused tenderness over the elbows despite no pain on forced dorsiflexion or palmar flexion of the wrist against resistance; complaints of pain in the spine with rotation of the trunk and pelvis; and a negative Britton test bilaterally although he resisted a straight leg raising at 30 degrees on the right and 5 degrees on the left due to low back pain. Dr. Gleason opined that the 4 to 6-week delay in seeking treatment for the elbows and low back injury was significant in terms of suggesting decreased severity in terms of any injury which may have occurred as well as suggesting a potential intervening injury. His complaints were not causally related to the lumbar spine but were related to a degenerative preexisting condition largely influenced by heredity and genetics. The lumbar treatment has been excessive given the lack of positive objective findings, the subjective complaints suggesting symptom magnification, the 4 to 6-week delay in seeking treatment and the lack of acute findings on MRI. The right and left elbow treatment has also been excessive and largely unnecessary given the lack of objective findings. As of July 13, 2021, he could work full duty from a musculoskeletal standpoint and work restrictions were not medically necessary or causally related to either work accident. He reached MMI on or before July 13, 2021 and was not in need of any further medical treatment. (PX.1.) Dr. Gleason was subsequently deposed and offered opinions consistent with his report.

Petitioner was seen by PA Hayduk on March 29, 2022 with continued low back and bilateral elbow pain. Therapy was still denied. He still had a sharp pain in the bilateral elbows and low back. He had radiating pain to the bilateral lower extremities with numbness and tingling. His pain was a 10 out of 10 despite being off work since the accident. He received a bilateral medial epicondyle steroid injection. A lumbar epidural steroid injection at L5-SI was scheduled. He was to remain off work. (PX.1.)

Petitioner followed-up with MAPS on April 12, 2022. He started physical therapy a week ago. He reported that the injection provided no relief. He had continued sharp pain in the bilateral elbows and low back. The pain radiated up and down his arms with numbness and tingling. He had intermitted hand cramping. He was continued off work. (PX.1.)

Petitioner underwent a trigger point injection on May 10, 2022. Petitioner reported during his June 20, 2022 visit that the pain increased significantly after the injection. He was continued off work. (PX.1.)

Petitioner was seen by Dr. Thomas Pontinen ("Dr. Pontinen") of MAPS on June 24, 2022. Dr. Pontinen criticized Dr. Gleason's Section 12 report stating that it was completely inaccurate and both "sad and immoral" for him to continue to be paid, report symptom magnification, state nothing is related to the injury and no treatment is necessary. Dr. Pontinen noted that he has treated Petitioner monthly since the injury and his exams have been consistent with his complaints along with the imagining and testing. He stated that Dr. Gleason would not be able to comment on Petitioner's back as he is not a board-certified pain doctor and does not perform procedures like epidural steroid injections. Petitioner is suffering because he has not received the proper treatment. He reviewed the MRI and saw a 5mm disc bulge at L4-L5 and moderate to severe bilateral neuroforaminal stenosis at L5-SI. This correlated both subjectively and objectively with Petitioner's symptoms. He further noted that Dr. Gleason failed to mention the tearing in the left

elbow MRI as well as the findings in the right elbow because the findings were consistent with a traumatic event. By not mentioning this, Dr. Gleason was better able to pretend there were no injuries sustained. He was embarrassed that Dr. Gleason wrote such an obviously inaccurate and biased report and put his own financial gains above the wellbeing of another person. Dr. Pontinen diagnosed Petitioner with low back and bilateral elbow pain, work related. The bilateral medial epicondyle steroid injection performed March 29, 2022 provided no relief. The right lumbar paraspinal trigger point injection performed May 10, 2022 provided minimal relief. He was continued off work. (PX.1.)

Dr. Pontinen was subsequently deposed. He stated that while it is impossible to say with certainty which finding on the lumbar MRI are related to the accident, Petitioner presented with a history and clinical picture consistent with the MRI findings. The most probable conclusion was the L4-L5 disc bulge and facet hypertrophy was caused by the accident, or the accident caused the condition to become symptomatic. He stated that the Petitioner never exhibited any signs of symptom magnification. Given the injections and physical therapy were not helping, he recommended a repeat injection, an olecranon bursa injection, a referral to an orthopedic specialist to see if elbow surgery is warranted, and he would also consider an EMG. On cross-examination, Dr. Pontinen stated that the first injury was not severe enough to stop Petitioner from working and seek treatment. The second accident worsened his symptoms to the point that he could not work. He stated that tendons would not tear without any form or external force and the partial tearing could have occurred during either accident. The elbows were probably worsened by the accident.

Petitioner was seen by Dr. Shukla on August 19, 2022 with continued bilateral elbow and low back pain. He was to remain off work. He was referred for surgical evaluation. (PX.1.)

Petitioner follow-up at MAPS on September 23, 2022 with continued low back and bilateral elbow pain. His pain was an 8 out of 10 and constant. He has not yet been scheduled to go to an orthopedic. He has been off work since the accident and was to remain off work. The diagnoses were radiculopathy of the lumbar region and low back pain. (PX.1.) This was Petitioner's last visit with MAPS as his insurance stopped paying for the visits. (T.43.)

Petitioner testified that he would like the recommended injections. (T.41.)

CONCLUSIONS OF LAW

The Commission adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. Based upon the evidence, the Commission finds that the Petitioner injured his low back and bilateral elbows as a result of his May 26, 2021 work-related accident and that those conditions were temporarily aggravated as a result of the June 15, 2021 work-related accident. Benefits are being awarded for the May 26, 2021 accident only. The evidence fails to establish that Petitioner injured his knees during the above-mentioned accidents and no benefits are awarded for the alleged knee injury.

With respect to factual matters, it is within the province of the Commission to judge the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the

evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009).

The Arbitrator found the Petitioner not credible based on the alleged inconsistencies in the record and further found Ms. Martinez credible and Dr. Gleason's opinions more persuasive than Dr. Pontinen's opinions. The Commission disagrees with the Arbitrator's credibility determination. While the medical records provide conflicting dates of accident, Petitioner testified that he was injured on May 26, 2021 and June 15, 2021. The date discrepancy contained within the record does not negatively impact Petitioner's credibility given he provided a consistent history of two accidents and his description of the accidents remained consistent throughout the record. The Arbitrator also noted that the Petitioner lacked credibility as he did not know the first or last name of "Padrino" despite having multiple conversations with him. In the Commission's view, the lack of knowledge of Padrino's first or last name is not sufficient evidence that negatively impacts Petitioner's credibility. Rather, Petitioner credibly testified that he reported the incidents to Padrino and Patricia. The Respondent offered no evidence to rebut Petitioner's testimony in this regard. The Commission also finds Ms. Martinez's testimony lacking as to the issue of accident. Ms. Martinez was questioned about the end of assignment form and offered no testimony as to the accidents. She testified that Petitioner took time off for health reasons. Her testimony has no bearing on the main issues in this case. For reasons explained below, the Commission finds Dr. Pontinen's opinions more persuasive than Dr. Gleason's opinions. Based on the evidence as a whole, the Commission finds the Petitioner credible.

The Commission finds that the evidence supports that Petitioner sustained two work-related accidents. Petitioner consistently testified that he sustained two accidents and that he notified Padrino and Patricia of the accidents and requested medical treatment. He stated that Padrino did not instruct him to fill out an accident report and his requests for medical treatment were ignored. Further, the medical records consistently indicate that the Petitioner sustained two accidents. Again, Respondent failed to offer any credible evidence rebutting Petitioner's testimony as to accident.

Next, the Commission finds that the Petitioner established that his bilateral elbow and low back condition is causally related to the work-related injuries. The evidence, however, fails to establish that he sustained injury to his bilateral knees. The Petitioner testified, without rebuttal, that he had no prior issues to his elbows and low back. He began to experience pain following the accidents. Petitioner credibly testified that he continued to work out of necessity and that his requests for medical treatment were denied. Once Petitioner sought treatment, his pain complaints were consistent and well documented in the medical records. Petitioner's treating physicians noted that his complaints were supported by the MRIs and were related to the work accidents.

The Commission is not persuaded by Dr. Gleason's opinion. Dr. Gleason opined that Petitioner's lumbar spine condition was degenerative in nature and largely influenced by heredity and genetics. He further found no positive findings with respect to the lumbar spine or elbows. The Commission finds that Dr. Gleason's opinion is contradicted by the record. There is no indication of any pre-existing issues or that he was unable to perform his job duties prior to the injuries. It was only after the accidents that he began to experience symptoms, which have not subsided. Dr. Gleason's opinion that there were no positive findings during his examination is

directly contradicted by the multiple doctors from MAPS, all of whom noted positive findings during their multiple examinations of the Petitioner and noted that Petitioner's condition was related to the accident. Further, Dr. Gleason is the only doctor who found signs of symptom magnification. Dr. Pontinen directly rebutted Dr. Gleason's opinion noting that Petitioner's examination findings were consistent with the imagining and testing. He further noted that the MRI findings were consistent with a traumatic event. Based upon Dr. Pontinen's persuasive opinion, the Commission finds Petitioner established that his low back and bilateral elbow condition is causally related to the work related accident of May 26, 2021.

Dr. Pontinen has recommended a repeat injection, an olecranon bursa injection, and a referral to an orthopedic specialist for his elbow. The Commission finds his recommendations persuasive. As Petitioner established causal connection, the Commission finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Pontinen.

The Commission also finds that the treatment rendered to the Petitioner was reasonable and necessary. As stated above, the Commission is not persuaded by Dr. Gleason's opinions. Dr. Gleason stated that the treatment was excessive and unnecessary. Dr. Pontinen, however, stated that the treatment rendered was related to his low back and elbow condition, which was the result of the work related accidents. Having found Dr. Pontinen's opinion persuasive, Petitioner is entitled to reasonable and necessary medical expenses totaling $41,770.14.

Finally, the Commission finds that Petitioner is entitled to TTD benefits from November 5, 2021 through May 19, 2023, representing 80-1/7 weeks. The parties stipulated on the Request for Hearing form that Petitioner's average weekly wage was $1,036.75. This yields a TTD rate of $691.17. While Petitioner argues that he has not been able to work since July 8, 2021, the medical records confirm that he was not taken off work until November 5, 2021 and has not been released back to work as of May 19, 2023, the date of the arbitration hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on September 29, 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 totaling $41,770.14 and pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical care as recommended by Dr. Pontinen in the form of a repeat injection, an olecranon bursa injection, and a referral to an orthopedic specialist for his elbow pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $691.17 per week for 80-1/7 weeks, from November 5, 2021 through May 19, 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 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.

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.

July 23, 2024

CAH/tdm
O: 6/20/24
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	21WC021847
Case Name	Marcos Arroyo v. Total Staffing Solutions
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Jack R Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 9/29/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 26, 2023 5.31%

/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

Marcos Arroyo Case # **21** WC **021847**
Employee/Petitioner
v.
Total Staffing Solutions
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 **05/19/2023**. 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. ☒ 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 **Future Medical/8a**

FINDINGS

On **May 26, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**1,036.75**; the average weekly wage was $**518.37**.

On the date of accident, Petitioner was **49** 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 medical bills, $**0** for payment of other benefits, for a total credit of $**00.00**

ORDER

As there was no compensable work accident on May 26, 2021. All other contested 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.

SEPTEMBER 29, 2023

Signature of Arbitrator

STATEMENT OF FACTS

Petitioner's Direct Testimony—

Petitioner testified he began working for Total Staffing on May 24, 2021 and was placed onsite at Assemblers. (T. at 9). He testified he never before had problems with his back, knees, or elbows. (T. at 14). He testified he never had any prior accidents related to his knees, his back, or his elbows. Id.

Petitioner stated he had an accident on May 26, 2021. Id. He states he was hit in his back and elbows by a runaway cart. (T. at 15). Petitioner testified he reported the accident to the general supervisor named "Godfather" or "Padrino" who told him to go home that day. Id. Petitioner had a conversation after the accident with Padrino, a Maria, and "this other person that they call her Naimary." (T. at 16). Petitioner states he returned to work the next day, and reported the accident again to "Padrino" and asked a second time to go to the doctor. (T. at 18).

Petitioner continued to work and says he had pain in his back and elbows, and asked Padrino a third time to see a doctor. (T. at 19-20).

Petitioner testified that on June 15, 2021, he was at work moving some trays and slipped on the floor on a wet spot, after which Petitioner reported this second accident to Padrino alone in the office. (T. at 21). Petitioner testified he told Padrino he hurt "my knees and back." (T. at 22).

Petitioner returned to work on June 16, 2021, and went to see Padrino again, telling Padrino he had pain in "my knees, in my back and in my elbows." (T. at 23-24). Petitioner continued to work for Assemblers after that, but would take off work "on the days that I felt too much pain." (T. at 29). Petitioner's last day at Assemblers was July 8, 2021. (T. at 36). Petitioner testified July 8, 2021 was his last day because "I couldn't take the pain no more." (T. at 37). Petitioner testified he has not been able to work anymore since July 8, 2021. (T at. 39). He testified he first sought medical care after consulting with an attorney. (T. at 40). Petitioner confirmed he only treated for his back and elbows, and not his knees. Id.

Petitioner testified he was forced to resign from his position with Respondent via execution of a "quit form" on July 16, 2021 that he did not understand because he testified he cannot write or read English. (T. at 72-73).

Petitioner's Cross-Examination Testimony:

Petitioner confirmed he had a prior Illinois Workers' Compensation case, 16WC 02799, involving an accident and settlement involving his left arm. (T. at 45). Petitioner testified it was a "cut that I had on my hand" and that "it was a little one." Id. Petitioner recalled receiving $13,500.00 out of that settlement. (T. at 46). Petitioner elaborated that he was paid "for my lost wages during the time that I was in the hospital" but denied being in the hospital for his work injury, stating "No, I don't remember." (T. at 47).

Petitioner was presented on cross-examination with the MAPS intake form he completed on July 13, 2021. (T. at 49). He confirmed he filled it out himself and that day, July 13, 2021 was

the first time he sought treatment of any kind for either work accident. Id. Petitioner was asked, "Why is there no mention of a June 15, 2021 injury or accident at work on that paper that you filled out?" Id. Petitioner answered that he talked to the doctor about it and the doctor took into consideration that he was going to talk about the more severe accident, which was the first one." Id.

Testimony of Total Staffing Representative Naimary Ramirez:

Ms. Naimary Ramirez testified she was employed by Total Staffing first in February 2021, and throughout May and June, 2021 and remains employed there presently as a recruiter. (T. at 79). She reviewed the July 11, 2021 quit form signed by herself and Petitioner. (T. at 80). Ms. Ramirez confirmed her familiarity with the quit form and that this task is a regular part of her job duties at Respondent, and that nearly all or all of the staffing office is bilingual. (T. at 81). Ms. Ramirez confirmed that in the event she fills out a "quit form" written in English that she would translate for an employee if needed, and specifically recalled doing so with Mr. Arroyo on July 16, 2021. (T. at 82). She also confirmed she recognized her signature on the document. Id.

Medical Records:

Petitioner first presented to Midwest Anesthesia and Pain Specialists (hereinafter "MAPS") on July 13, 2021 reporting pain in his bilateral elbows and lower back with VAS Score 10 out of 10. (P. x 1 at 3). His personally-handwritten intake form lists May 27, 2021 as the sole date of injury. The office note asks "when & how did your injury occur?" and the answer reads:

> *On 06/03/21 he was working in a wash room when suddenly he was hit with a cart in both arms causing him to extend his hips and jerk forward. Then on 06/15/21 he was carrying some trays in the same wash room and he slipped on some water causing him to jerk forward again.* Id.

Petitioner was diagnosed with low back pain, pain in right elbow, pain in left elbow, and Radiculopathy, lumbar region, and was told to undergo physical therapy 2-3 times per week for 4-6 weeks. Id.

On September 24, 2021, Petitioner returned to MAPS, stating he had not started physical therapy, and his pain was 10 out of 10. (P. x 1 at 7). MRIs of the lumbar spine and bilateral elbows were ordered to evaluate for soft tissue injury. He returned to MAPS on October 22, 2021, November 5, 2021, December 3, 2021, December 31, 2021, and January 31, 2022, status unchanged and without undergoing any physical therapy sessions. (P. x 1, *passim*).

On February 28, 2022, Petitioner returned to MAPS and discussed bilateral elbow MRIs, lumbar spine MRI still pending. Petitioner was referred to orthopedics for bilateral elbow pain. Physical therapy was ag. (P. x 1 at 37). A Lumbar ESI was scheduled. (id. at 38).

Petitioner underwent a Section 12 examination with Dr. Thomas Gleason on March 8, 2022. (R. x 6). Dr. Gleason obtained a history from Petitioner via a translator. Petitioner stated that "on May 26, 2021, while at work, he was pre-washing work utensils and got hit from behind by a

cart pinning him between his work station and the cart." (*See* Gleason Deposition Exhibit #2 at 1-2). Petitioner's history given to Gleason also states Petitioner "felt low back pain and bilateral elbow pain right away" but he returned to work the next day. Id. Petitioner told Dr. Gleason that this injury "has severely affected his mental state" and that he did not have any complaints or injuries to his lower back or elbows before May 26, 2021. Petitioner stated he "has not had any new injuries to his lower back or bilateral elbows after May 26, 2021." (id. at 2). The following are conclusions Dr. Gleason wrote:

- On examination of Petitioner, Dr. Gleason observed tenderness "even on gentle palpation, diffusely over the entire spine with withdrawal by the examinee to touch" causing Petitioner to need a break and sit down 5 minutes into the exam. Id.
- Tenderness on light palpation over the shoulders bilaterally. (id. at 4)
- Petitioner was observed as "able to use his elbows in a partially flexed position without complaints to move himself in a seated position up and down the table as requested." Id.
- "There are complaints of pain in the spine with rotation of the trunk and pelvis as a unit." Id.
- "The examinee resists the straight leg raising test at 30 degrees on the right and 5 degrees on the left due to complaints of back pain. Id.
- Dr. Gleason reviewed bilateral elbow MRI films, noting tendinosis and ganglion cyst in both left and right elbows. Dr. Gleason reviewed MRI films of the Lumbar Spine performed on February 23, 2022, noting "degenerative disc disease severe L5-S1 with disc space narrowing: and "moderate degeneration L4-5 with disc dessication." (id. at 6).
- DIAGNOSIS: "No positive objective findings on physical examination with respect to spine or upper extremities." (id. at 7).
- Dr. Gleason noted several examples of symptom magnification. Id.
- "An initial 4-6 week delay in the Petitioner seeking initial treatment is significant in terms of suggesting decreased severity in terms of any injury which may have occurred." (id. at 9).
- Regarding the lumbar spine and causal connection, Dr. Gleason opined "the Petitioner has no current complaints with respect to the lumbar spine causally-related to any of the three work accidents mentioned in the medical records" and stated, "to the degree that he may have subjective complaints related to his low back, this would be related to a degenerative pre-existing condition, largely influenced by heredity and genetics." Id.
- Treatment up to March 8, 2022 was "excessive, largely unnecessary and causally unrelated to either date of alleged work incident" according to Dr. Gleason with respect to the lumbar spine. Id.
- Treatment up to March 8, 2022 regarding the bilateral elbows was "excessive, largely unnecessary, and causally unrelated to either date of alleged work incident." Id.
- Regarding work restrictions, Dr. Gleason opined "As of July 13, 2021, there was no reason from a musculoskeletal standpoint why this individual could not return to work in some capacity. (id. at 10). Further, as of the date of IME, "there are no work restrictions medically necessary or causally related to either date of alleged work injury" and that "Petitioner could have returned to work full duty by at least July 13, 2021" and finally that the "estimated date of which the Petitioner reached maximum medical improvement would be on or before July 13, 2021." Id.

Dr. Gleason was deposed on January 17, 2023. He testified he was under the impression that Petitioner had returned back to work and that he was working for a month or so after his May 26, 2021 work injury. (R. x 6 at 11). Dr. Gleason testified that Petitioner's bilateral shoulder flexion 'was only to 110 degrees", and that 170 degrees is considered "normal." (R. x 6 at 17). Dr. Gleason testified that it was "unusual and abnormal" that Petitioner was unable to bend or extend his lower back at all. (id. at 29). Dr. Gleason explained, "since later on in the test—in testing, he was able to sit on the examining table upright with his legs straight out in front of him. There is just no explanation to be considered. Contradictory, inconsistent test." Id. Dr. Gleason explained Petitioner's Britton test was negative bilaterally, "where he was able to sit on the exam table, legs outstretched in front of him." (id. at 32). Gleason also explained and confirmed Petitioner reported pain on iliac compression bilaterally and pain during simulated axial rotation, both of which "suggest magnification or exaggeration." (id. at 29-31).

Dr. Gleason explained Petitioner's straight leg raise test results were "inconsistent, and, in fact, contradictory to the Britton test." (id. at 33). Dr. Gleason confirmed that a complaint of pain on a straight leg raise at five degrees as in Petitioner's case is "highly unusual." Id. Dr. Gleason stated "I have never know or seen an individual with an actual problem with their spine who had a negative Britton test bilaterally and yet resisted left straight-leg raising at five degrees." (id. at 34).

On March 29, 2022, Petitioner underwent bilateral medial epicondyle and cubital tunnel steroid injections at MAPS with "no relief" and newly reported bilateral swelling in elbows and radiating pain up and down his arms with numbness and tingling, and intermittent hand cramping. Radiating back pain with numbness and tingling 10/10 VAS. (P. x 1 at 46-47).

On May 10, 2022, Petitioner had a right lumbar paraspinal trigger point injection done at MAPS with "minimal relief" and was told to try an H-Wave device as the PT and TENS were ineffective. (P. x 1 at 64).

Petitioner's treating physician Dr. Pontinen testified that he is board certified in pain management and an anesthesiologist, but confirmed he has never been board certified in orthopedics. (P. x 8 at 77). Dr. Pontinen testified that he was unsure if he reviewed the MRI films of Petitioner's spine, or just reviewed the reports. (id.at 80). Dr. Pontinen testified he was not aware of Petitioner's prior left arm injuries or prior IWCC settlement. (id. at 85). Dr. Pontinen testified that stenosis of the spine can cause radiculopathy and can be completely degenerative. (id. at 90). Dr. Pontinen stated "there's definitely chronic findings on" Petitioner's lumbar MRI. (id. at 91). Dr. Pontinen testified that to the best of his knowledge, Petitioner did not work after June 15, 2021. (id. at 98-99).

CONCLUSIONS OF LAW

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

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

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

Credibility is the quality of a witness which renders Petitioner's 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 Petitioner's 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). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983).

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

The Arbitrator observed Petitioner's demeanor at trial. On direct exam, Petitioner appeared to be nervous and answered questions in a halting non-conversational manner. Observation of Petitioner's body language caused the Arbitrator to question whether there was exaggeration on the part of Petitioner regarding his pain and physical ability. On cross

examination, Petitioner's demeanor and manner of answering questions changed. He became defensive when asked to acknowledge that some of his prior testimony was inaccurate and confronted with documentary exhibits that contradicted his prior testimony and called into question histories he had given to medical professionals. A review of the medical records and testimony of witnesses both live and via evidence depositions yielded more inconsistencies. In short, Petitioner so little credibility that the Arbitrator finds Petitioner cannot meet his burden of proof.

The Arbitrator finds the testimony of Naimary Martinez credible because her demeanor at trial and patterns of speech were sincere. Her testimony was consistent with the record and is greatly preferred to that of Petitioner. The medical witnesses are discussed below.

REGARDING ISSUE B), WHETHER THERE WAS AN EMPLOYEE-EMPLOYER RELATIONSHIP ON MAY 26, 2021 AND ON JUNE 15, 2021, THE ARBITRATOR FINDS:

Based on the testimony and evidence in the record, Petitioner was an employee of Respondent on the date of the first alleged accident of May 26, 2021. In addition, despite the "quit form" in evidence demonstrating Petitioner resigned from his position with Respondent on June 11, 2021, Petitioner testified he went back to work for one day—June 15, 2021—and was injured a second time on that date. As such, the Arbitrator finds there was an employee-employer relationship on both dates of alleged work accidents.

REGARDING ISSUE C), WHETHER AN ACCIDENT OCCURED ARISING OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered a work-related injury to his bilateral elbows and lumbar spine on May 26, 2021 while working for Respondent.

The Arbitrator also finds Petitioner failed to prove by a preponderance of the evidence that he suffered a work-related injury to his bilateral elbows and/or lumbar spine and/or bilateral knees, on June 15, 2021 while working for respondent.

The Arbitrator assigns the testimony of Petitioner almost no weight, as per *R & D Thiel*. Petitioner's trial testimony is full of inconsistency. There are several instances where Petitioner's testimony is in conflict with the medical evidence in the record. Petitioner's medical records are themselves inconsistent and unclear with regard to what date or dates he was hurt, and what body parts were affected on which date(s). Petitioner was a poor historian and was unable to explain his prior IWCC injury when questioned. He was also unable to give the first or last name of "Padrino", his supervisor, yet testified to a half dozen specific conversations he recalled having with "Padrino" regarding his multiple work accidents and his multiple requests to seek medical attention. Petitioner was further unable to credibly explain why Dr. Pontinen's records clearly state a date of accident of June 3, 2021, only offering that the doctor was mistaken or confused.

The Arbitrator found Petitioner overall to be evasive on cross-examination. Petitioner testified on direct that he had numerous conversations with "El Padrino," an apparent supervisor at Assemblers. However, Petitioner was unable to provide a first or last name for this individual at any point during direct or cross examination when asked by counsel for both parties.

Combining the evasive and changing testimony from Petitioner surrounding dates of his alleged accidents with the Arbitrator's review of the medical evidence yielded a muddle as to the date of the initial alleged accident. The medical records in evidence state what seem to be four possible dates of accident. May 26, 2021, May 27, 2021, June 3, 2021, and June 15, 2021 all appear at points in the treatment records as dates of injury. Adding to the confusion, Petitioner told Dr. Gleason that he did not suffer any other accident or injury after the accident May 26, 2021. Petitioner's explanation for these varied and in many ways conflicting dates of accident was simply that the doctors he saw did not put the dates down accurately, or that the doctors misunderstood him.

On cross-examination, Petitioner was asked why he wrote down May 27, 2021 on a signed, and dated intake form at MAPS on July 13, 2021. Petitioner was also asked why he failed to write down the second accident date of June 15, 2021 at all on this intake form, which he personally filled out. Petitioner only offered that the second accident "would not have happened if the first one hadn't happened".

Petitioner was asked several times on cross-examination when precisely he filled out the MAPS intake form. Petitioner ultimately testified that "I filled that out after I talked to the doctor" and the doctor had told Petitioner what to write down on the form. (T. at 49-50).

In an effort to link up his allegedly work-related bilateral knee ailments to one or all of the accident dates claimed, Petitioner entered multiple photos into evidence taken by himself and his wife at points in June 2021 of both knees, and of various home therapies and equipment including Epsom salts and braces. Despite all of this evidence presented, Petitioner testified and confirmed that he did not seek or receive treatment for either knee on July 13, 2021 with MAPS at his initial date of service 48 days after the initial alleged accident. Further, there is no diagnosis of a knee condition on July 13, 2021 in the MAPS records or mention of either knee having an abnormality on clinical physical examination. Petitioner had no explanation for this lack of knee pain or treatment or diagnoses in the records from his initial treatment at MAPS. (P. x 1 3-5).

Petitioner was asked by Respondent's counsel on cross-examination if it was strange that the July 13, 2021 medical records don't mention his knees or document knee pain or swelling, to which he testified, "I don't know what to tell you about that." (T. at 69).

Also on cross-examination, Petitioner was asked "were you hurt at work at all on June 3, 2021?" to which he replied, "No, it was June 15." (T. at 52). Petitioner elaborated that Dr. Pontinen was mistaken in his records—Petitioner says he never told the doctor that he was injured on June 3, 2021 at any point.

Petitioner claims he was first injured after being hired by Respondent on May 26, 2021 after being hired on May 24, 2021. Petitioner worked May 27, 2021, and then worked

approximately 11 more days—without restrictions and regular duty—for Respondent before he quit his job for the first time on Friday June 11, 2021. Petitioner testified he was rehired and went back to work for Respondent on June 15, 2021 and had another accident that first day back.

Petitioner claims to have suffered two distinct work accidents while employed by Respondent. Petitioner worked for Respondent for a total of fifteen or sixteen days from May 26, 2021 through July 8, 2021. If Petitioner is taken at his word, all but his first 2 days of work were performed while enduring what he reported as 10 out of 10 pain in both of his elbows and low back, and for the last two or three weeks of his employment, both of his knees as well.

Petitioner's medical records demonstrate that, to date, he has experienced hand cramping, bilateral elbow pain, bilateral radiating arm pain, bilateral shoulder tenderness to light touch with significantly decreased bilateral shoulder range of motion, an inability to raise his left leg more than 5 degrees on straight leg raise testing, bilateral knee pain, and low back pain with radiation.

Despite all of these ailments, there is no dispute that Petitioner waited 48 days from his initial alleged injury of May 26, 2021 to seek any sort of medical treatment for any single body part.

Further undermining his credibility, Petitioner was presented on cross-examination with his prior IWCC settlement—16WC027199—a case which he settled in 2018 for 49.3% Loss of the left arm. (R. x 5). Petitioner testified that this settlement related to a minor scratch on his left wrist. The Arbitrator is concerned as to the reliability of Petitioner's testimony dismissing the prior left arm settlement as relating to a minor hand scratch in the face of such a large scheduled loss settlement of 49.3% of an arm.

Dr. Pontinen's deposition established that Dr. Pontinen believes Petitioner's most serious injuries were suffered on June 3, 2021 to both of his elbows and his lumbar spine when he was struck by a cart. (P. x 8 at 54), and yet Petitioner refutes any injury on June 3, 2021 and testified Dr. Pontinen's records are incorrect. Further, despite stating that the first injury of June 3, 2021 was more severe than the June 15, 2021 incident, Dr. Pontinen testified clearly that Petitioner only required work restrictions after the June 15, 2021 injury, stating the June 3 incident "created an injury that wasn't severe enough for him to have to stop work and seek treatment."

Petitioner's explanation for the confusing intake form at MAPS is that the doctor directed him to list only May 27, 2021 or May 26, 2021 as the injury date because it was the more serious accident. (*see* also P. x 1 3-5). It is still unclear why Petitioner wrote down May 27, 2021 as the date of accident on his intake paperwork. No clarification was attempted by Petitioner at trial as to this issue. Regardless whether May 26 or May 27, 2021 was the intended date on the form, Petitioner did testify that Dr. Pontinen convinced Petitioner the second accident did not need to be written down on the intake paperwork. In other words, Petitioner blames Dr. Pontinen for his inaccurate testimony and medical records and essentially accuses Dr. Pontinen of knowingly falsifying a medical record. The Arbitrator finds nothing in the record that causes him to doubt Dr. Pontinen's honesty.

In this case, the chosen treating doctor and the patient have irreconcilable histories of injury and accident(s). Dr. Pontinen says the second accident was the only reason there was ever a need for work restrictions, and yet Petitioner testified that the doctor told him to only write down the first accident on the paperwork because the first accident was more severe.

Dr. Pontinen's opinions have flaws. Dr. Pontinen opined the second accident rendered Petitioner unable to work, and yet Petitioner was demonstrably able to work after his June 15, 2021 alleged second accident full time without restrictions according to his paycheck history and his own testimony that his last day working for Respondent was July 8, 2021.

Petitioner's paycheck history and corroborating testimony demonstrates that he worked 40 hours in the week ending June 27, 2021 and 39.5 hours in the week ending July 4, and 3 more full work days prior to his last day working the job with Respondent on July 8, 2021. (R. x 4, see also R. x 2). Petitioner's testimony and medical records establish that he did not seek medical treatment at any point in the timeframe between May 26, 2021 and July 13, 2021, roughly 48 days.

After weighing the medical evidence, the Arbitrator finds the medical opinions and testimony of Dr. Pontinen to be less credible than the opinions and testimony of Dr. Gleason credible.

Dr. Gleason explained Petitioner's Britton test was negative bilaterally, "where he was able to sit on the exam table, legs outstretched in front of him." Dr. Gleason also explained and confirmed Petitioner reported pain on iliac compression bilaterally and pain during simulated axial rotation both of which "suggest magnification or exaggeration." (id. at 29-31). Dr. Gleason explained Petitioner's straight leg raise test results were "inconsistent, and, in fact, contradictory to the Britton test." Dr. Gleason confirmed that a complaint of pain on a straight leg raise at five degrees as in Petitioner's case is "highly unusual." Id. In a follow up to that statement, Dr. Gleason testified "I have never known or seen an individual with an actual problem with their spine who had a negative Britton test bilaterally and yet resisted left straight-leg raising at five degrees." (id. at 34). Dr. Gleason has been a board certified Orthopedic Surgeon since 1986.

After weighing the conflicting medical opinions of Dr. Pontinen and Dr. Gleason, and after gauging the credibility of Petitioner's testimony, the Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury to his bilateral elbows, his lumbar spine, and his bilateral knees arising out of and in the course of employment with Respondent on either May 26, 2021 or June 15, 2021.

Given the Arbitrator's ruling on issue C) above, all other contested issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021848
Case Name	Marcos Arroyo v. Total Staffing Solutions
Consolidated Cases	21WC021847;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0355
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Jack R Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 7/23/2024

/s/Christopher Harris, Commissioner

Signature

24IWCC0355

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARCOS ARROYO,

Petitioner,

vs. NO: 21 WC 21848

TOTAL STAFFING SOLUTIONS,

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 accident, causal connection, the reasonableness and necessity of the medical treatment and charges, prospective medical care, and temporary total disability (TTD) benefits, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission additionally 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).

This claim was consolidated with claim number 21 WC 21847 for purposes of the arbitration hearing and review before the Commission. A separate decision has been issued for claim 21 WC 21847. There is only one bond comprising both claims in the amount of $75,000.00.

The Commission incorporates the Findings and Fact and Conclusions of Law as stated in its decision for claim 21 WC 21847. For reasons stated in decision 21 WC 21847, the Commission finds that the June 15, 2021 accident resulted in a temporary aggravation only of Petitioner's low back and bilateral elbow condition. Benefits are being awarded for claim 21 WC 21847 only.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on September 29, 2023, is hereby reversed for the reasons stated in decision 21 WC 21847.

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.

July 23, 2024

CAH/tdm
O: 6/20/24
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	21WC021848
Case Name	Marcos Arroyo v. Total Staffing Solutions
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Jack R Epstein
Respondent Attorney	Thomas Boyd

DATE FILED: 9/29/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 26, 2023 5.31%

/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

Marcos Arroyo Case # **21** WC **021848**
Employee/Petitioner
v.
Total Staffing Solutions
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 **05/19/2023**. 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. ☒ 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 **Future Medical/8a**

FINDINGS

On **June 15, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**1,036.75**; the average weekly wage was $**518.37**.

On the date of accident, Petitioner was **49** 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 medical bills, $**0** for payment of other benefits, for a total credit of $**00.00**

ORDER

As there was no compensable work accident on June 15, 2021. All other contested 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.

SEPTEMBER 29, 2023

Signature of Arbitrator

STATEMENT OF FACTS

Petitioner's Direct Testimony—

Petitioner testified he began working for Total Staffing on May 24, 2021 and was placed onsite at Assemblers. (T. at 9). He testified he never before had problems with his back, knees, or elbows. (T. at 14). He testified he never had any prior accidents related to his knees, his back, or his elbows. Id.

Petitioner stated he had an accident on May 26, 2021. Id. He states he was hit in his back and elbows by a runaway cart. (T. at 15). Petitioner testified he reported the accident to the general supervisor named "Godfather" or "Padrino" who told him to go home that day. Id. Petitioner had a conversation after the accident with Padrino, a Maria, and "this other person that they call her Naimary." (T. at 16). Petitioner states he returned to work the next day, and reported the accident again to "Padrino" and asked a second time to go to the doctor. (T. at 18).

Petitioner continued to work and says he had pain in his back and elbows, and asked Padrino a third time to see a doctor. (T. at 19-20).

Petitioner testified that on June 15, 2021, he was at work moving some trays and slipped on the floor on a wet spot, after which Petitioner reported this second accident to Padrino alone in the office. (T. at 21). Petitioner testified he told Padrino he hurt "my knees and back." (T. at 22).

Petitioner returned to work on June 16, 2021, and went to see Padrino again, telling Padrino he had pain in "my knees, in my back and in my elbows." (T. at 23-24). Petitioner continued to work for Assemblers after that, but would take off work "on the days that I felt too much pain." (T. at 29). Petitioner's last day at Assemblers was July 8, 2021. (T. at 36). Petitioner testified July 8, 2021 was his last day because "I couldn't take the pain no more." (T. at 37). Petitioner testified he has not been able to work anymore since July 8, 2021. (T at. 39). He testified he first sought medical care after consulting with an attorney. (T. at 40). Petitioner confirmed he only treated for his back and elbows, and not his knees. Id.

Petitioner testified he was forced to resign from his position with Respondent via execution of a "quit form" on July 16, 2021 that he did not understand because he testified he cannot write or read English. (T. at 72-73).

Petitioner's Cross-Examination Testimony:

Petitioner confirmed he had a prior Illinois Workers' Compensation case, 16WC 02799, involving an accident and settlement involving his left arm. (T. at 45). Petitioner testified it was a "cut that I had on my hand" and that "it was a little one." Id. Petitioner recalled receiving $13,500.00 out of that settlement. (T. at 46). Petitioner elaborated that he was paid "for my lost wages during the time that I was in the hospital" but denied being in the hospital for his work injury, stating "No, I don't remember." (T. at 47).

Petitioner was presented on cross-examination with the MAPS intake form he completed on July 13, 2021. (T. at 49). He confirmed he filled it out himself and that day, July 13, 2021 was

the first time he sought treatment of any kind for either work accident. Id. Petitioner was asked, "Why is there no mention of a June 15, 2021 injury or accident at work on that paper that you filled out?" Id. Petitioner answered that he talked to the doctor about it and the doctor took into consideration that he was going to talk about the more severe accident, which was the first one." Id.

Testimony of Total Staffing Representative Naimary Ramirez:

Ms. Naimary Ramirez testified she was employed by Total Staffing first in February 2021, and throughout May and June, 2021 and remains employed there presently as a recruiter. (T. at 79). She reviewed the July 11, 2021 quit form signed by herself and Petitioner. (T. at 80). Ms. Ramirez confirmed her familiarity with the quit form and that this task is a regular part of her job duties at Respondent, and that nearly all or all of the staffing office is bilingual. (T. at 81). Ms. Ramirez confirmed that in the event she fills out a "quit form" written in English that she would translate for an employee if needed, and specifically recalled doing so with Mr. Arroyo on July 16, 2021. (T. at 82). She also confirmed she recognized her signature on the document. Id.

Medical Records:

Petitioner first presented to Midwest Anesthesia and Pain Specialists (hereinafter "MAPS") on July 13, 2021 reporting pain in his bilateral elbows and lower back with VAS Score 10 out of 10. (P. x 1 at 3). His personally-handwritten intake form lists May 27, 2021 as the sole date of injury. The office note asks "when & how did your injury occur?" and the answer reads:

> *On 06/03/21 he was working in a wash room when suddenly he was hit with a cart in both arms causing him to extend his hips and jerk forward. Then on 06/15/21 he was carrying some trays in the same wash room and he slipped on some water causing him to jerk forward again.* Id.

Petitioner was diagnosed with low back pain, pain in right elbow, pain in left elbow, and Radiculopathy, lumbar region, and was told to undergo physical therapy 2-3 times per week for 4-6 weeks. Id.

On September 24, 2021, Petitioner returned to MAPS, stating he had not started physical therapy, and his pain was 10 out of 10. (P. x 1 at 7). MRIs of the lumbar spine and bilateral elbows were ordered to evaluate for soft tissue injury. He returned to MAPS on October 22, 2021, November 5, 2021, December 3, 2021, December 31, 2021, and January 31, 2022, status unchanged and without undergoing any physical therapy sessions. (P. x 1, *passim*).

On February 28, 2022, Petitioner returned to MAPS and discussed bilateral elbow MRIs, lumbar spine MRI still pending. Petitioner was referred to orthopedics for bilateral elbow pain. Physical therapy was ag. (P. x 1 at 37). A Lumbar ESI was scheduled. (id. at 38).

Petitioner underwent a Section 12 examination with Dr. Thomas Gleason on March 8, 2022. (R. x 6). Dr. Gleason obtained a history from Petitioner via a translator. Petitioner stated that "on May 26, 2021, while at work, he was pre-washing work utensils and got hit from behind by a

cart pinning him between his work station and the cart." (*See* Gleason Deposition Exhibit #2 at 1-2). Petitioner's history given to Gleason also states Petitioner "felt low back pain and bilateral elbow pain right away" but he returned to work the next day. Id. Petitioner told Dr. Gleason that this injury "has severely affected his mental state" and that he did not have any complaints or injuries to his lower back or elbows before May 26, 2021. Petitioner stated he "has not had any new injuries to his lower back or bilateral elbows after May 26, 2021." (id. at 2). The following are conclusions Dr. Gleason wrote:

- On examination of Petitioner, Dr. Gleason observed tenderness "even on gentle palpation, diffusely over the entire spine with withdrawal by the examinee to touch" causing Petitioner to need a break and sit down 5 minutes into the exam. Id.
- Tenderness on light palpation over the shoulders bilaterally. (id. at 4)
- Petitioner was observed as "able to use his elbows in a partially flexed position without complaints to move himself in a seated position up and down the table as requested." Id.
- "There are complaints of pain in the spine with rotation of the trunk and pelvis as a unit." Id.
- "The examinee resists the straight leg raising test at 30 degrees on the right and 5 degrees on the left due to complaints of back pain. Id.
- Dr. Gleason reviewed bilateral elbow MRI films, noting tendinosis and ganglion cyst in both left and right elbows. Dr. Gleason reviewed MRI films of the Lumbar Spine performed on February 23, 2022, noting "degenerative disc disease severe L5-S1 with disc space narrowing: and "moderate degeneration L4-5 with disc dessication." (id. at 6).
- DIAGNOSIS: "No positive objective findings on physical examination with respect to spine or upper extremities." (id. at 7).
- Dr. Gleason noted several examples of symptom magnification. Id.
- "An initial 4-6 week delay in the Petitioner seeking initial treatment is significant in terms of suggesting decreased severity in terms of any injury which may have occurred." (id. at 9).
- Regarding the lumbar spine and causal connection, Dr. Gleason opined "the Petitioner has no current complaints with respect to the lumbar spine causally-related to any of the three work accidents mentioned in the medical records" and stated, "to the degree that he may have subjective complaints related to his low back, this would be related to a degenerative pre-existing condition, largely influenced by heredity and genetics." Id.
- Treatment up to March 8, 2022 was "excessive, largely unnecessary and causally unrelated to either date of alleged work incident" according to Dr. Gleason with respect to the lumbar spine. Id.
- Treatment up to March 8, 2022 regarding the bilateral elbows was "excessive, largely unnecessary, and causally unrelated to either date of alleged work incident." Id.
- Regarding work restrictions, Dr. Gleason opined "As of July 13, 2021, there was no reason from a musculoskeletal standpoint why this individual could not return to work in some capacity. (id. at 10). Further, as of the date of IME, "there are no work restrictions medically necessary or causally related to either date of alleged work injury" and that "Petitioner could have returned to work full duty by at least July 13, 2021" and finally that the "estimated date of which the Petitioner reached maximum medical improvement would be on or before July 13, 2021." Id.

Dr. Gleason was deposed on January 17, 2023. He testified he was under the impression that Petitioner had returned back to work and that he was working for a month or so after his May 26, 2021 work injury. (R. x 6 at 11). Dr. Gleason testified that Petitioner's bilateral shoulder flexion 'was only to 110 degrees", and that 170 degrees is considered "normal." (R. x 6 at 17). Dr. Gleason testified that it was "unusual and abnormal" that Petitioner was unable to bend or extend his lower back at all. (id. at 29). Dr. Gleason explained, "since later on in the test—in testing, he was able to sit on the examining table upright with his legs straight out in front of him. There is just no explanation to be considered. Contradictory, inconsistent test." Id. Dr. Gleason explained Petitioner's Britton test was negative bilaterally, "where he was able to sit on the exam table, legs outstretched in front of him." (id. at 32). Gleason also explained and confirmed Petitioner reported pain on iliac compression bilaterally and pain during simulated axial rotation, both of which "suggest magnification or exaggeration." (id. at 29-31).

Dr. Gleason explained Petitioner's straight leg raise test results were "inconsistent, and, in fact, contradictory to the Britton test." (id. at 33). Dr. Gleason confirmed that a complaint of pain on a straight leg raise at five degrees as in Petitioner's case is "highly unusual." Id. Dr. Gleason stated "I have never know or seen an individual with an actual problem with their spine who had a negative Britton test bilaterally and yet resisted left straight-leg raising at five degrees." (id. at 34).

On March 29, 2022, Petitioner underwent bilateral medial epicondyle and cubital tunnel steroid injections at MAPS with "no relief" and newly reported bilateral swelling in elbows and radiating pain up and down his arms with numbness and tingling, and intermittent hand cramping. Radiating back pain with numbness and tingling 10/10 VAS. (P. x 1 at 46-47).

On May 10, 2022, Petitioner had a right lumbar paraspinal trigger point injection done at MAPS with "minimal relief" and was told to try an H-Wave device as the PT and TENS were ineffective. (P. x 1 at 64).

Petitioner's treating physician Dr. Pontinen testified that he is board certified in pain management and an anesthesiologist, but confirmed he has never been board certified in orthopedics. (P. x 8 at 77). Dr. Pontinen testified that he was unsure if he reviewed the MRI films of Petitioner's spine, or just reviewed the reports. (id.at 80). Dr. Pontinen testified he was not aware of Petitioner's prior left arm injuries or prior IWCC settlement. (id. at 85). Dr. Pontinen testified that stenosis of the spine can cause radiculopathy and can be completely degenerative. (id. at 90). Dr. Pontinen stated "there's definitely chronic findings on" Petitioner's lumbar MRI. (id. at 91). Dr. Pontinen testified that to the best of his knowledge, Petitioner did not work after June 15, 2021. (id. at 98-99).

CONCLUSIONS OF LAW

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

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

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

Credibility is the quality of a witness which renders Petitioner's 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 Petitioner's 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). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983).

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

The Arbitrator observed Petitioner's demeanor at trial. On direct exam, Petitioner appeared to be nervous and answered questions in a halting non-conversational manner. Observation of Petitioner's body language caused the Arbitrator to question whether there was exaggeration on the part of Petitioner regarding his pain and physical ability. On cross

examination, Petitioner's demeanor and manner of answering questions changed. He became defensive when asked to acknowledge that some of his prior testimony was inaccurate and confronted with documentary exhibits that contradicted his prior testimony and called into question histories he had given to medical professionals. A review of the medical records and testimony of witnesses both live and via evidence depositions yielded more inconsistencies. In short, Petitioner so little credibility that the Arbitrator finds Petitioner cannot meet his burden of proof.

The Arbitrator finds the testimony of Naimary Martinez credible because her demeanor at trial and patterns of speech were sincere. Her testimony was consistent with the record and is greatly preferred to that of Petitioner. The medical witnesses are discussed below.

REGARDING ISSUE B), WHETHER THERE WAS AN EMPLOYEE-EMPLOYER RELATIONSHIP ON MAY 26, 2021 AND ON JUNE 15, 2021, THE ARBITRATOR FINDS:

Based on the testimony and evidence in the record, Petitioner was an employee of Respondent on the date of the first alleged accident of May 26, 2021. In addition, despite the "quit form" in evidence demonstrating Petitioner resigned from his position with Respondent on June 11, 2021, Petitioner testified he went back to work for one day—June 15, 2021—and was injured a second time on that date. As such, the Arbitrator finds there was an employee-employer relationship on both dates of alleged work accidents.

REGARDING ISSUE C), WHETHER AN ACCIDENT OCCURED ARISING OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT, THE ARBITRATOR FINDS:

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered a work-related injury to his bilateral elbows and lumbar spine on May 26, 2021 while working for Respondent.

The Arbitrator also finds Petitioner failed to prove by a preponderance of the evidence that he suffered a work-related injury to his bilateral elbows and/or lumbar spine and/or bilateral knees, on June 15, 2021 while working for respondent.

The Arbitrator assigns the testimony of Petitioner almost no weight, as per *R & D Thiel*. Petitioner's trial testimony is full of inconsistency. There are several instances where Petitioner's testimony is in conflict with the medical evidence in the record. Petitioner's medical records are themselves inconsistent and unclear with regard to what date or dates he was hurt, and what body parts were affected on which date(s). Petitioner was a poor historian and was unable to explain his prior IWCC injury when questioned. He was also unable to give the first or last name of "Padrino", his supervisor, yet testified to a half dozen specific conversations he recalled having with "Padrino" regarding his multiple work accidents and his multiple requests to seek medical attention. Petitioner was further unable to credibly explain why Dr. Pontinen's records clearly state a date of accident of June 3, 2021, only offering that the doctor was mistaken or confused.

The Arbitrator found Petitioner overall to be evasive on cross-examination. Petitioner testified on direct that he had numerous conversations with "El Padrino," an apparent supervisor at Assemblers. However, Petitioner was unable to provide a first or last name for this individual at any point during direct or cross examination when asked by counsel for both parties.

Combining the evasive and changing testimony from Petitioner surrounding dates of his alleged accidents with the Arbitrator's review of the medical evidence yielded a muddle as to the date of the initial alleged accident. The medical records in evidence state what seem to be four possible dates of accident. May 26, 2021, May 27, 2021, June 3, 2021, and June 15, 2021 all appear at points in the treatment records as dates of injury. Adding to the confusion, Petitioner told Dr. Gleason that he did not suffer any other accident or injury after the accident May 26, 2021. Petitioner's explanation for these varied and in many ways conflicting dates of accident was simply that the doctors he saw did not put the dates down accurately, or that the doctors misunderstood him.

On cross-examination, Petitioner was asked why he wrote down May 27, 2021 on a signed, and dated intake form at MAPS on July 13, 2021. Petitioner was also asked why he failed to write down the second accident date of June 15, 2021 at all on this intake form, which he personally filled out. Petitioner only offered that the second accident "would not have happened if the first one hadn't happened".

Petitioner was asked several times on cross-examination when precisely he filled out the MAPS intake form. Petitioner ultimately testified that "I filled that out after I talked to the doctor" and the doctor had told Petitioner what to write down on the form. (T. at 49-50).

In an effort to link up his allegedly work-related bilateral knee ailments to one or all of the accident dates claimed, Petitioner entered multiple photos into evidence taken by himself and his wife at points in June 2021 of both knees, and of various home therapies and equipment including Epsom salts and braces. Despite all of this evidence presented, Petitioner testified and confirmed that he did not seek or receive treatment for either knee on July 13, 2021 with MAPS at his initial date of service 48 days after the initial alleged accident. Further, there is no diagnosis of a knee condition on July 13, 2021 in the MAPS records or mention of either knee having an abnormality on clinical physical examination. Petitioner had no explanation for this lack of knee pain or treatment or diagnoses in the records from his initial treatment at MAPS. (P. x 1 3-5).

Petitioner was asked by Respondent's counsel on cross-examination if it was strange that the July 13, 2021 medical records don't mention his knees or document knee pain or swelling, to which he testified, "I don't know what to tell you about that." (T. at 69).

Also on cross-examination, Petitioner was asked "were you hurt at work at all on June 3, 2021?" to which he replied, "No, it was June 15." (T. at 52). Petitioner elaborated that Dr. Pontinen was mistaken in his records—Petitioner says he never told the doctor that he was injured on June 3, 2021 at any point.

Petitioner claims he was first injured after being hired by Respondent on May 26, 2021 after being hired on May 24, 2021. Petitioner worked May 27, 2021, and then worked

approximately 11 more days—without restrictions and regular duty—for Respondent before he quit his job for the first time on Friday June 11, 2021. Petitioner testified he was rehired and went back to work for Respondent on June 15, 2021 and had another accident that first day back.

Petitioner claims to have suffered two distinct work accidents while employed by Respondent. Petitioner worked for Respondent for a total of fifteen or sixteen days from May 26, 2021 through July 8, 2021. If Petitioner is taken at his word, all but his first 2 days of work were performed while enduring what he reported as 10 out of 10 pain in both of his elbows and low back, and for the last two or three weeks of his employment, both of his knees as well.

Petitioner's medical records demonstrate that, to date, he has experienced hand cramping, bilateral elbow pain, bilateral radiating arm pain, bilateral shoulder tenderness to light touch with significantly decreased bilateral shoulder range of motion, an inability to raise his left leg more than 5 degrees on straight leg raise testing, bilateral knee pain, and low back pain with radiation.

Despite all of these ailments, there is no dispute that Petitioner waited 48 days from his initial alleged injury of May 26, 2021 to seek any sort of medical treatment for any single body part.

Further undermining his credibility, Petitioner was presented on cross-examination with his prior IWCC settlement—16WC027199—a case which he settled in 2018 for 49.3% Loss of the left arm. (R. x 5). Petitioner testified that this settlement related to a minor scratch on his left wrist. The Arbitrator is concerned as to the reliability of Petitioner's testimony dismissing the prior left arm settlement as relating to a minor hand scratch in the face of such a large scheduled loss settlement of 49.3% of an arm.

Dr. Pontinen's deposition established that Dr. Pontinen believes Petitioner's most serious injuries were suffered on June 3, 2021 to both of his elbows and his lumbar spine when he was struck by a cart. (P. x 8 at 54), and yet Petitioner refutes any injury on June 3, 2021 and testified Dr. Pontinen's records are incorrect. Further, despite stating that the first injury of June 3, 2021 was more severe than the June 15, 2021 incident, Dr. Pontinen testified clearly that Petitioner only required work restrictions after the June 15, 2021 injury, stating the June 3 incident "created an injury that wasn't severe enough for him to have to stop work and seek treatment."

Petitioner's explanation for the confusing intake form at MAPS is that the doctor directed him to list only May 27, 2021 or May 26, 2021 as the injury date because it was the more serious accident. (*see* also P. x 1 3-5). It is still unclear why Petitioner wrote down May 27, 2021 as the date of accident on his intake paperwork. No clarification was attempted by Petitioner at trial as to this issue. Regardless whether May 26 or May 27, 2021 was the intended date on the form, Petitioner did testify that Dr. Pontinen convinced Petitioner the second accident did not need to be written down on the intake paperwork. In other words, Petitioner blames Dr. Pontinen for his inaccurate testimony and medical records and essentially accuses Dr. Pontinen of knowingly falsifying a medical record. The Arbitrator finds nothing in the record that causes him to doubt Dr. Pontinen's honesty.

In this case, the chosen treating doctor and the patient have irreconcilable histories of injury and accident(s). Dr. Pontinen says the second accident was the only reason there was ever a need for work restrictions, and yet Petitioner testified that the doctor told him to only write down the first accident on the paperwork because the first accident was more severe.

Dr. Pontinen's opinions have flaws. Dr. Pontinen opined the second accident rendered Petitioner unable to work, and yet Petitioner was demonstrably able to work after his June 15, 2021 alleged second accident full time without restrictions according to his paycheck history and his own testimony that his last day working for Respondent was July 8, 2021.

Petitioner's paycheck history and corroborating testimony demonstrates that he worked 40 hours in the week ending June 27, 2021 and 39.5 hours in the week ending July 4, and 3 more full work days prior to his last day working the job with Respondent on July 8, 2021. (R. x 4, see also R. x 2). Petitioner's testimony and medical records establish that he did not seek medical treatment at any point in the timeframe between May 26, 2021 and July 13, 2021, roughly 48 days.

After weighing the medical evidence, the Arbitrator finds the medical opinions and testimony of Dr. Pontinen to be less credible than the opinions and testimony of Dr. Gleason credible.

Dr. Gleason explained Petitioner's Britton test was negative bilaterally, "where he was able to sit on the exam table, legs outstretched in front of him." Dr. Gleason also explained and confirmed Petitioner reported pain on iliac compression bilaterally and pain during simulated axial rotation both of which "suggest magnification or exaggeration." (id. at 29-31). Dr. Gleason explained Petitioner's straight leg raise test results were "inconsistent, and, in fact, contradictory to the Britton test." Dr. Gleason confirmed that a complaint of pain on a straight leg raise at five degrees as in Petitioner's case is "highly unusual." Id. In a follow up to that statement, Dr. Gleason testified "I have never known or seen an individual with an actual problem with their spine who had a negative Britton test bilaterally and yet resisted left straight-leg raising at five degrees." (id. at 34). Dr. Gleason has been a board certified Orthopedic Surgeon since 1986.

After weighing the conflicting medical opinions of Dr. Pontinen and Dr. Gleason, and after gauging the credibility of Petitioner's testimony, the Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury to his bilateral elbows, his lumbar spine, and his bilateral knees arising out of and in the course of employment with Respondent on either May 26, 2021 or June 15, 2021.

Given the Arbitrator's ruling on issue C) above, all other contested issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC039869
Case Name	Maria Lopez v. Pradera Construction, Inc./Juan Ortega (Indiv) & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0356
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	Rachel Hamer

DATE FILED: 7/23/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0356

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 Lopez,

Petitioner,

vs. NO: 13 WC 39869

Pradera Constr. Inc., Ill. State Treasurer as *ex-officio* Custodian of the Injured Workers' Benefit Fund, and Juan Ortega, individually & d/b/a Pradera Constr. Inc.,

Respondents.

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 reverses the Arbitrator's conclusion that Petitioner failed to prove she sustained an injury due to a compensable work-related accident on November 19, 2023, and awards benefits accordingly.

After considering the totality of the evidence, the Commission strikes the fourth full paragraph on page 6 through the first full paragraph on page 7 from the Arbitration Decision ("After considering all the evidence adduced…Accordingly, the Arbitrator finds that Pradera Construction Inc. was not Petitioner's employer…"). The Commission also strikes in its entirety from page 7 of the Decision the subsection titled, "With Respect to Issue (B)…" Finally, the Commission strikes in its entirety from page 9 of the Decision the subsection titled, "With Respect to Issue (O)…"

Employment Relationship

The Arbitrator concluded that Petitioner failed to prove an employee-employer relationship between Pradera Construction, Inc. (Pradera), Juan Ortega, and Petitioner on November 19, 2013. The Commission views the evidence differently and finds Petitioner proved she was employed by

Pradera and Mr. Ortega on the date of accident. Petitioner testified credibly that Mr. Ortega hired her in September 2013. Petitioner did not know the name of Mr. Ortega's company at that time. However, Petitioner credibly testified that on the date of accident, Mr. Ortega's brother identified Pradera as Petitioner's employer. Mr. Ortega's brother told Petitioner that Mr. Ortega owned Pradera. Petitioner credibly testified that she initially met Mr. Ortega at his house and he sent her to a worksite with his brother.

Petitioner credibly testified that Mr. Ortega agreed to pay her $130 per day, in cash. Petitioner credibly testified that at the end of each week, Mr. Ortega told the workers to meet at his house on the next Monday so he could the assign workers to various projects. She credibly testified that Mr. Ortega would tell her where to go each day and would check her work at the end of each day. Mr. Ortega provided all the tools and he and his brother instructed Petitioner on how to perform each task. It is clear that Petitioner was employed by Mr. Ortega through Pradera. Thus, the Commission finds Petitioner met her burden of proving an employer-employee relationship existed on the date of accident.

Notice of the Hearing

After carefully reviewing the evidence, the Commission finds both Pradera and Mr. Ortega received notice of the January 23, 2023, arbitration hearing. The credible evidence shows that since June 2003, the registered agent for Pradera has always been:

Juan M. Ortega
5702 W. 26th St.
Cicero, IL 60804

(PX 4). The credible evidence also shows that Petitioner has mailed all Applications and other correspondence to Mr. Ortega at the above address. The Commission notes that the original Application was mailed to that address and there is no evidence that it was returned. Additionally, Petitioner mailed the First Amended Application and Second Amended Application to Mr. Ortega and Pradera at the same address. There is no evidence that either of those Applications were returned.

Over the years, Petitioner has also attempted to notify Mr. Ortega and Pradera of various hearing dates. (PX 3; PX 4; PX 8). Petitioner has sent various letters via certified mail and via regular mail. In 2020, Petitioner even hired a process server in an attempt to personally serve Mr. Ortega information regarding a scheduled hearing date. While none of the letters sent regular mail to Mr. Ortega's address were ever returned to Petitioner, Mr. Ortega managed to successfully avoid Petitioner's investigator and almost all letters sent via certified mail. However, on April 28, 2015, Mr. Ortega signed for one of Petitioner's letters. (PX 3; PX 8). The Commission finds that this is sufficient evidence that the correct address for Mr. Ortega and Pradera remains 5702 W. 26th St., Cicero, IL 60804.

The credible evidence shows that Petitioner mailed a letter to Mr. Ortega and Pradera giving notice of the January 23, 2023, arbitration hearing on November 4, 2022. (PX 8). The letter provided the date, time, and location of the hearing. Like all the prior correspondence sent

to Mr. Ortega via regular mail, there is no evidence that this letter was returned to Petitioner. After considering the evidence, the Commission finds the notice Petitioner provided Mr. Ortega and Pradera of the January 23, 2023, hearing complied with Section 9020.70(b)(1) of the IWCC Administrative Rules. Therefore, both Pradera and Mr. Ortega had appropriate notice of the hearing.

Permanent Disability

The Commission affirms the Arbitrator's analysis of the five factors pursuant to Section 8.1b(b) of the Act. After carefully considering the totality of the evidence and analyzing the five factors pursuant to Section 8.1b(b) of the Act, the Commission finds Petitioner sustained a 20% loss of the left hand and a 2% loss of the whole body due to the November 19, 2013, work accident.

Petitioner sustained a significant injury to her left wrist and also injured her left shoulder after falling off a ladder on the date of accident. Left wrist x-rays revealed a left distal radius impacted fracture and a left ulnar styloid tip fracture. The ER doctor diagnosed Petitioner with a closed fracture of the left radius shaft. On December 5, 2014, Dr. Ostric performed a left limited open reduction internal fixation of a Colles style fracture with significant comminution at the fracture site. Petitioner attended post-surgery physical therapy and Dr. Ostric removed four pins from Petitioner's wrist in January 2014. In late February 2014, Petitioner complained of left shoulder stiffness and pain. Eventually, a left shoulder MRI revealed rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon as well as a small glenohumeral effusion. In April 2014, Dr. Tu administered a left shoulder injection.

On May 19, 2014, Petitioner reported no complaints to Dr. Tu regarding her left shoulder. The examination revealed full rotation, no crepitation, and full strength. Dr. Tu concluded Petitioner's left shoulder impingement had resolved and cleared Petitioner to return to her normal activities with no restrictions. When Petitioner was discharged from therapy for her left wrist injury later that month, she told the therapist that her wrist felt great. Petitioner met all the identified goals and was able to perform most activities with minimal or no pain. Dr. Ostric placed Petitioner at MMI regarding the left wrist on June 5, 2014, and cleared Petitioner to return to work without restrictions. Petitioner had no complaints and Dr. Ostric wrote that Petitioner had recovered well from her severe distal radius fracture.

Petitioner testified that she currently cleans houses. She testified that she does not have to use ladders and the only machine she now uses is a vacuum cleaner. She testified that at times she lacks strength in her left hand is unable to twist or turn her hand. Petitioner testified that her left hand is always swollen. Petitioner also testified that she is unable to lift her left arm completely due to her shoulder injury. After considering the credible evidence, the Commission finds Petitioner sustained a 20% loss of the left hand and a 2% loss of the whole body due to the November 19, 2013, work accident.

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 June 14, 2023, is modified as stated herein.

IT IS FURTHER ORDERED that Respondents shall pay Petitioner temporary total disability benefits of $433.33/week for 28-2/7 weeks commencing November 20, 2013, through June 5, 2014.

IT IS FURTHER ORDERED that Respondents shall pay all reasonable and necessary medical charges submitted in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $390.00/week for 41 weeks, because the injuries sustained caused the 20% loss of the left hand, as provided in Section 8(e) of the Act. Respondent shall also pay Petitioner permanent partial disability benefits of $390.00/week for 10 weeks, because the injuries sustained caused the 2% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

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

July 23, 2024

o: 6/11/24
AHS/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC039869
Case Name	Maria Lopez v. Pradera Construction, Inc., State Treasurer, ex officio Custodian of the Injured Workers' Benefit Fund and Juan Ortega, Individually and d/b/a Pradera Construction, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Jeffrey Huebsch, Arbitrator

Petitioner Attorney	David Menchetti
Respondent Attorney	Thomas Owen

DATE FILED: 6/14/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/ Jeffrey Huebsch, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Maria Lopez Case # **13** WC **039869**
Employee/Petitioner

v.

Pradera Construction, Inc., State Treasurer, ex officio Custodian of the Injured Workers' Benefit Fund and Juan Ortega, Individually and d/b/a Pradera Construction, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **January 23, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/19/2013**, Respondent-Employer Prareda Construction, Inc. ***was not*** operating under and subject to the provisions of the Act.

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

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

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

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

Petitioner's average weekly wage was $**650.00**.

On the date of accident, Petitioner was **43** 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

Claim for compensation denied. The claim against Juan Ortega is barred by the Statute of Limitations. The claim against Pradera Construction, Inc. is barred by 805 ILCS 5/12.8 and a failure of proof on the issue of employer/employee.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer 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.

JUNE 14, 2023

Signature of Arbitrator

INTRODUCTION

The mater was tried on January 23, 2023. Petitioner was represented by counsel and testified via a English/Spanish interpreter. The State Treasurer/IWBF was represented by counsel from the Attorney General's office. Named Respondent-Employers Pradera Construction, Inc. ("Pareda"), and Juan Ortega, individually and d/b/a Pradera Construction, Inc. ("Ortega") did not appear for trial.

Per the IWCC Case Docket Website, which the Arbitrator takes judicial notice of, the Application for Adjustment of claim herein was filed against Pradera Construction, Inc. on December 3, 2013. An Amended Application for Adjustment of Claim was filed against Pradera Construction, Inc. and State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund on February 27, 2019. (RX 2) A 2nd Amended Application for Adjustment of Claim was filed herein on March 10, 2020, naming as Respondents, Pradera Construction, Inc., State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund and Juan Ortega, individually and d/b/a Pradera Construction, Inc. (RX 3) Per CompFile and the IWCC Case Docket website, no appearance was filed on behalf of Ortega or Pradera Construction, Inc.

As this is an IWBF case, all issues were in dispute. Additional issues raised by the IWBF were Statute of Limitations and Notice to Respondent-Employer.

FINDINGS OF FACT

It was Petitioner's testimony that on November 19, 2023 she was working for a company that she understood to be called Pradera Construction. She said that she was hired in September of 2013. A friend told her of a job and Petitioner met with Juan Ortega (Ortega) and his brother (Petitioner did not recall the brother's name) at his house in Cicero. Petitioner did not recall the exact date of this meeting. Ortega called Petitioner to his home and said that she was going to be working for him, but she needed to go with his brother to a work-site because he had other jobs going on. She did not sign an employee contract.

Ortega and Pradera were in the remodeling business. Ortega told Petitioner that she was going to pull up rugs and install wood floors. Petitioner's work involved demolition, removal and remodeling of structures, and the use of sharp edged cutting tools. Ortega provided the equipment, tools, and materials to perform the job. Ortega would send Petitioner, along with Ortega's brother, to work sites. Petitioner would only receive direction from Ortega or his brother. On Mondays, Petitioner would start at Ortega's house and he would tell her where to go. Petitioner did not work at a specific job site and was dispatched to different buildings Ortega's brother would supervise and direct her on how to do the work throughout the day. At the completion of work, Ortega would make sure that the work was done correctly. Petitioner believed that Ortega could terminate her, because it was his business.

Petitioner testified that she first heard of the entity Pradera Construction on the day of the accident.

Petitioner received $130 in cash per day, and she worked every day from 6:00 a.m. to 5:00 p.m. for two months. Respondent did not issue W-2s and Petitioner did produce any tax returns.

Petitioner testified that she is right hand dominant and had no prior injuries to her left hand or left arm before November 19, 2013.

On November 19, 2013, Petitioner went to Ortega's house and she and a co-worker took a company truck to Des Plaines to clean gutters. While Petitioner was reaching for the gutter, both the gutter and the ladder moved. Petitioner fell approximately 12 feet and injured her left hand. She felt a sharp pain and was unable to move her left hand.

Petitioner called Ortega immediately after the fall and told him that her left hand was broken and that she was going to call 911. Ortega told her not to call 911 and instead go to his doctor in Cicero. Petitioner testified that she drove herself to see the doctor (her co-worker could not drive). The doctor confirmed that her left hand was broken. Ortega's brother then picked her up and drove her to the MacNeal Hospital Emergency Room. Ortega's brother filled out the hospital forms and identified Petitioner's employer as Pradera. Petitioner testified that she first learned of the name Pradera Construction on the date of accident when Ortega arrived at the hospital, he was mad at his brother for providing that information. She does not know if the information is accurate, but thought it was due to Ortega's reaction.

Petitioner has not received any money from Pradera but believes that the company is still in business. Petitioner believes that her medical bills remain outstanding.

Petitioner testified that she continued treatment for her broken hand, which involved physical therapy and surgery. Petitioner subsequently sought treatment for her left shoulder, claiming that she could not raise her left arm and that the ladder hit her shoulder when she fell.

Currently, Petitioner's left hand is weaker and cannot twist and turn as well as it did prior to the injury. Petitioner's left hand is always swollen and she cannot lift her arm all the way up. Petitioner now works cleaning houses with another woman. She does not go up long ladders and she does not use machinery.

Petitioner's Exhibit 5, was a compilation of treating medical records. On November 19, 2013, Petitioner presented at MacNeal Hospital Emergency Room with a hand injury. X-rays of the left hand showed a left distal radius impacted fracture; and left ulnar styloid tip fracture. The diagnosis was a closed fracture of shaft of radius and fracture of ulnar styloid. Petitioner was provided a sling. (PX 5)

Petitioner then began treatment with Dr. Srdjan Andrei Ostric, MD, a fellowship trained hand surgeon, at Midwest Plastic and Reconstructive Surgery. On December 2, 2013, Petitioner underwent a limited left open reduction internal fixation of the fracture. On December 27, 2013, Petitioner presented at Midwest Plastic & Reconstructive Surgery ("Midwest") for a post-operative evaluation. Petitioner was advised to start physical therapy immediately and remain off work. On December 31, 2013, Petitioner presented at Athletico for an initial evaluation and started a course of physical therapy. (PX 5)

On January 9, 2014, Petitioner returned to Midwest and the pins were removed. Petitioner was instructed to continue physical therapy and remain off work. On February 6, 2014, Petitioner had abnormal sensations (sensory dysesthesias) in her radial nerve, which was expected due to the pins in the radial aspect of the wrist. Petitioner was found to have good range of motion, about 80 degrees clinically, and her fingers were supple. (PX 5)

On March 5, 2014, Petitioner reported that her left wrist was feeling better but she had increased shoulder pain since her last visit. The records show that her initial complaints did not focus on her left shoulder, but that

complaints of left shoulder pain increased over time. Petitioner was referred to a shoulder specialist and instructed to remain off work. (PX 5)

On April 7, 2014, Petitioner presented at G & T Orthopaedics and Sports Medicine ("G & T") for a consultation regarding her left shoulder. Petitioner reported a different accident date of November 22, 2023, and now reported that she jarred her left shoulder and elbow as a part of the fall. She was diagnosed with left shoulder pain and a possible rotator cuff tear. On the same day, Petitioner underwent an MRI, which showed an intact rotator cuff, but also tendonitis and/or bursitis involving the distal supraspinatus tendon, and a small glenohumeral effusion. On April 21, 2014, Petitioner returned to G & T and was diagnosed with shoulder impingement. Petitioner underwent a 2 cc of Depo-Medrol and 6 cc of lidocaine injection to subacromial space. On May 8, 2014, Petitioner returned to Midwest and her work restrictions were continued. On June 5, 2014, Petitioner reported that she felt good with no complaints. Petitioner demonstrated good range of motion of her wrist and full range of motion in her fingers. Petitioner had good grip strength. Petitioner was discharged from active care, placed at MMI, and told to resume full duty work as tolerated. (PX 5) June 5, 201 was the last date of treatment for Petitioner's injuries.

Several documents regarding the Respondent-Employers were accepted into evidence.

RX 1 was a Corporation Search, showing that Pradera Construction, Incorporated was involuntarily dissolved on November 14, 2008. The Agent for Pradera is listed as Juan M. Ortega, 5702 W. 26th St., Cicero, IL 60804. Its President is listed as Juan Ortega of the same address.

PX 1 was a subpoena response from NCCI documenting that there was no workers' compensation insurance coverage for Pradera Construction, Inc. on 11/19/2013.

PX 2 was documents from J. McCarthy Investigations regarding an attempted service of a trial subpoena for Juan Ortega, Individually and as President of Pradera Construction, Inc., returnable on 3/4/2020 at 8:45. The subpoena was not served on Ortega personally, but was left on a gate 5702 W. 26th St. in Cicero.

PX 3 contains trial notices, RFH forms and return receipts sent to Ortega and Pradera. It does appear that Petitioner's 7/13/2015 RFH to Pradera Construction, Inc. was signed for by Juan Ortega.

PX 4 is a Corpration Search regarding Pradera Construction, Inc., showing that it was dissolved 11/14/2008.

PX 8 was a Better Business Bureau search for Pradera Construction, Inc. It shows that Padrera is located at 5702 W 26th St. in Cicero and Juan Ortega is the owner. This exhibit also has copies of correspondence to Ortega advising him of trial dates in the case, including January 23, 2023. There is no proof that Ortega actually received notice of the 1/23/2023 hearing.

PX 6 was Petitioner's claimed bills. PX 9 was copies of subpoenas for the medical records and bills that Petitioner tendered into evidence.

CONCLUSIONS OF LAW

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

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

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

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

After considering all of the evidence adduced, the Arbitrator finds that Petitioner's claim for compensation is denied.

The reasons for the denial of the claim follow. Thereafter, the Arbitrator will make specific findings on Issues A through O so that the Commission can make a proper award in the event that it does not endorse the denial of the claim.

The Arbitrator finds that Petitioner's application against Ortega is barred by the statute of limitations and that the claim against Prareda is a nullity and that there was a failure of proof as to an employee/employer relationship between Petitioner and Pareda, such that the claim for compensation must be denied.

As to the claim against Pareda, the Act requires an application to be "filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation..." 820 ILCS 305/6. If this criteria is not met, the "right to file such application shall be barred." Id.

The date of accident is November 19, 2013. The original Application for Adjustment of Claim was timely filed on December 3, 2013, but only named Pradera Construction Inc. as a Respondent. The claim against Ortega was filed on March 10, 2020. The IWBF raised the Statute of Limitations as a defense to the claim and the Arbitrator finds that the claim against Ortega is time barred, having been filed 6 plus years post accident.

There was no employer/employee relationship between Petitioner and Pradera because Pradera was not a lawful entity in 2013 and, thus could not have entered into a contract of hire with Petitioner because it did not exist. According to the Illinois Secretary of State File Detail Report, Pradera Construction Incorporated was involuntarily dissolved on November 14, 2008, over five years prior to the claimed date of accident. The corporate entity of Pradera Construction did not exist in September of 2013 and could not lawfully conduct or transact business, including being incapable of hiring or employing anyone, in the State of Illinois at the time of the accident. 805 ILCS 5/3.10 and 805 ILCS 5/2.15. Further, as it had been dissolved for over five years at the time of the injury. Even had it existed, service upon same could not be made upon the corporate offices or registered agent. 805 ILCS 5/5.05 and 805 ILCS 5/5.25. Finally, as noted above, any claim against the dissolved corporation was barred five years after its dissolution. 805 ILCS 5/12.80. The Application was filed more than five years from Pradera's dissolution and is a nullity.

The Arbitrator further notes that Petitioner was not aware of Pradera's name while working for it. She found out the name at the emergency room on the date of accident.

Accordingly, the Arbitrator finds that Pradera Construction Inc. was not Petitioner's employer and that the original Application for Adjustment of Claim is deficient on its face for failing to identify a proper employer party.

WITH RESPECT TO ISSUE (A), WAS RESPONDENT-EMPLOYER OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS:

Petitioner's testimony establishes that her employer's business of remodeling/demolition with power tools and sharp instruments made it (whoever the correct employer was) subject to the Act under the automatic coverage provisions of Section 3 of the Act. 820 ILCS 305/3.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS:

There was no contract of hire as to Pradera, as it did not exist and could not enter into any contract. As to Ortega, Petitioner's claim is time barred, but he did apparently hire her and instructed her where to go and what to do and provided supplies, materials and tools.

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

The accident arose out of and in the course of whatever employment Petitioner had as a laborer. She was engaged in gutter cleaning at a location that she was directed to by Ortega when she fell off a ladder, a risk incidental to her job duties.

WITH RESPECT TO ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS:

November 19, 2013, per Petitioner's testimony and the MacNeal records.

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

Timely notice was given to Ortega, per Petitioner's testimony.

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

Petitioner's current condition of ill-being, status post ORIF wrist fracture and shoulder starin status post one injection is causally related to the injury.

WITH RESPECT TO ISSUE (G), WHAT WERE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's Average Weekly wage was $650.00, based upon her testimony.

WITH RESPECT TO ISSUE (H), WHAT WAS PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Per the medical records, Petitioner was 43 on the date of accident.

WITH RESPECT TO ISSUE (I), WHAT WAS PETITIONER'S MARITAL STATUS AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS :

Petitioner claimed to be single with no dependents and this is the Arbitrator's finding.

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:

The medical expenses claimed in PX 6 are found to be reasonable and necessary. Respondent has paid no bills.

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

The TTD rate would be $433.33/week and the period of lost time is November 20, 2013 through June 5, 2014 (28-2/7 weeks).

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

As to the five factors to be considered in determining PPD, per Section 8.1b(b) of the Act, the Arbitrator finds: Factor 1-No AMA PPI report was admitted. Factor 2- Petitioner was employed as a laborer and was able to return to work as a house cleaner, not climbing high ladders. Factor 3-Petitioner was 43 at the time of injury. Factor 4- No evidence of an impairment in earning capacity was submitted. Factor 5- records in PX 5 from Dr. Tu and Dr. Ostric support Petitioner's subjective complaints.

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

No claim for Penalties or Fees was made.

WITH RESPECT TO ISSUE (N), IS RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS:

Respondent is not due any credit.

WITH RESPECT TO ISSUE (O), STATUTE OF LIMITATIONS; NOTICE TO RESPONDENT-EMPLOYERS; LIABILITY OF THE IWBF; THE ARBITRATOR FINDS:

As stated above, the claim against Ortega is time-barred and denied.

Petitioner failed to prove notice of the January 23, 2013 arbitration hearing was given to Pradera or Ortega. They were not given notice of the trial.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC004086
Case Name	Joyce Carpenter (Surviving Spouse of Aaron Carpenter) v. Jim's Towing & Recovery/G4 Enterprises, Inc. and Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0357
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	Alex Rabin, Brett Kolditz

DATE FILED: 7/24/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOYCE CARPENTER
(SURVIVING SPOUSE OF
AARON CARPENTER),

Petitioner,

vs. NO: 14 WC 4086

G4 ENTERPRISES/JIM'S TOWING
& RECOVERY and INJURED
WORKERS' BENEFIT FUND,

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 jurisdiction and "other: Injured Worker Benefit Fund Liability," 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, further clarifying the Decision of the Arbitrator as follows.

The Commission agrees with the Arbitrator's conclusion that the Injured Workers' Benefit Fund (hereinafter "IWBF") is not liable for payments arising out of this accident as no evidence was presented at trial to show that Respondent, G4 Enterprises/Jim's Towing & Recovery (hereinafter "G4 Enterprises") failed to provide workers' compensation insurance coverage on the date of injury. As such, the Commission further writes to clarify that Respondent, G4 Enterprises is liable for payment of all awarded benefits in this case.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 12, 2024 is clarified 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 §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.

July 24, 2024

o: 07/11/24
CMD/jjm
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC004086
Case Name	Joyce Carpenter (Surviving Spouse of Aaron Carpenter) v. Jim's Towing & Recovery/G4 Enterprises, Inc. and Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	Suzanne Borland, Alex Rabin

DATE FILED: 1/12/2024

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

/s/ Dennis OBrien, Arbitrator

Signature

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

Joyce Carpenter (surviving spouse of Aaron Carpenter) Case # **14** WC **004086**
Employee/Petitioner

v. Consolidated cases: _____

Jim's Towing & Recovery / G4 Enterprises, Inc. and Injured Workers' Benefit Fund
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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 25, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

ORDER

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

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

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

On October 5, 2013 Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, and there was an employer-employee relationship between Aaron Carpenter and Respondent G4 Enterprises.

Petitioner Aaron Carpenter suffered an accident on October 5, 2013, which arose out of and in the course of his employment by Respondent.

Respondent was given notice of the accident within the time limits stated in the Act, and further, that if that notice was faulty in any way, it has not proved that it was prejudiced by faulty notice.

Petitioner's medical condition, death as a consequence of multiple traumatic brain injuries is causally related to the accident of October 5, 2013.

Petitioner's average weekly wage while working for Respondent from August 31, 2013 to October 5, 2013 was $353.69. resulting in annual earnings of $18,391.88.

On October 5, 2013, the date of this accident, and on October 10, 2013, the date of Aaron Carpenter's death, Aaron Carpenter 38 years of age, married to Joyce Marie Ritz Carpenter, and had no minor children.

Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner.

All of the bills introduced into evidence in Petitioner Exhibit 10, totaling $195,416.33, are related to Petitioner's traumatic brain injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident. They are to be paid pursuant to the Medial Fee Schedule.

The Arbitrator further finds that Respondent is liable for the payment of $8,000.00 in burial expenses pursuant to §7(f) of the Act.

Joyce Carpenter is the beneficiary of decedent Aaron Carpenter's workers' compensation benefits and under §7 of the Act payments the death benefits in this case were to be paid at the minimum weekly death rate then in effect, $499.20, and were to commence on October 10, 2013.

The Injured Workers Benefit Fund is not liable for payments arising out of this accident pursuant to §4(d) of the Workers' Compensation 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.

JANUARY 12, 2024

Signature of Arbitrator

Joyce Carpenter (surviving spouse of Aaron Carpenter) vs. Jim's Towing & Recover / G4 Enterprises, Inc. and Injured Workers Benefit Fund

14 WC 004086

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

This matter was heard in Springfield, IL, on October 25, 2023. Angela Grable, board member and officer of G4 Enterprises, was represented and appeared at hearing.

Petitioner testified that she is the surviving spouse of Aaron Carpenter, who, on the date of accident, October 5, 2013, was a tow truck driver for Jim's Towing, also known as G4 Enterprises, (G4 Enterprises). (TX 17) Petitioner testified that all tow calls that Aaron Carpenter took were dispatched by G4 Enterprises, she was unaware of any tow calls of his own. She said she had actually worked as one of Respondent's dispatchers, but was not the dispatcher on the date of the accident, she was unsure of who dispatched the call on the date of accident, though the call came in on the work phone. (TX 18-19) Petitioner became aware that Aaron Carpenter had been involved in an accident as a tow operate of another company called her and told her of an accident involving a Jim's Towing truck. She said she tried calling her husband on the work phone and it went straight to Angela Grable, and she told Ms. Grable what she had found out, and asked what was going on. (TX 20-21) She said Aaron Carpenter was hospitalized at St. John's Hospital for five days before he died on October 10, 2013. (TX 22). Aaron Carpenter's funeral was held at Staab Funeral Home. (TX 22-23) She identified the exhibits that constituted Aaron Carpenter's death certificate and the bill for his funeral. (TX 22,23)

Petitioner testified that G4 Enterprises provided the tow truck driven by Aaron Carpenter, as well as fuel, insurance and materials necessary for repairs to the tow truck. (TX 23). Some of the tools used by him on tow calls belonged to G4 and some were his. (TX 23-24). She Said her husband turned all of the money for the tows into Respondent G4 through dispatchers or owners, and he would then get paid at the end of the week, receiving 25% of the proceeds from tows that he reported conducting. (TX 24). Petitioner testified that G4 provided Aaron Carpenter with a work cell phone and that he did not spend money out of pocket on the tow truck. (TX 25). She said Petitioner's Exhibit 5 documented payments her husband received for the tows he had done prior to this accident. She said the call was dispatched to do at the time of the accident had been received from G4 Enterprises. (TX 25-26)

On cross-examination, Petitioner testified that Aaron Carpenter did not own a personal cell phone when he started doing tows for G4. She said she did not know of him ever getting calls directly from police agencies. She said she had a personal cell phone so her husband could check on her due to her health, but all he had was the work cell phone. (TX 27) Petitioner testified that Aaron Carpenter worked on friends' cars, but stated that she was unfamiliar with a business called Car-Jack Enterprises. (TX 27-28) She admitted that Aaron Carpenter was free to drive the truck on whatever route he wanted to the scene of a tow, and people from G4 did not drive along with him to the best of her knowledge. (TX 28-

29) She did not know whether taxes or social security payments were deducted from Aaron Carpenter's checks from G4. (TX 30)

On redirect, Petitioner explained that if Aaron Carpenter could not drive the tow truck that he was leasing, then G4 would give him a different one to drive. (TX 31) She said new drivers for the company would occasionally ride with her husband so he could show them the ropes. (TX 31)

Angela Grable

Ms. Grable testified that she was a board member and officer of G4 Enterprises, a tow company that G4 took over from a previous owner (Jim's Towing), which Aaron Carpenter had previously worked for. (TX 33-34). Ms. Grable never went on tow calls with Aaron Carpenter, but knew that nobody from G4 Enterprises directed his routes to tow calls. (TX 34). She testified that Aaron Carpenter leased a tow truck from G4 and that he kept the truck with him 95% of the time. (TX 35; RX 2). She further testified that Aaron Carpenter ran Car Jack Enterprises, his side business where he worked as a mechanic on various vehicles, out of the G4 Towing shop, using his extensive array of personal tools. (TX 36). Ms. Grable testified that none of the payments made to Aaron Carpenter by G4 had any deductions, such as taxes or social security, taken out. (TX 37). She explained that after the accident, she realized that G4 did not have full coverage insurance on the tow truck; Petitioner was of the understanding that since it was a single vehicle accident, and thus possibly Aaron Carpenter's fault, G4 might come after Petitioner for the value of the truck. (TX 38). To assuage Petitioner's concerns, Ms. Grable drew up a "Mutual Release of All Claims," which was signed by both Petitioner and Ms. Grable and notarized. (TX 38-39; RX 6). Ms. Grable testified that Aaron Carpenter was allowed to turn down tow calls that he received and that he was not mandated to do tow calls if he did not want to. (TX 39).

On cross-examination, Ms. Grable agreed that Petitioner had worked as a dispatcher for G4 for a period of time before Aaron Carpenter's accident. (TX 40). She stated that G4 paid for fuel, licensure, insurance, and parts for repairs to the tow truck and that Aaron Carpenter provided any necessary labor to repair the tow truck. (TX 41). Ms. Grable testified that G4 received 10% of Aaron Carpenter's Car Jack Enterprises revenue as rent for being allowed to conduct his side business at the G4 shop. (TX 41). She stated that agreement was not documented and that the "rent" was paid in cash. (TX 42). Ms. Grable said she could not remember how she became aware of Aaron Carpenter's accident, but she found out about it on the day of the accident. She agreed that he received tow jobs from G$ Enterprises' dispatchers. (TX 43)

When questioned by the Arbitrator, Ms. Grable said that if Petitioner did tows for anyone other than G4 Enterprises, he was to pay G4 the same amount he would if the tow had been assigned by a G4 dispatcher. She said she knew of no such tows having occurred, however. (TX 44-45)

DOCUMENTARY EVIDENCE

Petitioner's Exhibit 2 are the ambulance records of Medics First, and reflect treatment and transport of Aaron Carpenter from a one vehicle rollover motor vehicle accident. Mr. Carpenter was found alive but

unresponsive on the roadway after being ejected from the vehicle. He was transported to St. John's Hospital.

Petitioner's Exhibit 3 are the medical records of St. John's Hospital for Aaron Carpenter's admission and hospitalization from October 5, 2013 through the date of his death, October 10, 2013. He was treated for subarachoid hematoma, subdural hematoma, and left intraparenchymal hemorrhage with midline shift. Numerous tests were conducted which revealed bilateral rib fractures, right maxillary fracture, right manibular body fracture, bilateral zygomatic arch fracture and extracranial postseptal hematoma. By post-injury day number two testing revealed him to have brain death, he was eventually provided comfort care, and on October 10, 2013 he had no cardiac activity and was declared deceased.

Petitioner's Exhibit 4 consists of copies of cancelled checks to Aaron Carpenter from G4 Enterprises dated September 18, 2013 in the amount of $511.69 for "pay 8/31 – 9/6," dated September 22, 2013 in the amount of $208.00, with further notation on the check that "$100.00 pd in cash," dated September 27, 2013 in the amount of $316.65 for "pay 9/13 – 9/20," and dated October 4, 2013 in the amount of $320.70 for "9/20-9/27." An additional check dated October 11. 2013 made payable to Joyce Carpenter in the amount of $311.40 was noted to be for "Aaron 9/27-10/5." Together these checks and the $100.00 paid in cash add up to $1,768.44.

Petitioner Exhibit 5 is an Internal Revenue Service 1099-Misc miscellaneous income form issued by G4 Enterprises to Aaron Carpenter showing "nonemployee income" of $1,688.44.

Petitioner's Exhibit 6 is Aaron Carpenter's death certificate, showing a date of death of October 10, 2013.

Petitioner's Exhibit 7 is the marriage certificate dated April 11, 2011, for Aaron Carpenter and Petitioner.

Petitioner Exhibit 8 is a Sangamon County Sheriff traffic crash report describing the vehicular accident of October 5, 2013.

Petitioner's Exhibit 9 is the contract from Staab Funeral Home for $8,230.00.

Petitioner's Exhibit 10 are the medical records and bills from St. John's Hospital from October 5 – October 10, 2013, totaling $195,416.33.

Respondent's Exhibit 1 is a one paragraph lease agreement between Jim's 24 Hour Towing and Aaron Carpenter dated August 1, 2011. It is a very simple document and notes that Aaron Carpenter "is responsible if they get hurt and James is not responsible for any injury."

Respondent's Exhibit 2 is a far more detailed Lease Agreement between G4 Enterprises and Aaron Carpenter, signed by Aaron Carpenter and Angela Grable, board member and officer of G4, on August 29, 2013. G4 Enterprises is identified as "Lessor," and Aaron Carpenter as "Lessee." The Lease provides, inter alia, that Aaron Carpenter's rent for the tow truck was 70% of all earnings generated by tows he did. G4 could terminate the six-month lease agreement with one week's written notice or by mutual agreement. The lease did not provide for any early termination solely by Aaron Carpenter. The Lease permitted Aaron Carpenter to use the tow truck not only for G4-dispatched tows but also for self-initiated tows. The Lease required G4 to pay all operating costs of the equipment. The Lease contains a

clause stating that Aaron Carpenter indemnified and held G4 harmless for any claims including those of personal injury, death, or damage to property occasioned by the operation of the tow truck. The lease noted that G4 Enterprises was responsible for "all operating costs whatsoever of the equipment, including without limiting the generality of the foregoing, the cost of fuel, oil, grease, full coverage insurance, licenses pursuant to the Motor Carrier Act, license and registration fees pursuant to the Motor Vehicle Act, municipal licenses, and motor vehicle inspections fees." G4 Enterprises was to maintain and keep the equipment in good condition, to replace parts that wore out or became inoperative, but Aaron Carpenter was responsible for repairs caused by his negligence. Carpenter was to keep records about the vehicle and its maintenance, a vehicle daily report card, preventative maintenance records, accident reports, and daily tow sheets. G4 Enterprises was to insure the equipment and pay those insurance premiums when due, and Aaron Carpenter was to report losses and damage. Workers' compensation insurance is not mentioned in this lease agreement.

Respondent's Exhibit 3 and 4 are receipts relating to work done by a business called Car Jack Enterprises located at 1403 South 10 ½ Street in Springfield, which is the G4 shop address. Respondent Exhibit 3 is for $$60 of work performed on September 20, 2013, and Respondent Exhibit 4 is for the purchase of an $8.99 headlamp retaining ring.

Respondent Exhibit 5 is titled "Earnings log for Aaron Carpenter." It is simply a list of dates and figures for earnings, beginning July 31, 2013. No actual records are included with this list, and it is noted that only the last three of the ten payments are the same as the cancelled checks introduced in Petitioner Exhibit 4.

Respondent's Exhibit 6 is a Mutual Release of All Claims signed by Petitioner and Ms. Grable and notarized. The Release noted consideration of $2,500.00 paid to Petitioner. In exchange for this payment Joyce Carpenter was discharging G4 Enterprises, its agents, and officers, from all causes of action in any way arising from the personal injuries and death of Aaron Carpenter, and G4 Enterprises released Aaron Carpenter's estate from any liability for damage to its property. No mention of workers' compensation is included in this release.

ARBITRATOR CREDIBILITY ASSESSMENT

Joyce Carpenter appeared depressed and weak, and made little attempt to exaggerate or in any way draw extraordinary sympathy while testifying. She answered all questions in a soft voice, and did not appear to evade any questions placed to her by the attorneys. The Arbitrator finds her to have been a very credible witness.

Angela Grable appeared quite intelligent and answered all questions asked of her by the attorneys. She did not appear to be evading any questions, though her explanation that the release, Respondent Exhibit 6, was drawn up to prevent Joyce Carpenter from worrying about the damages to the tow truck seemed somewhat disingenuous, as its real effect was to protect G4 Enterprises from liability due to the medical care, suffering, and loss of life of Aaron Carpenter. The Arbitrator, for that reason, finds Angela Grable to be a somewhat credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether Respondent was operating under and subject

to the Illinois Workers' Compensation or Occupational Diseases Act and whether there was an employer-employee relationship between Aaron Carpenter and Respondent on October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

Respondent in this matter provided Mr. Carpenter with his tow vehicle, paid for gas and all maintenance for the vehicle, paid for any repairs to the vehicle and dispatched any calls that he would take directly from G4 Enterprises. Respondent provided insurance for the vehicle in question and most of the tools that Aaron would use on a day-to-day basis. Respondent in this matter handled all of the finances and accounting for the towing as Mr. Carpenter would simply turn in his tow receipts at the end of each day and then be paid a percentage out of those tows from a checking account in the name of the Respondent.

Mr. Carpenter was provided a work cell phone and that he would get dispatched tow calls through either the dispatcher employed by G4 Enterprises or from one of the owners directly. The dispatch that Mr. Carpenter received that ultimately led to the accident in question was clearly dispatched by G4 Enterprises.

While Mr. Carpenter could theoretically take other tow calls while using the G4 Enterprises truck, no person testified and no documentary evidence was introduced indicating he had ever towed a vehicle which had not been dispatched for tow by Respondent. One of the owners of the Respondent, Angela Grabel, testified that they were unaware that he had ever taken and completed such a tow.

The lease between G4 Enterprises and Aaron Carpenter is, with the exception of the right to accept other tows, and the right to refuse tows, generally one-sided in favor of G4 Enterprises, it can cancel the lease for no specific reason with one week's written notice, while Aaron Carpenter has no such cancellation right. The lease does give G4 Enterprises control of the vehicle in many, if not most, respects, including insurance, repair, maintenance, fueling, and G4 provided most of the tools as well as the principal equipment necessary to do the job of towing, the tow truck itself.

The Arbitrator finds that on October 5, 2013 Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, and there was an employer-employee relationship between Aaron Carpenter and Respondent G4 Enterprises. These findings are based upon the testimony of Joyce Carpenter and the documentary evidence introduced at arbitration.

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner Aaron Carpenter's employment by Respondent G4 Enterprises on October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act and employer-employee relationship, above, are incorporated herein.

The testimony indicates that Petitioner Aaron Carpenter was dispatched by Respondent G4 Enterprises's dispatcher to perform a tow, and while traveling to perform that tow, as a traveling employee, he was involved in a single vehicle accident resulting in his being ejected from the vehicle. No evidence to the contrary was introduced at arbitration.

The Arbitrator finds that Petitioner Aaron Carpenter suffered an accident on October 5, 2013, which arose out of and in the course of his employment by Respondent. This finding is based upon the testimony of Joyce Carpenter and Angela Grable, as well as the records of Medics First ambulance and the police crash report.

In support of the Arbitrator's decision relating to whether Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, and accident, above, are incorporated herein.

Joyce Carpenter testified that on the date of this accident, after being advised by another tow truck driver of an accident involving what could have been Aaron Carpenter's truck, during a period of time Aaron Carpenter was out on a tow call, she called Aaron Carpenter's work cell phone, and the call was answered by Angela Grable, an officer of G4 Enterprises, and passed on information about the reported accident and asked what was going on.

Angela Grable testified that she did not know how she became aware of the accident, but she knew she was made aware of it on the date of the accident.

The Arbitrator finds that Respondent was given notice of the accident within the time limits stated in the Act, and further, that if that notice was faulty in any way, it has not proved that it was prejudiced by faulty notice. This finding is based upon the testimony of Joyce Carpenter and Angela Grable.

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being, death, as a consequence of multiple traumatic brain injuries, is causally related to the accident of October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, and notice, above, are incorporated herein.

Petitioner was taken to St. John's Hospital by ambulance from the site of a single vehicle accident which resulted in his being injected from the vehicle as it was rolling over repeatedly. He was noted to be alive, but

unresponsive, by the ambulance crew. At the hospital he was found to have subarachoid hematoma, subdural hematoma, and left intraparenchymal hemorrhage with midline shift. Numerous tests were conducted which revealed bilateral rib fractures, right maxillary fracture, right manibular body fracture, bilateral zygomatic arch fracture and extracranial postseptal hematoma. By post-injury day number two testing revealed him to have brain death, he was eventually provided comfort care, and on October 10, 2013 he had no cardiac activity and was declared deceased.

The Arbitrator finds that Petitioner's medical condition, death as a consequence of multiple traumatic brain injuries is causally related to the accident of October 5, 2013. This finding is based upon the records of Medics First ambulance service and St. John's Hospital, as well as the Certificate of Death. **The Arbitrator further finds that the chain-of-events also support a finding of causal connection.** This finding is based upon testimony indicating a pre-accident state of asymptomatic good health, Aaron Carpenter's having an accident on October 5, 2013, and his immediately after said accident being unresponsive and being found to have traumatic brain injuries, medical treatment, new diagnoses based on diagnostic testing and physical examinations, and subsequent death. Certi-Serve, Inc. vs. Industrial Commission, 101 Ill.2d 236,244 (1984)

In support of the Arbitrator's decision relating to Petitioner's earnings preceding October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, and causal connection, above, are incorporated herein.

The lease agreement between Aaron Carpenter and G4 Enterprises is dated August 29, 2013.(RX 2)

Petitioner introduced canceled checks to Aaron Carpenter from G4 Enterprises (PX 4) dated September 18, 2013 in the amount of $511.69 for "pay 8/31 – 9/6," dated September 22, 2013 in the amount of $208.00, with further notation on the check that "$100.00 pd in cash," dated September 27, 2013 in the amount of $316.65 for "pay 9/13 – 9/20," and dated October 4, 2013 in the amount of $320.70 for "9/20-9/27." An additional check dated October 11. 2013 made payable to Joyce Carpenter in the amount of $311.40 was noted to be for "Aaron 9/27-10/5." Together these checks and the $100.00 paid in cash add up to $1,768.44.

Respondent introduced a list of payments which purported to show amounts paid (RX 5), but did not include any backup material to evidence the actual payment of said amounts. Some, but not all, of the amounts were consistent with the checks introduced in Petitioner's exhibit, other amounts were inconsistent with the copies of checks introduced. The $100.00 in cash noted in one of the checks was not included in the amount listed on Petitioner's list of payments.

The Arbitrator finds that Petitioner's average weekly wage while working for Respondent from August 31, 2013 to October 5, 2013 was $353.69. resulting in annual earnings of $18,391.88. This finding is based upon the payment checks contained in Petitioner Exhibit 4, reflecting payment of $1,768.45 in the five weeks Aaron Carpenter worked for G$ Enterprises. This finding is based upon the canceled checks introduced by

Petitioner, which are given great weight, and the testimony of Joyce Carpenter. No weight is given to the list of payments introduced by Respondent which are contradicted by the cancelled checks and the 1099-R form.

In support of the Arbitrator's decision in regard to the age of Aaron Carpenter and his marital status on October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, causal connection, and earnings, above, are incorporated herein.

Petitioner alleged that Aaron Carpenter was 36 years of age on the date of injury, married, and had no dependent children. (Arb X 1)

Joyce Carpenter testified that she was married to Aaron Carpenter, and his surviving spouse on the date of this accident and the date of Aaron Carpenter's death.

Aaron Carpenter's Certificate of Death, issued by the Springfield City Clerk, noted he was 38 years of age at the time of his death. It also lists Joyce Carpenter as his surviving spouse. (PX 6)

The Certificate of Marriage introduced into evidence noted that on April 11, 2011, Petitioner was 36 years of age, and on that date, he married Joyce Marie Ritz. (PX 7)

No evidence was introduced to rebut Petitioner's marriage to Joyce Carpenter or to prove they had subsequent to that marriage gotten divorced.

No evidence was introduced proving the existence of any minor children.

The Arbitrator finds that on October 5, 2013, the date of this accident, and on October 10, 2013, the date of Aaron Carpenter's death, Aaron Carpenter 38 years of age, married to Joyce Marie Ritz Carpenter, and had no minor children. These findings are based upon the testimony of Joyce Carpenter, Aaron Carpenter and Joyce Marie Ritz's Marriage Certificate, and Aaron Carpenter's Certificate of Death.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, causal connection, earnings, and age and marital status, above, are incorporated herein.

Parties are bound by their stipulations at arbitration. Walker vs. IIC, 345 Ill.App.3d, 804 N.E.2d 135, 281 Ill.Dec. 509 (2004)

In this case Petitioner did not claim any period of temporary total disability was owing as a result of this accident. (Arb X 1)

The Arbitrator finds that Petitioner was not temporarily totally disabled as a result of the accident for the period claimed by Petitioner. This finding is based upon its stipulation at arbitration.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Aaron Carpenter were reasonable and necessary as a result of the Accident of October 5, 2013, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, causal connection, earnings, age and marital status, and temporary total disability, above, are incorporated herein.

All of the medical bills included in Petitioner Exhibit 10 were incurred subsequent to the accident of October 5, 2013, and were rendered in an attempt to treat and/or cure Petitioner for the injuries suffered in this accident.

Aaron Carpenter died as a result of the injuries he sustained in the accident of October 5, 2013, and funeral expenses in the amount of $8,346.43were incurred as a result of his death. (PX 9)

The Arbitrator finds that all of the bills introduced into evidence in Petitioner Exhibit 10, totaling $195,416.33, are related to Petitioner's traumatic brain injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident. They are to be paid pursuant to the Medial Fee Schedule.

The Arbitrator further finds that Respondent is liable for the payment of $8,000.00 in burial expenses pursuant to §7(f) of the Act. These findings are based upon the findings of accident and causal connection, above, the medical records of St. John's Hospital, and the testimony of Joyce Carpenter.

In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, causal connection, earnings, age and marital status, temporary total disability, and medical, above, are incorporated herein.

Aaron Carpenter died as a result of the accident of October 5, 2013.

The Arbitrator finds that Joyce Carpenter is the beneficiary of decedent Aaron Carpenter's workers' compensation benefits and that under §7 of the Act payments the death benefits in this case were to be paid at the minimum weekly death rate then in effect, $499.20, and were to commence on October 10, 2013.

In support of the Arbitrator's decision relating to liability for payment of benefits by the Injured Workers Benefit Fund, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of documentary evidence, above, are incorporated herein.

The findings in regard to whether Respondent G4 Enterprises was operating under and subject to the Illinois Workers' Compensation Act, employer-employee relationship, accident, notice, causal connection, earnings, age and marital status, temporary total disability, medical, and nature and extent of injury, above, are incorporated herein.

The Illinois State Treasurer, as ex-officio custodian of the IWBF, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General.

A claimant has a burden of proving by preponderance of the credible evidence, all of the elements of this claim to recover benefits under the Illinois Workers' Compensation Act. Illinois Bell Telephone Company v. Industrial Commission, 265 Ill. App. 3d 381, 638 N.E. 2d 307 (1994).

§4(d) of the Workers' Compensation Act states that, "Moneys in the Injured Workers' Benefit Fund shall be used only for payment of workers' compensation benefits for injured employees ***when the employer has failed to provide coverage*** as determined under this paragraph (d) and has failed to pay the benefits due to the injured employee." (emphasis added)

No evidence was presented at trial that Respondent failed to provide workers' compensation insurance coverage on the date of injury. Petitioner did not introduce into evidence an NCCI printout showing no workers' compensation insurance for G4 Enterprises on October 5, 2013. Angela Grable, a board member and officer of G4 Enterprises, testified at trial, but was not asked and never volunteered testimony indicating whether or not G4 Enterprises carried workers' compensation insurance on October 5, 2013.

The Arbitrator finds that the Injured Workers Benefit Fund is not liable for payments arising out of this accident pursuant to §4(d) of the Workers' Compensation Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031110
Case Name	Genoveva Zuniga v. Medline
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0358
Number of Pages of Decision	12
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	James Toomey

DATE FILED: 7/25/2024

/s/Marc Parker, 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

Genoveva Zuniga,

Petitioner,

vs.

NO: 21 WC 031110

Medline,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds the evidence does not support the Arbitrator's causation finding regarding Petitioner's lumbar strain and subsequent treatment. Accordingly, the Commission denies liability for all medical expenses directly related to the lumbar spine and strikes the permanency award of 3% loss of the person as whole.

An employee must establish the existence of a causal relationship between his or her current condition of ill-being and employment. *Navistar International Transportation Corp.*, 315 Ill. App. 3d at 1197, 1202 (1st Dist. 2000). Whether a causal relationship exists between the claimant's employment and his condition of ill-being is a question of fact for the Commission. *Mansfield v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120909WC, 28, 999 N.E.2d 832, 376 Ill. Dec. 657 . In preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982).

On October 28, 2021, Petitioner was putting away her tools at work when she tripped on a pallet and fell on her bilateral hands and knees. Petitioner presented to the emergency room on October 29, 2021, with pain in her bilateral hands, knees, and left shoulder. Petitioner denied head, neck, and back pain. (PX1 at 57). On November 1, 2021, Petitioner presented to urgent care with continued left shoulder and right knee pain without any indication of low back pain. No lumbar exam was performed. (PX1 at 51). On November 5, 2021, Petitioner presented to Dr. Mandal with complaints of neck, left shoulder, right knee, and left forearm pain related to a work accident. Low back pain was noted, however, Petitioner indicated it was present before the work accident and currently exacerbated by prolonged standing. (PX1 at 66-67). On November 11, 2021, during her initial physical therapy examination, Dr. Yun diagnosed Petitioner with thoracic, left shoulder, left forearm, and right knee pain causally related to the work accident. (PX2 at 105-106). There is no record of low back pain or a lumbar exam.

On December 8, 2021, low back pain radiating towards the left hip and buttocks was recorded for the first time, which prompted Dr. Mandal to order an MRI. No specific lumbar treatment was recommended. (PX1 at 71). Petitioner continued to treat with Dr. Mandal for low back, left shoulder, and right knee pain through April 5, 2022. Dr. Mandal did not causally relate Petitioners' low back symptoms to the work accident, nor did he indicate the work accident aggravated or accelerated a pre-existing condition. Neither did Dr. Yun, Dr. Chunduri, or Dr. Levin. Petitioner participated in physical therapy through March 1, 2022. None of her physical therapy was directed towards her lumbar spine. On March 1, 2022, Petitioner was transitioned to work hardening, which focused on hand pedaling, lifting, and squatting in order for her to resume work activities. Outside of the lumbar MRI, none of Petitioner's treatment was specifically directed to her low back. For the reasons stated above, the Commission finds Petitioner has failed to prove her lumbar condition was causally related to the work accident.

The Commission further awards one additional day of temporary total disability benefits, which was excluded by the Arbitrator, thereby awarding TTD from October 29, 2021, through April 11, 2022, as provided in §8(b) of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 29, 2023, is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not liable for medical expenses directly related to the care and treatment of Petitioner's lumbar spine.

IT IS FURTHER ORDERED BY THE COMMISSION the permanency award of 3% loss of the person as whole per §8(d)2 of the Act, for injuries sustained to Petitioner's lumbar spine be stricken based on the modified causation finding.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to temporary total disability benefits from October 29, 2021, through April 11, 2022, as provided in §8(b) of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 25, 2024

MP: ns
o 6/20/24
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	21WC031110
Case Name	Genoveva Zuniga v. Medline
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	James Toomey

DATE FILED: 11/29/2023

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

/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

Genoveva Zuniga
Employee/Petitioner

v.

Medline
Employer/Respondent

Case # **21** WC **31110**

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 Eric Seal**, Arbitrator of the Commission, in the city of **Rockford**, on **9/28/2023**. 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 **10/28/2021**, 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 $**42,701.36**; the average weekly wage was $**821.18**.

On the date of accident, Petitioner was **41** 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

Respondent shall pay Petitioner temporary total disability benefits of $547.45/week for 23 & 2/7 weeks, commencing 10/29/21 through 4/11/22 (less one day), as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 10/29/21 through 4/11/22, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services as listed below, as provided in Sections 8(a) and 8.2 of the Act.

Illinois Orthopedic Network - $717.51
Midwest Specialty Pharmacy - $2,391.80
LaClinica - $27,110.00

Respondent shall pay Petitioner permanent partial disability benefits of $492.71/week for 6.45 weeks, because the injuries sustained caused the 3% loss of the right leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $492.71/week for 10 weeks, because the injuries sustained caused the 2% loss of the person as a whole (left shoulder), as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $492.71/week for 15 weeks, because the injuries sustained caused the 3% loss of the person as a whole (lumbar spine), 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.

NOVEMBER 29, 2023

Signature of Arbitrator

Genoveva Zuniga, Petitioner, testified that on October 28, 2021, she was employed by Medline, Respondent. Tx9. She began working there in 2002 and was still working there as of the date of trial. Id. Medline is a medical supply company for gloves, surgical kits, and assorted plastics. Id. Petitioner's job was to operate and fix machines, and that remains her job as of the date of trial. Id. at 10.

On October 28, 2021, Petitioner was putting away her tools at approximately 3:00pm. Tx10. While doing so, Petitioner noticed a pallet nearby, but did not notice a second pallet. Id. When she turned around, she tripped and fell on top of the unnoticed pallet. Tx11. The incident was immediately reported to a supervisor named Maria. Tx11. When Petitioner fell, she did not fall all the way to the ground - both of her hands and her right knee struck the pallet. Id.

Immediately following the incident, Petitioner met with an on-site nurse. Tx12. She had swelling in her knees and pain in her back. Id. She did finish her regular shift (ending at 7pm) after spending about 20 minutes applying ice to her knees. Id. The knee pain was greater on the right than the left. Tx13. The next morning, Petitioner was not scheduled to work, and had difficulty putting her clothes on. Id. She presented to Advocate Condell Medical Center. Id., Px1 at 9. The history at Condell indicates that the claimant slipped on the floor at work and fell forward onto her hands, feet and knees. Id. Physicians recorded pain to the left shoulder and bilateral knees. Id. at 12. She had full range of motion, and x-rays were negative for fractures. Id. She was discharged and instructed to follow up. Id. at 12.

Petitioner returned to work on Monday, November 1, as scheduled. Tx14. She had ongoing pain and had difficulty sleeping over the weekend. Id. She discussed with her supervisor and was sent to work. Id. After approximately an hour, Petitioner was instructed that she needed to see a doctor and receive confirmation that she was released to return to work. Id.

Petitioner reported to Advocate Condell's immediate care center in Gurnee. Px1 at 5. She gave a consistent history of tripping over a wooden skid. Id. She stated she was having difficulty walking because of her right knee, and could not raise her left arm over her head without pain. Id. She was released with light duty restrictions, and instructed to follow up in one week. Id. at 8, Tx15. Upon returning to work, Petitioner was told no work was available within her restrictions. Tx15.

Petitioner next sought treatment at Illinois Orthopedic Network on November 5, 2021 with Dr. Ronnie Mandal. Px1 at 20. Dr. Mandal took a consistent history. He noted left shoulder/trapezius/neck pain 6-9/10, as well as 6-7/10 right knee pain, as well as an aggravation of prior lumbar pain. Id. Dr. Mandal recommended physical therapy and medications, and kept the claimant off work, as her work could not accommodate light duty restrictions. Id. The claimant began a course of physical therapy and work conditioning at LaClinica which ran from November 11, 2021 until March 31, 2022. Px2 at 5-6.

Petitioner next followed up with Dr. Mandal on December 8, 2021. Px1 at 25. Dr. Mandal noted improvement with physical therapy. Id. He recommended further PT, as well as MRi scans of the lumbar spine and left shoulder. Id. He kept the claimant off work. Id.

The lumbar MRI was done December 22, 2021 and was abnormal for muscle spasms and a central/left disc bulge at L5-S1, resulting in mild left sided stenosis and indenting the thecal sac. Id. at 29. The MRI of the left shoulder was completed the same day, and was positive for bursitis. Id. at 30.

On January 19, 2022, Petitioner was seen by Dr. Krishna Chunduri at ION. Id. at 31. Dr. Chunduri noted the right knee pain had resolved, although the low back and left shoulder pain continued. Id. at 31. Dr. Chunduri released the claimant to 15# lifting restrictions, and instructed her to follow up in 4 weeks. Id. Petitioner testified she returned to work for one day with these restrictions and was dragging her knee the whole day. Tx17. On January 26, 2022, Dr. Chunduri took her back off work, and ordered a resumption of physical therapy. Px1 at 34. On February 16, 2022, Dr. Chunduri recommended a course of work conditioning, and noted new left knee pain. Id. at 37. On April 5, 2022, Dr. Chunduri released the claimant from his care and cleared her to resume full duty work on April 12, 2022. Id. at 40.

Petitioner testified at trial she had a prior injury to one of her knees about a year prior to this accident, and sought treatment with a chiropractor out of pocket. Tx18. She missed a few days from work for therapy. Id. She testified did not have any issues with her shoulders or back prior to this incident. Id. at 19. She testified she now has to take her time with activities because of back and right knee pain. Id. She is back doing her regular wor, but wears a back support brace she purchased on her own. Id. at 20. She has difficulty doing laundry and housework. Id. at 21. She has had no new accidents or injuries apart from the subject incident. Id.

On December 21, 2021, Petitioner was seen by Dr. Jay Levin, at the request of the Respondent under Section 12 of the Act. Rx3. Dr. Levin took a consistent history of the accident. Id. He noted improvement to the left shoulder and right knee pain. Id. He acknowledged low back and left forearm pain as well. Id. Physical examination was largely normal. His diagnosis was a left shoulder strain and right knee contusion. Id. He stated she should have been at MMI within 4-6 weeks of the accident. Id. He stated that oral anti-inflammatory medication was appropriate, as well as six sessions of PT for the right knee, and nine sessions of PT for the left shoulder. Id. He stated she did not require any further medical care as of the date of his report. Id.

On cross-examination, Petitioner testified that she is not sure if her left knee came into contact with the pallet or not. Tx22. She stated she had low back pain above the waist (stipulated by the attorneys as high lumbar/low thoracic) immediately after the incident. Tx23. She stated that she did have back pain at the ER the next day, and suggested that there may have been issues with the hospital interpreter, who hung up on the doctor during their

conversation. Id. She acknowledged visits with a chiropractor involving her right knee prior to this incident. Tx30.

CAUSAL CONNECTION

The Arbitrator finds that as a result of the accident, Petitioner suffered a right knee contusion, a left shoulder strain, and a lumbar strain. These diagnoses are supported by the records of Drs. Mandal and Chunduri, as well as the report of Dr. Levin (with the exception of the lumbar spine.) The Arbitrator finds Petitioner reached maximum medical improvement on April 12, 2022, the date Dr. Chunduri cleared her to return to work. The Arbitrator does not find the opinions of Dr. Levin credible or persuasive with respect to the MMI date.

Dr. Levin placed the claimant at MMI for the left shoulder on or about December 9, 2021, and placed her at MMI for the right knee on or about November 25, 2021. As of December 8, 2021, with Dr. Mandal, she had ongoing 6-7/10 low back, left shoulder, and right knee pain. The Arbitrator had the opportunity to personally view the testimony of Petitioner and finds her to have been credible. The Arbitrator does not doubt the statements Petitioner made to Dr. Mandal on December 8, 2021 about her ongoing pain. The Arbitrator finds it significant that the MRI scans of the left shoulder on December 22, 2021 showed ongoing fluid in the subacromial subdeltoid bursa, suggesting bursitis. This is not consistent with maximum medical improvement on the shoulder as of December 9, per Dr. Levin's opinions. Likewise the lumbar MRI findings of loss of normal lumbar lordosis due to muscle spasm are consistent with a back strain occurring around the time of the accident, and those spasms were still present as of December 22, 2021. The Arbitrator acknowledges that Dr. Levin did not have the MRI films or reports in his possession at the time of his evaluation, as they did not yet exist.

PAST MEDICAL

Having found for Petitioner on the issue of causation, the Arbitrator likewise awards past medical bills as claimed by Petitioner. Petitioner underwent a course of care consisting of office visits, diagnostic scans, four months of physical therapy, and one month of work conditioning. At the February 28, 2022 initial work conditioning evaluation, Petitioner reported ongoing back pain from 0-7 depending on circumstances. Px2 at 100. Per the physical therapist, she was only capable of very light physical activity work at that time. Id. at 101. By the end of work conditioning, Petitioner was sufficiently improved such that Dr. Chunduri released her to full duty work.

Respondent has presented no Utilization Review reports into evidence. Respondent relies on the opinions of Dr. Levin, which the Arbitrator has found not to be persuasive. Thus, the Arbitrator awards bills as claimed by Petitioner subject to the Fee Schedule.

TEMPORARY TOTAL DISABILITY

Petitioner claims entitlement to TTD benefits from October 29, 2021 through April 12, 2022. The Arbitrator notes Petitioner returned to work for one day in January, and also notes Petitioner was released to full duty as of April 12, 2022. Thus, the Arbitrator awards TTD benefits from October 29, 2021 through April 11, 2022, a period of 23 & 3/7 weeks. Less the one day worked in January, Petitioner is entitled to TTD for a period of 23 & 2/7 weeks at a rate of $547.45 per week.

PERMANENT PARTIAL DISABILITY

As discussed above, the Arbitrator finds the diagnoses of a left shoulder strain, left knee strain, and lumbar strain to be causally related to the accident, with MMI having been reached on April 12, 2022.

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 machine operator/mechanic at the time of the accident and that she did return to work in her prior capacity following said injury. The Arbitrator notes Petitioner testified to ongoing difficulties at work, but she is able to do the job. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Because of the fact that Petitioner has many years of working life ahead of her following this injury, the Arbitrator gives more weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner did return to her prior employment with no reduction in earning capacity. The Arbitrator gives some weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes at the time of discharge, Petitioner was released to full duty work. The Arbitrator gives some weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 3% loss of use of the right leg (right knee), 2% loss of use of the person as a whole (left shoulder) and 3% loss of use of the person as a whole (lumbar spine).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC027931
Case Name	Nate Juncer v. Gibson Electric
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b-1)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0359
Number of Pages of Decision	28
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Belcher
Respondent Attorney	Andrew Makauskas

DATE FILED: 7/29/2024

/s/ Deborah Simpson, Commissioner

Signature

23WC27931
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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nate Juncer,

Petitioner,

vs. NO: 23 WC 27931

Gibson Electric,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, notice, temporary disability and whether the 12/27/2023 narrative report of Dr. Shane Nho should not have been admitted into evidence 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 12, 2024, is hereby affirmed and adopted.

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

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

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

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

JULY 29, 2024
o7/10/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC027931
Case Name	Nate Juncer v. Gibson Electric
Consolidated Cases	
Proceeding Type	19(b-1) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	25
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Matthew Belcher
Respondent Attorney	Andrew Makauskas

DATE FILED: 4/12/2024

/s/ William McLaughlin, Arbitrator
Signature

INTEREST RATE WEEK OF APRIL 9, 2024 5.12%

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-1)

NATE JUNCER
Employee/Petitioner
v.
GIBSON ELECTRIC
Employer/Respondent

Case # **23** WC **27931**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **January 3, 2024**. Respondent filed a *Response* on **January 17, 2024**. The Honorable **William McLaughlin**, Arbitrator of the Commission, held a pretrial conference on **January 19, 2024**, and a trial on **March 8, 2024**, in the city of **Chicago, Illinois**. 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.

FINDINGS

On the date of accident, **September 5, 2023**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**85,873.32**; the average weekly wage was $**1,651.41**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $358.00 to Physicians Immediate Care, $62,519.85 to Midwest Orthopaedics at Rush, and $52,638.76 to Gold Coast Surgicenter, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,100.94/week for 20 1/7 weeks, commencing 10/20/2023 through 03/08/2024, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the medical treatment and physical therapy as proposed and recommended by Dr. Shane Nho of Midwest Orthopaedics at Rush.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter **$702.10** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) 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 12, 2024

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NATE JUNCER, Petitioner, v. GIBSON ELECTRIC, Respondent.	**23 WC 27931**

FINDINGS OF FACT

As of September 5, 2023, Nate Juncer (hereinafter referred to as "Petitioner") was thirty-six years of age, single, and had zero dependent children. (See Arb. Ex. 1). As of September of 2023, Petitioner was employed by Gibson Electric (hereinafter referred to as "Respondent") as an electrical contractor (T. p. 10).

In January of 2023, Petitioner was performing commercial electrical work at a data center build-out called Stack. (T. p. 13). While working at the Stack job site, Petitioner testified most of his work involved installing three-inch pipe called "EMT conduit" overhead in the ceiling. (T. 13-15). The ceiling was approximately twenty-five to thirty feet tall, which they accessed by using mobile lifts. (Id.). These EMT conduits were three-inches in diameter and ten-feet in length. (Id.). Each ten-foot pipe weighed approximately twenty-five pounds. (Id.).

Petitioner testified that some of the pipes were installed straight and some needed to be bent prior to installation. (T. p. 16). Petitioner testified they were required to bend the pipes at the job site, which was done using a pneumatic bending tool. (Id.). Once the section of pipe was ready to be installed, they used the

mobile lift to carry it up to the ceiling. (Id. at 17). He explained he worked with a partner to install these pipes in the ceiling. (Id.). One of them would lift the pipe into place while the other wrenched it into the racks that they previously installed into the ceiling. (Id.). To install the EMT conduits, Petitioner testified they would normally use two hands to hold it in place overhead above their shoulders. (Id. at 18-19). On occasion, one hand had to be used if the area of installation was tight. (Id. at 18).

In addition to three inch pipes, Petitioner testified he was required to install a variety of other items into the ceiling of the Stack job site. (T. p. 20).

One of those items was lighting fixtures, which required Petitioner to hang them. (Id. at 21-22). Petitioner and his partner worked together to carry these lights on their shoulders from the room they were stored to where they needed to be installed. (Id. at 22). They lifted the lights onto the mobile lift by hand and then placed the lights on top of the lift. (Id. at 22-23). They used the lift to get themselves into position near the ceiling. (Id. at 23). Once they were in this position, they lifted the lights up to the ceiling with the lift and screwed them into place. (Id.).

Petitioner testified that approximately eighty-five-percent of their time at the Stack job site was spent installing pipes into the ceiling. (T. p. 24). Of the time spent installing pipes into the ceiling, he testified around seventy-five-percent of the time was spent installing the three-inch pipes. (Id.). Petitioner testified he noticed pain in his left shoulder while using a hand bender on some of the one-inch piping. (Id. at 24-25). He indicated this incident occurred in May of 2023. (Id. at 25).

Once Petitioner completed the job at the Stack jobsite, he began a new project at Aligned, which was another data center, in June of that same year. (T. p. 25). He testified they performed work at Aligned from June until September of 2023. (Id.). At Aligned, Petitioner testified most of their work involved "pulling cable." (Id. at 26). Pulling cable involved working with coworkers by tying a heavy-duty string to the cable and "basically just pull one cable at a time with our hands counting on the radio so we're all pulling at the same time." (Id.).

Petitioner testified he used both his right and left hands to pull the cable because, "…you cannot do it with one hand." (T. p. 26). The cable was solid copper and was approximately one and a quarter inch to one and a half inch in diameter. (Id. at 27). Petitioner testified they were required to pull this cable through aluminum ducts in the ceiling. (Id. at 27-28). Approximately sixty-percent of the time was spent pulling wire overhead in the ceiling and forty-percent of the time was spent doing this below shoulder level. (Id. at 28).

While working at the Aligned jobsite, Petitioner testified his left shoulder pain became more severe. (T. p. 29). He testified his pain also moved from his biceps and shoulder down into his collarbone. (Id.). He explained that this particular jobsite required him to take cable and come overhead to shove it down into the building. (Id. at 29-30). He testified this "circular, overhead motion" is what really aggravated his pain complaints. (Id. at 30). Prior to his work at the Stack and Aligned jobsites, Petitioner testified he never had any issues with his left shoulder or biceps. (Id.).

After the job ended at Aligned he worked for Respondent at a BMO Bank, which he worked at from September to October of 2023. (T. p. 30-31). He was laid off by Respondent as of October 20, 2023. (Id. at 31). The BMO Bank project also involved pulling wires but was not as vigorous because the wires were smaller. (Id.). Ninety-percent of his day at BMO Bank involved pulling wires. (Id. at 32-33). Petitioner testified that most of the work on this project was overhead as well. (Id.). While working at the BMO Bank jobsite, Petitioner testified he experienced difficulties while performing his work. (Id. at 33). While pulling wires from junction box to junction box, he testified his left arm was raised and was painful while holding it up. (Id.). He continued working through his discomfort until he was laid off. (Id. at 34).

Petitioner's Initial Medical Treatment

Petitioner first sought medical care for his left shoulder complaints with Dr. Habeeb Farooqui at Humboldt Park Health on July 24, 2023. (PX1 p. 3-6). He testified he decided to seek medical care at that time because the pain had started to become significant. (T. p. 34). The pain had moved into his collarbone and was also tender to the touch. (Id.). He explained this initial visit to Humboldt Park Health was a walk-in visit to an immediate care. (Id. at 35).

At his First visit, Petitioner complained of left shoulder and collarbone pain, which he noted had been ongoing for about two or three months. (PX1 p. 4). Dr. Farooqui noted Petitioner worked as an electrician and frequently used his hands for manual labor. (Id. at 4-5). Petitioner advised the doctor he was feeling constant

pain but had no injury, trauma, or inciting event. (Id.). Dr. Farooqui indicated Petitioner's symptoms were "likely due to muscle strain vs. subacromial impingement." (Id. at 6). He provided Petitioner with a prescription for a Lidocaine patch and recommended physical therapy. (Id.). He also recommended limiting exercise and heavy lifting if activity became "too bothersome." (Id.).

Petitioner testified he elected to present to Physicians Immediate Care the following day, July 25, 2023, because he did not feel comfortable with the care he received at Humboldt Park Health. (T. p. 37-38). On that date, Petitioner treated with JaTame Carden, PA. (PX2 p. 4-6). Mr. Carden noted Petitioner complained of left shoulder and distal collarbone pain, which he reported "…was not the result of an injury." (Id. at 4). He reported a dull achy pain which was worse when lifting as well as a bump in that same area where he reported pain. (Id.). Mr. Carden advised Petitioner to follow up with an orthopedic physician. (Id. at 6).

Petitioner testified he scheduled his initial visit with an orthopedic surgeon at Midwest Orthopaedics at Rush. (T. p. 39). He testified he chose this facility because it was in network for his health insurance coverage. (Id.). Petitioner's initial visit at Rush was with Dr. Shane Nho on August 1, 2023. (PX3 p. 252). Dr. Nho indicated Petitioner complained of left shoulder pain that had been ongoing since May 15, 2023. (Id. at 253). Dr. Nho stated Petitioner reported an injury while exercising though Petitioner denies having told any medical providers, including Dr. Nho, that he was injured while exercising. (T. p. 40).

Dr. Nho stated Petitioner's left shoulder pain was possibly consistent with biceps tendinitis or a labral tear. (PX3 p. 253). He recommended a course of physical therapy. (Id.). If his symptoms improved, the symptoms could be managed conservatively. (Id.). If his symptoms remained unresolved after four weeks of therapy, Dr. Nho indicated that an MRI of the left shoulder could be obtained. (Id.). Petitioner testified he proceeded with physical therapy at Rush as recommended by Dr. Nho. (T. p. 50).

Petitioners first initial therapy visit was with therapist Erin Sargent on August 3, 2023. (PX3 p. 247). Ms. Sargent noted Petitioner complained of ongoing left shoulder pain since May of 2023. (Id. at 248). He denied any specific mechanism of injury ("MOI") but noticed the pain was worse while bending pipe at work. (Id). Sargent noted that the Petitioner told her he performs kettleball workouts two to three times a week. In his testimony Petitioner denied that he was performing kettlebell or other strength training at that time. (T. p. 52).

After several several weeks of physical therapy, Petitioner returned to Dr. Nho's office for a follow-up visit on September 5, 2023. (T. p. 53). At this visit, Petitioner testified that he had a conversation with Dr. Nho regarding his diagnosis and the cause of his injury. (Id.). Dr. Nho asked Petitioner if he lifted weights, and Petitioner advised him that he did not. (Id. at 54). He explained to Dr. Nho that he performed kettlebell training several years prior. (Id.).

Petitioner testified that he told Dr. Nho about installing lights, wrenching both at chest level, overhead, pulling wire, and pulling cable. (T. p. 54). Dr. Nho

replied that Petitioner's overhead work as an electrician was the cause of his left shoulder symptoms. (Id.). Dr. Nho stated, "Nathaniel Juncer is currently under my medical care following left shoulder surgery on 12/6/2023, as a result of a work-related injury due to repetitive use of the shoulder involving overhead motions as an electrician." (PX3 p. 255).

On the September 5, 2023 visit, Dr. Nho provided Petitioner with a steroid injection into his left shoulder and advised Petitioner to continue in physical therapy and modify his restrictions as needed. (211- 212). In the event the injection failed to alleviate his pain complaints, Dr. Nho indicated they would, "discuss surgical intervention as a next step." (Id.). Petitioner testified he felt immediate pain relief following this injection, however after approximately two weeks his pain returned to where they had been prior to the injection. (Id. At 55- 56).

On October 10, 2023. (PX3 p. 160). Dr. Nho recommended obtaining an MRI of Petitioner's left shoulder to better assess the shoulder for signs of injury. (Id. at 161). Following completion of the MRI, Dr. Nho indicated they could determine if Petitioner would benefit from an injection, therapy, or whether surgical intervention was warranted. (Id.). In the interim, he advised Petitioner to use NSAIDs on an as needed basis and continue with activity modifications. (Id.).

Petitioner testified he reported his left shoulder injury to Alex Sanchez, his lead foreman at Respondent, the following day, which was October 11, 2023. (T. p. 57). He advised Mr. Sanchez that Dr. Nho told him the injury was due to his electrical work and would need surgery. (Id. at 58). Petitioner testified he waited

until October 11, 2023, to report his injury to Respondent even though he was made aware of the connection to his work at his September 5, 2023, visit with Dr. Nho. (Id.). He explained that if the injection and physical therapy alleviated his symptoms, there was not a need to move forward with a work accident claim. (Id.). When he was advised he would likely need surgery, he knew the injury was more severe. (Id.). In addition to his verbal report of accident to Mr. Sanchez, Petitioner testified that a written report was completed by Bryan Steiber. (Id. at 59).

Bryan Steiber testified he was working as a safety manager for Respondent on October 11, 2023. (T. 88). Mr. Steiber testified he completed a written report of accident on October 11, 2023, for Petitioner. (Id. at 90-91). He stated Petitioner indicated he injured his left shoulder on April 23, 2023, while bending conduit. (Id. at 91).

As recommended by Dr. Nho, Petitioner obtained a left shoulder MRI at Midwest Orthopaedics at Rush on October 25, 2023. (PX3 p. 69-70). The MRI revealed, "Findings compatible with distal clavicular osteolysis…Mild rotator cuff tendinosis without tear. Mild subacromial/subdeltoid bursitis. Degeneration and fraying in the superior glenoid labrum." (Id. at 70).

Petitioner returned to Dr. Nho's office on October 27, 2023, Dr. Nho noted Petitioner thought his symptoms began on May 15, 2023, while bending pipe at work. (PX3 133- 134). Dr. Nho also indicated that Petitioner advised him the office notes from August 1, 2023, "wrongly notated that it was during exercise." (Id.).

The MRI, Indicated evidence of AC joint arthritis, inflammation, osteolysis, subacromial bursitis, and mild fraying of labral tissue. (PX3 p. 134). Dr. Nho stated:

> At this point, his options are to continue managing conservatively with time, activity modification, NSAIDs, PT, and injections. Alternatively, due to failed conservative treatment, the patient could consider surgical intervention in the form of a left shoulder arthroscopy, labral debridement, subacromial decompression, distal clavicle excision and possible open biceps tenodesis." (PX3 p. 134).

In a "Quick Report" dated November 1, 2023, Dr. Nho indicated Petitioner was unable to work. (PX3 p. 256).

Dr. Nho performed Petitioner's left shoulder surgery at Gold Coast Surgery Center on December 6, 2023. (PX3 p. 11-13). Surgery included arthroscopic extensive debridement, subacromial decompression with acromioplasty, distal clavicle excision, and open biceps tenodesis. (Id.). Following surgery, Petitioner began a course of post-operative physical therapy at Rush on December 14, 2023. (Id. at 125-127). Petitioner testified that he continued in therapy until his first post-surgical follow up visit with Dr. Nho on January 16, 2024. (T. p. 62 and See PX3).

At his January 16, 2024, visit, Dr. Nho indicated Petitioner was doing better with minimal pain following surgery. (PX3. 270). He advised Petitioner that he could discontinue use of the post-surgical sling. (Id.). He also recommended that Petitioner continue with physical therapy and return for another visit in six weeks. (Id.). Dr. Nho also advised Petitioner to remain completely off of work at that time.

(Id. at 275). As recommended, Petitioner continued in therapy following this visit. (T. p. 62 and See PX3).

On February 27, 2024, Dr. Nho indicated Petitioner was working on active range of motion, stretching, and light strengthening in therapy. (PX3 p. 298). He noted Petitioner wanted to return back to work and activities, however, he also noted his work as an electrician requires lifting fifty to one-hundred pounds. (Id.). Dr. Nho advised Petitioner to continue in therapy. (Id.). He also advised Petitioner that he could begin lifting but with a twelve pound limit. (Id. at 298, 302). Petitioner testified no light duty work was available with Respondent. (T. p. 63).

As of the date of trial Petitioner testified he is still on light duty work restrictions and has not returned to work. (Tr. 63)

Section 12 Examination and Testimony of Dr. Matthew Saltzman

Petitioner was examined by Dr. Matthew Saltzman pursuant to Section 12 of the Act on February 6, 2024. (T. p. 64). Dr. Saltzman testified by way of evidence deposition on March 7, 2024. (See RX4).

Dr. Saltzman testified that he took a history from Mr. Juncer as part of his examination. (RX4 p. 9). He testified, "…37-year-old, right-hand dominant male who stated he injured his left shoulder on 10/11/2023. States he was bending a pipe actually in May of 2023, felt some pain, but then actually reported it as an injury on 10/11/2023." (Id.). He indicated that Petitioner reported, "progressive left shoulder

pain between May and October of 2023, described as gradual onset, thinks that bending the pipe maybe exacerbated his left shoulder pain…" (Id. at 9-10).

Dr. Saltzman testified that he reviewed Petitioner's diagnostic films. (RX4 p. 11). He noted that Petitioner's rotator cuff was intact and normal. (Id.). He indicated Petitioner's collarbone contained edema or swelling, which he stated the diagnosis for this condition would be "distal clavicular osteolysis." (Id. at 12). Dr. Saltzman testified this was a degenerative condition and usually cumulative in nature. (Id.). He stated, "It's not something that happens with one specific injury. It's a finding that usually happens from repetitive stress at that joint."(Id.).

In regards to Petitioner's left shoulder, Dr. Saltzman testified he did not have a discrete tear of his labrum but it had degeneration, which he explained is something that happens with age and wear and tear. (RX4 p. 12-13). He also noted Petitioner had inflammation, swelling, edema, or fluid around his left biceps tendon. (Id. at 14). He agreed, however, that during the surgery completed on December 6, 2023, Petitioner's biceps revealed severe tenosynovitis, which was justification for releasing the biceps in the shoulder and reattaching it further down in the subpectoral region. (Id. at 14-15). Dr. Saltzman testified Petitioner appeared to be recovering satisfactorily following surgery. (Id. at 16).

Dr. Saltzman opined this type of injury is, "…usually a chronic repetitive strain type of situation, so it's most often seen in the setting of exercise and often lifting, but it can be seen in other situations." (RX4 p. 16- 17). Dr. Saltzman testified

that the treatment Petitioner had received in relation to his left shoulder, including surgery, had been reasonable and necessary. (Id. at 22-23). He felt that Petitioner would be at maximum medical improvement approximately four to six months after his surgery. (Id. at 23).

Dr. Saltzman testified thatX4 p. 34-35). He stated, "I didn't ask him specifics about his job." (RX4 34- 35). Dr. Saltzman did not know how long Petitioner had worked as an electrician. (Id.).

CONCLUSIONS OF LAW

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

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

Section1(b)3(d) of the Act provides, "To obtain compensation under this Act, 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." The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent on September 5, 2023. The Arbitrator finds that September 5, 2023 is the manifestation date of Petitioner's repetitive trauma injuries to his left shoulder, left biceps, and left collarbone.

In reaching this conclusion Arbitrator finds the Petitioners testimony to be credible. Petitioner testified to the type of work he performed at Gibson Electric as an electrician apprentice. The details of his work are provided above in the Arbitrator's Statement of Facts.

In addition, Petitioner testified that he described these job duties to his treating physician, Dr. Shane Nho of Midwest Orthopaedics at Rush. The Arbitrator notes that Dr. Nho's medical records contain a note dated December 27, 2023, in which he stated, "Nathaniel Juncer is currently under my care following left shoulder surgery on 12/6/2023, as a result of a work-related injury due to repetitive use of the shoulder involving overhead motions as an electrician."

The Arbitrator gives greater weight to the conclusion reached by Dr. Nho that that of Dr. Saltzman, who admitted that he had no knowledge regarding Petitioner's work duties. He did not know how long Petitioner worked as an electrician. And as noted above "I didn't ask him specifics about his job." While Dr. Saltzman understood that causal connection was a disputed issue in this claim, he admitted that nowhere in his report did he address Petitioner's work duties for Respondent.

Dr. Saltzman concluded that Petitioner's injuries were the result of heavy bench pressing and military pressing. However, Arbitrator gives greater weight to the credible testimony of the Petitioner which was that he had not bench pressed or military pressed since he was in the Marine Corps dating back to 2005-2009. He told Dr. Saltzman this as well.

For the above mentioned reasons, the Arbitrator finds that Petitioner sustained a repetitive-trauma type accident that arose out of and in the course of his employment by Respondent.

In determining a date of injury, an employee who suffers a repetitive-trauma injury 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 (2006); *AC & S v. Industrial Comm'n*, 304 Ill.App.3d 875, 879, 710 N.E.2d 837 (1999). This means that an employee suffering from a repetitive-trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand*, 224 Ill.2d at 65; *Williams v. Industrial Comm'n*, 244 Ill.App.3d 204, 209, 614 N.E.2d 177 (1993). Setting this manifestation date is a factual determination for the Commission. *Durand*, 224 Ill.2d at 65; *Palos Electric v. Industrial Comm'n*, 314 Ill.App.3d 920, 930, 732 N.E.2d 603 (2000).

Therefore, the facts must be closely examined in repetitive-trauma cases to ensure a fair result for both the employee and the employer's insurance carrier. *Durand*, 224 Ill.2d at 71; *Three "D" Discount Store v. Industrial Comm'n,* 198 Ill.App.3d 43, 49, 556 N.E.2d 261 (1989). Fairness and flexibility is the common theme throughout Commission decisions in which a central issue is the accident date of a repetitive-trauma claim. See *Durand*, 224 Ill.2d at 71. The rule for determining an accident date is broad enough to accommodate unique scenarios

presented in individual cases, and the Commission must weigh many factors when deciding when a repetitive-trauma injury manifests itself. *Id.*

Because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. See *Oscar Mayer & Co. v. Industrial Comm'n,* 176 Ill.App.3d 607, 610, 531 N.E.2d 174 (1988).

In *Durand*, the Petitioner testified that she knew about carpal tunnel syndrome and suspected she may have had it in September or October of 1997. *Durand*, 224 Ill.2d at 59. The claimant testified that she told her supervisor about her hand and wrist pain in September or October of 1997, but she didn't know at the time what it was even though she believed it could be work-related. *Id.* She reached that "expert opinion" based solely on the pain she was having and not on any doctor's advice. *Id.* at 60. She later reiterated that she "wasn't sure" her pain was carpal tunnel syndrome because it wasn't constant or severe in 1997. *Id.* She never sought medical treatment for her hand and wrist pain until 2000. *Id.* at 74. The Illinois Supreme Court held that a reasonable person would not have known of this injury and its putative relationship to her work before that time, and it was against the manifest weight of the evidence to conclude otherwise. *Id.* The Court stated, "We decline to penalize an employee who diligently worked through

progressive pain until it affected her ability to work and required medical treatment." *Id.*

In the case at bar, Petitioner testified he first noted pain in his left shoulder in May of 2023, while bending pipe at work. The Arbitrator notes that Respondent's witness Mr. Steiber testified that Petitioner advised him that the pain began on April 23, 2023. The Arbitrator notes that, regardless of the exact date that Petitioner felt pain while bending pipe, there is no evidence to suggest that his left shoulder injury was the result of a single traumatic episode.

Even though Dr. Saltzman, testified that bending pipe is not enough to cause or exacerbate distal clavicular osteolysis. He agreed that the incident in which Petitioner felt pain while bending pipe for Respondent was a manifestation of symptoms rather than a specific injury. Dr. Nho, Petitioner's surgeon, concluded that Petitioner's left shoulder injury and need for surgery was the "result of a work related injury due to repetitive use of the shoulder involving overhead motions as an electrician." The evidence presented supports a finding that Petitioner's left shoulder injury was the result of repetitive trauma. Arbitrator gives considerable weight to Dr. Nho's. testimony that Petitioner discussed his job duties with Dr. Nho. who was able to consider that in his conclusions than of Dr. Saltzman and who had zero knowledge of the work Petitioner performed as an electrician apprentice for Respondent.

Arbitrator notes Petitioner sought and received medical treatment for his left shoulder complaints prior to his accident date of September 5, 2023. However,

this medical care received prior to his work accident manifestation date is not a bar to Petitioner's claim. According to *Durand* situations such as in the present case, t an employee should not be penalized for diligently working through progressive pain. *Durand*, 224 Ill.2d at 74. In its most basic sense, the purpose of the Illinois Workers' Compensation Act is "…to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment..." 820 ILCS 305 (2007).

The rule and underlying theme in *Durand* is clear: the determination of an accident date in a repetitive-trauma claim demands fairness and flexibility. In short, once he proves that his injuries were caused by the work, an employee who sustains injuries as a result of his repetitive type work for an employer is entitled to all the benefits provided under the Act.

The fact that the Petitioner sustained injuries to his left shoulder, biceps, and collarbone due to his repetitive work at Respondent is clearly outlined in the medical records. The fairness and flexibility doctrine outlined in *Durand* and extended in its progeny provides an accident date of September 5, 2023.

For the foregoing reasons, the Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment by Respondent on September 5, 2023.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

The Arbitrator finds Petitioner timely reported the accident to his employer on October 11, 2023. Section 6(c) of the Act states in relevant part, "Notice of the

accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident."

Because the Arbitrator has concluded that Petitioner sustained a repetitive trauma accident that arose out of and in the course of his employment by Respondent on a repetitive trauma theory with an accident date of September 5, 2023, Arbitrator finds that notice was given on October 11, 2023. Petitioners' credible testimony was corroborated by Mr. Steiber.

Petitioner therefore provided notice to Respondent thirty-six days after the manifestation date of his work accident.

Therefore, the Arbitrator finds Petitioner timely reported the accident to his employer on October 11, 2023, within the time limits provided for in Section 6 (c) of the Act.

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

The Arbitrator finds that the Petitioner's present condition of ill-being is causally related to his repetitive trauma injury sustained on September 5, 2023.

To prevail on a claim for benefits under the Act, an employee must establish, among other things, that his or her current condition of ill-being is causally connected to a work-related injury. *Elgin Board of Education School Dist. U-46 v. Illinois Workers' Comp. Commission*, 409 Ill.App.3d 943, 948 (2011).

In reaching said conclusion The Arbitrator has considered the medical evidence as well as the credible testimony of the Petitioner relating to his accident, injuries, treatment, and ongoing issues related to his injuries.

Arbitrator gave great weight to Dr. Nho's note of December 27, 2023, which states, "Nathaniel Juncer is currently under my medical care following left shoulder surgery on 12/6/2023, as a result of a work-related injury due to repetitive use of the shoulder involving overhead motions as an electrician." That conclusion is in contradiction with Dr. Saltzman diagnosis. However, Arbitrator again draws attention to DR. Saltzman admission of having no knowledge of Petitioner's work duties for Respondent.

Based on the above analysis as well as the previously discussed conclusions The Arbitrator finds Petitioner has proven by a preponderance of the evidence that his current condition of ill-being as it relates to his left shoulder, left biceps, and collarbone is causally related to his work accident of September 5, 2023.

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?

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is

reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990). The Arbitrator finds that medical services provided to the Petitioner have been reasonable and necessary. Therefore, Arbitrator finds that Respondent is responsible for outstanding medical charges related to the petitioner which are listed in Petitioner's Exhibit Numbers 2, 3, and 4. There was no evidence presented to dispute the reasonableness and necessity of the treatment.

Arbitrator concludes that the Respondent should pay the following, pursuant to the medical fee schedule. $358.00 to Physicians Immediate Care, $62,519.85 to Midwest Orthopaedics at Rush, and $52,638.76 to Gold Coast Surgicenter, as provided in Sections 8(a) and 8.2 of the Act.

J. IS PETITIONER ENTITLED TO PROSPECTIVE MEDICAL TREATMENT?

The Arbitrator finds that Respondent shall pay for the necessary follow-up treatment with Dr. Nho and for the recommended physical therapy as has been prescribed by Dr. Nho.

Because the Arbitrator has already determined that Petitioner sustained a compensable work accident and that his current condition of ill-being is related to that work accident, the prospective medical required and recommended to treat that injury shall be authorized and paid for by Respondent.

L. IS PETITIONER ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS?

Petitioner is awarded temporary total disability benefits from October 20, 2023, through the date of arbitration, which was March 8, 2024. This represents a period of 20 1/7 weeks. 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).

On September 5, 2023, Dr. Nho advised Petitioner to continue in physical therapy and modify his restrictions as needed. on October 10, 2023, Dr. Nho recommended that Petitioner continue with activity modifications. Respondent laid Petitioner off of work on October 20, 2023. As of that date, Petitioner had been working with restrictions provided by Dr. Nho dating back to September 5, 2023. Beginning on November 1, 2023, Dr. Nho advised Petitioner to remain completely off of work. This recommendation was reiterated by Dr. Nho at his follow up visit on January 16, 2024.

At his next follow-up visit of February 27, 2024, Dr. Nho advised Petitioner that he could begin lifting at work but with a twelve pound limit. Respondent did not offer work within his twelve pound lifting limitation. Petitioner remained off of work as of the date of arbitration.

Petitioner's first day off of work due to his layoff was October 20, 2023. As of that date, his left shoulder condition had not stabilized and he was not capable of a return to full duty work. He became entitled to TTD benefits as of that date and remained entitled as of the date of arbitration. See *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill.2d 132, 148 (2010).

Wherefore, Respondent shall pay Petitioner temporary total disability benefits of $1,100.94/week, for 20 1/7 weeks, commencing October 20, 2023, through March 8, 2024, as provided in Section 8(b) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC000980
Case Name	Richard Alvarado v. Harmon, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0360
Number of Pages of Decision	17
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Sean Stec
Respondent Attorney	Jeffrey Gibellina

DATE FILED: 7/29/2024

/s/ Deborah Simpson, 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

Richard Alvarado,

Petitioner,

vs. NO: 23 WC 980

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 23, 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.

July 29, 2024

o7/10/24
DLS/rm
046

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

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

/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC000980
Case Name	Richard Alvarado v. Harmon, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Sean Stec
Respondent Attorney	Jeffrey Gibellina

DATE FILED: 10/23/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 17, 2023 5.33%

/s/Stephen Friedman, 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)

Richard Alvarado
Employee/Petitioner

v.

Harmon, Inc.
Employer/Respondent

Case # **23** WC **000980**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 26, 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, **December 14, 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 $**51,694.64**; the average weekly wage was $**2,349.76**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0.00** 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 $**7,936.70** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $119.43 to Illinois Bone and Joint Institute, and $116,184.50 to Geneva Surgical Suites, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner $2000.00 for out of pocket payments. Respondent shall be given a credit of $7,936.70 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 $1,566.51/week for 39 5/7 weeks, commencing December 23, 2022 through September 26, 2023, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Cummins including any post operative treatment, physical therapy or other reasonable and necessary care.

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

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

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

OCTOBER 23, 2023

/s/ Stephen J. Friedman
Signature of Arbitrator

ICArbDec19(b)

Statement of Facts

Petitioner Richard Alvarado testified that he is an ornamental and architectural ironworker. He has been an ironworker for 23 years. He is a union member of Local 63. In December 2022, he was employed by Respondent Harmon, Inc. as a job superintendent. As opposed to a journeyman, who does mostly installation, a superintendent oversees and manages a project and day-to-day operations.

Petitioner testified he had two prior Workers' Compensation claims. He believes he had a case in 2008 that settled for $385,000. He had a second claim in 2015 for a left knee injury.

Petitioner testified that he previously injured his left shoulder in 2019 when he fell in his driveway at home. Petitioner had treatment at Advocate Medical Group (PX 5). On January 9, 2020, Petitioner reported chronic right shoulder pain with a 1995 non-work accident. Bilateral shoulder pain happened in the past couple of months. Petitioner had already undergone a right shoulder injection and was on gabapentin. The records document bilateral shoulder injections May 27, 2021 and November 1, 2021, and a left shoulder injection on January 3, 2022 (PX 5, p 16).

On March 14, 2022, Petitioner was examined by Dr. Craig Cummins. Dr. Cummins reviewed an MRI of Petitioner's left shoulder and diagnosed a left rotator cuff tear. He recommended left shoulder arthroscopic acromioplasty and rotator cuff repair (PX 2, p 392-393). On May 4, 2022, Dr. Cummins performed a left shoulder arthroscopic acromioplasty and rotator cuff repair. Dr. Cummins found a type I SLAP tear and some mild tearing of the posterior inferior portion of the labrum of Petitioner's left shoulder. Dr. Cummins specifically noted that there was no biceps pathology (PX 2, p 379-380). On May 17, 2022, Dr. Cummins directed Petitioner to initiate a formal physical therapy program for 6-8 weeks (PX 2, p 312-313). Petitioner attended physical therapy at Illinois Bone and Joint Institute from May 24, 2022 through June 23, 2022 (PX 4, p 4-15).

On June 28, 2022, Dr. Cummins noted Petitioner was having more pain than typically seen at this point and ordered an MRI of his left shoulder. He suspended physical therapy for 2 weeks (PX 2, p 294-295). Petitioner had the left shoulder MRI on July 7, 2022 (PX 2, p 286-287). On July 12, 2022, Dr. Cummins stated that the MRI found post-surgical changes, but no definitive recurrent rotator cuff tear. Dr. Cummins directed Petitioner to resume his physical therapy program and provided Petitioner with a release to return to light duty work with no use of his left arm (PX 2, p 271-273). Petitioner testified that Respondent was unable to accommodate Petitioner's work restrictions. Petitioner resumed physical therapy at Illinois Bone and Joint Institute on July 19, 2022 (PX 4, p 16).

On August 24, 2022, Petitioner noted improvement but still described 6/10 pain at its worst and 1/10 at rest. He noted difficulty reaching behind his back and overhead. He was still experiencing discomfort on the side and back of his left shoulder. The doctor noted that Petitioner demonstrates an above average amount of pain but is within the bell curve of expectations. He was to continue physical therapy. Dr. Cummins increased Petitioner's work ability to no overhead use of the left arm and no lifting over 5 pounds (PX 2, p 249-253). Petitioner continued physical therapy from September 1, 2022 through October 6, 2022 (PX 4, p 27-42). On October 7, 2022, although noting some improvement, Petitioner described the same levels of pain and difficulties in activity. Dr. Cummins administered a subacromial corticosteroid injection to the left shoulder. He increased Petitioner's work ability to no lifting over 10 pounds and no overhead work (PX 2, p 226-231). Petitioner testified that the cortisone injection greatly improved his left shoulder symptoms. He continued physical therapy from October 11, 2022 through November 17, 2022 (PX 4, p 43-55).

On November 18, 2022, Petitioner reported the pain has returned. He rated pain at 6/10 at its worst and 3/10 at rest. He described the pain as aching, dull, sharp, and stabbing. He noted severe difficulty in reaching behind his back and overhead. Dr. Cummins noted that Petitioner showed progress since his last visit and that his pain levels and function were improved. Dr. Cummins indicated that he expected Petitioner to continue to improve up to one year following his surgery. He released Petitioner to return to light duty work with a 20-pound lifting restriction and limited overhead work (PX 2, p 197- 201).

Petitioner testified he had not returned to work with the light duty restrictions because there was no work to accommodate him. Petitioner testified that on November 18, 2022, the back of his shoulder at the anchor and incision locations were still painful, but it was very dull. Petitioner's lifting restriction was increased to 20 pounds with limited overhead work. He sent his work note to Tim Williams and possible Matt Rademaker via email. He returned to work for Respondent on November 21, 2022. At the time he returned to work, he was still feeling symptoms at the incision spot and a dull, achy feeling at the back of his shoulder.

On November 28, 2022 at therapy, Petitioner reported he was very sore. He is still sore at the posterior shoulder but same as right after surgery. The cortisone shot may be wearing off. He was sore from work as well (PX 4, p 56). The November 30, 2022 physical therapy reevaluation notes Petitioner reported that it is still painful and maybe worse. He is not sure what to do about it. He asked the MD to up his weight restriction at work because he wanted and needed to work. But he is sick of the pain. He reported he will call the MD to consult and let them know what the plan will be. The measurements in the evaluation note significant weakness and restricted motion. Petitioner was able to lift 6-10 pounds from lower to higher level. His pain level with activity was 7/10. The assessment notes quite a bit of pain and now more so with return to work. His ROM and strength has progressed and now regressed (PX 4, p 58-59).

On December 14, 2022, Petitioner was working in York, Pennsylvania. Petitioner testified that he flew there on December 5, 2022. This is a testing facility for a curtain wall that was to be installed in Detroit. The mock-up is a mini version of the actual installation to test for air, wind, and water leaks, and to see how the wall will perform in the field. He was considered a superintendent. He spoke with Tim Williams beforehand about his duties. He was told to stand there with a clipboard. He did not have an understanding that he should not rig up curtain walls. He testified that it did not exceed his restrictions, there is no lifting over 20 pound and no overhead work. During the 9 days before December 14, 2022, he was doing the same activity as when he was injured, installing curtain walls a few times a day. Sometimes he was just on the walkie-talkie, sometimes he was at the bottom end of the curtain wall. Petitioner testified that he was experiencing the regular aches and pains at the incision site and the anchors in the back of his shoulder.

Petitioner testified that on December 14, 2022, before lunch, he was rigging up a curtain wall with Tim Williams and Matt Rademaker. The curtain wall was 5 foot wide and 20 foot long. It weighed 800 to 900 pounds. The wall was laying flat and stacked on another one. He attaches the crane which lifts the top of the curtain wall. Tim Williams and Matt Rademaker were at the bottom of the panel. He testified that neither of them told him not to help. He pulled forward as they pushed in his direction. When he pulled it, he felt a pop underneath his incision on his bicep in the front of his arm. He was not bearing any weight of the curtain wall; he was performing a pulling motion. Petitioner testified that he shouted "ouch." Mr. Williams and Mr. Rademaker were about 20 feet away. Petitioner testified Mr. Rademaker asked him if he was OK and Petitioner told him that he thought he was.

Petitioner testified he continued to work until finishing around 4:00 or 4:30. He noticed pins and needles or a burning sensation on the front of his arm. He had never felt this prior to December 14, 2022. He worked the following day doing random stuff. There were no curtain walls to set. He worked December 16, 2022, setting one or two more units. He testified that was the last day of the job. He testified that he told Mr. Williams that he hurt his shoulder on Friday evening by text message and a phone conversation. He flew home Saturday morning December 17, 2022. He testified his pain was elevated. Reaching out for things would cause pain and burning sensation in the front of his arm. He testified he filled out a report on the Donesafe app when he got back home on Monday. When that is done, it is supposed to go out to all the people that get notifications including Tim Williams. Petitioner also testified he telephoned Ron Borza, Tim Williams' boss.

Timothy Williams testified that he is an ironworker in Local 63 for 39 years. He has been with Respondent for 6 years as the regional superintendent. He has known the Petitioner for about 15 years. Mr. Williams had spoken with Petitioner about his work restrictions prior to flying out to Pennsylvania. He testified Petitioner was not happy about the condition of his shoulder. Petitioner was talking about another surgery and getting a new doctor. He was in a lot of pain. Petitioner was going to run the project in Michigan, so he was to come out and see how everything goes together. He was to carry a clipboard, light duty. Petitioner was to talk to the crane operation when they stand up the panels and make sure everyone works safe. He testified that you put the shackle in the hole and tighten the screws. The crane picks it vertical. They are not lifting or pulling on it. They steady it, and the crane walks it over to the wall where the guys there set them.

Mr. Williams testified that on the first day, he did not really see if Petitioner was involved in lifting or pulling the curtain wall. Petitioner is the kind of guy who likes to work. It is hard to stop him. On December 14, 2022, Petitioner would be standing by the crane and Matt Rademaker, and he would push it. He does not know if Petitioner was pulling on the curtain wall at that time. Mr. Williams testified he was unaware that Petitioner was injured on that day. He first found out on Friday, when Petitioner texted him that he was being verbally abused so he did not want to tell Mr. Williams that he got injured. He got hurt setting curtain walls, was done, and wanted to fly home. Mr. Williams testified he did not hear Petitioner call out. He testified that he wears hearing aids and that the crane makes a lot of noise, so it is possible Petitioner said "ouch," and he did not hear him.

Mr. Williams testified he assumed it was on Friday, because Petitioner did not say anything and did not fill out any of the safety forms that they fill out if somebody gets hurt. There is a process to notify the corporation of an accident. Every superintendent gets trained. Petitioner was aware that if he sustained an accident that he was to fill out a report on the Donesafe App. Once it is filled out it goes to all of the safety team and then an investigation happens. Mr. Williams did not receive a notice on the Donesafe App. He is not aware that anyone else did. He is not aware of any investigation taking place. Mr. Williams testified that he spoke with Mr. Borza who said he really never had a conversation with Petitioner. Mr. Williams testified to an incident at the chamber hatch. He testified that they sign a sheet every morning that they are not hurt, and sign out every evening that they are not injured. On the last day Petitioner did not sign it.

On December 23, 2022, Dr. Cummins recorded a history from Petitioner that stated he states the pain flared up last week while he was at work. Petitioner rated his pain as 8/10 in severity. There was tenderness in the subacromial region and a positive impingement sign of his left shoulder. Dr. Cummins provided a cortisone injection to his left subacromial bursa and directed him to obtain an MRI of his left shoulder. Dr. Cummins took Petitioner off work (PX 2, p 176-180). The MRI was performed on December 30, 2022. The impression was tendinosis and multifocal ill-defined tear of the distal supraspinatus, mild tendinosis and tenosynovitis of the long head of the biceps tendon, mild acromioclavicular degenerative joint disease (PX 2, p 165-166). On

January 6, 2023, Dr. Cummins reviewed the MRI which demonstrated a high-grade partial thickness, possible full thickness recurrent tear which has worsened since post-surgical MRI performed on 07/07/22. Dr. Cummins opined these new MRI findings are likely attributable to the new injury that occurred. Dr. Cummins recommended a left shoulder arthroscopic acromioplasty and revision rotator cuff repair surgery (PX 2, p 151-152).

On February 21, 2023, Petitioner was examined by Respondent's Section 12 medical examiner, Dr. Matthew D. Saltzman. Dr. Saltzman opined that Petitioner's left shoulder condition was a manifestation of chronic degenerative rotator cuff disease and not causally related to Petitioner's work accident on December 14, 2022. Dr. Saltzman agreed that the treatment that Petitioner had received had been reasonable and necessary and that it was reasonable for Petitioner to consider repeat left shoulder surgery. Dr. Saltzman opined that Petitioner was able to return to work with a 15-pound lifting restriction, no repetitive pushing or pulling, and no repetitive overhead work (RX 4).

Petitioner saw Dr. Cummins on March 31, 2023. Dr. Cummins notes the history that Petitioner injured the shoulder while working light duty by lifting a heavy object. The MRI findings have worsened since the last post-operative MRI. These new findings are likely attributable to the new injury. He recommended surgery with which Petitioner wished to proceed (PX 2, p 133-134). Dr. Cummins performed an extensive arthroscopic debridement with lysis of adhesions and removal of retained suture material, an arthroscopic revision acromioplasty, an arthroscopic revision rotator cuff repair, and an open biceps tenodesis on Petitioner's left shoulder at Geneva Surgical Suites on April 19, 2023. The post operative diagnosis was left high grade near full thickness recurrent rotator cuff tear, post operative adhesions, high grade near 50% partial thickness tear of the biceps tendon (PX 6, p 60-62). Petitioner has continued post-operative case with Dr. Cummins. Dr. Cummins directed Petitioner to remain off work (PX 2, p 50-51). On August 9, 2023, Dr. Cummins provided Petitioner a subacromial corticosteroid injection for his left shoulder and directed Petitioner to follow-up in 6-8 weeks (PX 2). Petitioner performed physical therapy from May 12, 2023 through August 8, 2023 (PX 4).

Petitioner testified he feels pretty good. His symptoms are minimal. He is still in physical therapy. He next sees Dr. Cummins on October 6, 2023. He has not yet been released to return to work by Dr. Cummins. His medical bills have been paid by his group health insurance through the union.

Dr. Cummins testified by evidence deposition taken July 21, 2023 (PX 3). Dr. Cummins testified to his treatment of Petitioner prior to the date of accident, beginning in March 2022. He noted the history of shoulder pain started years ago but flared up in 2019 secondary to a fall. He examined Petitioner, reviewed an MRI, diagnosed a rotator cuff tear, and recommended surgery. On May 5, 2022, he performed a left shoulder acromioplasty and rotator cuff repair. He testified Petitioner did not have really significant arthritis. The biceps tendon looked fine. He testified to his post-operative treatment and findings in accordance with his records. He noted the July 2022 MRI finding of thinning and irregularity of the anterior distal fibers of the supraspinatus suggestive of a partial tear. A focal full thickness tear cannot be excluded. His impression was that the radiologist saw a lot of post-surgical changes. On November 18, 2022, Petitioner still had a positive impingement sign, but it had improved, as had strength and range of motion. His pain level and function had improved. He increased Petitioner's lifting to 20 pounds (PX 3)

Dr. Cummins testified that he saw Petitioner on December 23, 2022. Petitioner reported he had been improving, and the pain flared up last week while he was working. He did not detail what happened at work. On examination, Petitioner had positive impingement with decrease in motion and strength. He took Petitioner off

work and ordered an MRI. He agreed with the radiologist that there was at least a high grade partial thickness, possibly full thickness tear which had worsened since July 7, 2022. He performed surgery on April 19, 2023. There was a repair of a tear in the rotator cuff. There was a new finding of a tear of the biceps tendon. Petitioner continues in post-operative care. He is progressing appropriately for 2 month out from his surgery. He is in physical therapy. He is still off work (PX 3).

Dr. Cummins opined that Petitioner was improving and had returned to work. Something happened which he said made him worse, His shoulder got worse. The MRI showed worsening. At surgery, the rotator cuff was retorn and there was a biceps tear. These findings were the result of the work injury he presented with. He does not agree with Dr. Salzman that the work activities of 12/14/2022 are not likely to have caused a recurrent tear. He testified all you can do is go off what the patient tells you and then correlate the objective data. Petitioner told him he was at work and hurt his shoulder. This is supported by worsening of range of motion, more guarding, more weakness, and supported by the MRI. And the operative findings of a retear of the rotator cuff and a new tear of the biceps tendon. Putting it all together, it seems more likely than not that he reinjured his shoulder at work. The retear is a work injury of a pre-existing condition (PX 3).

Dr. Cummins testified that he is not specifically aware of the mechanism of injury. He testified that his impression is that he had an injury at work. He does not know what the injury was. He testified that causation is a secondary consideration to treating the patient. Prior to the second surgery, there were no specific finding indicative of the biceps tendon tear. A lot of symptoms overlap the rotator cuff and biceps tendon. It is possible to have a retear in the rotator cuff in the absence of trauma after the first surgery. There was nothing on the December 30, 2022 MRI to indicate acute trauma, but unless it is dramatic, it is difficult to assess (PX 3).

Dr. Salzman testified by evidence deposition taken August 22, 2023 (RX 2). Dr. Salzman testified to the history he received. Petitioner told him he fell on an icy driveway three years ago. He had surgery twice, the first in 2022. Dr. Salzman testified to his physical examination noting some loss of motion and slight weakness. He reviewed the July 7, 2022 and December 30, 2022 MRIs. He testified that the MRI studies were very similar in regard to the partial-thickness tear. Neither shows a full thickness tear. High grade tear is more than 50% (RX 2).

Dr. Salzman opined that the diagnosis is not caused or aggravated by the alleged December 14, 2022 accident. Petitioner was doing his normal job duties. There was no fall, direct blow to the shoulder, or dislocation. There is really no mechanism to cause a traumatic tear. He testified you need a substantial injury. It needs to be a fairly forceful blunt trauma. Heavy lifting especially below shoulder height would not usually cause a spontaneous rotator cuff tear. It could cause symptoms and make it difficult to do his job. (RX 2).

What was shown on the MRI is the normal degeneration and changes following both the initial tear and the type of surgery that he had. The objective evidence of a new injury would be an MRI that showed something different that was seen on a previous MRI. Arthroscopic examination would be a more precise evaluation than an MRI. A biceps tear can be degenerative or traumatic. You would need some sort of competent mechanism. Biceps can rupture when lifting, and that is usually an eccentric contraction. The December 30, 2022 MRI did not show any biceps tendon tear. Petitioner had no subjective complaints that would lead him to conclude there was biceps tendon pathology (RX 2).

The treatment rendered was reasonable and necessary, but related to the fall in 2019. That is a more competent mechanism for a traumatic rotator cuff tear. He had surgery and persistent symptoms leading up to

a week or two before the alleged new injury. Dr. Salzman would place Petitioner on a 15 pound restriction with no repetitive lifting, pushing or overhead work. These restrictions are unrelated to any December 14, 2022 injury. A revision rotator cuff repair would be reasonable if he has persistent pain, weakness and symptoms (RX 2).

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee. *International Harvester Co. v. Industrial Comm.*, 56 Ill. 2d 84, 89 (Ill. 1973). An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. For an injury to 'arise out' of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

Petitioner testified that on December 14, 2022, he was rigging up a curtain wall 5 foot wide and 20 foot long, weighing 800 to 900 pounds. He attached the crane which lifts the top of the curtain wall. When he pulled it forward, he felt a pop underneath his incision on his bicep in the front of his arm. If this incident occurred, the injury occurred during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. Its origin was a risk connected with, or incidental to, the employment, namely raising an 800 to 900 pound curtain wall.

Respondent argues that Petitioner's testimony is not credible due to inconsistencies with the other evidence submitted. 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).

The Arbitrator notes that elements of Petitioner's testimony are not totally consistent with the medical records or other testimony. Petitioner testified that his symptoms had significantly improved between his May 2022 shoulder surgery and his release to return to work in November 2022. Dr. Cummins records indicate he still had 6/10 pain, positive impingement testing and limitations in range of motion and strength. But Dr. Cummins testified that Petitioner was improving and that he could increase his lifting during this time from 1 pound to 20

pounds. The physical therapy notes also document that Petitioner's complaints were increased after his return to work, noting increased pain. Petitioner mentioned the injection might be wearing off and that he needed to see Dr. Cummins again. Mr. Williams testimony that Petitioner was unhappy with his surgical result would support that his shoulder was more symptomatic that Petitioner's testimony would indicate. But Petitioner performed his job duties including over a week at the job site in Pennsylvania before the episode on December 14, 2022. While Mr. Williams testified that he was unaware of Petitioner injuring himself at the time of the alleged accident. He acknowledged that Petitioner was assisting in raising the curtain wall segment. While he testified Petitioner was told to hold a clipboard and the walkie-talkie, he admitted Petitioner was a hard worker and could have been doing more. His testimony about the events of December 14, 2022 do not contradict what Petitioner claimed occurred. The testimony about the failure to report the injury on the day it occurred is not persuasive. The Arbitrator notes that the claimed time sheets were not offered into evidence and insufficient evidence was offered about the Donesafe app to convince the Arbitrator that the failure of Mr. Williams to receive notice is confirmation of lack of reporting. Petitioner's unpleasant and contrary behavior at the end of his Pennsylvania job as presented by Mr. Williams, can equally be explained by his frustration at the renewed condition of his shoulder after working so hard to try and get back to work.

The Arbitrator does not find the lack of detail in the accident description to Dr. Cummins on December 23, 2022 damning. Petitioner did report a flare up at work. Dr. Cummins testified he may have given more information, but that the mechanism was not a high priority for him in determining his medical care.

The Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner was calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable. While Petitioner may have presented his evidence such that it enhanced his position, the medical records and other testimony did not contradict him such that his testimony should be discounted.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on December 14, 2022.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill. Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner had a significant pre-existing condition in his left shoulder as described in Dr. Cummins medical records from March 2022 through November 2022. He was still under ongoing treatment, with continued symptoms and work restrictions.

It is well-established that an accident need not be the sole or primary cause—as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982). If the claimant had health problems prior to a work-related injury, he bears the burden of showing that the preexisting condition was aggravated by the employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Nunn v. Industrial Comm'n, 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 505, 109 Ill. Dec. 634 (1987)*. Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Nanette Schroeder v. The Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017).

Petitioner presented the testimony of Dr. Cummins who opined that Petitioner's condition in the left shoulder after December 23, 2022 was caused by the work accident on December 14, 2022. Respondent presented the testimony of Dr. Salzman who opined that the diagnosis is not caused or aggravated by the alleged December 14, 2022 accident. Petitioner was doing his normal job duties. There was no fall, direct blow to the shoulder, or dislocation. There is really no mechanism to cause a traumatic tear. It was related to the 2019 non-work-related fall.

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.

Having heard the testimony and reviewed the documentary evidence, the Arbitrator finds the opinions of Dr. Cummins more persuasive that those of Dr. Salzman. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician.

International Vermiculite Co. v. Industrial Comm'n, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992). The Arbitrator finds that Dr. Cummins opinions are based upon his extensive treatment of Petitioner before and after the December 14, 2022 accident. Further, his reading of the MRI is in accordance with the radiologist and is bolstered by his ability to observe the physiology of the Petitioner's left shoulder during both the May 2022 and the April 2023 surgeries. The post-accident findings included a retear of the rotator cuff and a new finding of a biceps tendon tear. The Arbitrator does not find his lack of detail concerning the mechanism of the accident undermines the examination findings and pathology identified by Dr. Cummins. The Arbitrator notes Dr. Salzman continues to state that Petitioner was just doing his normal job duties. This fails to consider the significant forces in maneuvering a curtain wall 20 feet long and weighing 800 to 900 pounds. The Arbitrator finds his opinions on the limited activities which can cause a rotator cuff tear unpersuasive. The Arbitrator also finds his testimony about the lack of a biceps tendon tear contradicted by Dr. Cummins clear operative findings.

Based on the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being in the left shoulder is causally connected to the accident sustained on December 14, 2022.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Based on the Arbitrator's findings with respect to Accident and Causal Connection, reasonable and necessary medical care for Petitioner's left shoulder condition would be compensable. Based on the Arbitrator's findings with respect to Accident and Causal Connection, reasonable and necessary treatment for Petitioner's left shoulder condition would be compensable.

Petitioner has submitted PX 1 with outstanding billing and Petitioner's out of pocket expenses. PX 7 and RX 4 are payments by the group carrier documenting the stipulated payments of $7,936.70 pursuant to Section 8(j). Dr. Cummins opined that the treatment that he rendered was reasonable and necessary. While Dr. Salzman disputed causation, he agreed that the treatment that Petitioner had received had been reasonable and necessary and that it was reasonable for Petitioner to consider repeat left shoulder surgery. The Arbitrator has reviewed the medical evidence and the billing submitted and finds that the records document reasonable and necessary treatment and bills as follows:

1. Petitioner has paid $2,000.00 out of pocket self-pay.
2. Unpaid bill to Illinois Bone and Joint Institute of $119.43 for treatment.
3. The unpaid surgical bill to Geneva Surgical Suites of $116,184.50.

The Arbitrator notes that these bills have not been reduced by fee schedule or negotiated rate.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $119.43 to Illinois Bone and Joint Institute, and $116,184.50 to Geneva Surgical Suites, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner $2000.00 for out of pocket payments. Respondent shall be given a credit of $7,936.70 for medical benefits that

have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Under section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are necessary to diagnose, relieve, or cure the effects of his injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n, 409 Ill. App. 3d 463, 470, 949 N.E.2d 1158, 1165, 351 Ill. Dec. 63 (2011)*. Based on the Arbitrator's findings with respect to Accident and Causal Connection, reasonable and necessary prospective medical care to treat Petitioner's left shoulder condition would be compensable.

Petitioner had the revision surgery on April 19, 2023 and continues in post-operative care by Dr. Cummins. Dr. Cummins testified Petitioner is making satisfactory progress. Petitioner is still in physical therapy and follow up with Dr. Cummins.

Based upon the record as a whole and the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Cummins including any post operative treatment, physical therapy or other reasonable and necessary care.

In support of the Arbitrator's decision with respect to (L) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that 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. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To be entitled to TTD benefits a claimant must prove not only that he did not work but that he was unable to work. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000).

Dr. Cummins took Petitioner off work on December 23, 2022. Thereafter, Petitioner underwent revision surgery to his left shoulder on April 19, 2023, and has been in post-operative treatment thereafter including ongoing physical therapy and follow up with Dr. Cummins. He continues in care. He has not been released to return to work through the date of hearing.

Based upon the record as a whole and the Arbitrator's findings with respect , the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he has been temporarily totally disabled commencing December 23, 2022 through September 26, 2023 (the date of the 19(b) hearing), a period of 39 5/7 weeks.