ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005993
Case Name	Gene Dorsey v. National Wrecking Co.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0196
Number of Pages of Decision	25
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Edward Czapla, Daniel Klein
Respondent Attorney	Andrew (AJ) Sheehan

DATE FILED: 5/1/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GENE DORSEY,

Petitioner,

vs. NO: 22 WC 05993

NATIONAL WRECKING CO.,

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 whether Petitioner's current condition of ill-being is causally related to the undisputed November 9, 2021 work accident, entitlement to Temporary Total Disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto. The Commission finds Petitioner's current condition of ill-being is causally related, in part[1], to the November 9, 2021 accident. 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 Statement of Facts set forth in the Decision of the Arbitrator and incorporates such facts herein.

CONCLUSIONS OF LAW

This case was consolidated for hearing with case number 22 WC 11066. Both cases involve accidental injuries to Petitioner's neck and back: 22 WC 5993 involves an undisputed November

[1] As detailed in companion case 22 WC 11066, the Commission views the evidence regarding the alleged March 28, 2022 accident differently.

9, 2021 accident and 22 WC 11066 involves an alleged March 28, 2022 accident. In 22 WC 5993, the Arbitrator found Petitioner had reached maximum medical improvement following the November 9, 2021 accident and thereafter suffered an intervening accident; based thereon, the Arbitrator denied ongoing causal connection and awarded benefits only through February 3, 2022. The Arbitrator also denied Petitioner's request for penalties and attorney's fees as well as Respondent's claim for credit[2]. In 22 WC 11066, the Arbitrator concluded Petitioner did not sustain an accidental injury arising out of his employment and denied all benefits. The Commission's analysis of the evidence yields a different result.

I. Causal Connection

In finding Petitioner's current condition of ill-being is not causally related to the November 9, 2021 accident, the Arbitrator made an adverse credibility determination. The Arbitrator found Petitioner's testimony was contradicted by the totality of the evidence, which supported Dr. Alexander Ghanayem's opinion that Petitioner had reached maximum medical improvement ("MMI") as of the February 3, 2022 §12 examination. The Arbitrator further found Petitioner thereafter suffered an intervening accident which broke the chain of causation when he experienced pain while lifting his granddaughter. The Commission views the evidence differently.

Initially, the Commission does not share the Arbitrator's credibility assessment, nor do we agree with the negative inferences in the Decision. The Commission finds Petitioner's testimony of persistent symptoms of varying intensity is corroborated by the treating records. The Commission further finds the video evidence does not materially contradict Petitioner's testimony. We have watched the surveillance video and the Facebook video in their entirety, and we note there is nothing particularly strenuous depicted on the surveillance video and instead Petitioner is performing mere activities of daily living that are in keeping with Petitioner's description of what he is capable of amidst his waxing and waning symptoms. For instance, we observe the video of Petitioner carrying a package of bottled water and a carton of eggs is consistent with Petitioner's testimony that he is able to carry approximately 10 pounds. T. 83. Moreover, we accept as truthful Petitioner's testimony that the emotion of the worship service overcomes his symptoms, but he "pay[s] for it at the end." T. 92. The Commission finds Petitioner was credible. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

Turning to the medical evidence, the Commission finds the treating records establish that Petitioner never had a resolution of his symptoms after the undisputed injury on November 9, 2021, and he had not reached MMI prior to the March 28, 2022 incident. The record reflects Petitioner presented to the Ingalls Memorial Hospital emergency room on the day of the accident and reported pain at 9-10/10 after being thrown against a piece of heavy equipment. After examination, X-rays, and a Toradol injection to ameliorate Petitioner's severe pain, the emergency room physician discharged Petitioner with instructions to follow-up with his primary care physician, Dr. Allison Martin. PX1. Pursuant to the directive, Petitioner was evaluated by Merime Shabani, a C.N.P. in Dr. Martin's office, on November 15, 2021. Petitioner gave a history of the

[2] On Review, Petitioner does not challenge the denial of penalties and attorney's fees, nor does Respondent challenge the denial of credit.

work accident and complained of neck and back pain at 7-8/10 which flared to 10/10 with movement. On examination, C.N.P. Shabani noted swelling, spasms, and tenderness from the neck to the low back, as well as painful neck range of motion. C.N.P. Shabani ordered further workup with CT scans and imposed activity restrictions. PX2. The head and thoracic spine CT scans were completed on November 29, 2021 and were unremarkable. On December 1, 2021, Petitioner was evaluated by Dr. Martin; Petitioner reported persistent pain at 7/10. After examination revealed tenderness from the neck to the lumbar spine, Dr. Martin documented that Petitioner was "not much better with pain and function" and needed better pain control; Dr. Martin added Hydrocodone to Petitioner's medications, authorized Petitioner off work, and noted physical therapy may be necessary. PX2. When Petitioner followed-up on December 15, 2021, he reported some improvement in his symptoms: his neck and upper back pain had resolved and the medications decreased his low back pain to 5-6/10. Noting that Petitioner still needed narcotics for pain management, Dr. Martin kept Petitioner off work and directed that he begin a stretching program. PX2. At the January 3, 2022 re-evaluation, Dr. Martin recorded Petitioner was still having low back pain at 5/10 but he continued to improve; she imposed activity restrictions and directed him to limit Hydrocodone to nights and weekends. PX2. When Petitioner next saw Dr. Martin on February 15, 2022, he again reported low back pain at 5/10; noting "minimal improvement since last visit," Dr. Martin recommended physical therapy "to see if this can help get him back the rest of the way with strengthening and pain control." PX2. On March 22, 2022, Petitioner returned to see Dr. Martin, who documented her prior order for physical therapy had been denied:

> Saw a spine specialist ordered through his WC. This spine specialist cleared him for 100% duty even though he has a lot of pain. Therefore the WC person would not approve PT. They have also CLOSED his WC case as if he were recovered. They [recommend] he go through his regular insurance. He is still in pain. PX2.

Again noting Petitioner's examination was positive for significant tenderness and he still required narcotic pain medication, Dr. Martin reordered physical therapy and authorized Petitioner off work. PX2. Six days later, Petitioner returned to work and suffered a second injury (the subject of 22 WC 11066). While Dr. Ghanayem opined that Petitioner had reached MMI as of his February 3, 2022 §12 examination, the Commission does not find Dr. Ghanayem's opinion persuasive. Dr. Ghanayem's assertion that Petitioner had only nonorganic examination findings and his conclusion that Petitioner had fully recovered is inconsistent with the treating medical records. The Commission finds Dr. Ghanayem's opinion is not credible.

The Commission further disagrees that Petitioner sustained an independent intervening accident. We begin with a review of the applicable standard. Intervening accidents are evaluated under a "but for" standard:

> Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. (Citations). Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. (Citation). Thus, <u>when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain</u>. (Citations).

> "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411. As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the first employer remains liable. *Global Products*, 392 Ill. App. 3d at 412. *PAR Electric v. Illinois Workers' Compensation Commission*, 2018 IL App (3d) 170656WC, ¶ 63 (Emphasis added).

This is a difficult burden of proof, as in order for an incident to rise to the level of an independent intervening accident, the proponent must prove the subsequent condition of ill-being would have occurred even if the claimant's condition had not already been weakened by the work accident. The Commission finds Respondent failed to make that showing, as the evidence establishes Petitioner would not have experienced the pain flare absent his low back already being in a weakened state after the November 9, 2021 work accident. We first emphasize this is not an instance where the claimant has a pre-existing condition or a history of prior back problems. Rather, the uncontradicted evidence establishes Petitioner had no back pain or problems until the undisputed injury on November 9, 2021. As detailed above, Petitioner presented to the emergency room that day with pain rated at 9-10/10, and over the next three months, he underwent a course of conservative care with medication management; although his symptoms improved, he continued to have low back pain at 5/10. The Commission observes there was no change in Petitioner's complaints after the alleged intervening accident: as of January 3, 2022, Petitioner was "still having low back pain, 5/10," and on February 15, 2022, Petitioner's pain level remained at "5/10 most of the time." PX2. While Petitioner reported an episodic increase in pain when he lifted his granddaughter, the record reflects Petitioner's spine was compromised by the undisputed November 9, 2021 accident and "but for" the initial injury, the benign maneuver of lifting his granddaughter would not have caused an increase in pain.

The Commission finds Petitioner's condition remains causally related, in part, to the November 9, 2021 accident. The Commission clarifies that, consistent with our determination Petitioner had not reached maximum medical improvement prior to his subsequent accident on March 28, 2022, all benefits are awarded under the instant case 22 WC 5993.

II. Temporary Total Disability

Petitioner alleged entitlement to Temporary Total Disability ("TTD") benefits from November 10, 2021 through March 27, 2022 and March 29, 2022 through March 9, 2023; Respondent, in turn, disputed Petitioner's entitlement to TTD benefits after February 3, 2022. ArbX1, ArbX2. Having concluded Petitioner's condition of ill-being remains causally related to his work activities and he has yet to reach maximum medical improvement, we consider what restrictions were in effect during the claimed periods. The Commission observes Dr. Martin imposed work restrictions from January through April 2022, at which point she referred Petitioner to Dr. Colman, and Dr. Colman thereafter maintained Petitioner's restricted status through the March 9, 2023 hearing. PX2, PX6, PX7.). As such, we find Petitioner proved entitlement to the disputed periods of TTD benefits.

The Commission finds Petitioner is entitled to TTD benefits from November 10, 2021 through March 27, 2022 and March 29, 2022 through March 9, 2023. Consistent with our

determination that Petitioner had not reached MMI prior to the March 28, 2022 accident, all TTD benefits are awarded herein.

III. Medical

A. Incurred Medical Expenses

Petitioner offered into evidence medical bills and the associated treatment records for the care provided at Ingalls Memorial Hospital (PX1), Advocate Medical Group (PX2), South Suburban Hospital (PX4), Munster Open MRI (PX5), Midwest Orthopaedics at Rush (PX6 and PX7), and University of Chicago Medicine (PX8). The Commission finds the charges detailed in Petitioner's exhibits are reasonable, necessary, and causally related to the work accidents, and Respondent is liable for same. Consistent with our determination that Petitioner had not reached MMI prior to the March 28, 2022 accident, all medical benefits are awarded herein.

B. Prospective Medical Care

Petitioner seeks an award of the epidural steroid injection and physical therapy recommended by Dr. Colman. The Commission finds Dr. Colman's treatment recommendations are reasonable, necessary, and causally related to the work accidents, and Respondent is ordered to provide and pay for same.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 2023 is hereby reversed. Petitioner's condition of ill-being is causally related, in part, to the November 9, 2021 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,173.93 per week for a period of 69 1/7 weeks, representing November 10, 2021 through March 27, 2022 and March 29, 2022 through March 9, 2023, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses contained in Petitioner's Exhibits 1, 2, 4, 5, 6, 7, and 8, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the treatment recommended by Dr. Colman, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties under §19(l) and §19(k) and attorney's fees under §16 is hereby denied.

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.

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.

May 1, 2024

/s/ *Raychel A. Wesley*

RAW/mck

O: 3/6/24

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC005993
Case Name	Gene Dorsey v. National Wrecking Co.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Daniel Klein, Edward Czapla
Respondent Attorney	Andrew (AJ) Sheehan

DATE FILED: 5/10/2023

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

/s/ Antara Nath Rivera, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gene Dorsey
Employee/Petitioner

v.

National Wrecking Co.
Employer/Respondent

Case # **22** WC **005993**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Antara Nath-Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **March 9, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/9/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**21,130.63**; the average weekly wage was $**1,760.89**.

On the date of accident, Petitioner was **51** years of age, **married** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay all reasonable and necessary medical services, incurred through February 3, 2022, pursuant to the medical fee schedule and as outlined in PX 1; PX 2; PX 4, PX 5; PX 6; PX 7; and PX 8, as provided in Sections 8(a) and 8.2 of the Act.

Respondent is not liable for any prospective treatment beyond February 3, 2022, the date of MMI.

Respondent paid TTD benefits for 18 and 4/7 weeks at an agreed TTD rate of $1,173.93. As such, no credit will be awarded to Respondent.

Respondent shall not pay penalties as provided in Sections 16 or 19 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

MAY 10, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

GENE DORSEY,	)	
	)	
Petitioner,	)	
v.	)	Case No. 22WC005993
	)	Consolidated Case No. 22WC011066
NATIONAL WRECKING COMPANY,	)	
	)	
Respondent.	)	

This matter proceeded to hearing on March 9, 2023, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. Issues in dispute include accident, current condition of ill-being, medical bills, prospective medical care, temporary total disability ("TTD"), and penalties and fees. (Arbitrator's Exhibit "AX" 1)

STATEMENT OF FACTS

November 9, 2021, accident

Gene Dorsey ("Petitioner") is a 53-year-old man who was employed by National Wrecking Company ("Respondent") as a demolition laborer. (Trial Transcript "T." 18-19) Petitioner testified that he worked for Respondent for nine years. Petitioner testified that when he first started at Respondent his duty as "torch guy and cut" was to cut the pipes and remove everything from the walls. (T. 19) Petitioner testified that after that, he had a jackhammer and would "go inside the machine and bring out the firewalls that was built inside the machine that he was tearing down." *Id*. Petitioner testified that he would then cut the steel into small pieces and move them into the factory. *Id*. Petitioner testified that this was heavy physical work. *Id*.

Petitioner testified that he worked for Respondent for six years in the 1990's, he left to work for Overnight Transportation, which was bought out by UPS freight, and then came back to Respondent about three years before the accident occurred. (T. 19-22) Petitioner testified that he became supervisor at Respondent when he came back. (T. 21) Petitioner testified that he worked full time with no restrictions to his neck and back prior to November 9, 2021. (T. 22-23) Petitioner testified that he never had neck or low back pain, treatment to neck or low back; and no injury to his neck or low back. (T. 23-24) Petitioner testified that he never had an MRI done of neck or low back prior to accident. (T. 24) Petitioner testified that he was never prescribed pain meds prior to the accident. (T. 25) Petitioner testified that his neck and back were good because he would finish before anyone and was a "go-getter." *Id.* Petitioner testified that

"[t]he other guys would be mad because I was, I would get the job done at a faster pace to cause the assignment to come to an end. So the company liked that." *Id.*

Petitioner testified that, on November 9, 2021, he was picking up a steel box coming out of an oil pit. (T. 27) Petitioner testified that his co-worker, Apolonar Ortiz ("Polo"), was the foreman, was inside the crane, raised the box out of the oil pit, and observed that the box was bound against the machinery. (T. 27; 30) Petitioner testified that another co-worker, 'Ruben', went to the left side, with a bar, and tried to keep the box from binding. *Id*. Petitioner testified that they were trying to put the bars in between and tried to keep the box from binding against the crane. *Id*. Petitioner testified that he applied too much force which caused the box to slip, caused him to fall backwards, and run into the steps of the crane. *Id*.

Petitioner testified that the middle of his back and left side hit the step of the crane and that he fell backwards onto the concrete and hit his head. (T. 28) Petitioner testified that he was wearing a hard hat and safety glasses. *Id*. Petitioner testified that his hat flew off after he hit the concrete. *Id.* Petitioner testified that he landed on his left side. (T. 29) Petitioner testified that everyone came over to help him off the ground. (T. 28)

Petitioner testified that he sustained a tight back. *Id.* Petitioner testified that Polo told him to walk it off but his back was tight. *Id.* Petitioner testified that when he bent over he was in a lot of pain and that his neck was tight. *Id.* Petitioner testified that he told Polo that he was leaving because he wanted to go to the clinic, but he told Petitioner to "hold on" until they finished the job and requested that Petitioner stay the rest of the day. *Id.*

Petitioner testified that he called Respondent and spoke to Art Mandel. (T. 30-31) Petitioner testified that Mr. Mandel told him to go to a doctor of Petitioner's choice and that Respondent would "take care of the bills." (T. 31) Petitioner testified that he asked Polo if he needed to fill out anything and that Polo said "no, just do what Art told you to do." *Id*.

Summary of medical records from November 9, 2021, accident

On November 9, 2021, Petitioner went to Ingalls Health Care Center. (Petitioner's Exhibit "PX" 1; T. 29-31) Petitioner reported that his left hip, rib cage hurt after being thrown into a crane. (PX 1 at 15) The medical records also indicated that "Pt states that he was thrown into a forklift this morning, c/o back, and left hip, Pt. states that it hurts when he breathes in." (PX 1 at 7; 16) Petitioner testified that he was doubled over in pain. (T. 31) Petitioner was diagnosed with thoracic back pain, hip pain, and low back strain. (PX 1 at 19)

On November 10, 2021, x-rays of the lumbar spine showed moderate diffuse facet degeneration. (PX 1 at 42[1]) He was recommended to return to work without restrictions on November 11, 2021. (PX 1 at 26)

On November 15, 2021, Petitioner presented to his primary care doctor, Dr. Allison Martin, M.D., at Advocate Medical Group (PX 2) Petitioner reported neck, left shoulder, low back, and left knee pain following the work accident. (PX 2 Vol. II at 38[2]) The medical records indicated that Petitioner did not lose consciousness but was lightheaded and experienced headaches. *Id*. The medical records also indicated swelling, spasms and tenderness to the cervical, thoracic and lumbar spine. (PX 2 Vol. II at 42) Petitioner was diagnosed with cervical pain, bilateral thoracic pain, lumbar pain and being intermittently lightheaded. (PX 2 Vol. II at 44-45) Petitioner was restricted from heavy lifting, prescribed Acetaminophen, Ibuprofen, Flexeril and instructed to follow up Dr. Martin. (PX 2 Vol II at 45; 85)

On November 29, 2021, a CT of the head/brain was performed which was reported as unremarkable. (PX 2 Vol. II at 31) The CT of the thoracic spine revealed multilevel degenerative disc disease and cervical spondylosis. (PX 2 Vol. II at 34)

On December 1, 2021, Petitioner presented to Dr. Martin and complained of acute neck pain, bilateral thoracic pain, bilateral low back pain without sciatica and acute chest wall pain. (PX 2 Vol. II at 23) Examination revealed tenderness over posterior neck, entire thoracic spine, paraspinals entire lumbar spine, and right lower ribs. (PX 2 Vol. II at 26) Petitioner was diagnosed with acute neck pain, bilateral thoracic pain, bilateral low back pain, and chest wall pain. (PX 2 Vol. II at 27) Petitioner was prescribed Ibuprofen, Cyclobenzaprine and Hydrocodone for pain and restricted from work. (PX 2 Vol. II at 27)

On December 15, 2021, followed up with Dr. Marin and reported his neck and shoulder area/upper back pain were gone, but that he continued reporting chest and low back pain. (PX 2 Vol II at 65) Physical examination showed normal range of motion of the cervical spine and no tenderness of the thoracic spine, but showed tenderness over the lumbar spine. (PX 2 Vol II at 66) Petitioner testified he was in a lot of pain and was taking the medication every four to six hours. (T. 37)

On January 3, 2022, Petitioner went back to Dr. Martin and reported low back pain of 5/10 and some chest wall pain. (PX 2 Vol. II at11) He was allowed to return to work with restrictions of no lifting more than 20 pounds. (PX 2 Vol II at 13)

On February 3, 2022, Petitioner was examined by Dr. Alexander Ghanayem M.D., pursuant to Respondent's Section 12 independent medical examination "IME" request. (Respondent's Exhibit "RX" 1 at 80[3] (fourth to last page of exhibit) Petitioner testified the examination lasted less than 5 minutes and the doctor did not touch him or make him bend and move around. (T. 40-41) Petitioner reported an injury

[1] PX 1 was not bates stamped. This respective page number reflects the respective page number indicated on the report.
[2] PX 2 Vol II was not bates stamped. The page numbers are descending in this exhibit. The page number on the decision reflects the respective page number indicated on the report.
[3] RX 1 is labeled as "ER 1." RX 1 is not bates stamped and the page number in the decision reflects the page number where it appears in the exhibit after manually counting the pages.

to his back when he was trying to lift a machine by using a prybar that slipped and he fell backwards about 2-3 feet hitting the crane steps. *Id*. X-rays of the lumbar and thoracic spine were reviewed to show age-appropriate degenerative changes. *Id*. Dr. Ghanayem noted his physical examination was objectively normal and he exhibited nonorganic findings. *Id*. Dr. Ghanayem diagnosed a back sprain caused by the November 9, 2021, work accident. *Id*. Dr. Ghanayem opined that he had "ample course of time to rest and recover from that injury." *Id*. Dr. Ghanayem placed him at maximum medical improvement ("MMI") without restrictions or further medical care. *Id*.

On February 15, 2022, Petitioner went to Dr. Martin and reported chest and low back pain after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported that "he had to put her right down due to increase in pain." *Id*. Dr. Martin recommended physical therapy, restricted Petitioner from work, and continued to prescribe Ibuprofen, Flexeril and Hydrocodone. *Id*. at 5.

On March 22, 2022, Petitioner presented to Dr. Martin, for that last time. (PX 2 Vol. II at 12 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported sharp pain in his back, shoulders, legs, and left arm. *Id*. Dr. Martin recommended that Petitioner put the physical therapy prescription through his own insurance in light of Dr. Ghanayem's opinion. *Id*. at 16. He was recommended to apply for FMLA to avoid losing his job and remain off work until physical therapy was completed on April 25, 2022. *Id*.

March 28, 2022, accident

Petitioner testified that on the morning of March 28, 2022, Petitioner returned to work at Respondent's request. (T. 44-45) Petitioner testified that he spoke with Matt Powell who called him with an assignment. (T. 43) Petitioner testified that he told Mr. Powell of his restrictions. (T. 44) Petitioner testified that despite his pain and tightness, he went back to work. (T. 45) Petitioner testified that he continued to have shooting pains in his arm down to his fingers and a pounding ache in the left side of his head and neck. (T. 45-46) Petitioner also testified that his back was tight and "felt like heat." (T. 46) Petitioner testified that he did not take any medication on March 28, 2022, because he drove to his job assignment in Aurora from Lansing. (T. 45) Petitioner testified that he did not refuse this assignment because Mr. Powell told him that Respondent's doctor found him to be at "100 percent" despite Petitioner telling Mr. Powell that he was not released from medical care. (T. 46)

Petitioner testified that his assignment was at a school. *Id*. Petitioner testified that he met with 'Pablo', the foreman on the job. *Id*. Petitioner testified that there were two other workers present named 'Gerry' and 'Hugo.' *Id*. Petitioner testified that his job that day was to remove ceiling tiles, metal pieces, and fixtures that were up top. (T. 47) Petitioner testified that he was told to stay on the ground because the supervisor "didn't want [him] doing too much." *Id*. Petitioner testified that Hugo was on the scaffolding taking items down from the ceiling and handing them to Petitioner. (T. 48) Petitioner testified that his job was to grab ceiling tiles and other items and twist his body to put them in the right place. Id. Petitioner testified that as he reached up to grab stuff from Hugo, he felt something pop in his left arm. (T. 48-49) Petitioner testified that he told Hugo that he was going to find Pablo. (T. 49) Petitioner testified that he

told Pablo that he reinjured himself and needed to go to a clinic because he felt something pop in his left arm, that his neck was tight, and that he was in a lot of pain. (T. 49-50) Petitioner testified that Pablo told him to call the office. (T. 50)

Petitioner testified that he called Mr. Powell, told him what happened, and Mr. Powell told him that Respondent did not have a doctor for Petitioner because Respondent's doctor said he was at 100 percent. (T. 51) Petitioner testified that after Mr. Powell refused to offer him medical care, he went to South Suburban Hospital that day. (T. 51; PX 4) Petitioner testified that he was on the job site for no longer than 45 minutes to an hour before reinjuring himself. (T. 51) Petitioner testified that the ceiling tiles weighed "a couple of pounds" and metal pieces as lightweight. (T. 78-80)

Summary of medical records from March 28, 2022, accident

On March 29, 2022, at South Suburban Hospital, Petitioner reported upper back, left-sided neck pain, and sharp pain and tingling in his lower back and left buttock that radiated down his left leg to his ankle that started this morning when he was doing overhead demolition of ceiling tiles at work. (PX 4 at 22-23; 33; 39) He reported that he twisted wrong and felt a pop in his shoulders with back spasms and nerve tingling, which he described as the same feeling as with the November 9, 2021, work accident. (PX 4 at 32; 39) X-rays of the cervical spine showed no acute findings in the disc spaces or significant narrowing. (PX 4 at 55) Petitioner was diagnosed with cervical radiculopathy and prescribed NSAID pain medication. (PX 4 at 31)

On April 7, 2022, Petitioner presented to Dr. Martin and reported that he sustained another injury on March 28, 2022, after his "job called him and demanded that he return to work with no restrictions." (PX 2 Vol. II at 2 of the April 7, 2022, medical report located toward the beginning of the document) He reported that he was three hours into his shift when he started having left-sided neck tightness and left arm numbness, tingling into his thumb and index finger, and low back tightness. *Id*. Dr. Martin recommended a cervical and lumbar MRI and referred Petitioner to Dr. Matthew Colman, an orthopedic spine surgeon. *Id*. at 5.

On April 12, 2022, an MRI of the lumbar spine showed the following: L2-L3: 1-2 mm broad disc protrusion; L3-L4: 2-3 mm bilateral foraminal disc bulge; L4-L5: 4 mm disc bulge, severe bilateral foraminal stenosis; L5-S1: 4.5 mm diffuse disc bulge extending into foramina, severe bilateral foraminal stenosis. (PX 5 at 3) An MRI of the cervical spine showed the following: C4-C5: 1 mm posterior central disc protrusion; C5-C6: 1 mm posterior central disc protrusion; C6- C7: 1 mm posterior central disc protrusion; C7-T1: 2 mm posterior central disc protrusion; and T1-T2: 3 mm posterior broad disc protrusion. (PX 5 at 6)

On April 18, 2022, Petitioner began physical therapy for low back pain and bilateral leg pain. (PX 4 at 9) He reported inability to stand or walk longer than 30 minutes due to pain. (PX 4 at 16)

On April 19, 2022, presented to Dr. Colman at Midwest Orthopedics at Rush. (PX 6) The medical records indicate that Petitioner treated for back pain and radiculopathy following a twisting injury on March 28, 2022, when he was reaching up to grab materials from another coworker. (PX 6 at 48) He

reported pain and tightness in his neck that radiated into his fingers and back pain that radiated into his bilateral legs, especially with walking. *Id*. Physical examination showed normal ambulation, full range of motion in cervical and lumbar spine with flexion, and without tenderness to palpation. (PX 6 at 48-49) X-rays taken showed mild degenerative disc disease at C6-C7. *Id*. Dr. Colman diagnosed Petitioner with neck and back pain with radiculopathy. (PX 6 at 44; 50) Physical therapy and a cervical MRI were recommended. (PX 6 at 49) Gabapentin and Norco were prescribed for pain and Petitioner was restricted from work. He was recommended to undergo physical therapy for his neck and low back pain and to remain off work. *Id.*

On April 22, 2022, during Petitioner's physical therapy appointment, Petitioner reported difficulty gripping objects and "excruciating" pain from his neck and low back. (PX 6 at 30) During his physical examination, the physical therapist noted it was "difficult to assess or pinpoint strength grade due to inconsistent strength grades throughout manual testing" and "although [Petitioner] reporting max tenderness on palpatory exam, no muscle/soft tissue tightness noted to [bilateral] gluteal or lumbar musc[les]." (PX 6 at 31)

On May 17, 2022, Petitioner returned to Dr. Colman and reported that his neck was more bothersome than his low back. (PX 6 at 22) He reported a recent onset of issues with his hands and "is now dropping things and has tingling in his hands." *Id*. The report indicated that Petitioner experienced "upper extremity weakness, especially with forward elevation and extension." *Id*. Dr. Colman recommended another MRI of the cervical spine. The MRI of the cervical spine was read to show "multilevel degenerative changes," including disc small bulges at C5-C6, C6-C7, and C7-T1. (PX 6 at 23; 52-53; PX.7 p. 100-101)

On May 23, 2022, at Midwest Orthopedics at Rush, the MRI of the cervical spine was reviewed to show a disc bulge at C6-7 causing stenosis as well as an incidental syrinx found, according to Dr. Colman. (PX 6 at 13(PX 6 at 23; 52-53; PX.7 p. 100-101) Dr. Colman recommended physical therapy and a cervical epidural steroid injection, as well as a neurological surgeon referral for the incidental syrinx found on the MRI. (PX 6 at 14)

On June 13, 2022, Petitioner was reexamined by Dr. Ghanayem. (RX 1 at 82) He reported a new neck, midback, and lower back injury when he was receiving ceiling tiles and metal pieces from another individual which he described as "not that heavy." *Id*. He also reported left-sided arm numbness and weakness and left-sided leg numbness and weakness. *Id*.

The report indicated that during his physical examination, Petitioner began crouching and showed positive Waddell signs. *Id*. The report also indicated that he had inconsistent responses to testing when distracted and inconsistent strength testing. *Id*. Dr. Ghanayem noted that Petitioner had delayed jerking response, which was nonmedical and consistent with malingering. *Id*. His distracted straight leg testing was negative, but when done purposely, he reported severe low back pain on the left side *Id*. Dr. Ghanayem's notes indicated that Petitioner left the examination room in a crouched position, but when he left the building, he was no longer in the crouched gait and was able to get into his car without difficulty, bending at the waist. *Id*.

Dr. Ghanayem determined Petitioner was "malingering and feigning weakness in an attempt to magnify his symptoms." (RX 1 at 83) His mechanism of injury was of such that he didn't believe a true injury occurred. *Id*. Based on that and the physical examination findings, Dr. Ghanayem determined that there was no disability, that Petitioner could report back to work regular duty, and that no additional care was needed. *Id*.

On July 14, 2022, Petitioner presented to Dr. Edwin Ramos, M.D., at the University of Chicago Medicine, neurology department, upon being referred by Dr. Martin. (PX 8) The medical records indicated that Petitioner reported the history of the two alleged work accidents. (PX 8 at 8-9) He reported numbness and tingling from his neck into his arms. *Id*. Physical examination showed poor effort in strength testing, but appeared to be normal. (PX 8 at 9-10) Dr. Ramos reviewed the May 17, 2022, cervical spine MRI and noted mild syringohydromyelia at the T1-T2 level and "mild degenerative changes with mild spinal canal stenosis at the T10-T11." (PX 8 at 16)

On August 2, 2022, Petitioner presented to Dr. Colman. (PX 7) Petitioner reported low back, neck, and upper back pain and tingling in the bottom of his feet. (PX 7 at 19) He reported pain with activities of carrying, lifting, standing, walking, and other activities of daily living. (PX 7 at 20) Petitioner also reported that he was able to walk two blocks, and walk for 10 minutes and stand for three minutes before having to take a break. *Id*. Petitioner continued taking the Norco, Gabapentin, and Flexeril and remained restricted from work. *Id*.

On August 11, 2022, Dr. Ramos indicated Petitioner was not a surgical candidate and recommended nonoperative management for his pain symptoms and degenerative spine changes. (PX 7 at 57)

On September 13, 2022, Petitioner returned to Dr. Colman and complained of low back, neck, and upper back pain. (PX 7 at 15-16) Dr. Colman recommended a cervical epidural steroid injection at C6-C7. (PX 7 at 16)

On October 18, 2022, Petitioner returned to Dr. Colman. (PX 7 at 9) The records indicated that Petitioner complained of "left shoulder/rotator cuff pain with radiation of pain down the arm and numbness into the left index finger, long finger and thumb." (PX 7 at 11) He reported subjectively decreased grip strength on the left side and continued issues with dropping objections. *Id*. Dr. Colman continued to recommend the cervical epidural injection and physical therapy and restricted Petitioner from work. (PX 7)

On November 29, 2022, Petitioner returned to Dr. Colman and reported some tingling and numbness in his left arm and pain. (PX 7 at 7) He stated he has been dropping things and sleeping less. *Id*. Physical examination showed full range of motion to the cervical and lumbar spine with flexion and no tenderness to palpation with fill active and passive range of motion to all four extremities. (PX 7 at 8)

Petitioner testified that he could carry items weighing about five to 10 pounds from the grocery store into his vehicle. (T. 83) Petitioner testified that he had issues getting in and out of his car. (T. 84) He testified that his wife helps him get dressed and put on a jacket. *Id*. Petitioner testified that he is an

evangelist outreach leader, praise team leader, and elder at Harvest of Souls Ministries church. (T. 86) Petitioner testified that, in that role, he participated in worship services that required him to be on stage singing and walking. (T. 87-88) He testified that he is only on his feet 10 to 20 minutes at a time before having to take a break. (T. 89)

At trial, Petitioner was shown RX 6, in which he identified himself in the video footage from June 24, 2022, walking, clapping and singing, raising his right arm above his head, and turning from side to side, among other activities. (T. 91) He testified that he did not take a break after 20 minutes on stage during this service and testified that he was on stage doing these movements for 45 minutes to an hour. (T. 92)

Petitioner was also shown RX 4, in which he identified himself in the video footage from October 25, 2022, carrying a 24-pack case of bottled water and eggs in a plastic bag from the store entrance to his vehicle. (T. 99) Petitioner testified that he estimated this case weighed about 10 to 12 pounds. (T. 100) Petitioner testified that the video footage from RX 4 also showed him, on September 23, 2022, taking some items out of the trunk of his vehicle and placing them on the ground, and vacuuming the back of his vehicle. (T. 101)

Petitioner's current condition

Petitioner testified that he still has numbness and tingling in the left hand and fingers. (T. 67) Petitioner testified that he sleeps three to four hours at a time because his back, legs, and neck are hurting or cramping. (T. 67-68) Petitioner testified that he sometimes sleeps in the bed, but mainly on the chair, but also sometimes lays down on a yoga mat. (T. 68) He testified that his injury has affected his marriage and intimacy. (T. 70) Petitioner testified that he has not received wages since his second accident, that his house is in foreclosure, that "they" picked up his truck, and that he suffers anxiety and stress because of it. (T. 70-71) Petitioner testified that he wants the injection and physical therapy to be able to move again. (T. 71) He testified he still has neck tightness and pain as well as left arm pain. (T. 72) He still drops items with his left hand and pain going down the left leg. (T. 73)

Deposition of Dr. Alexander Ghanayem

Dr. Ghanayem testified by way of deposition on July 11, 2022. (RX 1; Deposition transcript) He is a board-certified orthopedic spine surgeon who performs spine surgeries. *Id*. He performs Section 12 IMEs and treats patients as well. *Id*. Dr. Ghanayem testified that he is the chief medical office for an employed physician group and recently named the vice president for the American Orthopaedic Association. *Id*.

He testified that he first examined Petitioner on February 3, 2022. *Id*. Dr. Ghanayem testified, at that time, Petitioner reported no radicular pain in the legs, which is supportive of something that is not causing a pinched nerve. *Id*. Dr. Ghanayem testified that Petitioner's physical examination was positive for Waddell's signs and not consistent with organic structural back problems. *Id*. Dr. Ghanayem testified that his findings were not positive for evidence of a structural back problem in light of this. *Id*. Dr.

Ghanayem testified that Petitioner's range of motion was normal for his age. *Id*. Dr. Ghanayem testified that his diagnosis was a back sprain and he placed Petitioner at MMI. *Id*.

Dr. Ghanayem testified that he examined Petitioner again on June 13, 2022. *Id*. Dr. Ghanayem testified that when Petitioner initially presented, he was able to stand with normal posture, but over time he started to crouch down "like Groucho Marx." *Id*. Dr. Ghanayem testified that the physical examination once again showed positive Waddell's signs. *Id*.

Dr. Ghanayem testified that Petitioner's straight leg testing was inconsistent and his reflex testing was delayed. *Id*. Dr. Ghanayem testified that he watched Petitioner leave the room in a crouched position, but when he left the building and walked to his vehicle, he testified the crouched gait was no longer present and he had no issues getting into his vehicle. *Id*. Dr. Ghanayem testified that, in light of the mechanism of injury and physical examination, Petitioner was malingering and feigning weakness in an attempt to magnify his symptoms. *Id*. Dr. Ghanayem testified that Petitioner "did not have a structural physical problem that he could show me was honest and related to a structural problem in his neck or back. He was feigning a medical condition that didn't exist, plain and simple." *Id*. When asked about the mechanism of injury's role in his ongoing complaints, Dr. Ghanayem responded "from what he described to me, I don't see how he got hurt [on March 28, 2022] in the way that he's complaining of symptoms." *Id*.

Video Footage of Gene Dorsey

On June 24, 2022, Petitioner is shown participating in a church service in which he is walking and standing on a stage, holding a microphone singing. (RX 6) The video showed that he was able to raise his hands above his head, switch hands with the microphone, turn his head up and down and side to side, sway back and forth from side to side, nod his head, bend and crouch. *Id*. The video showed that he was able to jump up and down, twist in the air, and sing (RX 6 at 10:15, 1:04:40) The video showed that he jogged briskly, turned, and pivoted from one of the stage to another, skips, and jumps on stage. (RX 6 at 1:07:56) The video showed that he took his first break off stage after about 1 hour and 10 minutes but remains standing in the crown before walking back up on stage when he returns to his prior activities. (RX 6 at 1:09:50) The video showed that he walked off stage at the 1:21:10 mark of the video to collect donations and carried the donation bucket in his hand. (RX 6 at 1:21:10-1:24:00)

Petitioner testified that, on this video, he was behind the pastor clapping and singing and that he raised his right hand. (T. 89-92) Petitioner testified that, also on that video, he was on the stage for an hour without taking a break. *Id*. Petitioner testified that while in the presence of the lord, he gets more energy. *Id*. Petitioner testified that he was in pain that day. *Id*. Petitioner testified that that was him in the video raising both hands, and jumping up and down. *Id*. Petitioner testified that he sings, walks around the stage, and preaching. (T. 88-89) Petitioner testified that he is on his feet 10-20 minutes at a time. (T. 88-89; RX 2)

On September 18, 2022, the video showed Petitioner as he got in and out of his vehicle and leaned in and out of the vehicle. (RX 2) The video showed that he was able to put his suit jacket on without assistance and carry a tote bag in one hand and a folder in the other hand. *Id*.

On September 23, 2022, the video showed that Petitioner vacuuming the trunk of his vehicle, removing items from the trunk and placing them on the ground, carrying items, and stooping. *Id*.

On October 25, 2022, the video showed that Petitioner entering a grocery store and coming out carrying a case of bottled water and plastic bag with items with both hands. (RX 4) Petitioner testified that water and eggs weighed 10-12 pounds.(T. 99-100)

CONCLUSIONS OF LAW:

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

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

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

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App 3d 665, 674 (2009) Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 ILWC 004187 (2010)

In the case at hand, the Arbitrator observed Petitioner during the hearing and found him to be calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and found some material contradictions that would deem the witness unreliable. These inconsistencies and lack of credibility support Dr. Ghanayem's opinion that Petitioner reached MMI for the first work accident on February 3, 2022, and that Petitioner did not sustain a compensable work accident on March 28, 2022.

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

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

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

According to the Act, in order for a claimant to be entitled to Workers' Compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. *820 ILCS 305/1(d)* (West 2014) Case law interpreting the Act makes it clear that both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini, 117 Ill. 2d at 44-45; Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989); Free King Oil Co. v. Industrial Comm'n, 62 Ill. 2d 293, 294, 342 N.E.2d 1 (1976); Wise v. Industrial Comm'n, 54 Ill. 2d 138, 142, 295 N.E.2d 459 (1973)*

Based on the following, the Arbitrator finds that Petitioner sustained an accident on November 9, 2021, arising out of and in the course of her employment with Respondent. The Arbitrator finds that Petitioner did not sustain an accident on March 28, 2022. The Arbitrator finds that Petitioner reached MMI on February 3, 2022.

November 9, 2021, accident

In this case, Petitioner's injury occurred in the course of and arose out of his employment on November 9, 2021. The Arbitrator notes that Petitioner testified that he was injured in the middle of his back and left side when he hit the step of the crane and fell backwards onto the concrete hitting his head. (T. 28) The Arbitrator notes that Petitioner testified that he fell when he used too much force to pick up a steel box and prevent it from binding against the machinery while the box was coming out of an oil pit.

(T. 27; 30) Petitioner testified that the middle of his back and left side hit the step of the crane and that he fell backwards onto the concrete and hit his head. (T. 28) Petitioner testified that he landed on his left side. (T. 29) Petitioner testified that everyone came over to help him off the ground. (T. 28) Petitioner testified that he sustained a tight back. (T. 28; PX 1)

March 28, 2022, accident

As for the March 28, 2022, accident, Petitioner's injury did not occur in the course of nor arise out of his employment. The Arbitrator notes that Petitioner testified that he was injured on the morning of March 28, 2022, when he went back to work. (T. 47-50) The Arbitrator notes that this job required Petitioner to reach up and grab ceiling tiles and other items from a coworker. *Id*. The Arbitrator notes that as he reached up to grab an item, he felt a pop. *Id*. The Arbitrator notes that Petitioner testified that he went to South Suburban Hospital on March 28, 2022. (T. 51; PX 4) The Arbitrator notes that the medical records indicated that Petitioner went to the emergency room the next day, March 29, 2022. (PX 4)

The Arbitrator further notes that, on February 15, 2022, Petitioner presented Dr. Martin and reported chest and low back pain after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported that "he had to put her right down due to increase in pain." *Id*. The Arbitrator found this to be an intervening act.

Based on Petitioner's testimony and supporting medical records, the Arbitrator finds that Petitioner's November 9, 2021, accident arose out of and in the course of employment with Respondent. The Arbitrator finds, however, that Petitioner's March 28, 2022, accident did not arise out of the course of employment.

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

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

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the November 9, 2021, accident nor the March 28, 2022, accident. The Arbitrator finds that Petitioner was at MMI on February 3, 2022. The Arbitrator based her findings on the respective accident dates as follows.

November 9, 2021, accident

The Arbitrator notes that Petitioner was diagnosed with thoracic back pain, hip pain, and low back strain. (PX 1 at 19) Petitioner was diagnosed with cervical pain, bilateral thoracic pain, lumbar pain and being intermittently lightheaded. (PX 2 Vol. II at 44-45) On February 3, 2022, Dr. Ghanayem diagnosed a back sprain caused by the November 9, 2021, work accident. (RX 1) Dr. Ghanayem opined that he had "ample course of time to rest and recover from that injury." *Id*. Dr. Ghanayem placed him at MMI, on February 3, 2022, without restrictions or further medical care. *Id*.

March 28, 2022, accident

The Arbitrator notes that prior to March 28, 2022, Petitioner experienced low back pain, on February 15, 2022, after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) The Arbitrator notes that Petitioner's pain increased as a result of this action.

The Arbitrator notes that Petitioner was diagnosed with cervical radiculopathy, neck and back pain with radiculopathy after March 29, 2022. (PX 6 at 44, 50; PX 4 at 31) The Arbitrator notes that Petitioner reported inability to stand or walk longer than 30 minutes due to pain. (PX 4 at 16) The Arbitrator also notes that Petitioner testified that he was on the job site for no longer than 45 minutes to an hour before reinjuring himself. (T. 51) The Arbitrator notes that Petitioner testified that the ceiling tiles weighed "a couple of pounds" and metal pieces as lightweight. (T. 78-80)

The Arbitrator notes that while Petitioner experienced "upper extremity weakness, especially with forward elevation and extension" in May 2022, there was evidence presented which showed Petitioner holding a microphone and a bottled water for over an hour without dropping it in June 2022. (RX 6; PX 6 at 22) The Arbitrator notes that Petitioner is seen on stage for over an hour standing, swaying, turning, walking, jogging across the stage, without taking a break. (RX 6 at 1:07:56) The Arbitrator notes that he routinely jumped in the air, twisted, and regularly raised his hands above his head with the microphone in his hand. (RX 6 at 10:15 and 1:04:40)

The Arbitrator also notes that video footage from September 2022, showed Petitioner getting in and out of his vehicle without issue, putting his jacket on without assistance, carrying items in both hands without dropping them, and removing items from the trunk to the ground. (RX 2) The Arbitrator notes that video footage from October 2022, showed Petitioner carrying a 24-pack case of bottled water from the grocery store to his vehicle as well as a plastic grocery bag with eggs without dropping them. *Id*. The Arbitrator further notes that Petitioner testified that he had trouble getting in and out of the vehicle, and his wife had to help him put on a jacket. (T. 83-84)

The Arbitrator notes that when Petitioner was reexamined by Dr. Ghanayem, he noted that Petitioner had delayed jerking response, which was nonmedical and consistent with malingering. (RX 1)

The Arbitrator notes that Dr. Ghanayem's notes indicated that Petitioner left the examination room in a crouched position, but when he left the building, he was no longer in the crouched gait and was able to get into his car without difficulty, bending at the waist. *Id*. The Arbitrator notes that Dr. Ghanayem determined Petitioner was "malingering and feigning weakness in an attempt to magnify his symptoms." (RX 1 at 83) His mechanism of injury was of such that he didn't believe a true injury occurred. *Id*.

The Arbitrator notes that Dr. Ramos diagnosed degenerative, and not acute, findings based on the MRI of the cervical spine. (PX 8 at 16) He indicated Petitioner was not a surgical candidate and recommended nonoperative treatment for his "degenerative spine changes." *Id*.

Based on the above, the Arbitrator finds that Petitioner did not sustain a compensable work accident on March 28, 2022, and finds that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents.

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

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

As the Arbitrator found that Petitioner's current condition of ill-being was not causally connected to the November 9, 2021, and March 28, 2022, work-related accident, the Arbitrator finds that the following medical treatment and services Petitioner received through the MMI date of February 3, 2022, to be reasonable and necessary to cure and relieve Petitioner from the effects of the November 9, 2021, work accident. (PX 1; PX 2; PX 4, PX 5; PX 6; PX 7; and PX 8)

The Arbitrator finds the medical treatment for Petitioner's head, cervical, thoracic, lumbar spine, and left rib causally related to this November 9, 2021, work accident. the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, incurred through February 3, 2022, pursuant to the medical fee schedule and as outlined in PX 1; PX 2; PX 4, PX 5; PX 6; PX 7; and PX 8, as provided in Sections 8(a) and 8.2 of the Act.

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

As the Arbitrator found that Petitioner did not sustain a compensable accident on March 28, 2022, and that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents, the Arbitrator finds that Respondent is not liable for any prospective treatment beyond February 3, 2022, the date of MMI.

WITH RESPECT TO ISSUE (L), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.Apat3d 28, 30 (1995)

As the Arbitrator found that Petitioner did not sustain a compensable accident on March 28, 2022, and that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents, the Arbitrator finds that Petitioner was temporarily and totally disabled from November 10, 2021, through February 3, 2022, or 12 2/7 weeks. The Arbitrator notes that Respondent paid TTD benefits for 18 and 4/7 weeks at an agreed TTD rate of $1,173.93. As such, the Arbitrator finds that no credit will be awarded to Respondent.

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

The Arbitrator finds that Respondent's actions in this case were not unreasonable, vexatious, or without good cause and, therefore, Respondent shall not pay penalties as provided in Sections 16 or 19 of the Act. The Arbitrator notes that Respondent relied upon the medical expert opinion of Dr. Ghanayem in denying payment of benefits in accordance with his opinion.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC011066
Case Name	Gene Dorsey v. National Wrecking Co.
Consolidated Cases	22WC005993;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0197
Number of Pages of Decision	24
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Daniel Klein, Edward Czapla
Respondent Attorney	Andrew (AJ) Sheehan

DATE FILED: 5/1/2024

/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)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GENE DORSEY,

Petitioner,

vs. NO: 22 WC 11066

NATIONAL WRECKING CO.,

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 whether Petitioner sustained an accidental injury on March 28, 2022, whether Petitioner's current condition is causally related to the work accident, entitlement to Temporary Total Disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto. The Commission finds Petitioner sustained an accidental injury on March 28, 2022, and his current condition is causally related, in part[1]. 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 Statement of Facts set forth in the Decision of the Arbitrator and incorporates such facts herein.

CONCLUSIONS OF LAW

This case was consolidated for hearing with case number 22 WC 5993. Both cases involve accidental injuries to Petitioner's neck and back: 22 WC 5993 involves an undisputed November

[1] As detailed in companion case 22 WC 5993, the Commission views the evidence regarding the November 9, 2021 accident differently.

9, 2021 accident and 22 WC 11066 involves an alleged March 28, 2022 accident. In 22 WC 5993, the Arbitrator found Petitioner had reached maximum medical improvement following the November 9, 2021 accident and thereafter suffered an intervening accident; based thereon, the Arbitrator denied ongoing causal connection and awarded benefits only through February 3, 2022. The Arbitrator also denied Petitioner's request for penalties and attorney's fees as well as Respondent's claim for credit. In 22 WC 11066, the Arbitrator concluded Petitioner did not sustain an accidental injury arising out of his employment and denied all benefits. The Commission's analysis of the evidence yields a different result.

I. Accident

In finding Petitioner did not prove he sustained an accidental injury arising out of his employment on March 28, 2022, the Arbitrator made an adverse credibility determination. The Arbitrator found Petitioner's testimony was contradicted by the totality of the evidence, which supported Dr. Alexander Ghanayem's opinion that Petitioner had not suffered an injury on March 28, 2022. The Commission views the evidence differently.

Initially, the Commission does not share the Arbitrator's credibility assessment, nor do we agree with the negative inferences in the Decision. The Commission finds Petitioner's testimony of persistent symptoms of varying intensity is corroborated by the treating records. The Commission further finds the video evidence does not materially contradict Petitioner's testimony. We have watched the surveillance video and the Facebook video in their entirety, and we note there is nothing particularly strenuous depicted on the surveillance video and instead Petitioner is performing mere activities of daily living that are in keeping with Petitioner's description of what he is capable of amidst his waxing and waning symptoms. For instance, we observe the video of Petitioner carrying a package of bottled water and a carton of eggs is consistent with Petitioner's testimony that he is able to carry approximately 10 pounds. T. 83. Moreover, we accept as truthful Petitioner's testimony that the emotion of the worship service overcomes his symptoms, but he "pay[s] for it at the end." T. 92. The Commission finds Petitioner was credible. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

Turning to the accident issue, we begin with a review of the applicable legal standard. "Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Id*. Here, Petitioner alleges he sustained an accidental injury on March 28, 2022 when he experienced an acute onset of symptoms while reaching up to grab demolition materials from his coworker, *i.e.*, while performing his assigned job duty. Petitioner testified he immediately went to the foreman, reported the injury, and asked to be sent to a clinic, a request that was ultimately refused by a company representative per Dr. Ghanayem's report indicating Petitioner had fully recovered. T. 49-51. Petitioner explained he left the jobsite and he presented to South Suburban Hospital later that day. T. 51. The Commission observes the record is devoid of anything which contradicts

Petitioner's version of events. We further emphasize that, contrary to the finding in the Decision of the Arbitrator, the South Suburban Hospital records corroborate that Petitioner presented to the emergency room on March 28, 2022; to be clear, Petitioner arrived at the hospital at 9:45 p.m., but he was not evaluated until after midnight on the 29th. When Petitioner ultimately saw the emergency room physician, he reported "upper back, left sided neck pain, and sharp pain and tingling in his lower back and left buttock that radiates down his left leg to his ankle that started this morning when he was doing demolition on ceiling tiles this morning at work." PX4. After an examination and imaging, the physician diagnosed radiculopathy, prescribed Hydrocodone, and advised Petitioner to follow-up with his primary care physician, Dr. Allison Martin. The Commission further observes the subsequent medical records all document a consistent history of an acute onset of symptoms while reaching and grabbing ceiling demolition materials.

Petitioner's credible testimony as well as the medical records demonstrate Petitioner suffered an acute injury while demolishing a ceiling. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of his employment on March 28, 2022.

II. Causal Connection

Turning to causal connection, the Commission finds it important to clarify Petitioner's clinical picture leading up to the March 28, 2022 accident. Prior to his undisputed November 9, 2021 injury, Petitioner had no history of spine symptoms or treatment and was able to perform a physically demanding job without issue. T. 19, 22-24. On November 9, 2021, Petitioner tumbled backwards into the base of a crane. T. 27-28. Petitioner sought medical care at Ingalls Memorial Hospital and thereafter followed-up with his primary care physician, Dr. Martin. Over the next weeks, Dr. Martin oversaw a course of conservative care with medication and activity restrictions; as of March 22, 2022, Dr. Martin noted Petitioner had persistent pain and still required narcotic pain medications, so she ordered physical therapy. PX2. Rather than remain off work while undergoing the recommended physical therapy, however, Petitioner was forced to return to work full duty and on his first day back, he sustained the accident at issue here.

On April 7, 2022, Petitioner presented to Dr. Martin, who recorded the following history:

> He went to a job site in Oak Brook on 3/28/22. Was pulling items down from ceiling/demolition at a school. Had to take ceiling apart before taking the ductwork out. Was [three] hours into his shift approx. Started having tightness in the [left] side of the neck and [left] arm went numb and tingling. Into thumb and index finger. Also started getting tightness in [left] side of low back. PX2.

After an examination, Dr. Martin ordered MRIs of the neck and low back, referred Petitioner for orthopedic evaluation with Dr. Matthew Colman, and directed Petitioner remain off work. PX2.

Dr. Colman's records reflect Petitioner described the November 9, 2021 work accident, advised that his treating physician had recommended physical therapy, which was denied, and when he was thereafter direct to return to work on March 28, 2022, "he was on the ground reaching up and grabbing materials from a coworker when he twisted and experienced immediate pain, tingling, and numbness in his neck, arm, and back as well as muscle spasming." PX6. Following an examination and review of the diagnostic imaging reports, Dr. Colman's impression was "neck back pain, radiculopathy following work-related injuries in 11/2021 and 03/2022"; Dr. Colman

ordered physical therapy and authorized Petitioner off work. PX6. Due to insurance issues, Petitioner was unable to have the recommended course of physical therapy. When Petitioner was re-evaluated by Dr. Colman on May 17, 2022, he reported worsening neck symptoms; noting decreased strength at C6-7 on examination, Dr. Colman ordered a repeat MRI of the neck, again recommended physical therapy for the neck and back, and maintained Petitioner's off work status. PX6. The MRI was performed the same day, and Dr. Colman's records reflect it revealed a left foraminal disc bulge at C6-7 causing left-sided foraminal stenosis; given that finding, an epidural steroid injection ("ESI") at C6-7 was added to the treatment recommendations. PX6. Over the next months, Petitioner's symptoms persisted as Dr. Colman's treatment recommendations were not authorized. At the last pre-hearing follow-up visit, Dr. Colman continued to recommend an ESI and physical therapy to address Petitioner's ongoing symptoms.

Dr. Ghanayem, in turn, opined Petitioner had only a non-anatomic physical examination, could not have suffered a spine injury doing the activities he described on March 28, 2022, and "the only conclusion" possible is that Petitioner was malingering and feigning his symptoms. RX1, DepX3. The Commission does not find Dr. Ghanayem's opinions persuasive. Initially, we share Dr. Colman's conclusion that the mechanism of injury Petitioner described – reaching up to receive demolition debris from ceiling-level and twisting to place it in the appropriate place – is a competent cause of neck and low back injury. 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). Moreover, we find it significant that Dr. Ghanayem did not review Petitioner's imaging studies, and it is on the cervical spine MRI that Dr. Colman identified disc pathology "causing fairly severe stenosis at [C5-6 and C6-7], worse on the left." PX7. Finally, we note that over the course of several months treating Petitioner, neither Dr. Martin nor Dr. Colman found Petitioner to be malingering or manipulating his symptom presentation.

To summarize, the treating records document Petitioner had no history of neck or low back problems prior to the November 9, 2021 accident, voiced consistent complaints thereafter yet physical therapy was denied and he was instead ordered to return to his regular, physically-demanding job, on his first day back he suffered an exacerbation of his neck and low back symptoms, and those increased symptoms have yet to resolve. The Commission finds Petitioner's condition of ill-being is causally related, in part, to the March 28, 2022 work accident. Consistent with our determination that Petitioner's current condition is causally related to both work accidents but initiated with the November 9, 2021 accident, all benefits are awarded under consolidated case 22 WC 5993.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 2023 is hereby reversed. Petitioner sustained an accidental injury on March 28, 2022, and his condition of ill-being is causally related, in part, to the March 28, 2022 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that all benefits are awarded under consolidated case 22 WC 5993.

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.

The bond requirement in §19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As all benefits are awarded under consolidated case 22 WC 5993, no bond is set herein. 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.

May 1, 2024

/s/ *Raychel A. Wesley*

RAW/mck

O: 3/6/24

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC011066
Case Name	Gene Dorsey v. National Wrecking Co.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Antara Nath Rivera, Arbitrator

Petitioner Attorney	Edward Czapla, Daniel Klein
Respondent Attorney	Andrew (AJ) Sheehan

DATE FILED: 5/10/2023

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

/s/ Antara Nath Rivera, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gene Dorsey
Employee/Petitioner

v.

National Wrecking Co.
Employer/Respondent

Case # **22** WC **011066**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Antara Nath-Rivera**, Arbitrator of the Commission, in the city of **Chicago**, on **March 9, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **3/28/22**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**21,130.63**; the average weekly wage was $**1,760.89**.

On the date of accident, Petitioner was **52** years of age, **married** with **0** dependent children.

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

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

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

ORDER

Petitioner did not sustain a compensable work accident on March 28, 2022.

Respondent is not liable for prospective medical care.

Respondent is not liable for TTD after February 3, 2022.

Respondent shall not pay penalties as provided in Sections 16 or 19 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

MAY 10, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

GENE DORSEY,	)	
	)	
Petitioner,	)	
v.	)	Case No. 22WC005993
	)	Consolidated Case No. 22WC011066
NATIONAL WRECKING COMPANY,	)	
	)	
Respondent.	)	

This matter proceeded to hearing on March 9, 2023, in Chicago, Illinois before Arbitrator Antara Nath Rivera on Petitioner's Request for Hearing. Issues in dispute include accident, current condition of ill-being, medical bills, prospective medical care, temporary total disability ("TTD"), and penalties and fees. (Arbitrator's Exhibit "AX" 1)

STATEMENT OF FACTS

November 9, 2021, accident

Gene Dorsey ("Petitioner") is a 53-year-old man who was employed by National Wrecking Company ("Respondent") as a demolition laborer. (Trial Transcript "T." 18-19) Petitioner testified that he worked for Respondent for nine years. Petitioner testified that when he first started at Respondent his duty as "torch guy and cut" was to cut the pipes and remove everything from the walls. (T. 19) Petitioner testified that after that, he had a jackhammer and would "go inside the machine and bring out the firewalls that was built inside the machine that he was tearing down." *Id*. Petitioner testified that he would then cut the steel into small pieces and move them into the factory. *Id*. Petitioner testified that this was heavy physical work. *Id*.

Petitioner testified that he worked for Respondent for six years in the 1990's, he left to work for Overnight Transportation, which was bought out by UPS freight, and then came back to Respondent about three years before the accident occurred. (T. 19-22) Petitioner testified that he became supervisor at Respondent when he came back. (T. 21) Petitioner testified that he worked full time with no restrictions to his neck and back prior to November 9, 2021. (T. 22-23) Petitioner testified that he never had neck or low back pain, treatment to neck or low back; and no injury to his neck or low back. (T. 23-24) Petitioner testified that he never had an MRI done of neck or low back prior to accident. (T. 24) Petitioner testified that he was never prescribed pain meds prior to the accident. (T. 25) Petitioner testified that his neck and back were good because he would finish before anyone and was a "go-getter." *Id.* Petitioner testified that

"[t]he other guys would be mad because I was, I would get the job done at a faster pace to cause the assignment to come to an end. So the company liked that." *Id.*

Petitioner testified that, on November 9, 2021, he was picking up a steel box coming out of an oil pit. (T. 27) Petitioner testified that his co-worker, Apolonar Ortiz ("Polo"), was the foreman, was inside the crane, raised the box out of the oil pit, and observed that the box was bound against the machinery. (T. 27; 30) Petitioner testified that another co-worker, 'Ruben', went to the left side, with a bar, and tried to keep the box from binding. *Id*. Petitioner testified that they were trying to put the bars in between and tried to keep the box from binding against the crane. *Id*. Petitioner testified that he applied too much force which caused the box to slip, caused him to fall backwards, and run into the steps of the crane. *Id*.

Petitioner testified that the middle of his back and left side hit the step of the crane and that he fell backwards onto the concrete and hit his head. (T. 28) Petitioner testified that he was wearing a hard hat and safety glasses. *Id*. Petitioner testified that his hat flew off after he hit the concrete. *Id.* Petitioner testified that he landed on his left side. (T. 29) Petitioner testified that everyone came over to help him off the ground. (T. 28)

Petitioner testified that he sustained a tight back. *Id.* Petitioner testified that Polo told him to walk it off but his back was tight. *Id.* Petitioner testified that when he bent over he was in a lot of pain and that his neck was tight. *Id.* Petitioner testified that he told Polo that he was leaving because he wanted to go to the clinic, but he told Petitioner to "hold on" until they finished the job and requested that Petitioner stay the rest of the day. *Id.*

Petitioner testified that he called Respondent and spoke to Art Mandel. (T. 30-31) Petitioner testified that Mr. Mandel told him to go to a doctor of Petitioner's choice and that Respondent would "take care of the bills." (T. 31) Petitioner testified that he asked Polo if he needed to fill out anything and that Polo said "no, just do what Art told you to do." *Id*.

Summary of medical records from November 9, 2021, accident

On November 9, 2021, Petitioner went to Ingalls Health Care Center. (Petitioner's Exhibit "PX" 1; T. 29-31) Petitioner reported that his left hip, rib cage hurt after being thrown into a crane. (PX 1 at 15) The medical records also indicated that "Pt states that he was thrown into a forklift this morning, c/o back, and left hip, Pt. states that it hurts when he breathes in." (PX 1 at 7; 16) Petitioner testified that he was doubled over in pain. (T. 31) Petitioner was diagnosed with thoracic back pain, hip pain, and low back strain. (PX 1 at 19)

On November 10, 2021, x-rays of the lumbar spine showed moderate diffuse facet degeneration. (PX 1 at 42[1]) He was recommended to return to work without restrictions on November 11, 2021. (PX 1 at 26)

On November 15, 2021, Petitioner presented to his primary care doctor, Dr. Allison Martin, M.D., at Advocate Medical Group (PX 2) Petitioner reported neck, left shoulder, low back, and left knee pain following the work accident. (PX 2 Vol. II at 38[2]) The medical records indicated that Petitioner did not lose consciousness but was lightheaded and experienced headaches. *Id*. The medical records also indicated swelling, spasms and tenderness to the cervical, thoracic and lumbar spine. (PX 2 Vol. II at 42) Petitioner was diagnosed with cervical pain, bilateral thoracic pain, lumbar pain and being intermittently lightheaded. (PX 2 Vol. II at 44-45) Petitioner was restricted from heavy lifting, prescribed Acetaminophen, Ibuprofen, Flexeril and instructed to follow up Dr. Martin. (PX 2 Vol II at 45; 85)

On November 29, 2021, a CT of the head/brain was performed which was reported as unremarkable. (PX 2 Vol. II at 31) The CT of the thoracic spine revealed multilevel degenerative disc disease and cervical spondylosis. (PX 2 Vol. II at 34)

On December 1, 2021, Petitioner presented to Dr. Martin and complained of acute neck pain, bilateral thoracic pain, bilateral low back pain without sciatica and acute chest wall pain. (PX 2 Vol. II at 23) Examination revealed tenderness over posterior neck, entire thoracic spine, paraspinals entire lumbar spine, and right lower ribs. (PX 2 Vol. II at 26) Petitioner was diagnosed with acute neck pain, bilateral thoracic pain, bilateral low back pain, and chest wall pain. (PX 2 Vol. II at 27) Petitioner was prescribed Ibuprofen, Cyclobenzaprine and Hydrocodone for pain and restricted from work. (PX 2 Vol. II at 27)

On December 15, 2021, followed up with Dr. Marin and reported his neck and shoulder area/upper back pain were gone, but that he continued reporting chest and low back pain. (PX 2 Vol II at 65) Physical examination showed normal range of motion of the cervical spine and no tenderness of the thoracic spine, but showed tenderness over the lumbar spine. (PX 2 Vol II at 66) Petitioner testified he was in a lot of pain and was taking the medication every four to six hours. (T. 37)

On January 3, 2022, Petitioner went back to Dr. Martin and reported low back pain of 5/10 and some chest wall pain. (PX 2 Vol. II at11) He was allowed to return to work with restrictions of no lifting more than 20 pounds. (PX 2 Vol II at 13)

On February 3, 2022, Petitioner was examined by Dr. Alexander Ghanayem M.D., pursuant to Respondent's Section 12 independent medical examination "IME" request. (Respondent's Exhibit "RX" 1 at 80[3] (fourth to last page of exhibit) Petitioner testified the examination lasted less than 5 minutes and the doctor did not touch him or make him bend and move around. (T. 40-41) Petitioner reported an injury

[1] PX 1 was not bates stamped. This respective page number reflects the respective page number indicated on the report.
[2] PX 2 Vol II was not bates stamped. The page numbers are descending in this exhibit. The page number on the decision reflects the respective page number indicated on the report.
[3] RX 1 is labeled as "ER 1." RX 1 is not bates stamped and the page number in the decision reflects the page number where it appears in the exhibit after manually counting the pages.

to his back when he was trying to lift a machine by using a prybar that slipped and he fell backwards about 2-3 feet hitting the crane steps. *Id*. X-rays of the lumbar and thoracic spine were reviewed to show age-appropriate degenerative changes. *Id*. Dr. Ghanayem noted his physical examination was objectively normal and he exhibited nonorganic findings. *Id*. Dr. Ghanayem diagnosed a back sprain caused by the November 9, 2021, work accident. *Id*. Dr. Ghanayem opined that he had "ample course of time to rest and recover from that injury." *Id*. Dr. Ghanayem placed him at maximum medical improvement ("MMI") without restrictions or further medical care. *Id*.

On February 15, 2022, Petitioner went to Dr. Martin and reported chest and low back pain after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported that "he had to put her right down due to increase in pain." *Id*. Dr. Martin recommended physical therapy, restricted Petitioner from work, and continued to prescribe Ibuprofen, Flexeril and Hydrocodone. *Id*. at 5.

On March 22, 2022, Petitioner presented to Dr. Martin, for that last time. (PX 2 Vol. II at 12 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported sharp pain in his back, shoulders, legs, and left arm. *Id*. Dr. Martin recommended that Petitioner put the physical therapy prescription through his own insurance in light of Dr. Ghanayem's opinion. *Id*. at 16. He was recommended to apply for FMLA to avoid losing his job and remain off work until physical therapy was completed on April 25, 2022. *Id*.

March 28, 2022, accident

Petitioner testified that on the morning of March 28, 2022, Petitioner returned to work at Respondent's request. (T. 44-45) Petitioner testified that he spoke with Matt Powell who called him with an assignment. (T. 43) Petitioner testified that he told Mr. Powell of his restrictions. (T. 44) Petitioner testified that despite his pain and tightness, he went back to work. (T. 45) Petitioner testified that he continued to have shooting pains in his arm down to his fingers and a pounding ache in the left side of his head and neck. (T. 45-46) Petitioner also testified that his back was tight and "felt like heat." (T. 46) Petitioner testified that he did not take any medication on March 28, 2022, because he drove to his job assignment in Aurora from Lansing. (T. 45) Petitioner testified that he did not refuse this assignment because Mr. Powell told him that Respondent's doctor found him to be at "100 percent" despite Petitioner telling Mr. Powell that he was not released from medical care. (T. 46)

Petitioner testified that his assignment was at a school. *Id*. Petitioner testified that he met with 'Pablo', the foreman on the job. *Id*. Petitioner testified that there were two other workers present named 'Gerry' and 'Hugo.' *Id*. Petitioner testified that his job that day was to remove ceiling tiles, metal pieces, and fixtures that were up top. (T. 47) Petitioner testified that he was told to stay on the ground because the supervisor "didn't want [him] doing too much." *Id*. Petitioner testified that Hugo was on the scaffolding taking items down from the ceiling and handing them to Petitioner. (T. 48) Petitioner testified that his job was to grab ceiling tiles and other items and twist his body to put them in the right place. Id. Petitioner testified that as he reached up to grab stuff from Hugo, he felt something pop in his left arm. (T. 48-49) Petitioner testified that he told Hugo that he was going to find Pablo. (T. 49) Petitioner testified that he

told Pablo that he reinjured himself and needed to go to a clinic because he felt something pop in his left arm, that his neck was tight, and that he was in a lot of pain. (T. 49-50) Petitioner testified that Pablo told him to call the office. (T. 50)

Petitioner testified that he called Mr. Powell, told him what happened, and Mr. Powell told him that Respondent did not have a doctor for Petitioner because Respondent's doctor said he was at 100 percent. (T. 51) Petitioner testified that after Mr. Powell refused to offer him medical care, he went to South Suburban Hospital that day. (T. 51; PX 4) Petitioner testified that he was on the job site for no longer than 45 minutes to an hour before reinjuring himself. (T. 51) Petitioner testified that the ceiling tiles weighed "a couple of pounds" and metal pieces as lightweight. (T. 78-80)

Summary of medical records from March 28, 2022, accident

On March 29, 2022, at South Suburban Hospital, Petitioner reported upper back, left-sided neck pain, and sharp pain and tingling in his lower back and left buttock that radiated down his left leg to his ankle that started this morning when he was doing overhead demolition of ceiling tiles at work. (PX 4 at 22-23; 33; 39) He reported that he twisted wrong and felt a pop in his shoulders with back spasms and nerve tingling, which he described as the same feeling as with the November 9, 2021, work accident. (PX 4 at 32; 39) X-rays of the cervical spine showed no acute findings in the disc spaces or significant narrowing. (PX 4 at 55) Petitioner was diagnosed with cervical radiculopathy and prescribed NSAID pain medication. (PX 4 at 31)

On April 7, 2022, Petitioner presented to Dr. Martin and reported that he sustained another injury on March 28, 2022, after his "job called him and demanded that he return to work with no restrictions." (PX 2 Vol. II at 2 of the April 7, 2022, medical report located toward the beginning of the document) He reported that he was three hours into his shift when he started having left-sided neck tightness and left arm numbness, tingling into his thumb and index finger, and low back tightness. *Id*. Dr. Martin recommended a cervical and lumbar MRI and referred Petitioner to Dr. Matthew Colman, an orthopedic spine surgeon. *Id*. at 5.

On April 12, 2022, an MRI of the lumbar spine showed the following: L2-L3: 1-2 mm broad disc protrusion; L3-L4: 2-3 mm bilateral foraminal disc bulge; L4-L5: 4 mm disc bulge, severe bilateral foraminal stenosis; L5-S1: 4.5 mm diffuse disc bulge extending into foramina, severe bilateral foraminal stenosis. (PX 5 at 3) An MRI of the cervical spine showed the following: C4-C5: 1 mm posterior central disc protrusion; C5-C6: 1 mm posterior central disc protrusion; C6- C7: 1 mm posterior central disc protrusion; C7-T1: 2 mm posterior central disc protrusion; and T1-T2: 3 mm posterior broad disc protrusion. (PX 5 at 6)

On April 18, 2022, Petitioner began physical therapy for low back pain and bilateral leg pain. (PX 4 at 9) He reported inability to stand or walk longer than 30 minutes due to pain. (PX 4 at 16)

On April 19, 2022, presented to Dr. Colman at Midwest Orthopedics at Rush. (PX 6) The medical records indicate that Petitioner treated for back pain and radiculopathy following a twisting injury on March 28, 2022, when he was reaching up to grab materials from another coworker. (PX 6 at 48) He

reported pain and tightness in his neck that radiated into his fingers and back pain that radiated into his bilateral legs, especially with walking. *Id*. Physical examination showed normal ambulation, full range of motion in cervical and lumbar spine with flexion, and without tenderness to palpation. (PX 6 at 48-49) X-rays taken showed mild degenerative disc disease at C6-C7. *Id*. Dr. Colman diagnosed Petitioner with neck and back pain with radiculopathy. (PX 6 at 44; 50) Physical therapy and a cervical MRI were recommended. (PX 6 at 49) Gabapentin and Norco were prescribed for pain and Petitioner was restricted from work. He was recommended to undergo physical therapy for his neck and low back pain and to remain off work. *Id.*

On April 22, 2022, during Petitioner's physical therapy appointment, Petitioner reported difficulty gripping objects and "excruciating" pain from his neck and low back. (PX 6 at 30) During his physical examination, the physical therapist noted it was "difficult to assess or pinpoint strength grade due to inconsistent strength grades throughout manual testing" and "although [Petitioner] reporting max tenderness on palpatory exam, no muscle/soft tissue tightness noted to [bilateral] gluteal or lumbar musc[les]." (PX 6 at 31)

On May 17, 2022, Petitioner returned to Dr. Colman and reported that his neck was more bothersome than his low back. (PX 6 at 22) He reported a recent onset of issues with his hands and "is now dropping things and has tingling in his hands." *Id*. The report indicated that Petitioner experienced "upper extremity weakness, especially with forward elevation and extension." *Id*. Dr. Colman recommended another MRI of the cervical spine. The MRI of the cervical spine was read to show "multilevel degenerative changes," including disc small bulges at C5-C6, C6-C7, and C7-T1. (PX 6 at 23; 52-53; PX.7 p. 100-101)

On May 23, 2022, at Midwest Orthopedics at Rush, the MRI of the cervical spine was reviewed to show a disc bulge at C6-7 causing stenosis as well as an incidental syrinx found, according to Dr. Colman. (PX 6 at 13(PX 6 at 23; 52-53; PX.7 p. 100-101) Dr. Colman recommended physical therapy and a cervical epidural steroid injection, as well as a neurological surgeon referral for the incidental syrinx found on the MRI. (PX 6 at 14)

On June 13, 2022, Petitioner was reexamined by Dr. Ghanayem. (RX 1 at 82) He reported a new neck, midback, and lower back injury when he was receiving ceiling tiles and metal pieces from another individual which he described as "not that heavy." *Id*. He also reported left-sided arm numbness and weakness and left-sided leg numbness and weakness. *Id*.

The report indicated that during his physical examination, Petitioner began crouching and showed positive Waddell signs. *Id*. The report also indicated that he had inconsistent responses to testing when distracted and inconsistent strength testing. *Id*. Dr. Ghanayem noted that Petitioner had delayed jerking response, which was nonmedical and consistent with malingering. *Id*. His distracted straight leg testing was negative, but when done purposely, he reported severe low back pain on the left side *Id*. Dr. Ghanayem's notes indicated that Petitioner left the examination room in a crouched position, but when he left the building, he was no longer in the crouched gait and was able to get into his car without difficulty, bending at the waist. *Id*.

Dr. Ghanayem determined Petitioner was "malingering and feigning weakness in an attempt to magnify his symptoms." (RX 1 at 83) His mechanism of injury was of such that he didn't believe a true injury occurred. *Id*. Based on that and the physical examination findings, Dr. Ghanayem determined that there was no disability, that Petitioner could report back to work regular duty, and that no additional care was needed. *Id*.

On July 14, 2022, Petitioner presented to Dr. Edwin Ramos, M.D., at the University of Chicago Medicine, neurology department, upon being referred by Dr. Martin. (PX 8) The medical records indicated that Petitioner reported the history of the two alleged work accidents. (PX 8 at 8-9) He reported numbness and tingling from his neck into his arms. *Id*. Physical examination showed poor effort in strength testing, but appeared to be normal. (PX 8 at 9-10) Dr. Ramos reviewed the May 17, 2022, cervical spine MRI and noted mild syringohydromyelia at the T1-T2 level and "mild degenerative changes with mild spinal canal stenosis at the T10-T11." (PX 8 at 16)

On August 2, 2022, Petitioner presented to Dr. Colman. (PX 7) Petitioner reported low back, neck, and upper back pain and tingling in the bottom of his feet. (PX 7 at 19) He reported pain with activities of carrying, lifting, standing, walking, and other activities of daily living. (PX 7 at 20) Petitioner also reported that he was able to walk two blocks, and walk for 10 minutes and stand for three minutes before having to take a break. *Id*. Petitioner continued taking the Norco, Gabapentin, and Flexeril and remained restricted from work. *Id*.

On August 11, 2022, Dr. Ramos indicated Petitioner was not a surgical candidate and recommended nonoperative management for his pain symptoms and degenerative spine changes. (PX 7 at 57)

On September 13, 2022, Petitioner returned to Dr. Colman and complained of low back, neck, and upper back pain. (PX 7 at 15-16) Dr. Colman recommended a cervical epidural steroid injection at C6-C7. (PX 7 at 16)

On October 18, 2022, Petitioner returned to Dr. Colman. (PX 7 at 9) The records indicated that Petitioner complained of "left shoulder/rotator cuff pain with radiation of pain down the arm and numbness into the left index finger, long finger and thumb." (PX 7 at 11) He reported subjectively decreased grip strength on the left side and continued issues with dropping objections. *Id*. Dr. Colman continued to recommend the cervical epidural injection and physical therapy and restricted Petitioner from work. (PX 7)

On November 29, 2022, Petitioner returned to Dr. Colman and reported some tingling and numbness in his left arm and pain. (PX 7 at 7) He stated he has been dropping things and sleeping less. *Id*. Physical examination showed full range of motion to the cervical and lumbar spine with flexion and no tenderness to palpation with fill active and passive range of motion to all four extremities. (PX 7 at 8)

Petitioner testified that he could carry items weighing about five to 10 pounds from the grocery store into his vehicle. (T. 83) Petitioner testified that he had issues getting in and out of his car. (T. 84) He testified that his wife helps him get dressed and put on a jacket. *Id*. Petitioner testified that he is an

evangelist outreach leader, praise team leader, and elder at Harvest of Souls Ministries church. (T. 86) Petitioner testified that, in that role, he participated in worship services that required him to be on stage singing and walking. (T. 87-88) He testified that he is only on his feet 10 to 20 minutes at a time before having to take a break. (T. 89)

At trial, Petitioner was shown RX 6, in which he identified himself in the video footage from June 24, 2022, walking, clapping and singing, raising his right arm above his head, and turning from side to side, among other activities. (T. 91) He testified that he did not take a break after 20 minutes on stage during this service and testified that he was on stage doing these movements for 45 minutes to an hour. (T. 92)

Petitioner was also shown RX 4, in which he identified himself in the video footage from October 25, 2022, carrying a 24-pack case of bottled water and eggs in a plastic bag from the store entrance to his vehicle. (T. 99) Petitioner testified that he estimated this case weighed about 10 to 12 pounds. (T. 100) Petitioner testified that the video footage from RX 4 also showed him, on September 23, 2022, taking some items out of the trunk of his vehicle and placing them on the ground, and vacuuming the back of his vehicle. (T. 101)

Petitioner's current condition

Petitioner testified that he still has numbness and tingling in the left hand and fingers. (T. 67) Petitioner testified that he sleeps three to four hours at a time because his back, legs, and neck are hurting or cramping. (T. 67-68) Petitioner testified that he sometimes sleeps in the bed, but mainly on the chair, but also sometimes lays down on a yoga mat. (T. 68) He testified that his injury has affected his marriage and intimacy. (T. 70) Petitioner testified that he has not received wages since his second accident, that his house is in foreclosure, that "they" picked up his truck, and that he suffers anxiety and stress because of it. (T. 70-71) Petitioner testified that he wants the injection and physical therapy to be able to move again. (T. 71) He testified he still has neck tightness and pain as well as left arm pain. (T. 72) He still drops items with his left hand and pain going down the left leg. (T. 73)

Deposition of Dr. Alexander Ghanayem

Dr. Ghanayem testified by way of deposition on July 11, 2022. (RX 1; Deposition transcript) He is a board-certified orthopedic spine surgeon who performs spine surgeries. *Id*. He performs Section 12 IMEs and treats patients as well. *Id*. Dr. Ghanayem testified that he is the chief medical office for an employed physician group and recently named the vice president for the American Orthopaedic Association. *Id*.

He testified that he first examined Petitioner on February 3, 2022. *Id*. Dr. Ghanayem testified, at that time, Petitioner reported no radicular pain in the legs, which is supportive of something that is not causing a pinched nerve. *Id*. Dr. Ghanayem testified that Petitioner's physical examination was positive for Waddell's signs and not consistent with organic structural back problems. *Id*. Dr. Ghanayem testified that his findings were not positive for evidence of a structural back problem in light of this. *Id*. Dr.

Ghanayem testified that Petitioner's range of motion was normal for his age. *Id*. Dr. Ghanayem testified that his diagnosis was a back sprain and he placed Petitioner at MMI. *Id*.

Dr. Ghanayem testified that he examined Petitioner again on June 13, 2022. *Id*. Dr. Ghanayem testified that when Petitioner initially presented, he was able to stand with normal posture, but over time he started to crouch down "like Groucho Marx." *Id*. Dr. Ghanayem testified that the physical examination once again showed positive Waddell's signs. *Id*.

Dr. Ghanayem testified that Petitioner's straight leg testing was inconsistent and his reflex testing was delayed. *Id*. Dr. Ghanayem testified that he watched Petitioner leave the room in a crouched position, but when he left the building and walked to his vehicle, he testified the crouched gait was no longer present and he had no issues getting into his vehicle. *Id*. Dr. Ghanayem testified that, in light of the mechanism of injury and physical examination, Petitioner was malingering and feigning weakness in an attempt to magnify his symptoms. *Id*. Dr. Ghanayem testified that Petitioner "did not have a structural physical problem that he could show me was honest and related to a structural problem in his neck or back. He was feigning a medical condition that didn't exist, plain and simple." *Id*. When asked about the mechanism of injury's role in his ongoing complaints, Dr. Ghanayem responded "from what he described to me, I don't see how he got hurt [on March 28, 2022] in the way that he's complaining of symptoms." *Id*.

Video Footage of Gene Dorsey

On June 24, 2022, Petitioner is shown participating in a church service in which he is walking and standing on a stage, holding a microphone singing. (RX 6) The video showed that he was able to raise his hands above his head, switch hands with the microphone, turn his head up and down and side to side, sway back and forth from side to side, nod his head, bend and crouch. *Id*. The video showed that he was able to jump up and down, twist in the air, and sing (RX 6 at 10:15, 1:04:40) The video showed that he jogged briskly, turned, and pivoted from one of the stage to another, skips, and jumps on stage. (RX 6 at 1:07:56) The video showed that he took his first break off stage after about 1 hour and 10 minutes but remains standing in the crown before walking back up on stage when he returns to his prior activities. (RX 6 at 1:09:50) The video showed that he walked off stage at the 1:21:10 mark of the video to collect donations and carried the donation bucket in his hand. (RX 6 at 1:21:10-1:24:00)

Petitioner testified that, on this video, he was behind the pastor clapping and singing and that he raised his right hand. (T. 89-92) Petitioner testified that, also on that video, he was on the stage for an hour without taking a break. *Id*. Petitioner testified that while in the presence of the lord, he gets more energy. *Id*. Petitioner testified that he was in pain that day. *Id*. Petitioner testified that that was him in the video raising both hands, and jumping up and down. *Id*. Petitioner testified that he sings, walks around the stage, and preaching. (T. 88-89) Petitioner testified that he is on his feet 10-20 minutes at a time. (T. 88-89; RX 2)

On September 18, 2022, the video showed Petitioner as he got in and out of his vehicle and leaned in and out of the vehicle. (RX 2) The video showed that he was able to put his suit jacket on without assistance and carry a tote bag in one hand and a folder in the other hand. *Id*.

On September 23, 2022, the video showed that Petitioner vacuuming the trunk of his vehicle, removing items from the trunk and placing them on the ground, carrying items, and stooping. *Id*.

On October 25, 2022, the video showed that Petitioner entering a grocery store and coming out carrying a case of bottled water and plastic bag with items with both hands. (RX 4) Petitioner testified that water and eggs weighed 10-12 pounds.(T. 99-100)

CONCLUSIONS OF LAW:

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

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

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

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App 3d 665, 674 (2009) Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 ILWC 004187 (2010)

In the case at hand, the Arbitrator observed Petitioner during the hearing and found him to be calm, well-mannered, composed, and spoke clearly. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and found some material contradictions that would deem the witness unreliable. These inconsistencies and lack of credibility support Dr. Ghanayem's opinion that Petitioner reached MMI for the first work accident on February 3, 2022, and that Petitioner did not sustain a compensable work accident on March 28, 2022.

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

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

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

According to the Act, in order for a claimant to be entitled to Workers' Compensation benefits, the injury must "aris[e] out of" and occur "in the course of" the claimant's employment. *820 ILCS 305/1(d)* (West 2014) Case law interpreting the Act makes it clear that both elements must be present at the time of the accidental injury in order to justify compensation. *Orsini, 117 Ill. 2d at 44-45; Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989); Free King Oil Co. v. Industrial Comm'n, 62 Ill. 2d 293, 294, 342 N.E.2d 1 (1976); Wise v. Industrial Comm'n, 54 Ill. 2d 138, 142, 295 N.E.2d 459 (1973)*

Based on the following, the Arbitrator finds that Petitioner sustained an accident on November 9, 2021, arising out of and in the course of her employment with Respondent. The Arbitrator finds that Petitioner did not sustain an accident on March 28, 2022. The Arbitrator finds that Petitioner reached MMI on February 3, 2022.

November 9, 2021, accident

In this case, Petitioner's injury occurred in the course of and arose out of his employment on November 9, 2021. The Arbitrator notes that Petitioner testified that he was injured in the middle of his back and left side when he hit the step of the crane and fell backwards onto the concrete hitting his head. (T. 28) The Arbitrator notes that Petitioner testified that he fell when he used too much force to pick up a steel box and prevent it from binding against the machinery while the box was coming out of an oil pit.

(T. 27; 30) Petitioner testified that the middle of his back and left side hit the step of the crane and that he fell backwards onto the concrete and hit his head. (T. 28) Petitioner testified that he landed on his left side. (T. 29) Petitioner testified that everyone came over to help him off the ground. (T. 28) Petitioner testified that he sustained a tight back. (T. 28; PX 1)

March 28, 2022, accident

As for the March 28, 2022, accident, Petitioner's injury did not occur in the course of nor arise out of his employment. The Arbitrator notes that Petitioner testified that he was injured on the morning of March 28, 2022, when he went back to work. (T. 47-50) The Arbitrator notes that this job required Petitioner to reach up and grab ceiling tiles and other items from a coworker. *Id*. The Arbitrator notes that as he reached up to grab an item, he felt a pop. *Id*. The Arbitrator notes that Petitioner testified that he went to South Suburban Hospital on March 28, 2022. (T. 51; PX 4) The Arbitrator notes that the medical records indicated that Petitioner went to the emergency room the next day, March 29, 2022. (PX 4)

The Arbitrator further notes that, on February 15, 2022, Petitioner presented Dr. Martin and reported chest and low back pain after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) Petitioner reported that "he had to put her right down due to increase in pain." *Id*. The Arbitrator found this to be an intervening act.

Based on Petitioner's testimony and supporting medical records, the Arbitrator finds that Petitioner's November 9, 2021, accident arose out of and in the course of employment with Respondent. The Arbitrator finds, however, that Petitioner's March 28, 2022, accident did not arise out of the course of employment.

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

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

The Arbitrator finds that Petitioner's current condition of ill-being is not causally related to the November 9, 2021, accident nor the March 28, 2022, accident. The Arbitrator finds that Petitioner was at MMI on February 3, 2022. The Arbitrator based her findings on the respective accident dates as follows.

November 9, 2021, accident

The Arbitrator notes that Petitioner was diagnosed with thoracic back pain, hip pain, and low back strain. (PX 1 at 19) Petitioner was diagnosed with cervical pain, bilateral thoracic pain, lumbar pain and being intermittently lightheaded. (PX 2 Vol. II at 44-45) On February 3, 2022, Dr. Ghanayem diagnosed a back sprain caused by the November 9, 2021, work accident. (RX 1) Dr. Ghanayem opined that he had "ample course of time to rest and recover from that injury." *Id*. Dr. Ghanayem placed him at MMI, on February 3, 2022, without restrictions or further medical care. *Id*.

March 28, 2022, accident

The Arbitrator notes that prior to March 28, 2022, Petitioner experienced low back pain, on February 15, 2022, after he tried to pick his granddaughter up, who is about 30 pounds. (PX 2 Vol. II at 3 of the February 15, 2022, medical report located in the middle of the document) The Arbitrator notes that Petitioner's pain increased as a result of this action.

The Arbitrator notes that Petitioner was diagnosed with cervical radiculopathy, neck and back pain with radiculopathy after March 29, 2022. (PX 6 at 44, 50; PX 4 at 31) The Arbitrator notes that Petitioner reported inability to stand or walk longer than 30 minutes due to pain. (PX 4 at 16) The Arbitrator also notes that Petitioner testified that he was on the job site for no longer than 45 minutes to an hour before reinjuring himself. (T. 51) The Arbitrator notes that Petitioner testified that the ceiling tiles weighed "a couple of pounds" and metal pieces as lightweight. (T. 78-80)

The Arbitrator notes that while Petitioner experienced "upper extremity weakness, especially with forward elevation and extension" in May 2022, there was evidence presented which showed Petitioner holding a microphone and a bottled water for over an hour without dropping it in June 2022. (RX 6; PX 6 at 22) The Arbitrator notes that Petitioner is seen on stage for over an hour standing, swaying, turning, walking, jogging across the stage, without taking a break. (RX 6 at 1:07:56) The Arbitrator notes that he routinely jumped in the air, twisted, and regularly raised his hands above his head with the microphone in his hand. (RX 6 at 10:15 and 1:04:40)

The Arbitrator also notes that video footage from September 2022, showed Petitioner getting in and out of his vehicle without issue, putting his jacket on without assistance, carrying items in both hands without dropping them, and removing items from the trunk to the ground. (RX 2) The Arbitrator notes that video footage from October 2022, showed Petitioner carrying a 24-pack case of bottled water from the grocery store to his vehicle as well as a plastic grocery bag with eggs without dropping them. *Id*. The Arbitrator further notes that Petitioner testified that he had trouble getting in and out of the vehicle, and his wife had to help him put on a jacket. (T. 83-84)

The Arbitrator notes that when Petitioner was reexamined by Dr. Ghanayem, he noted that Petitioner had delayed jerking response, which was nonmedical and consistent with malingering. (RX 1)

The Arbitrator notes that Dr. Ghanayem's notes indicated that Petitioner left the examination room in a crouched position, but when he left the building, he was no longer in the crouched gait and was able to get into his car without difficulty, bending at the waist. *Id*. The Arbitrator notes that Dr. Ghanayem determined Petitioner was "malingering and feigning weakness in an attempt to magnify his symptoms." (RX 1 at 83) His mechanism of injury was of such that he didn't believe a true injury occurred. *Id*.

The Arbitrator notes that Dr. Ramos diagnosed degenerative, and not acute, findings based on the MRI of the cervical spine. (PX 8 at 16) He indicated Petitioner was not a surgical candidate and recommended nonoperative treatment for his "degenerative spine changes." *Id*.

Based on the above, the Arbitrator finds that Petitioner did not sustain a compensable work accident on March 28, 2022, and finds that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents.

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

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

As the Arbitrator found that Petitioner's current condition of ill-being was not causally connected to the November 9, 2021, and March 28, 2022, work-related accident, the Arbitrator finds that the following medical treatment and services Petitioner received through the MMI date of February 3, 2022, to be reasonable and necessary to cure and relieve Petitioner from the effects of the November 9, 2021, work accident. (PX 1; PX 2; PX 4, PX 5; PX 6; PX 7; and PX 8)

The Arbitrator finds the medical treatment for Petitioner's head, cervical, thoracic, lumbar spine, and left rib causally related to this November 9, 2021, work accident. the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services, incurred through February 3, 2022, pursuant to the medical fee schedule and as outlined in PX 1; PX 2; PX 4, PX 5; PX 6; PX 7; and PX 8, as provided in Sections 8(a) and 8.2 of the Act.

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

As the Arbitrator found that Petitioner did not sustain a compensable accident on March 28, 2022, and that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents, the Arbitrator finds that Respondent is not liable for any prospective treatment beyond February 3, 2022, the date of MMI.

WITH RESPECT TO ISSUE (L), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Under Illinois law, temporary total disability is awarded for the time period between when an injury incapacitates the petitioner to the date the petitioner's condition has stabilized or the petitioner has recovered to the amount the character of the injury will permit. *Whiteney Productions, Inc. v. Industrial Comm'n*, 274 Ill.Apat3d 28, 30 (1995)

As the Arbitrator found that Petitioner did not sustain a compensable accident on March 28, 2022, and that Petitioner's current condition of ill-being is not causally related to either the November 9, 2021, or March 28, 2022, work accidents, the Arbitrator finds that Petitioner was temporarily and totally disabled from November 10, 2021, through February 3, 2022, or 12 2/7 weeks. The Arbitrator notes that Respondent paid TTD benefits for 18 and 4/7 weeks at an agreed TTD rate of $1,173.93. As such, the Arbitrator finds that no credit will be awarded to Respondent.

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

The Arbitrator finds that Respondent's actions in this case were not unreasonable, vexatious, or without good cause and, therefore, Respondent shall not pay penalties as provided in Sections 16 or 19 of the Act. The Arbitrator notes that Respondent relied upon the medical expert opinion of Dr. Ghanayem in denying payment of benefits in accordance with his opinion.

It is so ordered:

Arbitrator Antara Nath Rivera

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC011238
Case Name	Amber Slaughter v. State of Illinois - Department of Corrections - Sheridan & State Treas. & Ex-Officio Cust. of the Rate Adj Fund
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0198
Number of Pages of Decision	28
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Michael D. Block
Respondent Attorney	Thomas Owen

DATE FILED: 5/1/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMBER SLAUGHTER,

Petitioner,

vs. NO: 16 WC 11238

STATE OF ILLINOIS,
DEPARTMENT OF CORRECTIONS SHERIDAN &
MICHAEL FRERICHS as STATE TREASURER and
EX-OFFICIO CUSTODIAN of the RATE ADJUSTMENT FUND ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of benefit rates, causal connection, the reasonableness and necessity of the medical treatment and expenses, prospective medical treatment, permanent partial disability, and TPD & PPD advance, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 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.

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.

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.

May 1, 2024
O: 4-25-24
CAH/tdm
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC011238
Case Name	Amber Slaughter v. State of Illinois – Department of Corrections - Sheridan & State Treas. & Ex-Officio Cust. of the Rate Adj Fund
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	25
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Michael D. Block
Respondent Attorney	Thomas Owen

DATE FILED: 8/30/2023

/s/ Roma Dalal, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF AUGUST 29, 2023 5.35%

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

August 30, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Amber Slaughter
Employee/Petitioner

v.

State of Illinois Department of Corrections Sheridan and Michael Frerichs as State Treasurer of the Rate Adjustment Fund
Employer/Respondent

Case # **16 WC 11238**

Setting: **Ottawa**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Roma Dalal**, Arbitrator of the Commission, in the City of **Joliet**, County of **Will**, on **May 11, 2023,** and in the City of **Ottawa**, County of **LaSalle**, on **June 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: Wage Differential and/or Perm. Total; Petitioner's potential earnings as of hearing date

FINDINGS

On **March 13, 2016,** Respondent-Employer ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage, calculated pursuant to Section 10 of the Act, was **$1,176.69.**

Petitioner's current wage as of trial is $72,000/year or $1,384.62/week

On the date of accident, Petitioner was **32** years of age, married with 1 dependent child.

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

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

Respondent shall be given a credit of $**108,372.98** for TTD, $ for TPD, $ for maintenance, and $**5,962.40 additional advanced TTD** for other benefits, for a total credit of $**114,335.38**.

Respondent is entitled to a credit of $**group medical payments made** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding Petitioner's orthopedic and PTSD/Mental condition as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Respondent is entitled to apply a credit against the reasonable and related medical bills that were processed and paid by group insurance pursuant to 8(j) before paying out on awarded medical expenses and will hold Petitioner harmless for same.

Respondent shall pay TTD March 14, 2016 through April 22, 2018 (110 weeks); July 23, 2018 through October 21, 2019 (65 1/7 weeks); April 8, 2020 through August 7, 2021 (69 4/7 weeks); and June 8, 2022 through August 7, 2022 (8 5/7 weeks), totaling 253 3/7 weeks at a rate of $784.46 per week as provided in §8(b) of the Act. Respondent is entitled for amounts TTD and advances paid as well as a credit, up to the TTD rate, for extended benefits paid under Section 8(j) of the Act.

Respondent shall pay temporary partial disability benefits of $27,260.46.

Respondent shall pay Petitioner permanent partial disability benefits, commencing August 23, 2022, of $716.31/week until May 10, 2023. In addition, Respondent shall pay Petitioner permanent partial disability benefits commencing May 11, 2023, of $747.08 per week, until Petitioner reaches age 67 or

five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Signature of Arbitrator

August 30, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

Amber Slaughter, Employee/Petitioner, v. State of Illinois DOC Sheridan and Michael Frerichs as State Treasurer and ex-officio custodian, Rate Adjustment Fund Employer/Respondent.	)	Case No. 16 WC 11238 Arbitrator Dalal Ottawa, IL

FINDINGS OF FACT

This matter proceeded to hearing on May 11, 2023 in Joliet Illinois and June 26, 2023 in Ottawa, Illinois before Arbitrator Roma Dalal on Petitioner's Request for Hearing. Issues in dispute include causation, disputed medical bills, TTD benefits, 8(j), and nature and extent. (Arb. Ex.1, TR1, p.4).

Amber Slaughter (hereinafter referred to as the "Petitioner") was 32 years old, married with one dependent at the time of injury. Petitioner was employed at Department of Corrections Sheridan (hereinafter referred to the "Respondent") and worked as a correctional officer. (TR1, p.57). Petitioner testified that she was certified as a State tactical response officer. (TR1, P.59). Prior to the injury she had been involved in inmate altercations and responded to crises. (TR1, p.60). She never had any mental reactions to anything of these things nor was ever attacked by an inmate. (TR1, p.61).

On March 13, 2016, Petitioner testified that she was coming back from the chow line with approximately 65 inmates. An inmate got angry and started cursing at her as he wanted to use the phone. When she got to his cell, he continued to yell obscenities. She was going to key up the radio, when the inmate punched her in the face, and she fell back into the cell door and hit her head on the concrete door. She went to regain her balance, and the inmate put his hands around her neck and started choking her. She attempted to break him down at the elbow, but he was tightening his grip and she couldn't breathe. Petitioner eventually got away, and he fell back. Petitioner slammed the door shut and was trying to call a code 1, but her radio had fallen. She was trying to get off the hall and the inmate came out of the cell again. The doors were all open and another inmate intervened and said dude, leave her alone. (TR1, p.63-66). Petitioner testified there was a period of time she was unable to breathe. (TR1, p.67).

Initially Petitioner reported injuries to her neck, headaches, and upper extremity. (TR1, p.68). Petitioner noted she was also punched in the cheek. She also did not realize that she had a left index broken finger. (TR1, p.69). Petitioner testified that she felt like she was going to die. (TR1, p.69). Petitioner testified they cleaned and bandaged the wounds on her neck and arm and put ice on her face. She also filled out an incident report. (TR1, p.70).

Petitioner testified she then went to Rush Copley and subsequently treated at Edward Medical Group. (TR1, p.71). Petitioner testified consistently with her medical records, noting she treated with Dr. Yarshen and underwent physical therapy. (TR1, p.72). She also began seeking treatment with a psychological professional, Amy Heiman at Centennial Counseling Service and Linden Oaks. (TR1, p.73-74). Petitioner testified that she was previously prescribed Xanax when her daughter was born due to complications. She testified she never actually took the medication. (TR1, p.76-77).

During the psychological treatment, Petitioner testified she was diagnosed with PTSD about two and half weeks after the assault and began treating with Dr. Michael Martin. (TR1, p.78). She also treated with Dr. Urbanoksy with respect to her extremities. (TR1, p.79). Petitioner testified she stopped seeing Ms. Heiman in March of 2022 because her insurance was cancelled. She continues to pay out of pocket to see Dr. Martin to continue her medications. (Wellbutrin, Prozac, Seroquel, Propranolol and Xanax). (TR1, p.80).

Petitioner testified on January 2, 2020 she returned to work full duty. (TR1, p.82). Petitioner stated her progression was slow and steady, utilizing medication, counseling and support from her parents and husband to help her. He further noted that her job was important to her. (TR1, p.83).

When she retuned to work things had changed. She noted there were a lot more inmate movement and more privileges given to inmates that she was not use to. They were also getting away from sending inmates to segregation. (TR1, p.85). She felt that there was a lot for her to be aware of and have to watch. The prison also allowed mentally ill and violent inmates to walk throughout the prison openly. (TR1, p.86). Petitioner testified she missed about 10 days of work between January and March of 2020 as she was struggling mentally to be back inside the prison, triggering issues with sleep, panic, and flashbacks. (TR1, p.86).

On March 11, 2020, Petitioner testified that two cellies had gotten into a fight. One cellie had stabbed another. Although there was no direct threat to her life, she suffered from a severe panic attack and had to go outside the prison walls to get her medication. (TR1, p.87). Petitioner testified that she continued to work to help support her family. She then was sent to the academy in Springfield to get recertified when they showed a video of real inmates attacked an officer. Petitioner testified she could not watch it and left the room crying. Petitioner did get recertified. (TR1, p.88). Petitioner returned to work on March 23, 2020 with the actual last day of working the prison on March 24, 2020. (TR1, p.89). Petitioner testified that she was working the same cell house getting two inmates out at a time to use shower and use the phone. She was working with another officer to get an inmate out when the inmate got super irate and started screaming and throwing chairs. Petitioner was standing in the foyer of the building and just froze. She noted that could be a death sentence if something is happening where an officer is being overpowered by an inmate and no one responds. She felt guilty and ashamed. On April 8, 2020 Petitioner returned to Dr. Martin who took her off work. Since then, her doctor has not returned to her full duty work. (TR1, p.89-91). After that episode, Petitioner testified she began spiraling again feeling depressed, having issues with sleep, panicking, and night terrors. (TR1, p.91). Petitioner testified that she began self-harming in the fall of 2020, cutting the inside of her legs and arm with a razor or knife. She testified that she had overwhelming feelings of the flashbacks, depression, and anxiety. When she would self-harm for that moment it would take her mind off all of the other stuff and would just focus on the pain. (TR1, p.92). Eventually she told Dr, Martin about this but felt ashamed and embarrassed. (TR1, p.93).

Due to this behavior, she eventually was partially hospitalized for the PTSD at Linden Oaks. The program was supposed to be four weeks, but she was there for 6 weeks. Petitioner testified she was at Linden Oaks from the time you wake up until the time you go to bed. You only go home to sleep and your whereabouts always need to be accounted for. (TR1, p.94). During the therapy session, she went to see Dr. David Hartman for a Section 12 examination. She testified she was also going through a medication change. She was released from the program on March 15, 2021. (TR1, p.95). Petitioner further testified that on July 23, 2021 she attempted suicide. (TR1, p.96). She testified that three days leading up to that day she started to have sleep paralysis which was worse than night terrors. It is when you are asleep, but you can't wake yourself up, so you feel like you are actually being attacked. Petitioner testified she knew she could not go into an inpatient program due to suicidal thoughts because she would lose her FOID card and never be in law enforcement again. Her medications were increased but it made her feel worse. She felt like there was no hope anymore and felt like she was just a burden to everyone and not being a good a wife and mother. Petitioner testified that after the suicide attempt, she awoke later in the ICU. She doesn't remember anything after taking the pills until she woke up. She was ultimately treated at Northwestern Behavioral Health and released on August 1, 2021. (TR1, p.97-99). Dr. Martin eventually entered her into another program from October 12, 2021 through October 29, 2021 for post-traumatic stress disorder at Linden Oaks for a diagnosis to prevent more suicidal thoughts. (TR1, p.100). Petitioner stated the program helped because by the end of the program she was in a place where she was still having bad thoughts but would not act on them. It did not help with the night terrors. (TR1, p.101).

At that time Petitioner went on State employee nonoccupational benefits and applied for SERS. (TR1, p.102-103). Petitioner testified she stopped counseling 6 months ago because she had no State Insurance. She still sees Dr. Martin who has not released her to return to work as a correctional officer. (TR1, p.104). Petitioner testified the current mediations have caused weight gain, sweating, stomach problems, tiredness, and lack of energy. (TR1, p.104). The side effects can also cause lack of concentration. Petitioner noted she is better with her PTSD but still cannot function the way she used to. She also still gets night terrors. (TR1, p.105). She noted she cannot go anywhere with large crowds because she feels like people are following her or try to hurt her. (TR1, p.105).

As of August 5, 2021, Dr. Martin provided her with permanent restrictions of part time work of 20 hours within a non-confrontational field. (TR1, p.107). Petitioner testified she currently works as a teacher's aide with 2-year-olds in preschool. She testified she explored other employment as well and tried the State's alternative employment program, but they did not have employment for 20 hours a week. (TR1, p.108). She noted her current wage is $13.20 an hour. She works four hours a day five days a week. (TR1, p.109). She testified that she is emotionally and mentally exhausted after the four hours. (TR1, p.112). She stated she cannot handle high stress situations anymore. (TR1, p.112). Petitioner testified they practice active shooter drills and fire drills. (TR1, p.113-115). Petitioner testified that there was a lockdown in school as the private investigator parked in the parking lot facing the playground. The school was locked down. (TR2, p.7). She further stated that when she works at school and is in public she tries to put on a happy face for her daughter and the kids she works with. (TR2, p.7). Petitioner testified that her job is not guaranteed to continue, and her daughter is expected to graduate in about five years. (TR2, p.8).

Petitioner further testified that she was terminated from Respondent because she was off work due to this accident. (TR2, p.10). In regards to her physical injuries, Petitioner testified she sustained bruising from the hands around her neck, right foot, and right side of her ribs. She also had a thumb injury, wrist injury and index finger fracture. (TR2, p.11). She then had physical therapy for her neck and right wrist.

(TR2, p.12). Petitioner further testified she had carpal tunnel surgery for her right wrist and a left thumb procedure called mini tightrope. (TR2, p.16). Petitioner testified her right index finger did not feel the same way it did before surgery and cannot stick all of her three fingers up the same way. She also has pain in her thumb and right index finger along with her left index finger. (TR2, p.17-18). Petitioner also stated she utilizes an upper back brace that helps when she does light work. (TR2, p.20). Petitioner testified she notices decreased grip strength, with troubling opening tight jar or bottles. (TR2, p.21). She further noted she still gets migraines about once a month. (TR2, p.23).

Petitioner testified that she was taking classes and requested a vocational assessment. (TR2, p.27). The State never offered her a vocational assessment. (TR2, p.28). Petitioner testified she worked a total of 33 weeks, with her salary being $13.20 per hour at a rate of 20 hours a week or $364 per week. (TR2, p.28). The Arbitrator notes the math is actually $264.00 per week. Petitioner noted she misses approximately five days a month due to night terrors, lack of sleep and flashbacks. (TR2, p.33).

On Cross-Examination, Petitioner confirmed that Exhibit 20 are jobs Petitioner applied to that fairly and accurately reflected her full job search after the injury. It did not take her long to search for the jobs and noted she was unaware if these jobs would accommodate her restrictions. (TR2, p.39-40). She later testified she looked for these jobs before Dr. Martin's current restriction. (TR2, p.60). Petitioner confirmed she received extended benefits and then worked light duty from April 24, 2018 through July 22, 2018. (TR2, p.41). Petitioner worked light duty for a second period of time from October 21, 2019 thorugh January 1, 2020 and worked full duty from January 2, 2020 through March 2020. Her last day she worked was March 24, 2020 and she left because she had a panic attack. (TR2, p.44). Petitioner stated she returned back to work during the pandemic and was concerned with bringing COVID home, but noted her husband also worked there so he had exposure. (TR2, p.45-46). Petitioner testified she started working at the school in August of 2020, so approximately two years. (TR2, p.47). Petitioner stated her computer skills were poor, but she owns a smart phone and maintains a Facebook account. (TR2, p.48-49). Petitioner noted she did not wear her upper back brace during either court hearings. (TR2, p.56). Petitioner testified she did not want to go back as a correctional officer. She believes she can do the work she is currently doing. (TR2, p.57).

On Redirect, Petitioner stated the injury ruined her life. She always wanted to work in law enforcement and worked hard to get there. (TR2, p.68). Petitioner further noted she wished she could return back to work due to financial restraints. (TR2, p.70).

Joshua Slaughter, Petitioner's husband, was also called on behalf of Petitioner. (TR1, p.11). He also works for Respondent. (TR1, p.12). He testified Petitioner's mental status was fine when they met. (TR1, p.13-14). He noted Petitioner had some anxiety for a period of a couple of months after their daughter's birth. Their daughter was born with some lung problems and required some extra care. (TR1, p.15-16). On the day of the assault, he heard a partial code 1 and knew where Petitioner was working. He saw Petitioner coming off the hall and her face was bright red, noting she was visibly upset. (TR1, p.17-18) He did not witness the assault. (TR1, p.47). He eventually went to the healthcare unit to check on her and conduct paperwork. (TR1, p.19). He took her to Copley ER and took pictures of the bruises and scratches. (TR1, p.21). A couple of days after the incident, he noticed Petitioner started to have bad dreams. She also was crying all the time, wouldn't eat or go out. (TR1, p.24). He started taking Petitioner to Centennial Counseling, with Dr. Michael Martin who provided her medication and psychiatric treatment. (TR1, p.26).

Mr. Slaughter testified on July 23, 2021 he called an ambulance as Petitioner attempted suicide. (TR1, p.27). He found her unconscious at a forest preserve near their house. They took her to the hospital where it was believed she took around 100 pills and was having kidney failure. (TR1, p.28-29). She then started outpatient treatment at Edward Linden Oaks System where he had custody of her before and after. (TR1, p.30).

Mr. Slaughter testified Petitioner cannot multi-task, it overwhelms her, she cries a lot, and gets mentally exhausted. She also has a hard time after her part time job doing anything further in the house. (TR1, p.32). In addition, she has anxiety when they are out in public. (TR1, p.34).

The witness also described an issue that Dr. Hartman reported where she told him about Mr. Slaughter's ex-stepdad sexually assaulting both of his nieces. He was thereafter arrested. There was no danger to Petitioner, and this was in August of 2018, two and half years after the assault. His younger niece moved in with them, but Petitioner had nothing to do with that. (TR1, p.36-37).

Regarding wages of a correctional officer, Mr. Slaughter testified that after 8 years at the top of his pay, employees are no longer eligible for any further yearly pay raises. This is called a "stepped out officer." (TR1, p.39). He testified he became a stepped-out officer in November of 2018. Petitioner would have become a stepped-out officer in June of the same year (2018). Currently stepped out officers make $6000 per month. (TR1, p.40). He noted as of September 2022 the pay was $5800.00 per month. (TR1, p.42). He produced public record documents that fellow stepped out officers at Sheridan as of the time of hearing were making $6,000.00 per month. (TR1, p.43).

Mr. Slaughter further testified Petitioner currently works at Cross Lutheran Church and School in Yorkville. She will come home very tired, cannot do tasks that would otherwise be normal, and usually takes a nap. (TR1, p.45).

Medical Summary

On March 13, 2016, Petitioner presented at Rush Copley Hospital with complaints of right hand, wrist, and elbow pain due to an inmate assault. X-rays showed no evidence of fracture or dislocation. Petitioner was diagnosed with right elbow pain, right hand joint pain, and acute pain of the right wrist. (PX1, p.11-13). Petitioner originally presented to Edwards Immediate Care in Oswego, but they would not do worker's compensation. (PX2).

Petitioner's Exhibit 5 is a number of state required CMS 95 forms. Pages 1 and 2 thereof are from a visit to Dr. Yarshen (the prior PCP) the day following the incident diagnosing a work-related injury of a wrist sprain, hand abrasions, and a cervical strain, finding her temporarily totally disabled from her occupation with restrictions of no handling of inmates or lifting with the right upper extremity. (PX5).

On March 31, 2016, Petitioner presented at Hinsdale Orthopedics with Dr. Leah Urbanosky for evaluation and treatment of her right wrist and left index finger. Petitioner also reported neck spasms. The Doctor diagnosed pain in the right wrist, carpal tunnel syndrome, right forearm synovitis and

tenosynovitis, non-displaced fracture of the proximal phalanx of the left index finger, initial encounter for closed fracture, and cervicalgia. Dr. Urbanosky referred her to Dr. Kirincic, a physiatrist, for the neck. (PX3, p.8-11). Dr. Urbanosky performed multiple injections on Petitioner's right wrist and right thumb between May 2016 and March 2017 and between January and July 2018. (PX3, p.16, 36-55, 95; PX3B, p.9, 39).

On April 25, 2016, Petitioner saw Dr. Kirincic for headaches/neck pain and participated in 25 sessions of physical therapy from May 16, 2016 to August 15, 2016. (PX3B, 11, PX4A). At discharge, Petitioner reported that she would still get headaches about 3 to 4 times a week, but noted her neck was not hurting as much. (PX4A, p.34). Petitioner treated on January 3, 2018 and resumed treatment with Dr. Kirincic approximately seven months later. (PX3B, p.12-15, 40). Petitioner also treated intermittently with Dr. Amita Bijari for headaches starting October 24, 2016. (PX7, p.15-25).

On December 7, 2016, via referral from Dr. Urbanosky, Petitioner saw a different hand specialist, Dr Paul Papierski at Chicago Hand, and Orthopedic Surgery Centers. She gave the history of the injury in March of that year, symptoms, and imaging, including recent right wrist MRI which included the thumb. His diagnosis was right carpal tunnel syndrome and subluxation of carpometacarpal joint of right thumb, sequala. He recommended repair or reconstruction of the volar beak ligament of the right thumb CMC joint at the same time as a carpel tunnel release. (PX8, p.5-6).

On October 10, 2017, Dr. Urbanosky performed a right carpal tunnel release and right thumb CMC arthroscopy, followed by placement of a Mini Tightrope Anchor for stabilization. (PX3A, p.31-132, PX10, p.33). From October 24, 2017 to August 13, 2018, Petitioner participated in 52 sessions of occupational therapy/work conditioning with ATI. (PX4B, p.31-77, PX4C, p.32-45, PX4D, p.14).

On March 26, 2019, Petitioner underwent a right thumb hardware removal and trapezial excision with revision mini tightrope anchor. (PX3B, p.79, 10). Petitioner continued to follow up with Dr. Urbanosky and underwent another injection.(PX3C, p.29-61). On November 18, 2019, Dr. Urbanosky released Petitioner to light duty work. *Id.*at 78-82. On January 13, 2020, Dr. Urbanosky administered a final injection and released Petitioner to full duty work. *Id.* at 88-92. As of May 4, 2020, Petitioner was able to qualify with respect to firearms, but had continued complaints of index finger swelling and decreased flexibility. She had required a shot in the PIP joint of the index finger. *Id.* at 93-96.

On March 23, 2021, Petitioner saw Dr Kirincic advising she had returned to work but was now off for PTSD from her psychiatrist. She reviewed the drug monitoring program and found it consistent with patient report. She was given acupuncture and an injection for the neck. Her final visit with Dr. Kirincic was on April 20, 2021, where she was given acupuncture, a trigger point injection, and fitted for a neck brace. (PX3D, p.25-30).

Between these last two visits Petitioner sought chiropractic care with Eric Lukosus, D.C. at Illinois Spinal and Sports Rehab, for her chronic neck pain, with a history of injury at work as a correctional officer. (PX12). He diagnosed a cervical strain of muscle, fascia and tendon, Cervicalgia, and Central disc disorder at C5-C6 with radiculopathy. After the second visit she ceased to follow up.

Summary of Medical Treatment Regarding Psychological Injuries

On March 22, 2016, Petitioner saw Dr. Eisele, her general practitioner and was diagnosed with PTSD, anxiety, and depression. (PX48A). On April 8, 2016, Petitioner began counseling at Centennial Counseling Center. (PX6, p.4). Petitioner was again diagnosed with PTSD and placed off work. From 2016 through 2019, Petitioner underwent approximately 42 sessions of counseling at Centennial Counseling Center. (PX6). Petitioner was consistently seen as cooperative, friendly, and engaging with good eye contact and normal attention, focus, and activity levels throughout these visits. Petitioner continued to have recurrent distressing dreams of event, dissociative reactions of trauma occurring, psychological distress and physiological distress due to cues of trauma. (PX6, 6A). The records of Ms Heiman in PX6A tract symptoms of PTSD from which Petitioner was suffering, noting whether they had worsened, remain unchanged, or improved, the things such as recurrent and intrusive memories of trauma, recurrent distressing dreams of the event, dissociative reactions, psychological or physiological distress, avoidance of distressing thoughts or external reminders of the trauma, diminished interest or participation in significant activities, detachment or estrangement from others, hypervigilance, exaggerated startle response, concentration difficulties and sleep disturbance, among others. (PX6A).

The first record in evidence is from February 15, 2017, when Petitioner saw Dr. Michael Martin for a follow up of PTSD. (PX9, p.12). Petitioner reported a few night terrors that were not specific to the work environment, but otherwise said she was feeling better. *Id.* On May 10, 2017, Petitioner reported that she was easily anxious, mostly about ex-inmates or potential insurance investigators. *Id.* at 14. On August 7, 2017, Petitioner reported that she was feeling better, but she had been somewhat retraumatized by seeing a dog bite at a family party. *Id.* at 16.

On January 24, 2018, Dr. Martin released Petitioner to return to work. (PX9, p.20). From April 24, 2018 to July 22, 2018, Petitioner worked light duty. Petitioner worked in the mail room with no inmate contact from 8:00 a.m. to 4:00 p.m. On May 7, 2018, Petitioner reported high anxiety at work in afternoons and anxiety about being late. *Id.* at 22. On August 6, 2018, Petitioner reported that her PTSD worsened when her husband's stepfather was arrested for molesting minor relatives and one victim had moved in with her and another was to move in shortly. *Id.* at 24. On June 6, 2019, Petitioner reported to Dr. Martin that she had horrible depression, anxiety, and that her home had flooded. She also reported having 3 children living upstairs in a 2-bedroom house. *Id.* at 28.

On March 5, 2020, Dr. Martin found Petitioner to be moderately and slightly dysphoric affect with no suicidal thinking or impaired judgment. (PX9, p.36). Dr. Martin advised Petitioner that she needed to give herself a full 6 months to reacclimate. *Id.*

At hearing, Petitioner testified that on March 11, 2020, she had a severe panic attack after witnessing the aftermath of a stabbing between two inmates. The records reflect that she did not mention this incident to a provider until five months later on August 7, 2020. Petitioner's panic attacks became a lot more frequent, and she was not able to calm herself down. Later, at the academy in Springfield, she was shown a video of an inmate attack, and she had to get up and leave the room. On March 24, 2020, Petitioner froze when she observed an officer dealing with an inmate. Petitioner testified that at that point, she decided that she could no longer work.

On April 8, 2020, Petitioner reported to Dr. Martin that she had no current nightmares, but experienced panic attacks and took 2 Xanax at night to sleep. (PX9A, p.14). Petitioner reported, that "[d]ue to the COVID, I've been unable to work, we don't have childcare." The records further noted Petitioner had increased stress as her husband continued to work at Sheridan Correctional Center where there was a lack of PPE, lack of support from above, and her daughter has asthma. Petitioner indicated that she would apply for "stress leave." *Id.* Dr. Martin supported a leave of absence and increased Xanax to 1 mg daily as needed. *Id.* at 14. On May 1, 2020, Petitioner reported that her husband had been sleeping downstairs due to the risk of virus transmission. Petitioner denied panic attacks, but she was assessed with increased depression. *Id.* at 27. On June 17, 2020 Petitioner noted she had night terrors three weeks ago. She was still not in current counseling but considering it. *Id.* at 41.

On August 7, 2020, the records first note that Petitioner witnessed a stabbing. (PX9A, p.48). Petitioner stated she wanted to go back but did not know how to "mentally make my mind right." Dr Martin's assessment noted she was struggling with both anxiety and depression, changed medications and postponed the return-to-work date to November 1, 2020. *Id.* at 48-52.

From July 2, 2020 to January 12, 2021, Petitioner followed up with Centennial Counseling on at least 13 occasions. (PX6B).

On September 23, 2020, Petitioner had a phone visit with Dr. Martin. Petitioner felt better with higher doses of Wellbutrin but had moments of overwhelming sadness and loneliness that last a few minutes, at least daily. Dr. Martin postponed her return to work return to January 1, 2020, (PX9A, p.59). As of November 2, 2020 Petitioner was feeling a lot better. Dr Martin recommended Petitioner to do some gentle exposure therapies regarding workplace. On December 23, 2020, Petitioner reported to Dr. Martin that she was struggling badly the last few weeks and had a fear of returning to work. Dr. Martin delayed her return to work until January 11, 2021. (PX9A, p.79-82).

On January 18, 2021, Petitioner had a full psychiatric evaluation by Dr Martin. Petitioner was a 37-year-old with a history of anxiety, depression, ADHD, and PTSD who was out of work several months with PTSD symptoms, after suffering an inmate attack 5 years ago. Every time she thinks of going back to work, she has a panic attack. On one hand, she enjoys the camaraderie and the financial gains, on the other hand, she is terrified that something bad will happen again. She has great difficulty producing and maintaining sleep. She has been stress eating and gaining weight unintentionally. She reverted to cutting (slitting) arms and legs, as a coping mechanism, and has not been truthful with Dr. Martin nor her therapist. Petitioner had thoughts of death, dying and suicide thoughts but denied plan or intent. No history of mania or psychosis, alcohol, or drug abuse. Diagnoses and related disorders were major depressive disorder, recurrent episode, moderate recurrent depressive disorder, and posttraumatic stress disorder. The plan was an intensive outpatient program next 2-4 weeks, speak to lawyer about long-term disability through SRS and work a part time job, or make one last ditch effort to set a return-to-work date and work on her mental health to get there. (PX9A, p.86-88).

A plan of care was developed by Ayesha Afridi, LPC. She outlined symptoms of depression and anxiety. Patient isolates in her room and avoids contact. Having flashbacks, night terrors and wakes up in sweats feeling panicky, resulting in being unable to get quality sleep. Petitioner has a history of past trauma and is reliving all the feelings and emotions of the past trauma, which she doesn't know how to handle.

Petitioner was struggling to manage impulsive behavior, fear/panic, nomination, mood swings, body aches, shame/guilt and racing thoughts. (PX9A, p.101).

Exhibit 9B is three volumes, 1082 pages, for the January 2021 Intensive Outpatient Program at Linden Oaks, as well as follow up through Oct 29, 2021. It includes Dr Martin's complete psychiatric assessment discussed above. Reason for admission was noted started self-harming and having night terrors of committing suicide, with precipitating event "I was attacked by an inmate who tried to drag me into a cell in 2016 hand injury r/t incident." Petitioner participated in group and individual therapy sessions. She was panicky in large crowds or areas reminding her of the trauma. Medication calmed her down but had side effects. Still poor sleep with night terrors interrupting sleep. She was more accepting that she could not return to her job due to it triggering her PTSD symptoms. She noted to begin looking at other jobs and was going to begin volunteering at an animal shelter. Reviewed medications and effects. Continuing low moods and periods of tearfulness. Still back and neck pain. Still nightmares but not having flashbacks or night terrors. Trying to eat healthier and avoid binge eating. Appeared to be more hopeful. (PX9B).

On July 23, 2021, Petitioner was found minimally responsive in her car after an intentional drug overdose. (PX11). She was transferred to Kishwaukee Hospital and admitted on July 27, 2021 to an adult inpatient psychiatry unit and diagnosed with major depressive disorder. (PX11A, p.3). It was noted Petitioner felt overwhelmed as her medications were not working so she attempted to kill herself. *Id.* at 9. She noted that what is causing her the most stress is the inmate attack 5 years ago. She had four surgeries on her hand and mental health to help with the PTSD. In February of this year her medication wasn't working, she took a leave of absence and did outpatient with the psychiatrist. She switched medications. This past week she was feeling very low, night terrors and sleep paralysis. Her husband would stay up and watch her. She was not getting sleep and by day 3 of no sleep her grandma passed away. She also got in an argument about what the kids were not doing what they were supposed be doing. She needed a break and her husband said if you're going to divorce me you won't get the kids because of the psychiatric problems. During assessment, patient presented as anxious, depressed, flat affect, alert and cooperative. Wants to work on "to feel safe." Plan was to improve cognitive, behavioral, and emotional functioning. *Id.* at 39-42. Petitioner was discharged on August 2, 2021. (PX11A, p.3).

Petitioner followed up with Dr. Chuck Ritili for psychotherapy appointments and continued to treat with Dr. Martin. See generally, PX9.

From October 12, 2021 to October 29, 2021, Petitioner was admitted for treatment in the PTSD Services Intensive Outpatient Program. (PX9C, p.1). Petitioner reported experiencing repeated, disturbing, and unwanted memories and dreams of the event, dissociative reactions (including flashbacks) related to the event, intense feelings of prolonged psychological distress when exposed to reminders of the event, and a marked psychological reaction when reminded of the event. *Id*. Petitioner demonstrated improvements in her PTSD symptoms, but she still met the criteria for PTSD upon her discharge. *Id*. at 2.

On November 4, 2021, Dr. Martin continued to diagnose Petitioner with major depressive disorder, recurrent, moderate to severe without psychosis, and chronic PTSD. Dr. Martin recommended Petitioner pursue noncompetitive employment. He recommended no more than 20 hours weekly for the next 3 months so she could build her distress tolerance slowly. He recommended that she not return to corrections service, law enforcement, or any occupation involving potential confrontation. (PX9F).

On August 18, 2022, Dr Martin completed a Mental Functional Capacity Assessment for Petitioner's application to the state's alternative employment program noting Petitioner was moderately or markedly limiting understanding and memory, sustained concentration and persistence, social interactions, and adaptation. He noted genuine disability, not malingering. (PX5C).

On March 16, 2022, March 25, 2022, March 26, 2022 and May 23, 2022, Petitioner underwent a neuropsychological assessment with Dr. Neli Cohen. (PX23, p.1). Dr. Cohen diagnosed Petitioner with PTSD, caused by the work incident, which resulted in significant emotional and cognitive limitations impacting her work ability. *Id.* at 12-13. Dr. Cohen opined Petitioner is permanently and totally disabled from working as a correctional officer and that she would not be able to work full-time in a competitive environment. Dr. Cohen opined Petitioner may be able to work a part-time, highly structured, routine job with occasional interaction from others. *Id.*

Petitioner continued treatment with Dr. Martin. On February 2, 2023, Dr. Martin opined Petitioner's mental health was clearly worsened by the workplace injuries, from which she had never fully recovered. (PX9H). He opined she would never be fit to serve in a correctional setting in the future and that the possibility Petitioner had pre-existing psychiatric illness does not preclude the fact that trauma sustained while at work caused a long-term deficit. Dr. Martin opined Petitioner was at maximum medical improvement for the work injury but was considered in a permanent disability status. *Id.*

Reports

Petitioner underwent independent medical examinations with Dr. Kathleen Weber on June 5, 2017, February 4, 2019, and October 2, 2019. Dr. Weber opined Petitioner's right carpal tunnel and subsequent related treatment was casually related to the work accident. (RX7, RX8, RX9). Dr. Weber opined that Petitioner's right thumb CMC arthroscopy was unrelated, as the thumb MRI suggested no ligamentous injury. Dr. Weber found that Petitioner's complaints and objective findings were inconsistent and changed overtime. Dr. Weber opined Petitioner's work and life capabilities appeared to be normal and that she was at MMI for her work injuries. *Id.*

On February 8, 2021, Petitioner underwent an independent medical examination with Dr. David Hartman. (RX12). He opined Petitioner does not have chronic PTSD as a result of the work event based on her likely pre-claim psychopathology, inconsistent symptom fluctuation, and inconsistent or exaggerated symptoms. *Id.* Dr. Hartman found Petitioner to be at MMI and that her ongoing symptoms are a combination of a chronic personality disorder, probable bipolar disorder, and malingered exaggeration for secondary gain. Dr. Hartman could not rule out that the experience in 2016 may have caused a temporary worsening of a more chronic pre-existing psychopathology. Dr. Hartman opined that with appropriate medication, Petitioner should be able to maintain full time employment without work or life disruptions. Dr. Hartman opined that Petitioner should not have been considered a good candidate for a career as a corrections officer when hired and that she remains a poor candidate for work as a corrections officer. *Id.*

Dr. Michael Martin, the director of Linden Oaks Mental Health Outpatient Services, offered opinions in this case which were admitted in the form of Linden Oaks Medical Group outpatient records, (November 15,2017 through March 1, 2023). In Dr Martin's report of September 2, 2021, he had reviewed Dr. David Hartman's Section 12 examination. He noted discrepancies, the first being she had never sought

psychiatric or psychological care prior to the assault and therefore concluded that she did not have any pre-existing psychiatric illness. Even if Petitioner were to have borderline illness, the work-related injury in 2016 clearly changed the course of her illness and produced the current functional state. He felt that although Dr. Hartman found exaggeration it did not detract from the clinical course and findings of petitioner's therapist, Ms. Amy Heiman, nor his repeated observations of Petitioner. He did agree that Petitioner would be unable to return to law enforcement. (PX9E).

On September 27, 2021, Dr. Hartman opined Petitioner was likely demonstrating worsening effects of PCOS and/or pre-claim bipolar disorder, which required new or adjusted medications. (RX13, p.4). Dr. Hartman recommended a permanent restriction against work in a position that involves direct contact with aggressive inmates due to the fluctuating pre-claim psychiatric vulnerabilities. Dr. Hartman opined that Petitioner was malingering and clearly unwilling to consider a return to work. *Id.* at 4.

On February 2, 2023, Dr. Martin wrote another response to the addendum report from David Hartman, PhD. He noted Petitioner continued to suffer depression and PTSD and would never be able to serve in a correctional setting in the future. She never showed signs of bipolar disorder. His experience was it was common for people to exaggerate symptoms when distressed or not taken seriously, as could have happened here. He, however, did not believe Petitioner was malingering. Petitioner tried to go back to work at least three times after her injury. Dr. Martin opined Dr. Hartman was not qualified to render an objective opinion as to whether or not Petitioner's injuries were caused by trauma while working in the prison system. It also needs to be considered that David Hartman is not a medical doctor. For him to suggest that polycystic ovarian syndrome has anything to do with Amber's psychopathology or in general disposes women to psychotic illness is completely absurd, smacks of misogyny and shows he did not graduate medical school. He reconfirmed the trauma at work caused the long-term deficits. Petitioner is at maximum medical improvement. (PX9H).

Deposition Testimony

The Parties proceed with the evidence deposition of Edward Steffan on October 25, 2022. (PX24). Mr. Steffan is a rehabilitation counselor. *Id.* at 4. On March 15, 2022, he performed an initial evaluation and rehab plan for Petitioner. *Id.* at 6. He opined there is no reasonable stable labor market for Petitioner. He opined Petitioner could not obtain full-time employment. He opined if Petitioner's daughter was not attending that school, she would not gain employment. *Id.* at 12. He believed this was not competitive employment rather gratuitous employment. *Id.* at 13. He opined that he does not believe Petitioner would ever earn the previous salary she used to make as a correctional officer. *Id.* at 20. Mr. Steffen did concede it was possible Petitioner could work as a teacher's aide at a different school. *Id.* at 40.

The parties proceeded with the evidence deposition of Dr. Neli Cohen on November 29, 2022. (PX25). Dr. Cohen is a licensed clinical psychologist noting his specialty is clinical neuropsychology. *Id.* at 5. He testified he performed a neuropsychological assessment on Petitioner. *Id*. at 7. Dr. Cohen opined Petitioner's work injury resulted in significant emotional and cognitive limitations impacting her work ability. She is permanently and totally disabled from working as a correctional officer due to emotional,

cognitive, and adoptive deficits. Currently, Petitioner would not be able to work full time in a competitive work environment due to her limitations. She may be able to do part-time, highly structured, routine job with occasional interactions with the public. Her ability to deal with job-related stress and make decisions at work is poor. *Id.* at 12-13. Dr. Cohen testified he administered psychological tests on Petitioner. *Id.* at 13. She noted she utilizes the DSM-5 in her testing which is an instrument that she uses to diagnose every single disorder, which is generally accepted in the neuropsychological community. *Id.* at 14-15. She testified that she reviewed Dr. Hartman's report, the September 3, 2021 a report from Dr. Martin and the August 18, 2022 functional capacity assessment by Dr. Martin. She further testified that she diagnosed Petitioner with post-traumatic stress disorder. *Id.* at 16. Dr Cohen concluded that the pattern of cognitive and affective findings was causally connected to the workplace assault, that she is permanently and totally disabled from working as a correctional officer, that she would not be able to work in a full-time competitive work environment, and that she may be able to do a part time, highly structured routine job with occasional interaction with the public, supervisors, and co-workers. Finally, her ability to deal with job-related stress and make decisions at work is poor. She testified Petitioner's level of employability was four hours a day, 20 hours a week. *Id.* at. 31.

Dr. Cohen testified she noted major inconsistencies with Dr. Hartman's report. The main one being that Petitioner was struggling from very significant suicidal ideations during that time that Dr. Hartman did not take into consideration. In fact, Petitioner actually attempted suicide. She further noted that in order for people to be part of the partial hospitalization program, people have to meet certain criteria. *Id.* at 34. Dr. Cohen believed Dr. Hartman did not take those into consideration. *Id.* at 35. She further found that Dr Hartman admitted the May, 2016 experience may have caused a temporary worsening of chronic psychopathology. She agreed the episode caused psychological issues, but there were no previous chronic psychological problems which could have been exacerbated. She disagreed with Dr Hartman, noting there was insufficient evidence of malingering. One of the tests she had given had 99.5% Validity as to malingering, and she passed validity on that test. It was objectively scored on a computer. *Id.* at 39-40. Dr Cohen testified about Polycystic Ovary Syndrome referenced by Dr Hartman. Since Dr James Hawkins in 2019 gave her a hormone test which was within normal limits, she didn't know how PCOS can be existing with a normal test. And then physiologically, she didn't know how she could be affected by the disorder with a normal test. *Id.* at 43. She further noted that the incident where an out of state in-law of Petitioner sexually assaulted his daughter two years after Petitioner was diagnosed with PTSD. He was then jailed. The daughter later came to stay with Petitioner and her husband. Dr Cohen couldn't perceive how Petitioner would perceive her life in danger from this episode, something found in PTSD, and it was two years after the diagnosis. *Id.* at 44. She further testified all the psychological and psychiatric treatment following the March 13, 2016 incident was reasonable and necessary and causally related to the March 13, 2016 assault. *Id.* at 45. Dr. Cohen agreed with Dr. Martin that August 18, 2022 would be an appropriate time to place Petitioner at maximum medical improvement. *Id.* at 49.

On Cross-Examination, Dr. Cohen noted that some PTSD patients could return to baseline depending on the circumstance. (PX25, p.58-60). Dr. Cohen further clarified the full-time work is generally competitive environment. Part time work she can probably function. *Id.* at 75.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds her testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and finds the witness reliable. While the Arbitrator did note some inconsistencies, the Arbitrator finds that any inconsistencies in her testimony are not attributed to an attempt to deceive the finder of fact.

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

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

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result

of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 834 N.E.2d 583 (2d Dist. 2005).

In the instant case, the Arbitrator finds Petitioner's current condition of ill-being is causally related to her work accident. The Arbitrator will address the orthopedic and psychological issues.

The Arbitrator will first address the orthopedic issues. The Arbitrator finds that Petitioner credibly testified that she injured her right wrist, neck, left index finger, right thumb, and head at the time of accident. The only disputed injury by the evidence is to the right thumb. Petitioner did not have symptoms immediately, but only after the thumb became painful in physical therapy. She had also had an originally undiagnosed left index finger fracture. Dr Urbanosky referred claimant for a consult to Dr Paul Papierski, a hand specialist. He found instability on exam of the right thumb cmc joint not shown on MRI, which MRI would not have subluxed the thumb, as he found on examination. He opined the mechanism of injury was from the sprain she sustained in the assault. Dr Weber, who is not an orthopedic surgeon or hand specialist, could not see a cause for the injury. The assault was literally hand to hand combat, leaving Petitioner with a swollen right hand and bruising. As such, the Arbitrator finds causation on all orthopedic claims.

Regarding the Petitioner's psychological condition, the Arbitrator finds the opinions of Dr. Martin the most persuasive. The evidence shows that Petitioner's condition manifested from the original work injury.

The chain of events presented in this case show Petitioner's started suffering symptoms a few days after the assault seeking a counselor through the State. Dr Eisele made the PTSD diagnosis on that first visit. Petitioner had made an appointment with Centennial Counseling, Ms Heiman, for April 8 yet consulted workers comp to see if they could get her in to their chosen counselor sooner, per Dr Eisele's note. They couldn't, and their counselor was more distant, so she went to Ms. Heiman. There is a clear temporal relationship with no gap of a life changing event.

The Arbitrator notes that once Petitioner began medical care, the medical records document consistent treatment. While Petitioner may have improved, she never got back to her preinjury status.

At the first visit to Ms Heiman, a licensed clinical professional counselor, Ms. Heiman also made the same diagnosis. Ms Heiman, as someone trained and licensed to treat PTSD through counseling, can render an opinion on exactly what she was trained to do. *See People v Downer*, 2021 Il App (2d) 200158-U, Para 60f, where a physician's assistant was allowed to render opinions within her training, and *Malley v Menard Correctional Center*, 16 IWCC 0117, where a PTSD diagnosis was made by a social worker. Even the last progress notes of Ms Heiman referenced the March, 2016 physical assault by an inmate. (PX6B, p.67). Dr. Michael Martin, a psychiatrist, and the only M.D. to offer an opinion, also opined that

Petitioner's diagnosis was post traumatic depression. His first narrative report of September 3, 2021 noted Petitioner continued to suffer from PTSD and depression. He notes claimant never sought psychiatric or psychological care before the assault.

Per Petitioner's testimony and the State's drug reporting record, she was prescribed an anti-anxiety medication, generic Xanax, in February, 2014, when she coming off maternity leave after the traumatic birth of her daughter on November 29, 2013. While this event could potentially be a basis for an expanded diagnosis of PTSD, it was never serious enough to call in any mental health professional. No testimony or opinions have been offered on other psychiatric medicines being prescribed, with the records going back to 2012, and the Xanax (Alprazolam) was never refilled.

The Arbitrator finds the opinion of Dr. Martin credible. Dr. Martin noted Petitioner continued to suffer depression and PTSD and would never be able to serve in a correctional setting in the future. She never showed signs of bipolar disorder. He did not believe it was unusual that Petitioner would have exaggerated her symptoms when distressed as she had not been taken seriously. He specifically noted Petitioner was not malingering. He further indicated Petitioner tried to go back to work at least three times after her injury. Dr Martin's opinion, after years of treatment, was that claimant was unable to successfully return to the workplace environment due to the PTSD from the assault. (PX9H).

Dr. Martin opined Dr. Hartman was not qualified to render an objective opinion as to whether or not Petitioner's injuries were caused by trauma while working in the prison system. It also needs to be considered that David Hartman is not a medical doctor. For him to suggest that polycystic ovarian syndrome has anything to do with Petitioner's psychopathology or in general disposes women to psychotic illness is not credible. Dr. Martin reconfirmed the trauma at work caused the long-term deficits. She is at maximum medical improvement. (PX9H). He further noted he did not recommend more than 20 hours a work weekly. (PX9F).

The Arbitrator also finds the opinions of Dr. Neli Cohen, Petitioner's examining neuropsychologist, more persuasive than Dr Hartman. Dr. Cohen opined Petitioner's work injury resulted in significant emotional and cognitive limitations which impacted her work ability. She further opined Petitioner is permanently and totally disabled from working as a correctional officer due to emotional, cognitive, and adoptive deficits. Unlike Dr Hartman, she used DSM-5 criteria. One of the malingering tests showed 99.5% validity and was computer scored, not subject to outside interpretation, and showed no malingering.

Dr. Cohen testified that she noted major inconsistencies with Dr. Hartman's report. The main one being that Petitioner was struggling from very significant suicidal ideations during that time that Dr. Hartman did not take into consideration. In fact, Petitioner actually attempted suicide. She further noted that in order for people to be part of the partial hospitalization program, people have to meet certain criteria. *Id.* at 34. Dr. Cohen believed Dr. Hartman did not take those into consideration. *Id.* at 35. She

further found that Dr Hartman admitted the May, 2016 experience may have caused a temporary worsening of chronic psychopathology. She agreed the episode caused psychological issues with no previous chronic psychological problems which could have been exacerbated. The Arbitrator finds Dr. Cohen explained what was required to diagnose PTSD, and that the assault was such as it would be expected. She explained why a hormone test by Dr James Hawkins ruled out claimant suffering the effects of PCOS. She also explained how PTSD patients can appear normal, contrary to what Dr Hartman implied.

Based on the same, the Arbitrator adopts the findings, opinions and conclusions of Drs Martin and Cohen and finds Petitioner's condition of ill-being as it relates to her orthopedic injuries and mental condition causally related to her work accident sustained on March 13, 2016.

With regard to issue (G), earnings, the Arbitrator finds as follows:

The parties agreed the average weekly wage (AWW) at the time of injury was $1,176.69, leaving a TTD/PTD rate of $784.46. The issue is earnings at the time of hearing in the event an 8(d)(1) wage differential award should be allowed. Petitioner in the Request for Hearing form claimed $72,000 per year, which is $6,000 per month or $1384.62 per week, as earnings Petitioner would make at the time of hearing.

Petitioner's husband, Joshua Slaughter, testified he was also a correctional officer. Mr. Slaughter testified that after 8 years at the top pay, officers are not eligible for any further yearly pay raises. This is called a "stepped out officer." Currently stepped out officers make $6000 per month. (TR1, p.40). He noted as of September 2022 the pay was $5800.00 per month. (TR1, p.42). He produced public record documents that fellow stepped out officers at Sheridan as of the time of hearing were making $6,000.00 per month. (PX53-54).

Mr. Slaughter noted he had been off due to his illness, but at the time he went on leave he was earning $5,800 per year. By the evidence the Arbitrator finds that the average amount which Petitioner would be able to earn in the full performance of her duties as a correctional officer as of the trial date is $72,000 per year, or 1,384.62 per week beginning as of the time of hearing, May 11, 2023.

The Arbitrator notes that from the period of August 18, 2022 through the initial trial date, May 11, 2023, Mr. Slaughter was making $5800.00 per month or $69,600.00 per year. As Petitioner would have qualified to be a "stepped out" employee the same year she would have earned the same. This would have resulted in an average weekly wage of $1,338.46.

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

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. In reviewing the medical services provided to Petitioner, the Arbitrator finds that Respondent has

not paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary.

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

Given the Arbitrator's finding of causation between Petitioner's March 13, 2016 work accident and her conditions of ill-being, Respondent is liable for reasonable and necessary medical treatment of the causally related conditions through the date of hearing, as she continues to treat with Dr Martin.

The Arbitrator orders Respondent to pay Petitioner all other reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related conditions pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

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

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. *Nascote Industries*, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on March 14, 2016 through April 22, 2018; June 24, 2018 through October 21, 2019 and March 29, 2020 through May 11, 2023, the start of the hearing as provided in Section 8(b) of the Act. The Arbitrator will review each period.

For the first period of TTD, March 14, 2016 through April 22, 2018, the Arbitrator finds Petitioner was first paid extended benefits and then extended benefits. The parties at the beginning of trial noted that the State would get credits for what the State paid with extended benefits, limited to the period claimed

and TTD benefits. (TR1, p.9). As such, the Arbitrator awards this period and notes Respondent shall receive credit for amounts paid.

The second period claimed is June 24, 2018 through October 21, 2019. Petitioner testified she worked light duty from April 24, 2018 through July 22, 2018. (TR2, p.41). The Arbitrator notes this corroborates with her testimony that she worked light duty for 90 days as that is the maximum period the state allows. (TR1, p.81). Based on the same, the Arbitrator awards TTD benefits from July 23, 2018 through October 21, 2019. During this periods of TTD, Petitioner remained under medical care and either had restrictions which Respondent could not accommodate or was completely removed from work. Respondent shall receive credit for amounts paid.

The last period of TTD claimed is from March 29, 2020 through May 11, 2023, the start of the hearing. Per Petitioner's testimony she left the prison on March 24, 2020 and did not return due to a panic attack. The Arbitrator finds that Dr. Martin subsequently took her off work on April 8, 2020. The Arbitrator finds Petitioner reached maximum medication improvement as of August 18, 2022, the date Dr Martin authored a Mental Residual Functional Capacity Assessment for the State's Alternative Employment Program. The Arbitrator notes that Petitioner began working at Lutheran General Schools as of August 8, 2021. (PX51). Based on the same, the Arbitrator awards TTD benefits as of April 8, 2020 through August 7, 2021, i.e., 69 4/7 weeks.

The Arbitrator notes that Petitioner worked from partial hours from August 8, 2021 through her MMI date of August 18, 2022. (PX51). The Arbitrator notes that no TPD benefits were sought out on the stipulation sheet as Petitioner was seeking TTD benefits during this period. (Arb. Ex.1). The Arbitrator further notes that Respondent also did not dispute any TPD benefits or note any objections to the period. As the Arbitrator finds Petitioner's job to be valid beginning on August 8, 2021, the Arbitrator finds no TTD benefits are owed, except for the period 06/08/2022-08/07/2022 (8 5/7 weeks) as Petitioner did not work during this time frame. (PX51). The Arbitrator finds Petitioner's job to be valid and finds Petitioner is owed TPD benefits. The Arbitrator has utilized a two-week period to be $2,353.38 ($1,176.69 *2) and calculated each two-week period as follows through 8/22/22. The Arbitrator notes Petitioner was at maximum medical improvement as of August 18, 2022; however, the paycheck stub was through August 22, 2022. The benefits are as follows:

- 8/8/21-8/22/21:$2,353.38-$198.00 * 2/3 = $1436.92
- 8/23/21-9/7/21: $2,353.38-$432.00 * 2/3 = $1280.92
- 9/8/21-9/22/21:$ 2,353.38-$528.00 *2/3 = $1180.92
- 9/23/21-10/7/21: $2,353.38-$480.00 * 2/3 = $1248.92
- 10/8/21-10/22/21: $2,353.38-$378.00 * 2/3 = $1316.92
- 10/23/21-11/7/21: $2,353.38-$402.00 * 2/3 = $1300.92
- 11/8/21-11/22/21: $2,353.38-$480.00 * 2/3 = $1248.92
- 11/23/21-12/7/21: $2,353.38-$384.00 * 2/3 = $1313.20

- 12/8/21-12/22/21: $2,353.38-$336.00 * 2/3 = $1344.92
- 12/23/21-01/7/22: $2,353.38-$180.00 * 2/3 = $1448.92
- 01/08/22-01/22/22: $2,353.38-$462.00 * 2/3 = $1260.92
- 01/23/22-02/07/22: $2,353.38-$582.00 * 2/3 = $1180.92
- 02/08/22-02/22/22: $2,353.38-$468.00 * 2/3 = $1256.92
- 02/23/22-03/07/22: $2,353.38-$510.00 * 2/3 = $1228.92
- 03/08/22-03/22/22: $2,353.38-$594.00 * 2/3 = $1172.92
- 03/23/22-04/07/22: $2,353.38-$606.00 * 2/3 = $1164.92
- 04/08/22-04/22/22: $2,353.38-$366.00 * 2/3 = $1324.92
- 04/23/22-05/07/22: $2,353.38-$600.00 * 2/3 = $1168.92
- 05/08/22-05/22/22: $2,353.38-$276.00 * 2/3 = $1384.92
- 05/23/22-06/07/22: $2,353.38-$162.00 * 2/3 = $1460.92
- 06/08/2022-08/07/22 – TTD benefits
- 08/08/22-08/22/22: $2,353.38-$52.80 * 2/3 = $1533.72

Total: $27,260.46

Based on the same, the Arbitrator finds Petitioner was temporarily totally disabled from March 14, 2016 through April 22, 2018 (110 weeks); July 23, 2018 through October 21, 2019 (65 1/7 weeks); April 8, 2020 through August 7, 2021 (69 4/7 weeks); and June 8, 2022 through August 7, 2022 (8 5/7 weeks), totaling 253 3/7 weeks at a rate of $784.46 per week as provided in §8(b) of the Act. During the periods of TTD, Petitioner remained under medical care and either had restrictions which Respondent could not accommodate or was completely removed from work. The Arbitrator further finds Respondent owes temporary partial disability benefits from August 8, 2021 through August 22, 2022 in the amount of $27,260.46. Respondent shall receive credit for amounts paid, including stipulated advances.

With respect to Issue (L), what is the nature and extent of the injury and with respect to issue (O), whether Petitioner is entitled to Permanent Total Disability Benefits, Wage Differential, or Specific Loss, the Arbitrator finds as follows:

Petitioner is seeking compensation for permanent total disability. An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. Petitioner has submitted the vocational opinion of Mr. Ed Steffan to support the position Petitioner is unable to perform gainful employment. The Arbitrator finds this opinion unpersuasive. First the Arbitrator reviewed the medical opinions of Drs. Martin and Cohen, both who opined Petitioner was able to work in a job for 20 hours a week. In addition, the Arbitrator finds no vocational tests were administered and no vocational services were offer. Moreover, the Arbitrator finds for the past two years Petitioner has been working as a teacher's aide for twenty hours a week. Petitioner testified that her daughter was enrolled in this school for the next five years. In addition, she testified she is not in the same classroom as her daughter. Mr. Steffan opined that this was gratuitous employment but

also conceded it was possible Petitioner could work as a teacher's aide at a different school. The Arbitrator finds that Petitioner has been performing this job for two years and believes that Petitioner has the capacity if she chooses to continue to work twenty hours a week.

The Arbitrator believes Petitioner is highly educated and can find some time of routine work as evidence by her current job. Based upon Petitioner's testimony and the vocational report, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she is an "odd lot" permanent total disability.

Having found Petitioner has failed to prove she is permanently and totally disabled; the Arbitrator must then determine the nature and extent of Petitioner's injuries. The remaining options are a permanent partial disability or a wage differential.

Petitioner indicated on the request for hearing that she was claiming a permanent total disability or a wage differential. The Commission and courts have emphasized that Section 8(d)1 is the preferred method of awarding permanent partial disability when Petitioner meets the burden of proof required to demonstrate that the disability caused an impairment of earning capacity unless the Petitioner waives his right to an award under Section 8(d)1. Since the statute favors an award based on loss of earnings, such an award should be rendered without formal election of wage loss, if the elements of proof are met.

Section 8 of the Act governs the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." Section 8(d) details two types of compensation for employees who are permanently and partially disabled; subparagraph 1 provides for a wage differential award and subparagraph 2 provides for a percentage of the person as a whole award. The Supreme Court has expressed a preference for wage differential awards. See *Gallianetti v. Industrial Comm'n, 315 III. App. 3d 721, 727, 734 N.E.2d 482, 487, 248 III.Dec. 554 (2000).* The Supreme Court explained that "[i]t is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage partial loss of use." *General Electric Co., 89 III. 2d at 437, 433 N.E.2d at 673-74.* The Appellate Court held that "the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti, 315 III. App. 3d at 728, 734 N.E.2d at 488.*

In order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents her from pursuing her "usual and customary line of employment" and (2) an impairment in earnings. A claimant must prove her actual earnings for a substantial, period before her accident and after she returns to work, or in the event that she is unable to return to work, she must prove what she is able to earn in some suitable employment. The restrictions imposed by Drs. Martin and Cohen prevent Petitioner from returning to her usual and customary line of employment. The release to the twenty hours a week is below a full-time correctional officer position.

In this case, the Arbitrator finds Petitioner presented sufficient evidence to establish the impairment of earnings. Petitioner would be entitled to a wage differential award under section 8(d)(1) of the Act. This would be for 2/3 of the difference between what claimant would be making now in the performance of her usual and customary duties as a correctional officer, and her current employment, or, alternatively, the average amount she would be able to earn in some suitable employment. The Arbitrator notes that *Gallianetti v Industrial Commission*, 315 Il App (3d) 721 (2000) holds a claimant who

demonstrates a loss of earning capacity from a work-related injury should receive a wage differential award, and that there is no affirmative requirement that claimant conduct a job search to support an award.

As indicated above, the Arbitrator found Petitioner would have been earning $6,000/month, or $1,384.62/week, as a Correctional Officer as the date of trial. Petitioner testified that she was employed as a teacher's aide earning $13.20 an hour for 20 week. Per *Washington District 50 Schools v. Illinois Workers' Compensation Commission*, 394 Ill. App. 3d 1087, 917 N.E.2d 586 (2009), the Court calculated Petitioner's average weekly wage by dividing her salary by the number of weeks she actually worked. The Appellate court noted 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." Washington District 50 Schools*, 394 Ill. App. 3d at 1090.

As such, per Petitioner's testimony, the Arbitrator finds Petitioner to have a $264.00 average weekly wage. With unpaid scheduled time off for holidays and breaks, as she testified, she works 33 weeks a year. The Arbitrator finds the restrictions of Drs Martin and Cohen, including hours limited to 20 hours per week, and avoidance of any stressful competitive employment as they outlined, reasonable under the circumstances of this case.

Based on Petitioner's earning in August of 2022, Petitioner would have been earning $1,338.46, minus the sum of $264.00, leaving a difference of $1074.46. Two-thirds of the same leaves $716.31 per week which the Arbitrator awards from August 23, 2022 through May 10, 2023, i.e., 89 3/7 weeks. The Arbitrator notes that TPD benefits were awarded through this August 22, 2022 even though MMI was August 18, 2022 given the paycheck stubs were through this period.

The Arbitrator further finds that Petitioner's current average weekly wage of $1,384.62, minus the sum of $264.00, leaves a difference of 1,120.62 per week. Two-thirds of the same leaves $747.08 per week which the Arbitrator awards until claimant reaches the age of 67 commencing May 11, 2023.

Based upon the record as a whole, including the Petitioner's testimony, the medical evidence admitted and the vocational records admitted, the Arbitrator finds that Petitioner has established entitlement to permanent disability pursuant to Section 8(d)1 of the Act in the amount of $747.08 per week for the duration of her disability.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031948
Case Name	Ledora Johnson v. Chicago Transit Authority
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0199
Number of Pages of Decision	10
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Gary Friedman
Respondent Attorney	Andrew Zasuwa

DATE FILED: 5/1/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEDORA JOHNSON,
Petitioner,

vs. NO: 20 WC 031948

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 20, 2023 is hereby affirmed and adopted.

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

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

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

May 1, 2024
O: 04/25/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031948
Case Name	Ledora Johnson v. CTA
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Francis Brady, Arbitrator

Petitioner Attorney	Gary Friedman
Respondent Attorney	Andrew Zasuwa

DATE FILED: 9/20/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 19, 2023 5.30%

/s/Francis Brady, 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

LEDORA JOHNSON
Employee/Petitioner
v.

CTA
Employer/Respondent

Case #20 WC 031948

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 Francis Brady, in the city of **Chicago**, on July 6, 2023, and September 19, 2023. Two hearings were necessary because proofs had to be reopened so a record could be made on the issue of the admission of a substitute Respondent's Exhibit 1. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 21, 2020**,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $75,465.52; the average weekly wage was $1,451.26.

On the date of accident, Petitioner was **57** 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.

To date, Respondent has paid $ 0 in TTD and/or for maintenance benefits and is entitled to a credit for any and all amounts paid.

ORDER

Because Petitioner did not sustain an accident that arose out of and in the course of employment, benefits are denied. All other issues are moot.

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

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

SEPTEMBER 20, 2023

Signature of Arbitrator

STATEMENT OF FACTS

On December 21, 2020, shortly before 9 am, Petitioner, Ledora Johnson, "Johnson" a long-term employee of the Respondent, Chicago Transit Authority, "CTA", feeling "fine" emotionally, operated her train towards a stop at the Clinton/Lake station Tr. 14, 15. The train consisted of "5000 Series cars "which were about 40 feet in length. (Tr. 36, 37) and was equipped with cameras. (RX 1)

Arriving at Clinton Johnson was notified of a problem so, after contacting control center, she went out into the car to find a passenger, "offender" playing with a knife. (Tr. 15-17) Johnson saw only "flipping metal" (Tr 17). Offender, a female "threatened" Johnson who "immediately backed off, returning to her "motor cab . . . where she could secure herself" (Tr 17)

Offender "didn't seem right . . . in the head," to Johnson, "or maybe was . . . high." (Tr. 17). As Johnson waited for the police to arrive, she was nervous. (Tr 18). Offender continued to yell threats. (Tr 18)

When the police got to the train, they arrested the offender based on a complaint Johnson signed and took her into custody. (Tr 19).

Johnson operated the train back to its home terminal at Harlem and Lake, even though she felt "really wired up and upset. . . queasy. . . "with a headache. (Tr 19, 20)

From the home terminal Johnson went "straight" to Midwest Express, Express, in River Forest because it was close by (Tr 21, px 1., P 1) Charting there specifies Johnson had been "threatened to be stabbed" and currently complained of "chest tightness. Stomachache., Headache; Intensity: Severe" (PX 1., p 1, 4) While her "Exam" at Express revealed her to be in "no acute distress", (PX 1., p. 2) she later depicted herself as "very upset. pretty distraught . . ." at the time (Tr. 22, 23). "It felt like a full-blown panic attack . . . "(Tr 23) even though the records from Express document she was ". . . respond(ing) normally to environment." (PX 1. 2) . Though she remembered talking to Midwest personnel "extensively . . ." their records show her "Psych" status was "NORMAL; Mental Status appears to be Normal." (PX 1., p. 2). Express noted as well that Johnson "tensed up" when the offender threatened, and muscle spasms resulted. (PX 1., p 4). She was discharged by Express with a prescription and orders to return to her full-time job without restriction as of December 21, 2020 (PX 1., pps 4, 10).

Johnson returned to the CTA terminal at her supervisor's request the day after the incident and the "woman who threatened (her) was standing right outside. . ." giving her quite a fright (Tr. 29, 30)

Johnson was again in contact with Express on December 23, 2020, this time via "Telemedicine. (PX 1., p 7; Tr 21). She was "consulting for explanation of examination or test findings" and "results (were) given" (PX 1 p. 8) In the chart note for this telemedicine encounter, Johnson "Denies: Headache; Dizziness" (PX 1., p. 7)

Also on December 23, 2020, at the direction of CTA, Johnson presented to Concentra at 10137 West Grand, in Franklin Park, Concentra, where she reported "that on Monday she was pursued and threatened while trying to drive her train for CTA by a woman with a knife. She called the police and had the woman arrested. . . (but) . . . (s)he is convinced the woman. . . will return to hurt her while driving her train. . . She is having nightmares is anxious, cannot sleep, and feels that she may be a little depressed. She had some muscle cramping . . . She is tearful. . . ." She was referred to a psychiatrist CTA had on contract but instead made an appointment with Dr Daniel Kelley, Kelley, a psychologist with whom she had treated in 2012.Concentra discharged her with a

diagnosis of Post Traumatic Stress Disorder and ruled out driving company vehicles (Tr.23, 24; 25; PX 2, p 1, 4,)

Johnson presented to Kelley initially on December 24, 2020, detailing the episode on December 21, 2020 when "while working as a CTA train operator, a female passenger with a knife reportedly threatened to stab her (and) the Chicago Police arrested the female passenger." (Tr. 26) Kelley recorded Johnson's history of adjustment disorder in 2012 secondary to witnessing a death on the tracks. Johnson told Kelley since the incident where she was threatened by the passenger she was having trouble sleeping and experiencing other symptoms, including headaches fear and flashbacks (hearing the female passenger asking '"do you want me to stab you") (Tr., PX 3 p 5) Kelley preliminarily diagnosed Acute Stress Disorder secondary to the stressor event of the 12/21/20 work incident. (PX., p 6) He prescribed a course of cognitive behavioral therapy to address Johnson's symptomology and facilitate her coping skills and return to work. (Tr. 27, 28; PX 3 p 7) In the meantime, he continued her leave of absence from her job as a train operator stating her return would depend on whether her symptoms improved. (Tr. RX 3 p 7)

Johnson treated with Kelley frequently thereafter through March 22, 2021 (Tr. 26, 27 PX 3, pps. 9 – 47). Diagnosis remained "acute stress disorder "until January 21, 21 on which date it was "revised to "Adj Disorder, Mixed" (PX 3., p 18). There is no refence to improvement until the chart note of March 15, 2021, which. estimates a return-to-work date of March 22, 2021. (PX 3 p 40). On March 22, 2021, noting her "decrease. in depressive and anxiety symptoms . . . significant decrease in negative cognitive ruminations . . . and significant progress in her emotional/psychological functioning, Kelley discharged her from care and returned her to work, full duty (PX 3 p 47; Tr. 28). At this point, Johnson felt like Kelly's treatment had "helped a lot" and that she "got better" (Tr. 28)

Johnson has not been seen by a medical provider of any sort since her last visit to Kelley on March 22, 2021. (Tr 29). Even so she continues to experience flashbacks where she gets "scared all over again" when certain. things are happening at work . . . " (Tr.29). While Kelley's care was largely successful his bill for services rendered remains unpaid (Arb. Ex 1; Tr. 30, 65; PX 4)

The foregoing recites the proverbial "thousand words" depicting Johnson's confrontation. The "single picture" of allegorical fame is on full display in Respondent's Exhibit 1, RX 1. It portrays views from nine different. cameras, seven of them revealing the interior of the car where the alleged accident took, two the inside of Johnson's operating cab; and one the tracks ahead the car.

The video commences at 8:30 am showing a seated female passenger in a greenish coat and a stocking cap. It continues as passengers board, and some greet each other. At just about 8:32 the offender boards, and seats herself. No weapon is visible, but she does have a bottle in her hand from which she is drinking. At 8:34 a CTA employee boards momentarily. At 8:35 assailant arises from her seat and detrains but she returns abort 20 seconds later to the same seat without the bottle. There is still no weapon seen.

Johnson enters the train car at 8;36, followed by the CTA employee, and they walk past the assailant to the operating cab. At almost 8:38 Johnson puts the train in motion. At 8:51: 24, a male passenger boards and sits down directly opposite offender. At 8:52. 48 the woman in a black puffer coat enters and seats herself on the same side of the car as offender, 2 seats down. Offender leans a bit forward and reaches out at 8:57: 21 and she has something in her hand but the male passenger sitting directly across from her does not appear to take note. He is not alarmed.

At 9:00:23 the woman in the black puffer coat arises and walks deliberately past assailant in a calm manner about 10-12 feet to a call button where she's heard signaling Johnson that there is a passenger on the train with

a knife. At 9; 01:44 Johnson exits her cab and moves deliberately toward offender who remains always sitting. They remain about 6-8 feet apart and dialogue is had. Offender does not physically threaten Johnson in any fashion and the latter does not retreat or recoil as if she's in danger. No passengers are disturbed, and none exits the car even though it is stopped at a station with the doors open. The offender remains seated. At 9:02 Johnson turns and calmly returns to her cab talking on the radio as she goes. She is not fleeing nor are any other passengers. The woman in the puffer coat remains at the call button but stays in the car, even though offender is still in her seat. At 9:02:37 there appears to be a small blade in offender's hand, though it might be a key. At 9 02:51 one passenger, wearing a red stocking cap, does detrain but not in a panic and he leaves from a position that is nowhere close to offender. The woman in the puffer coat moves closer to offender at about 9;04 though she remains standing.

Offender exits into the next car at 9:04:15. There is no panic or flight among the other passengers as she transits down the aisle. At 9:04 Johnson, who is in her operating cab makes an announcement and at 9:04:30 she looks out the widow which she leaves open. She again looks out at 9:04:59 and at 9:05:22 is still leaning out the open window speaking with another CTA employee.

A CTA employee boards the car at 9:06:33 with Johnson still in her cab, window open, sometimes looking out. At 9:09: 01 she she's filling out paperwork in the cab. She leans out the open cab window again at 9:09:27, 9:10, and at 9;11;16 watching down the platform. At 9:12 :06 Johnson shuts the cab window, comes out of the cab, and exits the train car onto the platform followed by the other CTA employee

Offender comes back into the car at 9:13;01 and takes her same seat. The same male across from her has never moved and does not move now. The female in the puffer coat woman also remains where she had been standing. Offender utters no words nor makes any movements. At 9:13:33 Chicago Police officers appear near the door at which offender is seated. She arises without incident, holding out her hands which are empty, and exits the car voluntarily. There is no struggle.

Johnson reenters the car at 9:14:11 and goes to her cab. At 9:14 41 she re-opens the window and looks down platform. The video ends at 9:15.

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

The incident reviewed in depth above involved no physical contact or injury. Thus, Johnson has got to prove, by a preponderance of the evidence, that her condition (apparently resolved "Adj Disorder Mixed" with residual anxiety and fear) was caused or aggravated by a "sudden severe emotional shock" which would similarly impact "a person of normal sensibilities". Diaz v Ill. Workers Comp. Com;n, 989 N.E. 2nd 233, 370 Ill. Dec 845 (2nd Dist 2013)

Examining published decisions discloses the following circumstances fit the definition of "sudden severe emotional shocks" allowing recovery for mental distress without physical trauma in an Illinois Worker Compensation action: pulling the severed hand of a co-worker from a machine, Pathfinder Co. v Industrial Comm'n., 62 Ill. 2d 556, 343 N.E 2d. 913 (1976); sheltering from a suspect because he continues to advance and refuses an order to drop his orange tipped gun, Diaz supra; commanding a fire scene where one of your firefighters is killed, Moran v. Ill. Workers' Comp. Comm'n, 59 N.E. 3d 934, 406 Ill. Dec. 156 (1st Dist. 2016); exiting the bus you're operating to find a pedestrian lying in a fetal position at roadside and learning he later

died, Chicago Transit Authority v Ill. Workers Comp. Comm'n 989 N.E. 2d 608, 371 Ill. Dec. 18 (1st Dist, 2018)

Herein, Johnson from a physical distance of at least 6 feet exchanged words with a passenger who was flipping metal (which may have been a knife) but who never left her seat. The passenger never made any threatening gestures. Johnson never showed fear or upset. She always appeared calm and deliberate. After her brief exchange with offender, she went back in her cab but continued to lean out of her window which remained open thus exposing herself.

None of the other passengers were panicked. They remained seated. Several remained near the offender. They observed her at times but at others took no note. They never fled even though they had opportunities One did leave the train eventually, but it certainly didn't seem he was retreating out of fear, more like impatience due to the delay. (Cf. Dixon v. Chicago Transit Authority, 17 WC 022491, 19 IWCC 00566 where video displayed the alleged offender run onto a bus pushing past several passengers onto the front of the bus; the petitioner ducking down under her steering wheel; and passengers diving on the ground and moving hastily toward the back of the bus)

Johnson claims that events on her CTA train around 9 am on December 21, 2020, constitute a sudden severe emotional shock. Taking the time to closely watch 40 minutes of video, RX 1, conclusively demonstrates that they do not. The fundamental question of compensability comes down to the meaning of the words the Courts have chosen to define the standard a petitioner has to meet. Here Johnson has not

proved circumstances meeting them.

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

In light of the Decision on Issue A this issue is Moot.

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

In light of the Decision on Issue A this issue is Moot,

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

In light of the Decision on Issue A this issue is Moot,

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

In light of the Decision on Issue A this issue is Moot,

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC003685
Case Name	Twana Riley v. Crescent Care
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0200
Number of Pages of Decision	10
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Haris Huskic
Respondent Attorney	Thomas Flaherty

DATE FILED: 5/1/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TWANA RILEY,

Petitioner,

vs. NO: 23 WC 003685

CRESCENT CARE,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 7, 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 $27,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 1, 2024
O: 04/25/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	23WC003685
Case Name	Twana Riley v. Crescent Care
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision – 19b
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Haris Huskic
Respondent Attorney	Thomas Flaherty

DATE FILED: 11/7/2023

/s/ Gerald Granada, Arbitrator

Signature

INTEREST RATE WEEK OF NOVEMBER 7, 2023 5.26%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Twana Riley
Employee/Petitioner
v.
Crescent Care
Employer/Respondent

Case # **23** WC **003685**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **10/19/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/2/23**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**27,128.92**; the average weekly wage was $**521.71**.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $266.00 from AMCI, $164.44 from Greater Family Health, $2,675.00 from Suburban Orthopedics, $17,390.14 from North Lake Therapy and Rehab, and any related expenses from Advocate Sherman as provided in Sections 8(a) and 8.2 of the Act. Payment of said expenses shall be made directly to the Petitioner and her attorney.

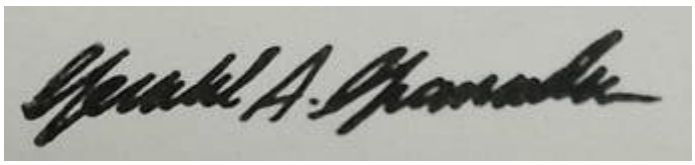
Respondent shall pay Petitioner temporary total disability benefits of $347.81 /week for 18-3/7 weeks, commencing 2/9/23 through 2/13/23, and from 6/13/23 through 10/19/23, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the prospective medical care as prescribed by Dr. Chhadia, including the right arm/shoulder surgery.

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

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

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



Signature of **Arbitrator Gerald Granada**

November 7, 2023

FINDINGS OF FACT

This case involves Petitioner Twana Riley, who alleges to have sustained injuries while working for Respondent Crescent Care on February 2, 2023. Respondent disputes Petitioner's claim, with the issues being: 1) accident; 2) causation; 3) medical expenses; 4) TTD; and 5) prospective medical care.

Petitioner's testimony

Petitioner has worked for Respondent as a dietary aide for three and a half years prior to February 2, 2023. On February 2, 2023, she was attempting to move a food cart off an elevator. After moving the cart off the elevator, she noticed that the cord from the cart was stuck between the elevator doors that had closed. She attempted to pull the cord out of the closed elevator doors as the elevator began to rise. As the elevator began going up, it pulled the food cart upward by the cord and the cart began to fall to its side. Petitioner attempted to prevent the cart from falling by holding onto it, but the cart eventually fell over. Petitioner testified that felt pain in her right shoulder later that day.

Video evidence

Respondent played a video of the incident that was viewed during the arbitration hearing. In the video, the Petitioner is seen standing behind a large metal food cart that appeared taller than the Petitioner. The cart fell as Petitioner described. Petitioner is positioned behind the cart as it falls and cannot be seen until the cart begins to tilt to the side as it falls. As the cart is seen falling to its side, Petitioner's right arm is not visible. Petitioner testified that she was holding the cart with her right hand and tried to hold up the cart to keep it from falling. As the cart tipped over, Petitioner let it fall and she backed away as it fell. Petitioner testified that she injured her right arm while the cart was falling and she was holding on to the cart.

Medical treatment

On February 5, 2023, Petitioner presented to Advocate Sherman Hospital complaining of right shoulder pain. (PX1, p. 387) Petitioner gave a history of injuring her right shoulder at work on February 2, 2023 while pushing and eventually holding a cart with a cord attached to it, the cord got trapped in the elevator door and as the elevator door was rising, it caused the cord to snap and in the process it yanked her right upper extremity at the shoulder joint and she felt a pop in the right shoulder immediately. *(Id*, p. 387-388). Petitioner reported having no prior issues or injuries to the right shoulder. Following a physical examination and an x-ray of the right shoulder, Dr. Zahid Shuttari diagnosed Petitioner with acute pain of the right shoulder. *(Id*, p. 380). Due to the diagnosis, Dr. Shuttari ordered an MRI of the right shoulder, provided Petitioner with a sling to use for the right shoulder, prescribed Anaprox DS for pain relief, and released Petitioner back to work with restrictions of no lifting with right upper extremity; no use of the right hand; and no elevation of the right upper extremity above the right shoulder height. *(Id*, p. 389).

On February 8, 2023, Petitioner was seen at Greater Family Health for hypokalemia and right shoulder pain. (PX2, p. 401). Following a physical examination, Dr. Mark Thompson diagnosed Petitioner with impingement syndrome of the right shoulder and instructed Petitioner to follow up with an orthopedic specialist. *(Id*, p. 408).

On February 9, 2023, Petitioner had a telemedicine visit with Dr. Jesse Day out of AMCI with complaints of right shoulder pain following her February 2, 2023 work accident. (PX3, p. 421). Again, Petitioner gave a history of working as a dietary aide and a cart full of trays was about to fall due to the cord being in the elevator door and she tried prevent the cart from falling but ended up injuring her right shoulder. Petitioner informed Dr. Day that she felt immediate pain after the accident and reported it right away to her supervisor. *Id.* However, she continued to work the next few days but was eventually seen by a physician on February 5, 2023 due to severe pain in the right shoulder. Petitioner informed Dr. Day that her pain level during the phone visit was a 9 out of 10 on a 10 point pain scale with increased pain when raising her arm above the level of the head, pulling and lifting. Petitioner localized the pain primarily superiorly, described it as throbbing pain, and reported weakness in the shoulder with restriction in active range of motion. Due to the ongoing pain, Petitioner reported taking Naproxen and Tramadol with minimum relief and having difficulty with sleeping. Dr. Day ordered Petitioner to remain off work until she was examined by an orthopedic specialist, prescribed pain medications, and ordered a course of physical therapy. (*Id,* p. 415).

On February 13, 2023, Petitioner started physical therapy as prescribed by Dr. Day at North Lake Therapy & Rehab with Dr. Saoud Dabbah. (PX5). At the hearing, Petitioner testified that she still does therapy with Dr. Dabbah.

On February 14, 2023, Petitioner was seen by Dr. Ankur Chhadia out of Suburban Orthopedics for an evaluation of her right shoulder. (PX4, p. 441). Petitioner once again gave the same history of her February 2, 2023 work accident as the one she gave at the hearing, at Advocate Hospital, and to Dr. Day- while working as a dietary aid, she was pushing a cart full of trays and while trying to prevent the cart from falling, she injured her right shoulder while trying to catch the cart with her arm outstretched, she ended up hearing a pop in her right shoulder. *Id*. Petitioner noted that the cart weighed about 100 pounds as it was fully loaded. Petitioner informed Dr. Chhadia that she attempted to work for a few days thereafter, however when the pain became too unbearable, she ended up going to Advocate Hospital. Petitioner reported to Dr. Chhadia that she had no prior injuries, accidents, or pain with regards to the right shoulder (prior to the accident). Petitioner noted increased pain in the right shoulder when raising her arm above the level of her head and with any pulling/lifting activity. At that visit, Petitioner's pain level was a 10 out of 10 and that she was taking Tramadol that provided minimum relief. Dr. Chhadia had Petitioner undergo an x-ray of the right shoulder. Following a review of the x-ray results coupled with a physical examination, Dr. Chhadia diagnosed Petitioner with a right shoulder rotator cuff tear and bicipital tenosynovitis. (*Id,* p. 443). In response to the diagnoses, Dr. Chhadia placed an order for an MRI of the right shoulder, prescribed pain medications, ordered another course of physical therapy and instructed Petitioner to remain off work. *(Id,* p.443-445).

On March 1, 2023, Petitioner underwent an MRI of the right shoulder at Advocate Sherman Hospital. The MRI revealed the following: Supraspinatus tendinopathy without full-thickness tear and suspected type II SLAP tear of the anterior superior glenoid labrum extended into the biceps anchor. (PX1, p. 306-307).

On March 10, 2023, Petitioner returned to see Dr. Chhadia. (PX4, p. 436). Petitioner informed Dr. Chhadia that the pain in the right shoulder was still present and that it was radiating into her cervical spine. Petitioner noted there to be throbbing pain, weakness, numbness and tingling in her right shoulder. *(Id*, p. 436). At that visit, Petitioner's pain level was an 8 out of 10. At that visit, Dr. Chhadia reviewed the March 1st MRI of the right shoulder. Following a review of the MRI along with conducting a physical examination, Dr. Chhadia diagnosed Petitioner with a right rotator cuff strain, bursitis/tenonitis, and bicipital tenosynovitis. (*Id*, p. 439). Dr. Chhadia informed Petitioner the treatment options she could elect to undergo in order to treat her right shoulder condition, which included injections and surgical intervention. Dr. Chhadia also ordered another course of physical therapy for 4-6 weeks and for Petitioner to remain off work for 4 weeks. *(Id*, p.448;440).

On April 7, 2023, Petitioner followed up with Dr. Chhadia still complaining of right shoulder pain. Petitioner rated the pain as a 7 out of 10 and having to take Tramadol for any relief. (PX4, p. 431). Due to the ongoing pain coupled with the MRI findings, Dr. Chhadia ordered and administered a Triamcinolone injection into the right shoulder subacromial space. (*Id,* p. 434) Following the injection, Dr. Chhadia prescribed another course of therapy for 4-6 weeks and ordered Petitioner to remain off work (*Id*, p. 447;434).

On May 5, 2023, Petitioner returned to Dr. Chhadia and reported some improvement following the cortisone injection, however the injection was wearing off and the pain returned in the right shoulder, which was radiating into the cervical spine. (PX4, p. 428). Petitioner also noted numbness and tingling going down the right arm and into the right hand. Petitioner communicated to Dr. Chhadia that she had been attending therapy 3 times a week and feeling sore following the sessions. Petitioner detailed hearing occasional cracking in her right shoulder. At that visit, Petitioner's pain level was a 6 out of 10. Due to the ongoing pain and diagnosis, Dr. Chhadia administered another Triamcinolone injection into the right shoulder subacromial space. (*Id,* p. 430). Following the injection, Dr. Chhadia instructed Petitioner to continue with therapy and ordered her to remain off work for another 4 weeks. (*Id,* p. 426).

On June 2, 2023, Petitioner followed up with Dr. Chhadia and reported ongoing and persistent pain for the prior 4 months in the right shoulder that was radiating into the cervical spine. (PX4, p. 451) At that visit, Petitioner described her pain level as a 7 out of 10. Following an examination, Dr. Chhadia diagnosed Petitioner with a complete rotator cuff tear or rupture of the right shoulder, biceps tendinitis and bursitis. *(Id*, p. 451). Due to the ongoing pain and the fact that Petitioner failed 4 months of conservative treatment, which included physical therapy, activity modifications, pain medications, and injections, Dr. Chhadia ordered surgery in the form of a right shoulder arthroscopic rotator cuff repair versus debridement subacromial decompression and extensive debridement. (*Id*, p. 452). Dr. Chhadia also prescribed another 4-6 weeks of physical therapy and pain medications. (*Id*, p. 453). Petitioner was again ordered to remain off work for another 4 weeks. (*Id*, p. 452).

On June 7, 2023, Petitioner underwent an Independent Medical Evaluation with Respondent's Section-12 examiner, Dr. Michael Birman. Dr. Birman diagnosed Petitioner with right shoulder rotator cuff tendinitis and right shoulder SLAP tear. Dr. Birman also reviewed the 40-second video of the accident and opined that the accident seen in the video was not the cause of Petitioner's right shoulder condition. Dr. Birman explained that the mechanism of injury that Petitioner describes was plausible for causing or aggravating a right shoulder rotator cuff tendonitis and SLAP tear, the video does not support that a

right shoulder injury occurred in a way that the Petitioner described. He noted that Petitioner described that she tried to stop the cart from falling by holding her right arm forcefully overhead – which Dr. Birman did not see in the video. Dr. Birman could not reconcile the Petitioner's history of injury with the video of the incident.

On June 30, 2023, Petitioner returned to see Dr. Chhadia and rated her right shoulder pain as a 7 out of 10. (PX4, p. 449). Following an examination, Dr. Chhadia placed another order for right shoulder surgery, prescribed an additional 4-6 weeks of physical therapy and ordered Petitioner to remain off work. (*Id*, p. 450).

On July 6, 2023, Dr. Chhadia authored a response to Dr. Birman's IME report. (PX7). Dr. Chhadia opined that Petitioner's initial physical examination with him revealed tenderness to palpation, limited range of motion and weakness, and that the diagnostic imaging studies were consistent with rotator cuff tendinopathy subacromial impingement and a type II SLAP tear. Dr. Chhadia also opined that Petitioner's diagnoses were that of a rotator cuff strain, bursitis tendinitis, biceps tenosynovitis, and type II SLAP tear of the right shoulder. However, despite activity modifications, physical therapy and an injection, Petitioner received transient relief from the treatments and still had persistent symptoms and dysfunction.

On July 28, 2023, Petitioner followed up with Dr. Chhadia still complaining of right shoulder pain. (PX8, p.561). Petitioner reported that the pain was radiating up to her cervical spine and rated the pain as a 7 out of 10. Again, Dr. Chhadia placed an order for right shoulder surgery and prescribed an additional 4-6 weeks of physical therapy. Dr. Chhadia opined that the diagnosed condition for which Petitioner was treating for is more likely causally connected to the accident that the Petitioner described. (*Id,* p. 562). Petitioner was ordered to remain off work following the examination.

On August 25, 2023, Petitioner returned to see Dr. Chhadia and rated the pain in her right shoulder as a 7 out of 10. (PX8, p. 563) Following an examination, Dr. Chhadia once again placed an order for right shoulder surgery, prescribed another 6 weeks of physical therapy and ordered Petitioner to remain off work. *(Id,* p. 564).

Petitioner testified that she currently has complaints of pain in her right shoulder that has affected her sleep. She favors her left arm in her daily activities and wants to undergo the surgery recommended by Dr. Chhadia.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof. In support of that finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the evidence presented at the hearing. The Arbitrator notes that the question of accident is the primary issue underlying the disputes in this case. Petitioner's testimony that she injured her right shoulder while trying to prevent a 100-pound heating cart from falling was corroborated by the preponderance of the medical evidence that show a consistent history of injury. Respondent relies on the video showing the actual incident in which the Petitioner's right hand is not seen holding onto the cart as it falls. However, in reviewing the video at trial, the view of Petitioner's right arm is obscured by the tall, metal cart prior to that cart tipping over. While viewing this video during the hearing, Petitioner credibly explained that she was standing behind the cart, her right arm was on the cart and her left hand (which can be seen on the video) was on the top of the cart as it began to topple over. Petitioner testified that she injured her shoulder as the elevator was moving up and pulling the cord attached to the cart, and the cart was falling. There was no evidence offered to rebut Petitioner's account of her accident and her explanation of what was seen on the video evidence. Based on these facts, the Arbitrator finds that the Petitioner sustained an accident while working for Respondent on February 2, 2023.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence – all of which show that Petitioner sustained an injury to her right arm/shoulder resulting in supraspinatus tendinopathy without full-thickness tear and suspected type II SLAP tear of the anterior superior glenoid labrum extended into the biceps anchor. Respondent disputes this case based on the opinions of their IME, Dr. Birman, whose diagnosis was similar to those of the treating physicians, but who found no causation based on his review of the video depicting the incident in question. However, as indicated above, the Arbitrator finds the video does not negate Petitioner's accident claim, and therefore places more weight on the opinions of the treating physicians regarding the question of causation. Furthermore, there is no evidence of any other trauma to Petitioner's right shoulder after the work accident nor has there been any superseding, intervening accidents to break the chain of causation. Therefore, the Arbitrator concludes that the Petitioner's current condition of ill-being in her right arm/shoulder is causally connected to her February 2, 2023 work accident.

3. Regarding the issue of medical expenses and consistent with the findings above, the Arbitrator further finds that the Petitioner's medical treatment related to her right arm/shoulder following her February 2, 2023 work accident has been reasonable and necessary in addressing her work-related conditions. As such, Respondent shall pay for the following expenses subject to the Fee schedule and in accordance with Sections 8(a) and 8.2 of the Act: Greater Family Health: $164.14; AMCI: $266.00; Suburban Orthopedics: $2,675.00; and North Lake Therapy and Rehab: $16,960.00. Furthermore, Respondent shall pay for any related medical expenses from Advocate Sherman Hospital. Said expenses shall be paid directly to the Petitioner and her attorney.

4. Regarding the issue of TTD and consistent with the findings above, the Arbitrator further finds that the Petitioner has been temporarily totally disabled from February 9, 2023 through February 13, 2023, and from June 16, 2023 through October 19, 2023. This is supported by the Petitioner's unrebutted testimony and the medical evidence showing Petitioner was medically restricted from returning to work for these time periods and Respondent either did not or could not accommodate Petitioner's restrictions at the time.

5. Regarding the issue of prospective medical care and consistent with the findings above, the Arbitrator further finds the that the Petitioner's request for prospective medical treatment is both reasonable and necessary in addressing her work-related arm/shoulder condition stemming from her February 2, 2023 work accident. The need for surgery was not disputed by Respondent's IME. Accordingly, Respondent shall authorize and pay for the surgery and any related treatment, as recommended by Petitioner's treating physicians, subject to the Fee Schedule and in accordance with the provisions of Section 8 and 8.2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031393
Case Name	Donald Reed v. MV Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0201
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Brian Thomas
Respondent Attorney	Rich Lenkov

DATE FILED: 5/1/2024

/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

DONALD REED,

Petitioner,

vs. NO: 21 WC 31393

MV TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 6, 2023 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall receive a 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 $4,100.00. 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 the Circuit Court.

May 1, 2024

CAH/pm
d: 4/25/24
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	21WC031393
Case Name	Donald Reed v. MV Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Brian Thomas
Respondent Attorney	Rich Lenkov

DATE FILED: 11/6/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 31, 2023 5.32%

/s/ Joseph Amarilio, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Donald Reed
Employee/Petitioner

v.

MV Transportation
Employer/Respondent

Case # **21** WC **031393**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **August 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

FINDINGS

On **September 13, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

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

On the date of accident, Petitioner was **59** years of age, ***unmarried*** with **2** dependent children.

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

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

Respondent shall not be given a credit for $**752.37** maintenance for a TTD overpayment per the stipulation of the parties

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $480.00 per 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.

Respondent shall pay Petitioner permanent partial disability benefits of $0 per week for 0 weeks, because the injuries sustained caused the 0% loss of the leg, as provided in Section 8(e) of the Act.

As a result of the September 13, 2021 accident Petitioner sustained a concussion, forehead contusion, neck strain, right shoulder strain, and a right knee contusion all of which are causally related to the accident.

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

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

/S/ *Joseph D. Amarilio* **NOVEMBER 6, 2023**

Signature of Arbitrator JOSEPH D. AMARILIO

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

AMENDED ATTACHMENT TO ARBITRAITON DECISION

DONALD REED,	)	
	)	
Petitioner,	)	
	)	Number: 21 WC 031393
vs.	)	
	)	
MV TRANSPORTATION,	)	
	)	
Respondent.	)	

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

Mr. Donald Reed (Petitioner) caused to be filed an Application for Adjustment of Claim for benefits under the Illinois Worker's Compensation Act. Petitioner alleged that he sustained an injury while working in his capacity at MV Transportation (Respondent) on September 13, 2021. This claim proceeded to hearing on August 25 2023, before the Arbitrator in the City of Chicago, County of Cook. Petitioner testified in support of his claim.

At trial the parties stipulated to a $752.37 credit for a TTD overpayment. (Arb. X 1) The submitted exhibits and the trial transcript of the hearing were examined by the Arbitrator. The parties mutually requested a written decision, including findings of fact and conclusions of law pursuant to the Act. (Arb. X 1)

II. FINDINGS OF FACT

Petitioner is an employee of MV Transportation. He was a 59 year old father of two dependent children (Pet. Exhibit 1). Mr. Reed had been working for MV Transportation in Rosemont where his job consisted of driving a passenger bus. (Transcript page 8). As of September 13, 2021, Mr. Reed had worked at the facility for four years (Transcript page 7). Mr. Reed worked between ten to twelve hours on a given day. (Transcript page 10). The parties stipulated that his average weekly wage was $800.00 during the year proceeding the accident of September 13, 2021.

Accident is not in dispute. On September 13, 2021, the Petitioner was performing his regular work duties, as he reviewed his paperwork, preparing to enter his bus, near the Rosemont Blue Line station when he lost his balance and tripped (Transcript page 12). Upon losing his balance, Mr. Reed's right knee, right arm, and neck went into the curb, and his head bounced off

the cement (Transcript page 12). After the fall, the first thing Mr. Reed remembers was his two co-workers yelling "Don, Don, wake up, wake up." (Transcript page 16). Upon waking up, his co-worker told Mr. Reed that he was out for 30 - 45 seconds (Transcript page 16). Mr. Reed described the feeling as "kind of like in a dream." (Transcript page 16). Upon regaining consciousness, Mr. Reed felt pain in his right knee, right shoulder, and head." (Transcript page 17). Mr. Reed recalled that he was also bleeding from his forehead (Transcript page 18). In the moments following the fall, Mr. Reed was advised to stay on the ground until the ambulance arrived, which he did (Transcript page 18). When the paramedics arrived on scene, Mr. Reed attempted to explain what happened but was having difficulties due to feeling drowsy after the fall (Transcript page 19). Mr. Reed was then placed in a cervical collar and put into an ambulance (Transcript page 18-19). Mr. Reed was subsequently transported to the emergency room at Resurrection Medical Center (Transcript page 20).

The Ambulance report recorded that the paramedics found Petitioner sitting on the steps of his CTA bus. Petitioner fell face down onto the ground due to a mechanic fall with no loss of consciousness as reported by an unnamed bystander. The paramedics recorded that Petitioner had a small one-inch abrasion on his forehead with no bleeding. Petitioner also reported right shoulder pain and neck stiffness. He was placed in a neck brace and taken to the emergency room. (PX 2, p. 4)

Upon arrival at the emergency room of Resurrection Medical Center, Mr. Reed reported that he tripped and briefly lost consciousness (Pet. Exhibit 3). He complained of dizziness, headaches, neck pain, and right shoulder pain (Pet. Exhibit 3). Mr. Reed's principal diagnosis was a concussion (Pet. Exhibit 3). He was also diagnosed with a cervical sprain, right shoulder pain, and an abrasion to his head. (Pet. Exhibit 3). He underwent a CT scan of the cervical spine and head (Pet. Exhibit 3). He also underwent an X-ray of his right shoulder (Pet. Exhibit 3). Upon discharge, he was provided with pain medication, and advised to follow up in two days for clearance to work if he is feeling better (Pet. Exhibit 3).

The next day he presented to Concentra Morton Grove at Respondent's request. Pet. Exhibit 4). Mr. Reed reported to the providers at Concentra that he had tripped while switching buses and while falling his head bounced off the cement (Pet. Exhibit 4). Mr. Reed reported that he continued to have a headache and mild dizziness (Pet. Exhibit 4). The providers at Concentra diagnosed Mr. Reed with a forehead contusion, acute neck strain, and a right shoulder strain (Pet. Exhibit 4). At the end of this visit, the providers at Concentra cleared Mr. Reed to return to work (Pet. Exhibit 4). Mr. Reed testified that he was cleared to work despite never being evaluated at Concentra (Transcript page 24).

As Petitioner did not feel right, the next day he reported to his primary care facility, Healing Hands (Transcript page 25). His pain complaints and diagnoses were unchanged. (Pet. Exhibit 5). Mr. Reed reported that he still felt lightheaded and dizzy (Pet. Exhibit 5). Mr. Reed told the physician that "it just feels like when people are talking, they are in another world." (Pet. Exhibit 5). Following his evaluation, the providers at Healings Hands diagnosed Mr. Reed with a concussion and instructed him to rest and not to drive (Pet. Exhibit 5). Mr. Reed was also provided with pain medication for his right shoulder (Pet. Exhibit 5).

Years prior to the September 13, 2021, fall, Petitioner had a knee replacement. (Transcript page 34). However, it was not until this fall that Mr. Reed's knee pain returned (Transcript page 35). Mr. Reed stated, "I thought because I had a knee replacement. I thought that—it was going through my leg it hurt that bad" (Transcript page 21). As Petitioner's right knee pain persisted, on September 27, 2021, he presented to Dr. Regan at Illinois Bone & Joint for evaluation (Pet. Exhibit 6). Petitioner preferred treatment at Illinois Bone & Joint for his right knee because he wanted to be seen by his bone doctor (Transcript page 42). He attempted to enter treatment with Illinois Bone & Joint earlier but was not able to get an appointment until that date (Transcript page 44). He provided a history to Dr. Regan stating that he had landed on his knee and since then he's had a slight numbness sensation in his right knee (PX 6). He also reported that he continued to have concussion symptoms (PX 6). Petitioner said that he could not work because of his right knee pain (PX 6). He also reported that he had not had any pain in his knee before the fall (PX 6). After an evaluation and reviewing Xray's, Dr. Regan diagnosed Petitioner with a right knee contusion (PX 6). Dr. Reagan also continued to keep him off work (PX 6). Petitioner was provided with pain medication and told to follow up in two weeks (Pet. Exhibit 6).

On October 7, 2021, Mr. Reed returned to his primary care facility to report that he no longer was having headaches and was feeling "90%-100% better" (PX5). Mr. Reed reported that he wanted to return to work and was given a note to be released for work on October 11, 2021 (PX 5).

On October 8, 2021, Mr. Reed returned to see Dr. Regan with Illinois Bone & Joint (PX 6). At that visit, Mr. Reed noted that he felt he had recovered enough to return to his regular duties (PX6). Subsequently, Dr. Regan provided Mr. Reed with a note stating that he could return to work on October 11, 2023, at full duty (PX6). Mr. Reed also had a follow up with at Concentra on October 11, 2023, to confirm that he was ready to return to work (PX 4).

Mr. Reed followed up with Dr. Regan one final time on November 5, 2021 (Pet. Exhibit 6). On that date, Mr. Reed noted his knee pain was no longer significant, and that he was tolerating his job without issue. (PX 6).

Petitioner testified that he was in significant pain after the fall, reporting his pain to be a 10/10 at the emergency room (Transcript page 23). In the days after the fall, the pain had not improved and he continued to feel sore, drowsy, and dizzy (Transcript page 25). During his time in treatment, he was not able to do the things he liked to and instead just rested and sat around (Transcript page 28). It took a couple weeks for Petitioner's dizziness to subside (Transcript page 32). With treatment and time, the pain throughout his body eventually dissipated and he was able to return to work. Prior to September 13, 2021, Mr. Reed never had any chronic headaches or dizziness (Transcript page 35). Mr. Reed also never had any prior pain or medical treatment for his neck (Transcript page 35). A long time prior to September 13, 2021, Mr. Reed had a right knee replacement (Transcript page 34). However, Mr. Reed was pain free in the knee immediately prior to September 13, 2021 (Transcript Page 35).

Other than the testimony of the witnesses, Donald Reed, the Petitioner submitted his Exhibits 1-7 into evidence and Respondent did not submitted any Exhibits into evidence.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. The Act provides that, in order to obtain compensation under the Act, the employee bears the burden of proving, by a preponderance of the evidence, all of the elements of the claim. *820 ILCS 305/1(d)*. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980) It is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954).

Credibility: 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. The Arbitrator finds that Petitioner's testimony at arbitration was credible. Petitioner answered all questions posed to him by both attorneys and was not evasive nor defensive. The Arbitrator notes that Petitioner is not a sophisticated individual and that any inconsistencies in his testimony was not material and not intended to mislead the Arbitrator.

F. IS MR. REED's CONDITION OF ILL-BEING CAUSALLY RELATED TO THE WORKPLACE INCIDENT OF SEPTEMBER 13, 2021.

The Arbitrator finds that the Petitioner's condition of ill-being is related to the workplace incident of September 13, 2021 based on the chain of events. As a result of the accident Petitioner sustained a concussion, forehead contusion, neck strain, right shoulder strain, and a right knee contusion. In so finding, the Arbitrator relies on the credible testimony of the Petitioner, taken together with the medical records of his treating medical physicians.

Petitioner was seen at the emergency room immediately after the fall. Petitioner reported that he believed that he briefly lost consciousness and that he felt very dizzy. He also reported that he had significant pain in his right shoulder and cervical spine. Upon undergoing a physical examination and imaging, the attending physician at the emergency room diagnosed Petitioner with a concussion, sprain of the cervical spine, right shoulder pain, and an abrasion to the head. Despite not fully evaluating Petitioner, parts of the diagnoses were echoed by the physician at Concentra, the facility his employer sent him to. At Concentra, Mr. Reed was diagnosed with a forehead contusion, neck strain, and shoulder strain. When Petitioner presented to his primary care facility two days after the fall, he reported he still was feeling lightheaded and dizzy. He also reported having the same pain as he had at the emergency room. Petitioner was again given a primary diagnosis of a concussion without loss of consciousness.

Petitioner was also seen at Illinois Bone & Joint on September 27, 2021, as it took some time for him to be seen by an orthopedic surgeon. Mr. Reed reported that he still had concussion

symptoms and that he continued to have pain in his right knee. Upon evaluation and imaging, Dr. Regan diagnosed Mr. Reed with a right knee contusion.

Petitioner was 59-year-old on the date of his injury. He testified that he never had any pain or medical treatment to his neck prior to this fall. Petitioner also never had any chronic headaches or medical treatment for his head prior to this fall. There is also nothing to suggest that Petitioner had any right shoulder pain prior to this fall. The only prior surgical history listed in the records is a right knee replacement that Petitioner testified to occurring "a long time ago." Petitioner testified that immediately prior to this fall, he had no issues with his right knee. Mr. Reed was able to perform his work duties without issue and it was not until this injury to his right knee that he had to be taken off work. There is absolutely no indication in the record that he ever made complaints of any pain in his head, right knee, right shoulder, or neck leading up to the workplace incident. There are no medical records that pre-date the September 13, 2021, fall that show Petitioner had pain prior to September 13, 2021.

The petitioner carries the burden of providing his case by a preponderance of the evidence. In the present case, the preponderance of the evidence provides that Petitioner's condition of ill-being is related to the September 13, 2021, work incident. The Arbitrator finds the Petitioner's testimony credible; further that testimony is corroborated by the medical records. There is no evidence Petitioner had any head, right shoulder, or neck pain at any time prior to the September 13, 2021, incident. There is also no evidence Petitioner has had any pain or issues with his right knee since the time that he had his knee replacement. No evidence was introduced that Petitioner missed time off work or requested time off work due to issues with his shoulder, neck or knee. No evidence was introduced that Petitioner was unable to perform his dues as a bus driver due any preexisting symptomatic condition of illbeing.

Taken all of the evidence together, the arbitrator concludes that Petitioner has proven, by a preponderance of the evidence, that his claimed head, right knee, right shoulder, and neck condition is related to the September 13, 2021, work incident.

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

Petitioner suffered soft tissue injuries to his head, right knee, right shoulder, and neck. The medical evidence establishes that Petitioner sustained a right knee contusion, right shoulder strain and neck strain. The evidence also reveals that Petitioner also suffered a concussion. Whether he lost consciousness or not is not determinative in rending a decision on the nature and extent of his injury. Petitioner testified to being dizzy, nauseous, and confused following the incident. He reported feeling concussed as far out as September 27, 2021, two weeks after the fall had occurred. It was not until October 7, 2021, that he reported that his headaches had gone away and felt 90%-100% better. Petitioner was diagnosed with a concussion both by the emergency room as well as his primary care facility. There has also been nothing in the record to dispute Mr. Reed's soft tissue injuries to his right knee, right shoulder, and neck. These injuries were treated with pain medication, office visits, and rest. As soon as Mr. Reed returned to maximum medical improvement, he

returned to work at full duty. Petitioner did not overtreat for his injuries. He sought the minimal medical care to cure and relieve him of his injureis.

The Arbitrator addresses Petitioner's claim for permanent partial disability (PPD) benefits. The Arbitrator bases his determination of the level of PPD benefits upon factors set forth in the Act, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." Id. § 305/8.1b(b)(v).

In this case, the Arbitrator gives no weight to factor (i), as no impairment report was submitted. The Arbitrator gives some weight to factor. (ii), As Petitioner's occupation as bus driver with long workdays dealing with the daily joys and aggravations of the public. The Arbitrator gives some but not great weight to factor (iii), as Petitioner was 59 years old at the time of his injury and may now have just 8 or more years of work remaining before retirement but tempered with the understanding the body is less resilient with age. The Arbitrator gives no weight to factor (iv), as Petitioner remains employed by Respondent in the same position with no evidence of decreased wages. Petitioner also did not submit additional evidence regarding future earnings. The Arbitrator places some weight on factor (v), as Petitioner's current complaints of head, neck and shoulder pain find support in the treatment records. The Arbitrator finds that it was reasonable for Petitioner to see his orthopedic surgeon on two occasions for his knee pain in light or his prior unrelated knee replacement too remain off work for three weeks an let his body heal However, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained a permanent partial disability to his right knee contusion.

Ultimately, Petitioner sustained a brain concussion, neck strain, and a right shoulder strain for which he has received conservative treatment. Petitioner did not testify to significant disability regarding the activities of daily life. Accordingly, Arbitrator awards PPD benefits to the extent of 2% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act and no PPD benefits for the right knee contusion.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC035139
Case Name	Alejandra Tepale v. McDonald's
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0202
Number of Pages of Decision	10
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Carol Cesaretti

DATE FILED: 5/1/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEJANDRA TEPALE,

Petitioner,

vs. NO: 21 WC 35139

McDONALD'S,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, the reasonableness and necessity of the medical treatment and charges, temporary total disability, prospective medical treatment, and evidentiary 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. 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 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 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.

May 1, 2024
O: 4-25-24
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	21WC035139
Case Name	Alejandra Tepale v. McDonald's
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	James McHargue
Respondent Attorney	Carol Cesaretti

DATE FILED: 6/26/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 21, 2023 5.17%

/s/Gerald Granada, Arbitrator

Signature

21STATE OF ILLINOIS)
)SS.
COUNTY OF **DuPAGE**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alejandra Tepale
Employee/Petitioner

v.

McDonald's
Employer/Respondent

Case # **21WC035139**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **05/09/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/12/2021**, 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.

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

In the year preceding the injury, Petitioner earned **$21,118.54**; the average weekly wage was **$406.13**.

On the date of accident, Petitioner was **45** 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 **$8,433.25** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**17,615.32** for other benefits, for a total credit of $**26,048.57**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $337.33 for 82 and 6/7 weeks, commencing October 6, 2021 through May 9, 2023, as provided in Section 8(b) of the Act; Respondent shall receive a credit for any TTD it has already paid.

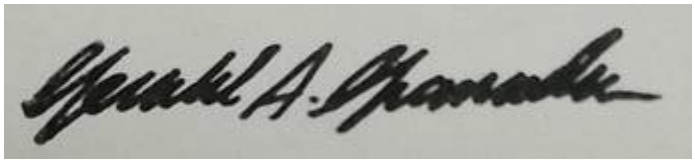
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of Midwest Specialty Pharmacy, $13,323.19; Illinois Orthopedic Network, $39,206.79; Parkview Orthopaedic Group SC, $421.00; Chicago Medical Imaging, $1,500.00; ATI Physical Therapy, $18,464.33; Metro Anesthesia Consultants, $7,322.11, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize the prospective medical care as prescribed by Dr. Mekhail, including the proposed lumbar surgery.

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

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

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



Signature of Arbitrator Gerald Granada

JUNE 26, 2023

FINDINGS OF FACT

This case involves Petitioner Alejandra Tepale, who is also known as Alejandra Tepale Tomay. Petitioner alleges she sustained injuries while working for the Respondent McDonald's on August 12, 2021. Respondent disputes Petitioner's claim, with the issues being: 1) causation; 2) medical expenses; 3) prospective medical care; and 4) TTD. Petitioner testified via a Spanish interpreter.

Petitioner works for Respondent as a kitchen manager. She has worked over 20 years for Respondent. Her job duties include preparing the kitchen, stocking the refrigerators, and stacking boxes of items that were to be used in the kitchen. On August 12, 2021, she was lifting boxes off a cart into the kitchen when she felt pain in her back. She then pushed the cart and felt a "crack" in her back and pain down her left leg. She notified her manager and eventually sought treatment on her own.

On August 16, 201, Petitioner went to Edward Hospital where they noted her complaints of low back pain, radiating pain down the left posterior lateral aspect of the leg. (PX 2) After finding tenderness and positive straight leg on the left, Petitioner was eventually prescribed physical therapy, which she underwent at Edward from September 2, 2021 through September 21, 2021.

On September 16, 2021, Petitioner underwent a lumbar MRI that revealed: (1) L4-L5 broad based left foraminal/extraforaminal left foraminal encroachment and associated left annular fissure; (2) L5-S1 bilateral disc protrusion resultant effacement of the bilateral descending S1 and bilateral exiting L5 nerves contributing to mild bilateral lateral recess/foraminal encroachment; and (3) L3-L5 bilateral extraforaminal disc protrusions with hypertrophy that creates bilateral foraminal encroachment.

On October 6, 2021, Petitioner saw Dr. Frank Lawrence at Elmhurst Hospital for a neurological consultation. (Px3) At the initial visit, Petitioner complained of low back pain and pain radiating to the left lower extremity and a history consistent with the trial testimony. On physical examination, Dr. Lawrence noted reduced range of motion and positive Waddell's signs. Dr. Lawrence reviewed the MRI and agreed that there was a left L4-L5 foraminal annular tear but did not note nerve root impingement. Dr. Lawrence on his review of the MRI report noted, "I had the report sent here and indeed the wording does indicate disc problems but I disagree." Dr. Lawrence placed Petitioner off work and recommended Petitioner undergo physical therapy. Petitioner followed up with Dr. Lawrence on October 25, 2021 and November 16, 2021 with similar complaints and physical examination findings. Dr. Lawrence diagnosed Petitioner with lumbar strain and myofascial pain and recommended Petitioner undergo a facet injection. On December 6, 2021, Petitioner underwent a bilateral L3-4, L4-5, and L5-S1 facet injections. She underwent a course of physical therapy at IvyRehab Physical Therapy from October 21, 2021 through December 17, 2021. (PX 4)

On December 28, 2021, Petitioner saw Dr. Lipov at Illinois Orthopedic Network for a second opinion. (PX 5) Dr. Lipov noted a positive straight leg raise on the left, recommended an EMG, and placed Petitioner off work. The January 26, 2022 EMG of her bilateral lower extremities was normal. On February 3, 2022, Dr. Lipov noted a positive Kemp and straight leg raise on the left and indicated "given physical exam findings, additionally positive MRI findings of narrowing on the left at multiple levels," Dr. Lipov discussed potential injection and recommended physical therapy.

On February 11, 2022, Petitioner underwent an independent medical examination with Dr. Carl Graf at the request of the insurance company. (RX 1, Ex.3) Dr. Graf noted straight leg raise and non-organic

pain and Waddell signs. Dr. Graf diagnosed Petitioner with a lumbar strain with initial vague left-sided radicular complaints. Dr. Graf also noted it was possible Petitioner suffered a disc bulge on the left at L4-L5, but did not find any objective evidence to substantiate Petitioner's complaints. Dr. Graf opined Petitioner was at maximum medical improvement and did not require any further treatment. On February 3, 2023, Dr. Graf authored an addendum report in which he opined that Petitioner had ongoing complaints of low back pain with vague occasional radiating leg pain and numbness, that Petitioner does not require surgical intervention, and that his opinions were unchanged from the previous report. Dr. Graf testified via evidence deposition on February 10, 2023 and his testimony was consistent with his medical report. (RX 1)

On March 9, 2022, Petitioner followed up with Dr. Lipov, who indicated that Petitioner's condition may be discogenic in nature with lumbar radiculopathy and referred Petitioner for a spinal consult. Dr. Lipov also reviewed the IME report and disagreed with the Waddell sign findings given Petitioner having positive physical examination findings and two disk bulges or protrusions with annular tear on the MRI.

On March 18, 2022 saw Dr. Templin for a spine consultation. Dr. Templin noted lumbar flexion and extension exacerbate pain extending to the back and left buttock. Dr. Templin reviewed the lumbar MRI and noted there was a large annular tear posterolaterally extending to the foramen at the left side and dorsally displacing the left L4- nerve root as it exited the foramen. Dr. Templin recommended physical therapy, a diskogram, and placed Petitioner off work. The June 8, 2022 discogram showed a posterior and left sided disc protrusion with a grade 4 annular tear at L4-L5 causing left foraminal stenosis and a broad based posterior disc protrusion with grade 4 annular tear at L5-S1 with bilateral foraminal stenosis. On June 15, 2022 with continued lower back pain and left buttock pain, similar physical examination findings, and Dr. Templin indicated he was apprehensive to perform a two-level fusion given the risk of improvement. Dr. Templin referred Petitioner for a second orthopedic opinion with Dr. Mekhail at Parkview Orthopaedic Group.

On July 7, 2022, Petitioner saw Dr. Anis Mekhail at the Parkview Orthopaedic Group. (PX 7) Dr. Mekhail noted positive femoral stretch down the left leg and decreased sensation in the L4 distribution. Dr. Mekhail reviewed the MRI and noted an annular tear and disc protrusion on the left at L4-5 foramen consistent with the L4 nerve distribution. Dr. Mekhail discounted the diskogram and disagreed with the IME's opinions, indicating that "there is no way the patient would be able to explain how the numbness goes in the L4 distribution consistent with the herniated disc in the front at L4-L5" and that Petitioner had been working for Respondent for over twenty years which supports that Petitioner was not malingering. Dr. Mekhail recommended a microdiscectomy for the L4-L5 foraminal herniated disc. On December 21, 2022, Petitioner underwent a lumbar epidural injection and continued to follow up with Dr. Mekhail pending the surgery approval. Dr. Mekhail testified via evidence deposition on November 10, 2022. His testimony was consistent with his medical reports in which he noted a positive femoral stretch test which indicates irritation of the nerves in the lumbar spine, which produces pain down the left anteromedial leg. He reviewed the MRI imaging which showed an annular tear and a disc protrusion in the left L4/L5 foramen consistent with the L4 distribution symptoms both in the pain and numbness. He further testified that Petitioner's subjective complaints correlated with his physical examination and review of the MRI as it followed the L4-L5 dermatomal distribution pattern. Dr. Mekhail testified that Petitioner's work accident of carrying or lifting boxes was causally related to her back condition because it was a classic case of twisting and reaching with her lumbar spine.

Michelle Dunn testified on behalf of the Respondent. Ms. Dunn works for the Schmitt Management Group that supervises four McDonalds locations, including the location where Petitioner worked. She confirmed that Petitioner was a kitchen manager. Ms. Dunn was notified on August 15, 2021 of Petitioner's injury.

Margarita Acosta also testified on behalf of the Respondent. Ms. Acosta is an assistant manager worked with Petitioner. Ms. Acosta was not present when Petitioner was injured. She confirmed that the boxes of meat handled in the kitchen are heavy and would usually be lifted by the "guys." Ms. Acosta never spoke to Petitioner about her accident, but also confirmed that Petitioner never mentioned any back pain prior to her accident date.

Petitioner testified that six months following the work accident, she still felt back pain and left leg radicular pain. She pointed to her left inner thigh when discussing where the pain goes down her left leg. and testified that she has not worked for Respondent or any other employer since the accident. Petitioner wishes to proceed with the surgery recommended by Dr. Mekhail and would return back to work after recovery from the surgery. Her condition affects her daily life and activities such as washing dishes, bathing, and interacting with her children. She is taking medications for her pain and has side effects such as vomiting, diarrhea and headaches. Petitioner testified she did not have any issues with her back prior to the work accident nor had any intervening accidents during her treatment.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence which show that following Petitioner's undisputed accident on August 12, 2021, she sustained an injury to her back. Petitioner's complaints of back and lower extremity pain following her August 12, 2021 accident are consistent with the history indicated in her treating medical records. Although Respondent relies on the opinions of its IME, Dr. Graf - who opined that Petitioner sustained a lumbar strain that has since resolved - his opinions do not provide any explanation of Petitioner's ongoing complaints of pain in her back and into her leg. Dr. Graf's opinions are also outweighed by the medical evidence from Petitioner's treating physicians, Dr. Lipov, Dr. Templin and Dr. Mekhail – all of whom provide opinions that causally connect Petitioner's current back condition to her August 12, 2021 accident. The Arbitrator finds persuasive the opinions and testimony of Dr. Mekhail, who explained how the Petitioner's objective findings of an annular tear and a disc protrusion at L4-5 are causing Petitioner's current complaints of pain. Furthermore, there was no evidence of Petitioner having any prior problems or treatment of her lower back, nor was there any evidence of any intervening incidents involving her back or lower extremities following her work accident. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being in her lower back is causally connected to her August 12, 2021 work accident.

2. Regarding the issue of medical expenses and consistent with the Arbitrator's findings above, the Arbitrator further finds that Petitioner's medical treatment has been reasonable and necessary. Other than the IME opinion of Dr. Graf limiting Petitioner's injury to a strain, there were no utilization reviews offered to deny the necessity of any of the care rendered by Petitioner's treaters. As such, the Arbitrator awards the Petitioner the related medical expenses subject to the Fee Schedule that include: Midwest

Specialty Pharmacy ($13,323.19); Illinois Orthopedic Network ($39,206.79); Parkview Orthopaedic Group SC ($421.00); Chicago Medical Imaging ($1,500.00); ATI Physical Therapy ($18,464.33); and Metro Anesthesia Consultants ($7,322.11)

3. Regarding the issue of prospective medical care and consistent with the findings above, the Arbitrator further finds the that the Petitioner's request for prospective medical treatment is both reasonable and necessary in addressing her work-related back condition stemming from her August 12, 2021 work accident. Accordingly, Respondent shall authorize and pay for the surgery and any related treatment, as recommended by Petitioner's treating physicians, subject to the Fee Schedule and in accordance with the provisions of Section 8 and 8.2 of the Act.

4. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from October 6, 2021 through May 9, 2023. This is supported by the Petitioner's unrebutted testimony and the medical evidence showing Petitioner was medically restricted from returning to work for this time period and Respondent either did not or could not accommodate Petitioner's restrictions at the time. Accordingly, the Arbitrator awards payment of temporary total disability benefits from October 6, 2021 through May 9, 2023 and Respondent shall receive a credit for any TTD it has already paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010225
Case Name	William Keith Hudson v. W.E. O'Neil Construction
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0203
Number of Pages of Decision	26
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Paul Coghlan

DATE FILED: 5/1/2024

/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

WILLIAM KEITH HUDSON,

Petitioner,

vs. NO: 16 WC 10225

W.E. O'NEIL CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, the reasonableness and necessity of the medical treatment and charges, temporary total disability, permanent partial disability, and Petitioner's entitlement to wage differential benefits and vocational rehabilitation expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 12, 2023 is hereby affirmed and adopted.

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

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

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.

May 1, 2024

O: 4-25-24
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	16WC010225
Case Name	William Keith Hudson v. W. E. O'Neil Construction
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Paul Coghlan

DATE FILED: 7/12/2023

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

/s/ Paul Seal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Keith Hudson
Employee/Petitioner

v.

W.E. O'Neil Construction
Employer/Respondent

Case # **16** WC **10225**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **4/7/2023** and **Waukegan, Illinois**, on **5/23/2023**. 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 **Vocational rehabilitation services pursuant to Section 8(a).**

FINDINGS

On **12/4/2015**, 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 $**90,569.96**; the average weekly wage was $**1,741.73**.

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 $**140,473.88** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**140,473.88**.

Respondent is entitled to a credit of $**15,489.43** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,161.15**/week for **184-4/7** weeks, commencing **12/6/2015** through **6/20/2019**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing **6/21/2019**, of $**853.33**/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay reasonable and necessary medical services of $**51,762.10**, as provided in Sections 8(a) and 8.2 of the Act.

Penalties and fees are denied.

Respondent shall pay vocational rehabilitation expenses of $**2,633.02**, as provided in Section 8(a) of the Act, directly to the providers.

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

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

JULY 12, 2023

Signature of Arbitrator

FINDINGS OF FACTS

Petitioner's Testimony and Medical Treatment

The Petitioner, Mr. William Keith Hudson, is 61 years old and lives with his wife in Chicago. (TA 1 of 2 at 20). He is right-hand dominant. (TA 1 of 2 at 20). He is not currently working. (TA 1 of 2 at 20). The last place he worked was W.E. O'Neil Construction, the Respondent. (TA 1 of 2 at 20-21). The Respondent is a general contractor operating in the construction industry. (TA 1 of 2 at 20-21). He started working for the Respondent in 2005. (TA 1 of 2 at 21). He is a member of the Laborers Union, Local 4. (TA 1 of 2 at 21). He has been a member of Laborers Local 4 for 38 years; he started working as a laborer at age 16. (TA 1 of 2 at 22, TA 2 of 2 at 57). He has a GED but did not finish high school. (TA 1 of 2 at 22).

The last project the Petitioner worked on for the Respondent was a rehab project of the London House hotel in downtown Chicago. (TA 1 of 2 at 23). He was working as a union laborer on a project pouring concrete. (TA 1 of 2 at 24). This required him to carry a variety of heavy objects including steel pipes that were 8 feet long with a 12-inch circumference, 8-foot long, thick rubber hoses with steel tips, five or six 16-foot long 2 x 4s, bags of dry concrete, concrete forms and pieces of plywood that were 6 feet tall and 4 feet wide. (TA 1 of 2 at 23-25, 27-28, 30). He would have to connect pipes together, use a jackhammer and chipping gun, level out freshly poured concrete and shovel wet concrete. (TA 1 of 2 at 23-25, 31). His days would typically start around 5:00am or 6:00am and his shifts would last 8 to 10 hours. (TA 1 of 2 at 25, 31-32). He would typically work 6 to 7 days per week, for a total of 40 and 60 hours per week. (TA 1 of 2 at 32).

On 12/4/15, the Petitioner was tasked with dumping a gondola full of garbage into a dumpster. (TA 1 of 2 at 32-33). As he lifted and tilted the gondola toward the dumpster, he felt a popping sensation in his right shoulder. (TA 1 of 2 at 35). He reported the injury to his foreman, but worked the rest of the day, nevertheless. (TA 1 of 2 at 35). The injury occurred on a Friday, but his complaints continued over the weekend. (TA 1 of 2 at 35-36). By Sunday, 12/6/15, his pain was so severe he decided to seek emergency treatment at Advocate Christ Medical Center. (TA 1 of 2 at 36-37, PX 1 at 387). He presented with complaints of right shoulder pain after throwing a heavy object into the garbage at work two days prior. (TA 1 of 2 at 37, PX 1 at 387). He underwent a series of x-rays, which were negative for fracture, and recommended to follow-up with an orthopedic surgeon. (TA 1 of 2 at 37, PX 1 at 389). The following day, 12/7/15, he returned to work and spoke with the safety director, Jim Smith. (TA 1 of 2 at 38, AX 1). Mr. Smith directed him to see a doctor. (TA 1 of 2 at 38).

Prior to 12/4/15, the Petitioner testified that he never sought medical treatment related to his right shoulder, right shoulder blade or neck. (TA 1 of 2 at 38-39). He likewise testified that he had never previously been recommended surgical intervention in his right shoulder or neck. (TA 1 of 2 at 39). The Petitioner further indicated that he had not felt any pain in his right shoulder, shoulder blade or neck prior to 12/4/15. (TA 1 of 2 at 41-42). He likewise did not miss any time from work related to pain in any of these three body parts. (TA 1 of 2 at 42).

A few days after meeting with Mr. Smith, the Petitioner underwent an MRI of his right shoulder at Little Company of Mary Hospital. (TA 1 of 2 at 43, PX 6 at 7-8). He then saw an orthopedic surgeon, Dr. Daniel Troy, on 12/18/15. (TA 1 of 2 at 44, PX 2 at 12). The Petitioner had a prior treating relationship with Dr. Troy for long-standing issues with his knees, but this was the first time he had seen him for the shoulder. (TA 1 of 2 at 44, PX 2 at 12). Dr. Troy reviewed the MRI and diagnosed him with a shoulder strain. (TA 1 of 2 at 44, PX 2 at 13). He removed the Petitioner from work and recommended a course of physical therapy as well as an injection. (TA 1 of 2 at 44-45, PX 2 at 14). The Petitioner returned to Dr. Troy on 1/2/16. (TA 1 of 2 at 45, PX 2 at 15). He had continued complaints of shoulder pain, but also noted pain in the scapular region on the right side. (TA 1 of 2 at 45, PX 2 at 15). Dr. Troy performed another injection and again recommended continued therapy. (TA 1 of 2 at 45, PX 2 at 16-17). He returned again on 1/23/16, still with complaints of pain in the right shoulder as well as the latissimus dorsi region of his back. (TA 1 of 2 at 45-46, PX 2 at 18). Dr. Troy diagnosed him with right shoulder impingement syndrome and performed another injection. (TA 1 of 2 at 46, PX 2 at 20). He also recommended continued therapy as well as an MR arthrogram of the right shoulder. (TA 1 of 2 at 46, PX 2 at 19). The MR arthrogram was done on 2/3/16, and he returned to Dr. Troy on 3/5/16. (PX 2 at 405, PX 6 at 12-15). He again presented with complaints of ongoing periscapular pain. (PX 2 at 405). Dr. Troy discussed possible shoulder surgery but advised that this would not address the periscapular pain. (PX 2 at 405). He discussed the possibility of shoulder surgery, but a decision was not made at that time. (PX 2 at 406). The Petitioner returned to Dr. Troy on 3/15/16 and again presented with complaints of right shoulder and right parascapular pain. (TA 1 of 2 at 47, PX 2 at 21). At this stage Dr. Troy suspected the Petitioner may have a rotator cuff tear. (TA 1 of 2 at 47, PX 2 at 22). He performed another injection, this time in the cervical spine, and recommended continued therapy. (TA 1 of 2 at 47, PX 2 at 23). He returned again on 3/26/16, still with complaints of right parascapular pain. (TA 1 of 2 at 47, PX 2 at 25). He also reported right-sided cervical paraspinalis pain. (TA 1 of 2 at 48, PX 2 at 25). Dr. Troy opined that the cervical pain was likely "secondary to the shoulder pain." (PX 2 at 25). In light of his intractable complaints, Dr. Troy recommended a diagnostic arthroscopic shoulder surgery. (TA 1 of 2 at 51-52, PX 2 at 26). He returned pre-operatively to Dr. Troy on 4/13/16, at which time Dr. Troy planned on performing a possible rotator cuff repair. (TA 1 of 2 at 52, PX 2 at 28).

On 4/20/16, Dr. Troy performed arthroscopic should surgery and identified a partial thickness tear of the rotator cuff. (TA 1 of 2 at 52, PX 2 at 30). He performed a debridement of the rotator cuff, as well as a biceps tenodesis and subacromial decompression. (TA 1 of 2 at 52-53, PX 2 at 30-32). The Petitioner returned to Dr. Troy postoperatively on 5/4/16. (TA 1 of 2 at 53, PX 2 at 35). The Petitioner reported improvement in his shoulder pain, and Dr. Troy recommended a course of physical therapy. (TA 1 of 2 at 53, PX 2 at 35-36). He returned again on 5/25/16; at this stage he reported that his shoulder pain had improved, but the periscapular pain persisted. (TA 1 of 2 at 53, PX 2 at 37). Dr. Troy performed another injection and recommended continued therapy. (TA 1 of 2 at 53-54, PX 2 at 38-39). The Petitioner next returned on 6/11/16. (TA 1 of 2 at 54, PX 2 at 40). Dr. Troy noted continued improvement in his shoulder pain whereas most of the pain was still in the periscapular region. (TA 1 of 2 at 54,

PX 2 at 40). Dr. Troy again performed an injection and recommended continued therapy. (TA 1 of 2 at 54, PX 2 at 41-42). He returned again on 6/25/16; the shoulder pain was still improving but the periscapular pain persisted. (TA 1 of 2 at 54-55, PX 2 at 44). Dr. Troy again recommended continued therapy and an injection. (TA 1 of 2 at 55, PX 2 at 45-46). He returned again on 7/20/16, and again he had persistent periscapular pain. (TA 1 of 2 at 55, PX 2 at 47-48). Dr. Troy recommended continued therapy. (TA 1 of 2 at 55, PX 2 at 47-48). He returned on 8/27/16, still in the same condition. (TA 1 of 2 at 55-56, PX 2 at 49). Dr. Troy again recommended continued therapy. (TA 1 of 2 at 56, PX 2 at 50). He returned to Dr. Troy on 10/8/16; he reported the shoulder pain was 75-85% better, but the periscapular pain was unchanged. (TA 1 of 2 at 56, PX 2 at 51). Dr. Troy again recommended continued therapy. (TA 1 of 2 at 56, PX 2 at 52). He also recommended an MRI of his chest to further investigate the source of his periscapular complaints. (TA 1 of 2 at 56). The MRI was completed on 11/16/16 at Christ Hospital. (TA 1 of 2 at 56-57, PX 2 at 118-19). He returned to Dr. Troy on 11/26/16. (TA 1 of 2 at 57, PX 2 at 53). Dr. Troy reviewed the chest MRI but could not identify any source of his periscapular complaints. (TA 1 of 2 at 57, PX 2 at 53). He recommended continued therapy and suggested a possible FCE. (TA 1 of 2 at 57, PX 2 at 54). He next returned on 12/30/16; the right shoulder was 85% better but the periscapular pain persisted. (TA 1 of 2 at 57-58, PX 2 at 55). Dr. Troy recommended transitioning from therapy to work conditioning. (TA 1 of 2 at 58, PX 2 at 56). The Petitioner returned again on 2/11/17; his shoulder complaints were 85-90% better but he noted significant periscapular and cervical pain. (TA 1 of 2 at 59, PX 2 at 60). Dr. Troy recommended continued work conditioning. (TA 1 of 2 at 59, PX 2 at 61). He next returned to Dr. Troy on 3/18/17. (TA 1 of 2 at 59, PX 2 at 62). Dr. Troy opined that he had reached maximum medical improvement as to the shoulder and released him with permanent restrictions. (TA 1 of 2 at 59-60, PX 2 at 62-63, 318). Unfortunately, the Petitioner was unable to return to work with the Respondent. (TA 1 of 2 at 60).

Over the next several months, the Petitioner sought follow-up treatment every few m months with his primary care physician, Dr. Win Myint. (TA 1 of 2 at 60, PX 3 at 41-46). During this period, the periscapular pain persisted. (TA 1 of 2 at 60-61). He contacted Dr. Troy's office and made an appointment for 11/4/17. (TA 1 of 2 at 61). Unfortunately, he missed that appointment because he went to the wrong clinic, so he was rescheduled to 11/10/17. (TA 1 of 2 at 61, PX 1 at 945-46). In the meantime, he sought treatment at the emergency room at Christ Hospital on 11/6/17. (TA 1 of 2 at 62, PX 1 at 945-46). He presented with complaints of right shoulder pain after sweeping with a broom in his kitchen. (TA 1 of 2 at 62, PX 1 at 945-46). He was provided with ibuprofen and a shoulder sling, and was recommended to follow-up with Dr. Troy. (TA 1 of 2 at 62-63, PX 1 at 946). He returned to Dr. Troy on 11/10/17 with complaints of increasing periscapular pain. (TA 1 of 2 at 63, PX 2 at 65). Dr. Troy recommended a repeat MRI of the shoulder as well as physical therapy. (TA 1 of 2 at 63, PX 2 at 66). The MRI was completed on 11/20/17, and he returned to Dr. Troy on 11/24/17. (TA 1 of 2 at 64, PX 2 at 68, 132-33). Dr. Troy could not identify any explanation for the Petitioner's complaints in the shoulder MRI, so he ordered a cervical MRI. (TA 1 of 2 at 64, PX 2 at 69). The cervical MRI was completed on 12/2/17, and he returned to Dr. Troy on 12/6/17. (TA 1 of 2 at 64, PX 2 at 70, 112-13). He presented with ongoing complaints of periscapular pain. (TA 1 of 2 at 65, PX 2 at 70). Dr. Troy reviewed the MRI results and diagnosed the Petitioner with severe cord

compression at C3-4; he immediately recommended surgical intervention. (TA 1 of 2 at 65, PX 2 at 70, 78).

At this stage, the Petitioner elected to seek out a second opinion with Dr. Wellington Hsu from Northwestern Medicine. (TA 1 of 2 at 65, PX 4 at 12). He saw Dr. Hsu on 12/11/17 with complaints or neck pain radiating to right shoulder blade. (PX 4 at 12). He did not have his cervical MRI with him, so Dr. Hsu asked him to return on 12/13/17. (TA 1 of 2 at 65, PX 4 at 13). He returned on 12/13/17 with the MRI disc; Dr. Hsu reviewed the study and recommended he attempt an epidural steroid injection at C3-4. (TA 1 of 2 at 66, PX 4 at 9). He opined that if the Petitioner had a good result from that injection, he would be "a good candidate for a C3-4 anterior cervical diskectomy and fusion." (TA 1 of 2 at 66, PX 4 at 9). The day prior, 12/12/17, the Petitioner saw Dr. Troy. (TA 1 of 2 at 66, PX 2 at 80). Dr. Troy again recommended surgery and scheduled the Petitioner for 12/28/17. (TA 1 of 2 at 67, PX 2 at 71-77, 81). He returned for a pre-operative visit on 12/27/17, and on 12/28/17, Dr. Troy performed an anterior cervical diskectomy and fusion at C3-4. (TA 1 of 2 at 67, PX 2 at 71-77, 82-83).

The Petitioner returned post-operatively on 1/9/18. (TA 1 of 2 at 67, PX 2 at 88). He reported improvement in his right upper extremity symptoms, but continued pain. (TA 1 of 2 at 67, PX 2 at 88). Dr. Troy recommended a course of physical therapy for both the shoulder and cervical spine. (TA 1 of 2 at 67, PX 2 at 89). He returned to Dr. Troy on 1/27/18; at this stage, he finally reported improvement in his right periscapular pain. (TA 1 of 2 at 67-68, PX 2 at 91). Dr. Troy recommended continued therapy. (TA 1 of 2 at 68, PX 2 at 92). He next returned on 3/6/18. (TA 1 of 2 at 68, PX 2 at 94). He again reported that his periscapular pain was improving, but it would return when he does any heavy lifting. (TA 1 of 2 at 68-69, PX 2 at 94). The Petitioner noted that the periscapular pain was much better than before the surgery, but it still bothered him. (TA 1 of 2 at 70). Dr. Troy again recommended continued therapy. (TA 1 of 2 at 71, PX 2 at 95). He returned to Dr. Troy on 4/24/18. (TA 1 of 2 at 71, PX 2 at 96). He continued to report improvement in his periscapular symptoms, with recurring pain with heavy lifting. (TA 1 of 2 at 71, PX 2 at 96). Dr. Troy recommended that he transition from formal therapy to a home exercise program. (TA 1 of 2 at 71-72, PX 2 at 97). The Petitioner next saw Dr. Troy on 6/16/18. (TA 1 of 2 at 72, PX 2 at 98). He presented with complaints of hypersensitivity in his fingers in both hands. (TA 1 of 2 at 72, PX 2 at 98). Dr. Troy recommended an EMG to investigate those complaints. (TA 1 of 2 at 72, PX 2 at 99). He returned again on 7/15/18; he was still having complaints of right periscapular pain. (TA 1 of 2 at 72, PX 2 at 100). Dr. Troy performed another injection and again recommended an EMG. (TA 1 of 2 at 72, PX 2 at 101).

He next saw Dr. Troy on 8/3/18. (TA 1 of 2 at 73, PX 2 at 102). He reported continued periscapular pain, albeit improved since the cervical surgery. (TA 1 of 2 at 73, PX 2 at 102). He underwent the EMG on 8/14/18, and it revealed no evidence of cervical radiculopathy at that time. (TA 1 of 2 at 73, PX 1 at 1076-81). He returned to Dr. Troy on 8/28/18 to review the results. (TA 1 of 2 at 73, PX 2 at 336). Dr. Troy again noted improved, though persistent, periscapular pain. (PX 2 at 336). Dr. Troy recommended a course of Neurontin medications and a follow-up in a few months. (TA 1 of 2 at 73, PX 2 at 336). He returned to Dr. Troy on

12/13/18. (TA 1 of 2 at 73, PX 2 at 105). Dr. Troy performed another shoulder injection and recommended work restrictions. (TA 1 of 2 at 73-74, PX 2 at 106). The Petitioner next returned to Dr. Troy on 2/20/19. (TA 1 of 2 at 74, PX 2 at 107). He was still having complaints of periscapular pain, but he advised that it was better than it felt before the cervical surgery. (TA 1 of 2 at 74, PX 2 at 107). At this stage, Dr. Troy released the Petitioner with permanent work restrictions to avoid lifting over 20 pounds. (TA 1 of 2 at 75, PX 10 at 18-19). A few months later, Dr. Troy recommended a 2-day FCE, which was completed on 6/19/19 and 6/20/19. (TA 1 of 2 at 75, PX 7 at 9-20). The FCE revealed that the Petitioner required permanent restrictions, primarily related to lifting. (TA 1 of 2 at 75, PX 7 at 7). Specifically, the results provided that the Petitioner was capable of lifting in the range of approximately 40 to 50 pounds, depending on the context. (PX 7 at 7).

The Petitioner testified that he continues to have complaints of pain from his shoulder into his neck. (TA 1 of 2 at 75-76). He particularly notices the pain when attempting to move something heavy, throw a ball, or go swimming. (TA 1 of 2 at 76). He admitted that his symptoms improved with the surgeries Dr. Troy performed, but they persist, nevertheless. (TA 1 of 2 at 76-77). The symptoms in his right periscapular region are particularly noticeable when he attempts to lift something. (TA 1 of 2 at 77). He testified that he has difficulty dancing with his wife because of his symptoms. (TA 1 of 2 at 78). He explained that if something heavy needs to be moved, he has to call his son to help him. (TA 1 of 2 at 79). He was an avid swimmer before, but now has difficulty doing that. (TA 1 of 2 at 79). Before his accident he would routinely go to the gym three days a week, usually before work. (TA 2 of 2 at 57-58). He explained that the exercise would help him get ready for the physical demands of his job. (TA 2 of 2 at 58-59).

The last day he worked for the Respondent was the date of accident: 12/4/15. (TA 1 of 2 at 80). He has not earned any income from working since then. (TA 1 of 2 at 80). His income consists of social security disability benefits and a partial retirement pension through his Laborers' union. (TA 1 of 2 at 80).

After his FCE, he attempted to look for work within his restrictions. (TA 1 of 2 at 80-81). He documented those efforts in job search logs with the help of his wife. (TA 1 of 2 at 80-85, PX 13). His efforts spanned from 9/10/21 through 11/1/21. (TA 1 of 2 at 82, PX 13 at 1-33). He contacted 99 potential employers during that period. (PX 13 at 1-33). Despite these efforts, he was unable to obtain work. (TA 1 of 2 at 85). He explained that he felt he lacked the capacity to look for work without assistance. (TA 1 of 2 at 85-87). He had worked as a Laborer his entire adult life, from age 16 to 54. (TA 1 of 2 at 86, TA 2 of 2 at 53). The highest grade of school he completed was sophomore year of high school. (TA 1 of 2 at 86). He indicated that, had his vocational counselor's services been approved, he would have participated in the recommended plan. (TA 1 of 2 at 88). He explained that he wanted to return to work. (TA 1 of 2 at 88-89). He testified that Laborers from his union are earning $47.40 per hour through 5/31/22. (TA 1 of 2 at 89-90, PX 14 at 6).

On cross-examination, the Petitioner testified that he has not filed for bankruptcy. (TA 2 of 2 at 15, 46). He admitted that he did not know whether he always complained about his right periscapular pain to his medical providers. (TA 2 of 2 at 17-19). He recalled that the pain was in the shoulder, but he did not know where it was coming from. (TA 2 of 2 at 19). The shoulder pain started immediately after the accident. (TA 2 of 2 at 21). He did not realize initially that there was a distinction between the shoulder pain and the periscapular pain. (TA 2 of 2 at 21). He admitted that he could not identify when the periscapular pain specifically started. (TA 2 of 2 at 22-23). He admitted that Dr. Troy opined he could return to some type of work, and he agreed he could do some kind of work. (TA 2 of 2 at 26-27). However, Dr. Troy did not think he could return to work as a laborer. (TA 2 of 2 at 51). He further admitted that he did plan on eventually retiring but clarified that he would still be working in his prior occupation if he could. (TA 2 of 2 at 30-32). He acknowledged, however, that he never attempted to return to that same job, nor did he ask Dr. Troy to release him back to work on a trial basis. (TA 2 of 2 at 32). He admitted that the only job searching he did was the period documented in his job search logs. (TA 2 of 2 at 32-33, PX 13).

The Petitioner agreed that he was examined by Dr. Forsythe twice, the second time in 2017. (TA 2 of 2 at 34, 54). He acknowledged that if the work hardening records from 3/17/17 suggested he could work at a medium to heavy duty capacity, he would not dispute that. (TA 2 of 2 at 36). He admitted that he had a problem in his right knee, for which he underwent a fluoroscopy. (TA 2 of 2 at 37). He agreed that the knee problems were unrelated to his work accident. (TA 2 of 2 at 37). He further admitted that he had symptoms of numbness in his left hand secondary to frostbite several years ago. (TA 2 of 2 at 39). He also testified that he was shot in the right hand during a robbery when he was 15 years old, resulting in a surgically implanted steel plate. (TA 2 of 2 at 40-41, 56). However, that condition never impacted his ability to work as a laborer. (TA 2 of 2 at 56).

The Petitioner admitted that Dr. Troy recommended he go to the gym and attempt to swim. (TA 2 of 2 at 41). However, he has not been able to do that since his injury. (TA 2 of 2 at 41). He testified that his exercise consists of walking in a park or walking in a pool. (TA 2 of 2 at 42). As far as medications go, he takes metformin and pain pills for his shoulder. (TA 2 of 2 at 43). He is prescribed pain medications by his primary care physician, Dr. Win Myint. (TA 2 of 2 at 43, PX 3 at 122). He admitted that he has not seen Dr. Troy since 2019. (TA 2 of 2 at 44). He admitted that he still had health insurance coverage through his union. (TA 2 of 2 at 44).

Deposition Testimony of Dr. Daniel Troy, Orthopedic Surgeon

Dr. Daniel Troy testified on behalf of the Petitioner by way of an evidence deposition on 5/29/19. (PX 10). Dr. Troy is a board-certified orthopedic surgeon with Advanced Orthopedic Spine Care. (PX 10 at 4-5, 7). Dr. Troy prepared a narrative report regarding the Petitioner at the request of the Petitioner's attorney. (PX 10 at 7).

Dr. Troy testified that he first treated the Petitioner for right shoulder pain on 12/18/15. (PX 10 at 7). He presented with a history of feeling a pop in his right shoulder after emptying something in a dumpster at work. (PX 10 at 8). He reported seeking initial treatment at Advocate Christ Medical Center a few days later. (PX 10 at 8). Dr. Troy noted that this history was significant insofar as it depicted an acute onset of the complaints. (PX 10 at 8-9). Dr. Troy conducted a physical exam and reviewed an MRI of the right shoulder. (PX 10 at 9). He initially diagnosed the Petitioner with a right shoulder strain and recommended conservative treatment. (PX 10 at 10-11). As the Petitioner's condition did not improve over time, Dr. Troy eventually performed surgical intervention on 4/20/16 in the form of a right shoulder arthroscopy with debridement of the labrum, among other procedures. (PX 10 at 11-12). However, the Petitioner continued to be symptomatic. (PX 10 at 12). Dr. Troy testified that both before and after the shoulder surgery, the Petitioner complained of "atypical periscapular pain" in the right shoulder. (PX 10 at 12). Since the shoulder surgery did not resolve these complaints, Dr. Troy shifted his focus to the cervical spine. (PX 10 at 12). Ultimately, Dr. Troy performed a C3-4 anterior cervical discectomy and fusion on 12/28/17. (PX 10 at 13). He explained that there was a herniated disc causing pressure on the spinal cord. (PX 10 at 13). During surgery he decompressed the spinal cord and installed a cylindrical cage stabilized by an anterior plate, which allowed the C3 and C4 vertebrae to fuse together. (PX 10 at 13). The Petitioner's condition improved after surgery, although not completely. (PX 10 at 13). Dr. Troy concluded that the Petitioner's diagnosis was two fold: a right shoulder condition stemming from shoulder pathology as well as referred pain secondary to cervical pathology. (PX 10 at 13-14). The periscapular pain was greatly improved with the cervical surgery but was still present. (PX 10 at 14).

As of the last time Dr. Troy examined the Petitioner, he had continued periscapular pain secondary to the cervical spine. (PX 10 at 15). Dr. Troy opined that the Petitioner's 12/4/15 caused the condition of ill-being in both his right shoulder and cervical spine. (PX 10 at 16). He based that opinion on his experience as an orthopedic surgeon, as well as the history provided by the Petitioner, as well as the Petitioner's improved symptomology as to the periscapular pain after the cervical surgery. (PX 10 at 16). He further testified that the work accident likely aggravated pre-existing arthritic changes in the Petitioner's cervical spine. (PX 10 at 16-17). He opined that the Petitioner's current condition was likely permanent and has reached maximum medical improvement. (PX 10 at 17). He opined that the Petitioner would likely continue to have the right periscapular pain indefinitely. (PX 10 at 18). Future treatment would likely include continued use of anti-inflammatories, as well as intermittent steroid injections. (PX 10 at 18).

Dr. Troy testified that the Petitioner was unable to return to his prior level of employment due to his ongoing periscapular pain. (PX 10 at 18). He imposed permanent work restrictions on the Petitioner to avoid lifting more than 20 pounds. (PX 10 at 19). He recommended a functional capacity evaluation to flesh out more specific restrictions. (PX 10 at 19). He further opined that the medical treatment he provided to the Petitioner was reasonably required to relieve the Petitioner of the effects of his work injury. (PX 10 at 19).

On cross-examination, Dr. Troy admitted that his opinion regarding causation is based on the history the Petitioner provided; he did not personally witness the accident. (PX 10 at 19). He admitted that he recommended the Petitioner attempt to swim to help regain normal strength and range of motion in the shoulder. (PX 10 at 20-21). He testified that the Petitioner did not have normal range of motion in the shoulder at his last visit on 2/20/19; his strength was normal, but his pain was persistent. (PX 10 at 25). Nevertheless, Dr. Troy agreed that the surgeries he performed on the Petitioner were successful. (PX 10 at 21). He admitted that the only evidence of ongoing problems in the Petitioner were the subjective complaints of ongoing pain. (PX 10 at 22). He admitted that the Petitioner could return to work, but not in the construction industry. (PX 10 at 22). He testified that he prescribed Norco for the Petitioner on 2/20/19 but has not renewed that prescription since then. (PX 10 at 23-24). Dr. Troy denied that the Petitioner had any history of drug or alcohol abuse. (PX 10 at 24).

Deposition Testimony of Dr. Brian Forsythe, Section 12 Examiner

Dr. Brian Forsythe testified on behalf of the Respondent by way of an evidence deposition on 6/30/20. (RX 2). Dr. Forsythe is an orthopedic surgeon; he completed his orthopedic training at Harvard and the University of Pittsburgh. (RX 2 at 4, 6). He has been treating patients for 11 years and routinely treats shoulder conditions. (RX 2 at 6).

Dr. Forsythe first examined the Petitioner on 3/24/16. (RX 2 at 7). He testified that the Petitioner reported a history of dumping a gondola into a dumpster when he felt sharp shoulder pain. (RX 2 at 7-8). He diagnosed the Petitioner with right shoulder acromioclavicular joint osteoarthritis and biceps tendinitis. (RX 2 at 8). He recommended arthroscopic surgery including distal clavicle excision, subacromial decompression, rotator cuff debridement and biceps tenodesis. (RX 2 at 8-9). He opined that the need for this treatment was causally related to the work accident. (RX 2 at 9).

He next examined the Petitioner on 7/14/16. (RX 2 at 9). At this stage, the Petitioner reported undergoing right shoulder surgery and persistent soreness in the periscapular region of his right shoulder. (RX 2 at 9). Dr. Forsythe recommended continued physical therapy followed by a transition to full-duty work. (RX 2 at 9-10). He felt continued use of Norco and Valium was not necessary. (RX 2 at 10).

Dr. Forsythe next examined the Petitioner on 2/23/17. (RX 2 at 10). At this stage, the Petitioner had transitioned to work conditioning and continued to make progress. (RX 2 at 10). He continued to complain of right periscapular pain, but now radiating to his neck. (RX 2 at 10). He denied pain in the shoulder itself. (RX 2 at 10-11). Dr. Forsythe recommended completing work conditioning, and then undergoing an FCE if he could not return to work without restrictions. (RX 2 at 11).

Dr. Forsythe examined the Petitioner for a fourth time on 7/27/17. (RX 2 at 11). He continued to have complaints of right periscapular pain. (RX 2 at 11). He still had not had an FCE. (RX 2 at 11). Dr. Forsythe again recommended the Petitioner undergo an FCE. (RX 2 at

12). Dr. Forsythe then prepared an addendum report dated 9/17/18. (RX 2 at 12). He testified that whether the Petitioner could return to his prior occupation would depend on the results of an FCE. (RX 2 at 13). Nevertheless, he testified that the Petitioner could return to full-duty work based on his 7/27/17 shoulder exam. (RX 2 at 13). He further opined that no additional treatment was necessary for the Petitioner. (RX 2 at 15-16). Dr. Forsythe testified that he was provided the 6/19/19 FCE report subsequent to his 9/17/18 addendum. (RX 2 at 16). It did not change his opinions; he testified that the FCE was done at the Petitioner's treating facility and therefore was unreliable. (RX 2 at 16-18). He further testified that he would not rely on this FCE because it was performed by an athletic trainer. (RX 2 at 45-46).

On cross-examination, Dr. Forsythe admitted that the individual who administered the FCE was not the same individual who provided the Petitioner with therapy. (RX 2 at 19). He admitted that he did not know whether the FCE was conducted at the same location as the Petitioner's physical therapy. (RX 2 at 19). He further admitted that the FCE was determined to be valid. (RX 2 at 20). Dr. Forsythe testified that he would generally defer to the opinions of a spine specialist on questions of the cervical spine. (RX 2 at 22). He admitted that the Petitioner's periscapular pain complaints could be an indication of an injury in the cervical spine, typically along the C5 dermatome. (RX 2 at 24). He further acknowledged that tightness in the trapezius, which the Petitioner reported on 7/14/16, could be evidence of an injury in the cervical spine. (RX 2 at 27-28). He confirmed that he believed the Petitioner's right shoulder condition, as well as the shoulder surgery Dr. Troy performed, were causally related to the work accident. (RX 2 at 25, 43).

Dr. Forsythe admitted that he did not examine the Petitioner between his 7/27/17 exam and his 9/17/18 addendum. (RX 2 at 37). He further admitted that he did not review any additional medical records between that period. (RX 2 at 37). The only additional information he was provided was that the Petitioner declined to undergo an FCE. (RX 2 at 37). He admitted that he did not state the Petitioner could return to full-duty work on 7/27/17 but did recommend he could in his 9/17/18 addendum. (RX 2 at 38). He was completely unaware that the Petitioner had undergone cervical surgery on 12/28/17. (RX 2 at 39). He confirmed that all of his opinions are limited to the Petitioner's shoulder condition only. (RX 2 at 39-40). He indicated that he had no opinion on whether the Petitioner's cervical spine condition has any impact on his ability to return to work without restrictions. (RX 2 at 41-42).

Dr. Forsythe testified that he performs five to ten medical-legal exams per week. (RX 2 at 44). He charges $1,200 per exam, and $1,500 per hour for a deposition. (RX 2 at 44-45). He did not know what percentage of these exams were done at the request of a Petitioner versus a Respondent. (RX 2 at 44).

Deposition Testimony of Dr. Avi Bernstein, Section 12 Physician

Dr. Avi Bernstein testified on behalf of the Respondent by way of an evidence deposition on 10/28/21. (RX 1). Dr. Bernstein is an orthopedic surgeon specializing in treatment of the spine. (RX 1 at 5). He performs about 200 to 250 spine surgeries per year and

has been practicing for around 20 years. (RX 1 at 5). He commonly treats the cervical spine. (RX 1 at 8).

In August 2020, he prepared a record review regarding the Petitioner. (RX 1 at 6). He reviewed the medical records from Dr. Troy, as well as physical therapy records, an FCE and the deposition of Dr. Forsythe. (RX 1 at 7-8). He noted that the Petitioner underwent a C3-4 anterior cervical discectomy and fusion on 12/28/17. (RX 1 at 9). The purpose of this surgery is to decompress the spinal canal and nerve roots and to stabilize the disc level. (RX 1 at 22-23). He denied that the need for this treatment was related to the 12/4/15 work accident. (RX 1 at 9). He based that opinion on the fact that the Petitioner's initial injury was related to the right shoulder, and that the scapular pain did not improve much after the surgery. (RX 1 at 9-10). Furthermore, he opined that pathology at C3-4 is not typically responsible for scapular pain. (RX 1 at 10-11). More typically, those symptoms come from C6-7. (RX 1 at 10-11). He agreed, however, that the Petitioner may have suffered some soft tissue injury in the cervical spine in the work accident. (RX 1 at 11). He opined that the cervical spine treatment or any subsequent lost time was unrelated to the work accident. (RX 1 at 11).

On cross-examination, Dr. Bernstein confirmed that he had never examined the Petitioner. (RX 1 at 12). His opinions were based solely on his review of the records. (RX 1 at 12-13). Those records were provided to him by the Respondent's attorney. (RX 1 at 13). He confirmed that his opinions were limited to the cervical spine only. (RX 1 at 13-14). He explained that a disc herniation can result in compression of a nerve, which results in pain, weakness and numbness. (RX 1 at 15). Those symptoms are called radiculopathy. (RX 1 at 16). The distribution of that nerve along the body is called the dermatomal distribution. (RX 1 at 16). He explained that radicular symptoms start at the C4-5 level; that corresponds to the deltoid and shoulder. (RX 1 at 17). He explained that the dermatomal distribution of the C3 nerve root is the back of the neck and the base of the skull. (RX 1 at 18). The C4 nerve root corresponds to a bit lower down the spine; he explained that there is some overlap between the dermatomal distributions. (RX 1 at 18-19). He admitted that pathology at C5 can cause problems in the periscapular region but denied that C4 could. (RX 1 at 19). Nevertheless, he admitted that the C4 and C5 dermatomes can overlap with each other. (RX 1 at 19). He further admitted that there is some variation of these dermatomal distributions throughout the patient population. (RX 1 at 19).

Dr. Bernstein agreed that an individual with degenerative changes in his cervical spine can be asymptomatic. (RX 1 at 20). He explained that a traumatic injury can aggravate those degenerative changes so much so that they become symptomatic. (RX 1 at 20). He explained that the periscapular region of the body refers to the area above, below and around the shoulder blade. (RX 1 at 22). He admitted that an FCE could be a useful tool in determining a patient's functional abilities. (RX 1 at 26).

Dr. Bernstein agreed that a good understanding of the mechanism of an injury is important in determining what conditions are caused by that injury, but not in all cases. (RX 1 at 26-29). He admitted that he did not know the mechanism of the Petitioner's work injury

besides that he was dumping gondolas. (RX 1 at 29-30). His understanding of a gondola is that it is similar to a bucket. (RX 1 at 30). He admitted that he did not know how much they weighed or whether they were filled with anything. (RX 1 at 31). He did not know what the Petitioner's body position was when he dumped the gondola. (RX 1 at 32). He admitted, however, that dumping a gondola could cause a cervical injury. (RX 1 at 32).

Dr. Bernstein testified that he agreed the MRIs from December 2017 revealed cord impingement at C3-4. (RX 1 at 33). He believed that this condition was chronic and pre-existing. (RX 1 at 33). He agreed that the surgery Dr. Troy performed on the cervical spine was reasonable and necessary. (RX 1 at 33-34). He opined, however, that the Petitioner could return to full duty work in his prior occupation despite his cervical condition. (RX 1 at 34). He admitted, however, that he did not know what the Petitioner's prior occupation was. (RX 1 at 34). Nevertheless, Dr. Bernstein concluded that since a hypothetical 20-year-old professional football player could return to professional football after a single-level cervical fusion, the Petitioner should be able to likewise return to whatever his job was. (RX 1 at 35-36).

Dr. Bernstein testified that he charged $3,500 for the record review he prepared in this case. (RX 1 at 36-37). He charges $1,700 for an IME. (RX 1 at 37). He performs about 100 IMEs per year. (RX 1 at 37). About 85% of those are done at the request of an insurance carrier. (RX 1 at 37). He charges $1,500 per hour for a deposition; he does about 50 per year and 85% of those are done at the request of the insurance carrier. (RX 1 at 38).

Deposition Testimony of Ms. Kathleen Mueller, Vocational Rehabilitation Counselor

Ms. Kathleen Mueller testified on behalf of the Petitioner by way of an evidence deposition on 8/16/22. (PX 12). Ms. Mueller is a vocational rehabilitation counselor with Independent Rehabilitation Services. (PX 12 at 5). She conducts vocational assessments, evaluates earning capacity and performs labor market research and job placement surveys. (PX 12 at 5). 90% of her practice involves workers' compensation claims in Illinois. (PX 12 at 5). About 50% of her referrals come from employers or their insurance carriers, and the other 50% from employee's attorneys. (PX 12 at 6).

Ms. Mueller performed a vocational assessment of the Petitioner. (PX 12 at 7). She explained that the Petitioner had a singular work history; he worked as a union laborer for over 30 years. (PX 12 at 9). He has not achieved anything higher than a high school education and is currently in an advanced age of 62 years old. (PX 12 at 9). He had limited transferable skills, which are skills that can be applied to alternative jobs; the Petitioner's lack of these skills narrows the alternative jobs he would be well-suited for. (PX 12 at 10-11). He has permanent work restrictions imposed by Dr. Troy. (PX 12 at 10). Lastly, he has no computer skills, which makes searching for work online challenging. (PX 12 at 10).

Ms. Mueller opined that the Petitioner suffered a reduction in his earning capacity as a result of his injury. (PX 12 at 11). She confirmed that no vocational rehabilitation services for the Petitioner have been authorized by the Respondent. (PX 12 at 12). She did not feel that

the Petitioner was trainable. (PX 12 at 12). She agreed that the Petitioner was employable, but there were several barriers to the Petitioner actually securing employment. (PX 12 at 12). She did, however, recommend that the Petitioner undergo computer skills training to improve the likelihood that he could find employment. (PX 12 at 13). It would also help him develop a resume and cover letter, as well as use email to correspond with potential employers. (PX 12 at 13). Additionally, the Petitioner has been out of the labor force for over 6 years which tends to make him less desirable to potential employers. (PX 12 at 13). She opined that his current earning capacity was likely $15 to $18 per hour. (PX 12 at 14-15). She explained that whether she relies on Dr. Troy's restrictions of no lifting beyond 20 pounds, or the results of the FCE, her opinions would be unchanged. (PX 12 at 15-16).

On cross-examination, Ms. Mueller admitted that she did not consider the opinions of any non-treating physicians. (PX 12 at 17). She agreed that if the Petitioner could return to full duty work, he would not require vocational rehabilitation services. (PX 12 at 20). She admitted that she was not aware of which parts of the claim the Respondent was disputing. (PX 12 at 22). She did not provide any opinion distinguishing the Petitioner's shoulder condition from his cervical condition. (PX 12 at 22-23, 30). She admitted that the FCE evaluated both the cervical and shoulder conditions together. (PX 12 at 25, 28-29). She testified that she was aware that the Petitioner was searching for work with the assistance of his wife. (PX 12 at 33). She reiterated her opinion that the Petitioner was employable, but clarified that he needed the assistance of a vocational counselor to actually secure employment. (PX 12 at 33-34). She admitted that the Petitioner has not obtained any additional training or employment since she first evaluated him in 2019. (PX 12 at 34). She understood the Petitioner was working as a laborer before his work accident. (PX 12 at 34-35). Her understanding of his job duties was based on the information the Petitioner provided to her and the Dictionary of Occupational Titles. (PX 12 at 35-36). She understood that the job was very heavy, and would be physically demanding for someone of advanced age. (PX 12 at 36). She declined to agree, however, that all people in their 60s would be unable to do the job. (PX 12 at 38-39).

CONCLUSIONS OF LAW

F. The Petitioner's current condition of ill-being in his right shoulder and cervical spine is causally related to his work accident.

The Arbitrator finds that the Petitioner's current condition of ill-being in his right shoulder and cervical spine is causally related to his injury. It has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "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. *Id.* at 64.

Furthermore, it has long been recognized that, in pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accident 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 and not simply the result of a normal degenerative process. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 204-05 (2003). It is axiomatic that employers take their employees as they find them; even when an employee has a pre-existing condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was a causative factor. *Id.* at 205. An employee need only prove that some act or phase of his employment was a causative factor of the resulting injury, the mere fact that he might have suffered the same disease, even if not working, is immaterial. *Twice Over Clean, Inc. v. Indus. Comm'n*, 214 Ill.2d 403, 414 (2005).

In this claim, the Respondent stipulated that the Petitioner's 12/4/15 work accident arose out of and in the course of his employment with the Respondent. (AX 1). The Respondent further stipulated that the right shoulder condition is causally related to Petitioner's 12/4/15 work accident. (TA 1 of 2 at 7, TA 2 of 2 at 7).

As to the cervical spine, the Petitioner provided unrebutted testimony that, prior to his work accident, he never sought medical treatment or had been recommended surgery for his cervical spine. (TA 1 of 2 at 38-39). Prior to his work accident, he never experienced significant pain in the right periscapular region, nor did his cervical spine ever affect his ability to work. (TA 1 of 2 at 41-42). The Petitioner testified that he worked as a laborer for about 38 years, since he was 16 years old. (TA 1 of 2 at 22, TA 2 of 2 at 57). As a result, the Petitioner established that his cervical spine was in a "previous condition of good health." *Int'l Harvester* at 63-64.

The Petitioner also established that he suffered a traumatic injury involving his cervical spine. (AX 1). He testified that he felt the onset of pain in the area of his right shoulder, including the periscapular region, immediately following the accident. (TA 2 of 2 at 21). Dr. Troy explained that these periscapular complaints were "referred pain" emanating from the cervical spine. (PX 10 at 13-14). This is further corroborated by the Petitioner's treating medical records; Dr. Troy documented complaints of "pain in his right scapular region" as early as 1/2/16, less than a month after his accident (PX 2 at 15). Moreover, the diagnostic testing further supports a finding of a subsequent disabling condition. Specifically, the cervical spine MRI performed on 12/2/17 revealed severe cord compression at C3-4. (PX 2 at 112-13). Dr. Troy, Dr. Bernstein and Dr. Hsu all opined that this pathology warranted surgical intervention. (PX 4 at 9, PX 10 at 13, RX 1 at 33-34).

The testimony of Dr. Troy further supports a finding that the cervical spine condition was causally related to the work accident. Dr. Troy credibly testified that the Petitioner's 12/4/15 caused the condition of ill-being in his cervical spine. (PX 10 at 16). He based that opinion on his experience as an orthopedic surgeon, as well as the history provided by the Petitioner. (PX 10 at 16). Dr. Troy explained that the periscapular pain was "referred pain . . .

emanating from the cervical spine." (PX 10 at 13-14). He was persuaded by the fact that the Petitioner's periscapular pain symptoms improved after the cervical surgery. (PX 10 at 14, 16). This was further corroborated by the Petitioner's testimony; he was clear that the periscapular pain improved significantly after the cervical surgery, albeit not entirely. (TA 1 of 2 at 70, 76-77). The medical records likewise document improvement in his periscapular complaints after the cervical surgery. (PX 2 at 91, 94, 96, 107). The Arbitrator notes that the Petitioner's medical records document extremely consistent complaints of periscapular pain beginning less than a month after his accident and continuing through nearly every visit with Dr. Troy leading up to the cervical surgery on 12/28/17. (PX 2 at 15, 18, 21, 25, 37, 40, 44, 47, 49, 51, 53, 55, 60, 65, 68, 70, 405). The shoulder surgery, on the other hand, did not relieve his periscapular pain at all. (PX 2 at 37).

The Arbitrator is not persuaded by either Dr. Forsythe or Dr. Bernstein's opinions on the issue of the cervical spine. First, Dr. Forsythe admitted that his opinions were limited to the shoulder condition only. (RX 2 at 39-40). Dr. Bernstein, on the other hand, opined that the cervical condition was unrelated to the work accident. (RX 1 at 9). However, Dr. Bernstein admitted somewhat paradoxically that the Petitioner's work accident resulted in sufficient trauma to cause a soft tissue injury in the Petitioner's cervical spine. (RX 1 at 11). He admitted that the Petitioner was a surgical candidate in his cervical spine, but opined that the surgery was unrelated to that trauma. (RX 1 at 9, 11, 33-34). He opined that the Petitioner's need for the cervical surgery was due to a chronic and pre-existing condition, but admitted that a traumatic injury could aggravate such asymptomatic pre-existing condition so much so that it becomes symptomatic. (RX 1 at 20, 33). He provided these contradictory opinions despite admitting that he never examined the Petitioner, did not understand the mechanism of his injury, nor did he know what the Petitioner did for a living. (RX 1 at 12, 29-32, 34). As a result, the Arbitrator is not persuaded by Dr. Bernstein's opinions.

In short, the Arbitrator finds that the Petitioner's current condition of ill-being as to his cervical spine is causally related to his work accident. The Petitioner did not suffer from any significant right periscapular or cervical complaints prior to his work accident. The Arbitrator finds that it is more likely than not that the periscapular pain complaints were stemming from pathology in the cervical spine as those complaints improved after completion of the cervical surgery. The Petitioner's medical records document complaints of periscapular pain beginning shortly after the accident and continuing consistently throughout his treatment leading up to the cervical surgery. The Arbitrator is persuaded by Dr. Troy's opinion that the cervical condition was causally related, and not persuaded by Dr. Bernstein's opinion stating otherwise. As a result, the Arbitrator finds the Petitioner's cervical spine condition is causally related to his work accident.

J. The medical services that were provided to the Petitioner were reasonable and necessary. The Respondent has not paid all of the appropriate charges. The Respondent shall pay $51,762.10 in medical expenses pursuant to Section 8(a) and 8.2 of the Act.

The Arbitrator finds that the medical treatment provided to the Petitioner has been both reasonable and necessary. The Arbitrator further finds that the Respondent is responsible for all of the bills contained in Petitioner's Exhibit 8 and the Appendix for a total of $51,762.10. (PX 8, Appendix).

Section 8(a) of the Act provides that an "employer shall provide and pay the negotiated rate, if applicable, or the less of the health care provider's actual charges or according to a fee schedule, subject to 8.2 . . . for all necessary first aid, medical and surgical services, an all necessary medical, surgical and hospital services thereafter incurred . . ." 820 ILCS 305/8(a).

Throughout his treatment, the Petitioner always maintained a chain of referrals within his own two choices of providers. He initially sought emergency treatment at Advocate Christ Hospital. (TA 1 of 2 at 36-37, PX 1 at 387). He subsequently sought treatment with Dr. Daniel Troy at Advanced Orthopedic and Spine Care. (TA 1 of 2 at 44, PX 2 at 12). Dr. Troy referred him to ATI Physical Therapy for physical therapy, and performed cervical spine surgery at Advocate Christ Medical Center. (PX 7, PX 1). The Petitioner sought a second opinion with Dr. Wellington Hsu at Northwestern Medicine on the issue of the cervical spine surgery. (PX 4). Pathology testing services for that surgery were provided by Midwest Diagnostic Pathology. (PX 8 at 134). Dr. Troy and Dr. Bernstein both credibly testified that the Petitioner's treatment, including the cervical surgery, was reasonable and necessary. (PX 10 at 19, RX 1 at 33-34).

As the Arbitrator finds that the Petitioner's current condition of ill-being in his right shoulder and cervical spine is causally related to his work accident, that his medical treatment hereto has been reasonable and necessary, and that he has always been within his two choices of providers, the Arbitrator finds that the Respondent shall be responsible for the bills listed in Petitioner Exhibit 8 and the Appendix totaling $51,762.10. (PX 8).

K. The Petitioner is due temporary total disability benefits in the amount of $1,161.15 per week for 184-5/7 weeks for the period of December 6, 2016 through June 20, 2019.

The Arbitrator finds that the Petitioner is due temporary total disability benefits in the amount of $1,161.15 per week for 184-5/7 weeks for the period of 12/6/15 through 6/20/19 for a total of $214,480.99. The Arbitrator, having found that the Petitioner's current conditions of ill-being in his right shoulder and cervical spine are causally related to his work accident, further finds that all of the lost time the Petitioner incurred was likewise related to the work accident.

Section 8(b) of the Act provides that "in cases where the temporary total incapacity for work continues for a period of 14 days of more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). "The compensation rate for temporary total incapacity . . . shall be equal to 66 2/3% of the employee's average weekly wage . . .". 820 ILCS 305/8(b)(1). A claimant is entitled to temporary total disability benefits for the entire period of incapacity until the moment the "claimant's condition has stabilized, i.e.,

[when] the claimant has reached maximum medical improvement." *Interstate Scaffolding, Inc. v. Ill. Work. Comp. Comm'n*, 236 Ill. 2d 132, 142 (2010).

The parties stipulated that the Petitioner's average weekly wage was $1,741.73. Two-thirds of the average weekly wage is $1,161.15. Accordingly, the Arbitrator finds that the Petitioner's weekly TTD rate is $1,161.15 per week. The record reflects that the Petitioner was restricted from work beginning on 12/6/15 when he first sought treatment at the emergency room at Advocate Christ Medical Center. (PX 1 at 404). Dr. Troy first restricted him from work at the initial visit on 12/18/15, and never releases him to full-duty work thereafter. (PX 2 at 14, PX 10 at 19). The Arbitrator finds that the Petitioner's condition did not stabilize until the second day of his 2-day FCE test completed on 6/20/19. (PX 7 at 15). As a result, the Arbitrator finds he is due temporary total disability benefits for the period.

All Told, the Arbitrator finds that the Respondent is liable for temporary total disability benefits in the amount of $1,161.15 per week for 184-5/7 weeks for the period of 12/6/15 through 6/20/19, for a total of $214,480.99. The Arbitrator further finds that the Respondent is entitled to a credit for TTD benefits paid in the amount of $140,473.88. (AX 1). This results in a net total of $74,007.11.

L. The nature and extent of the Petitioner's injury shall be based on an award for wage differential benefits pursuant to Section 8(d)(1) of the Act, at a rate of $853.33 per week, commencing on June 21, 2019 until the Petitioner reaches age 67.

The Arbitrator finds that the nature and extent of the Petitioner's injury shall be based on an award for wage differential benefits pursuant to Section 8(d)(1) of the Act. The Petitioner would have earned an average of $1,896.00 per week in the full performance of his prior occupation; his injury resulted in a reduced earning capacity to $616.00 per week. This results in a difference of $1,280.00 per week, and a corresponding wage differential benefit of $853.33 per week commencing 6/21/19 and continuing until he reaches age 67.

Section 8(d)(1) of the Act provides, in pertinent part, that, "[i]f, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall . . . receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% 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).

To establish a wage differential claim, an injured worker must prove: (a) a permanent partial incapacity preventing him from pursuing his usual and customary line of work; and (b) impairment of earnings. *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756 (1st Dist. 1995). Under Section 8(d)(1), an award should be calculated based on the amount the claimant would

have been able to earn at the time of the hearing if the injured worker were able to fully perform the duties of the occupation in which he was engaged at the time of the accident. *Old Ben Coal Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 493 (5th Dist. 1990).

The Petitioner suffered severe injuries to both his right shoulder and cervical spine resulting in the need for surgical intervention to address both conditions. (TA 1 of 2 at 52, 67, PX 2 at 30-33, 71-77). Following these surgeries, and a period of post-operative therapy for each, the Petitioner underwent a functional capacity evaluation to determine his permanent restrictions. (TA 1 of 2 at 75, PX 7 at 9-20). Dr. Troy, Dr. Forsythe and Dr. Bernstein all testified that an FCE would be an appropriate method of determining the Petitioner's specific work restrictions. (PX 10 at 19, RX 1 at 26, RX 2 at 11-13). The FCE revealed that the Petitioner should be restricted to lifting in the range of 40 to 50 pounds, depending on the context. (PX 7 at 7). The Petitioner credibly testified that his prior occupation as a union laborer for the Respondent required the lifting of a variety of objects that weighed in excess of 50 pounds. (TA 1 of 2 at 23-25, 27-28, 30-31). The Arbitrator further notes that Ms. Mueller provided an unrebutted vocational expert opinion that the Petitioner's work restrictions preclude him from returning to work as a union laborer. (PX 12 at 55). Accordingly, the Arbitrator finds that the Petitioner's restrictions remove him from his prior occupation.

The Arbitrator further finds that the Petitioner suffered an impairment of earning capacity as a result of his inability to return to his prior occupation. The Petitioner testified that has only worked as a laborer for 38 years, dating back to his teenage years. (TA 1 of 2 at 22, TA 2 of 2 at 57). Ms. Mueller credibly testified that such a "singular work history" would be a hurdle to securing alternative employment. (PX 12 at 9). She further explained that he had a limited education and was at an advanced age. (PX 12 at 9). He has limited transferable skills that would be marketable to alternative occupations, and lacks computer skills that would be helpful for both searching for work and performing work within his restrictions. (PX 12 at 10-11). Although she declined to opine that the Petitioner was entirely unemployable, she did credibly testify that any work he is able to secure would come with a significant reduction in his earnings. (PX 12 at 11-13, 33-34). She opined that his current earning capacity would range from $15 to $18 per hour. (PX 12 at 14-15). The Arbitrator notes that the Petitioner lives in Chicago, and the current minimum wage in Chicago is $15.40 per hour. (TA 1 of 2 at 20). As a result, the Arbitrator finds that the Petitioner's current earning capacity is the minimum wage in Chicago, $15.40 per hour, or $616.00 per week assuming a 40-hour work week. The Petitioner credibly testified that he would be earning $47.40 per hour in the full performance of his prior occupation, based on the current wage scales from his Laborers' union. (TA 1 of 2 at 89-90, PX 14 at 6). Accordingly, the Arbitrator finds that the Petitioner has established an impairment of his earnings caused by his work accident.

The Arbitrator finds that "the average amount which [the Petitioner] 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" is equal to the current wage rate for the Petitioner's Laborers' union: $47.40 per hour, or $1,896.00 per week assuming a 40-hour work week. 820 ILCS 305/8(d)(1), (TA 1 of 2 at 89-90, PX 14 at 6). For the "average amount which he . . . is able to earn in some suitable

employment or business after the accident," the Arbitrator finds the Petitioner is capable of earning $15.40 per hour, for an average of 40 hours per week. 820 ILCS 305/8(d)(1). This results in a current average earning capacity of $616.00 per week. Deducting the current earning capacity from his full performance wage results in a difference of $1,280.00; 66-2/3% of this difference is $853.33. As a result, the Arbitrator finds that his wage differential benefit is equal to $853.33. The Arbitrator finds that the Petitioner's current earning capacity could have been reasonably determined at the time his condition stabilized: 6/21/19. As a result, the Arbitrator awards wage differential benefits of $853.33 per week beginning 6/21/19, and ending at the time the Petitioner reaches age 67.

In short, the Arbitrator finds that the Petitioner's right shoulder and cervical spine injuries resulted in permanent restrictions removing him from his prior occupation. Specifically, his lifting restrictions fall below the demands of his prior occupation as a union laborer. These limitations prevent him from being able to use the tools of his trade, as well as lift and move the necessary materials needed to perform the work. The Arbitrator finds the testimony of the Petitioner and the vocational counselor Ms. Mueller credible on this issue. As a result, the Arbitrator finds that the Petitioner shall receive a wage differential benefit of $853.33 per week beginning 6/21/19, and ending when the Petitioner reaches age 67. As of the second date of trial, the period of accrued wage differential benefits is 6/21/19 through 5/23/23, a period of 204-5/7 weeks. At a rate of $853.33 per week, the Respondent shall pay a total of $174,688.84 in accrued wage differential benefits, and initiate weekly benefits of $853.33 per week thereafter until the Petitioner reaches age 67.

M. Penalties and fees are denied.

The Arbitrator finds the opinions of the petitioner's treaters more credible and persuasive than those of the respondent's section 12 examiners; however, the Arbitrator does not find the respondent's reliance on said opinions unreasonable or in bad faith.

O. The Petitioner is entitled to $2,633.02 in expenses incurred related to vocational rehabilitation services pursuant to Section 8(a).

The Arbitrator finds that the Petitioner is entitled to vocational rehabilitation services. Respondent shall be liable for the vocational rehabilitation assessments performed by Ms. Kathleen Mueller, the Petitioner's chosen vocational rehabilitation counselor, in the amount of $2,633.02.

Section 8(a) of the Act states, in part:

> The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required. 820 ILCS 305/8(a).

"A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005). The Supreme Court, in *National Tea v. Industrial Comm'n*, 97 Ill.2d 424, 433 (1983), held that determining whether a claimant is entitled to vocational rehabilitation to restore him to his pre-injury earning capacity depends upon the particular circumstances of each case. *Id.* Such a standard, however, should not be inflexibly applied. *Id.*

The *National Tea* Court established several factors that an Arbitrator should consider when determining whether vocational rehabilitation is appropriate. *Id.* at 432. First, that Court considered whether the claimant has sustained an injury which caused a reduction in his earning capacity and there is evidence rehabilitation will increase his earning capacity. *Id.* Next, it addressed the likelihood that the claimant will be able to obtain employment upon completion of his training. *Id.* Additionally, the Court considered whether the claimant unsuccessfully underwent similar treatment in the past. *Id.* Finally, it considered "the relative costs and benefits to be derived from the program, the employee's work-life expectancy, his ability to undertake the program, and his prospects for recovering work capacity through medical rehabilitation or other means." *Id.*

Because the primary goal of rehabilitation is to return the injured employee to work, if the injured employee has sufficient skills to obtain employment without further training or education, that factor weighs against an award of vocational rehabilitation. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432 (1983). Moreover, an injured employee is generally not entitled to vocational rehabilitation if the evidence shows that he does not intend to return to work, although able to do so. *Euclid Bev'g Co. v. Illinois Workers' Comp. Comm'n*, 124 N.E.2d 1027, 1034 (2nd Dist. 2019).

The Arbitrator finds that Ms. Mueller's vocational rehabilitation services were appropriate pursuant to *National Tea*. Ms. Mueller provided an unrebutted opinion that the Petitioner was removed from his prior occupation as a union laborer for the Respondent. (PX 12 at 55). This resulted in a reduction in his earning capacity, which could be increased with the implementation of vocational rehabilitation services. (PX 12 at 13, 33-34). As a result, the Arbitrator finds that it was reasonable to undergo an initial assessment and an updated assessment with Ms. Mueller.

In *Euclid Bev'g Co. v. Illinois Workers' Comp. Comm'n*, 124 N.E.2d 1027, 1034 (2nd Dist. 2019), the Appellate Court denied maintenance and vocational rehabilitation benefits to a claimant because the claimant "never sought or gained employment following termination from [his employer] . . .". *Euclid Bev'g Co.*, 124 N.E.2d at 1034. The court held that vocational "rehabilitation is neither mandatory for the employer nor appropriate if an injured employee does not intend, although capable, to return to work." *Id.* at 1035. *Euclid Bev'g* is distinguishable from the instant claim in several ways. First, unlike the claimant in *Euclid Bev'g*, the Petitioner submitted two months of job search logs documenting his efforts. (PX 13). He credibly testified that he would participate in Ms. Mueller's plan if it were authorized, and also

would return to work if he could. (TA 2 of 2 at 88-89, TA 2 of 2 at 30-32). The Arbitrator finds that the Petitioner did have an intention to return to work. However, without the assistance of vocational rehabilitation services, it was extremely difficult for the Petitioner to actually secure alternative employment. (PX 12 at 33-34). Accordingly, the Arbitrator finds that the Petitioner did have a genuine intention to return to work, that he made a good faith attempt to look for work given his limitations, and as a result is entitled to vocational rehabilitation services.

Finally, Petitioner has a right to choose his own vocational rehabilitation counselor at Respondent's expense, pursuant to Section 8(a) of the Act. 820 ILCS 305/8(a). *See Hir v. City of Joliet*, 04 IIC 0614; *Costello v. Baxter Healthcare*, 95 IIC 451; *Thul v. Mike Nicholas, Inc.*, 89 IIC 392; *Avenarius v. Consolidated Freightways*, 86 IIC 1498; *see also Youngblood v. Addus Health Care*, 12 IWCC 1080. Accordingly, the Arbitrator finds that the Respondent shall be liable for the vocational rehabilitation services provided by Ms. Kathleen Mueller.

The record reflects that Ms. Mueller's invoices for the vocational assessments she performed totaled $2,633.02. (PX 11 at 10-11, 17). As a result, the Arbitrator finds the Respondent liable for $2,633.02 in vocational rehabilitation services pursuant to Section 8(a).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008667
Case Name	Mario Ferrell v. Healthcare Linen Services Group dba Superior Health Linens, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0204
Number of Pages of Decision	25
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Martha Niles
Respondent Attorney	Grace Di Gerlando

DATE FILED: 5/1/2024

/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

MARIO FERRELL,

Petitioner,

vs. NO: 20 WC 8667

SUPERIOR HEALTH LINENS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits and evidentiary rulings, 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 first notes that the arbitration record, the Arbitrator's Decision and the parties' Briefs fluctuated between March 9 and 10, 2020 as the accident date. The incident report documented that the accident occurred on March 10, 2020 at 12:35 a.m. (Pet. Ex. 1). Petitioner was subsequently taken by ambulance and treated at the emergency room around 7:00 a.m. on March 10, 2020. The Commission thus finds that March 10, 2020 is the correct accident date and modifies the Arbitrator's Decision to conform with the proofs and provide a clear record going forward.

The Commission next finds that Petitioner's current condition of ill-being in his right shoulder is causally related to the March 10, 2020 undisputed work accident. Petitioner started working for Respondent in July or August 2019 and became symptomatic in his right shoulder in the Fall of that year after a separate work injury. An October 7, 2019 MRI of the right shoulder demonstrated: (1) tendinosis and undersurface tearing of 50-percent of the supraspinatus, (2) tendinosis and intrasubstance tearing of the subscapularis with undersurface fraying, (3) tendinosis, tenosynovitis and longitudinal partial-thickness tearing of the long head of the biceps tendon, and (4) irregularity and increased signal in the posterior superior labrum and possibly, degenerative fraying. Petitioner was referred to orthopedic specialist Dr. Joshua Neubauer, he

received an injection, underwent physical therapy and surgery had been recommended. Petitioner testified that he did not proceed with surgery because his condition was improving.

A February 14, 2020 visit note from ProCare documented that Petitioner was still having mild pain in his right shoulder although it had significantly improved since returning to the orthopedic surgeon for the injection. Examination revealed no muscle weakness, improving muscle aches and anthralgias/joint pain and that Petitioner's tenderness and range of motion were almost at baseline. The Commission finds that the medical records corroborated Petitioner's testimony regarding his prior treatment, prior surgical recommendation and that he was doing better prior to the March 2020 accident. He returned to his regular duties with Respondent on March 1, 2020, driving, loading and unloading a truck/trailer and pushing and pulling 500 to 800-pound containers of linens.

On March 10, 2020, Petitioner tripped and fell on his right arm, side and hip while delivering linens to Rush University Medical Center. He sought emergency treatment that same date at the University of Illinois Hospital. X-rays of the right shoulder revealed that the subacromial space was widened possibly representing fluid within the bursa. There was also narrowing of the right humeral glenoid joint space. Petitioner was diagnosed with a right shoulder AC joint sprain and a bruise to the right hip. He followed-up with his primary care physician's office at ProCare Medical Group on March 11, 2020. The medical notes corresponded with Petitioner's testimony and the medical records regarding his pre-existing right shoulder problems from September/October 2019 and that he now had increased right shoulder pain.

Petitioner also saw Dr. Neubauer on March 11, 2020 who noted that Petitioner had great difficulty moving his right arm so much so that Dr. Neubauer could not perform a reliable examination. Dr. Neubauer ordered an MRI of the right shoulder. The March 2020 MRI report was not in evidence but Dr. Nikhil Verma, Respondent's Section 12 examiner, had indicated that there was evidence of moderate impingement, a partial thickness rotator cuff tear and degenerative changes of the long head biceps with subacromial impingement. On May 6, 2020, Dr. Neubauer performed a right shoulder subacromial decompression, distal clavicle resection, rotator cuff repair and limited glenohumeral debridement with debridement of the superior labrum tear. Petitioner's post-operative diagnoses were right shoulder subacromial impingement, acromioclavicular joint arthrosis, high-grade partial rotator cuff tear and superior labrum fraying with biceps tendon tear. Dr. Neubauer's August 4, 2020 visit note stated that Petitioner's right shoulder injury was work-related. The parties did not depose Dr. Neubauer.

Dr. Verma opined to the contrary that Petitioner's right shoulder condition was not causally related to the March 10, 2020 work accident and that he did not sustain an aggravation to any pre-existing condition in the right shoulder. Dr. Verma's opinions were based on his understanding that Petitioner had a pre-existing symptomatic shoulder condition which he expected would cause pain, disability or loss of function, Petitioner underwent the same surgery that had been previously recommended and Dr. Verma noted no change in the anatomic condition of the shoulder nor any evidence of an acute or traumatic injury on the MRIs before and after the work accident. Dr. Verma added, however, that it was materially relevant and important to understand Petitioner's symptomatology, the condition of his right shoulder and how it was functioning immediately predating the March 2020 work accident so that he could compare Petitioner's answers to the

medical records. Dr. Verma explained that Petitioner did not or would not disclose any information about any prior shoulder issues due to ongoing litigation related to his prior shoulder injury. Dr. Verma stated that although there was no objective evidence of an aggravation of a pre-existing condition, he could not determine whether Petitioner had a symptomatic aggravation of his condition because Petitioner had not been forthcoming about his right shoulder history.

The Commission's review of the evidence is not so limited given Petitioner's testimony and the medical records that documented the timeline and nature of his right shoulder condition as well as the symptomatic changes. More importantly with respect to Petitioner's pre-existing right shoulder condition, "[t]he salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Schroeder v. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, ¶ 26. The Commission notes that notwithstanding Petitioner's prior history related to his right shoulder, and prior to the work-related fall on March 10, 2020, he had returned to work for Respondent, was able to use his arms to drive a truck, load and unload his truck and push/pull the container of linens without issue. Following his work injury, Petitioner testified that his pain was stronger and worse than before, he was also unable to maneuver his right arm for physical examination and he proceeded with a surgery that he was previously able to postpone for several months. The evidence supports a finding that Petitioner aggravated his right shoulder on March 10, 2020 and that his current condition of ill-being is causally related to that work accident.

Based on the Commission's finding of causation in favor of Petitioner, the Commission finds that Petitioner is entitled to workers' compensation benefits. Respondent disputed liability for benefits based on its position on causation. Nevertheless, Dr. Verma testified that Petitioner's medical treatment through January 27, 2021 had been reasonable and necessary regardless of causation. The Commission therefore awards the reasonable and necessary medical treatment detailed in Petitioner's Exhibit 6 as it relates to Petitioner's right shoulder injury resulting from the March 10, 2020 work accident. The medical bills shall be paid pursuant to Sections 8(a) and 8.2 of the Act. The Commission further affirms the Arbitrator's award of credit to Respondent in the amount of $18,399.21 for medical bills previously paid. The Commission additionally awards Petitioner TTD benefits from March 10, 2020 through October 4, 2020. Dr. Neubauer allowed Petitioner to return to work without restrictions as of October 5, 2020. With respect to PPD benefits, the Commission weighs the five factors under Section 8.1b of the Act as follows:

(i) Impairment Rating: The parties did not offer any impairment rating into evidence. The Commission gives this factor no weight.

(ii) Occupation of Injured Employee: Following his full duty release on October 5, 2020, Petitioner did not return to work for Respondent but instead obtained employment driving trucks and a tanker for various other employers. As of the arbitration date, Petitioner was employed by J.B. Hunt driving a truck locally. The Commission gives this factor moderate weight.

(iii) Petitioner's Age: Petitioner was 53 years old on the accident date; neither party submitted evidence into the record which would indicate the impact of the Petitioner's age on any permanent disability resulting from the March 2020 work accident.

Nonetheless, the Commission finds that Petitioner must still live with this disability and gives moderate weight to this factor.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. The Commission gives this factor no weight.

(v) Evidence of Disability: Evidence of Petitioner's disability is corroborated by the treating medical records. Following the March 2020 work accident, Petitioner underwent surgery as indicated above and was released to full duty work. He testified that his arm would get tired at times and he had difficulty using it to lift the landing gear on his truck. His shoulder also felt stiff and achy and it was hard to sometimes sleep on his right side. The Commission gives this factor significant weight.

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission finds that Petitioner is entitled to ten-percent (10%) loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 27, 2023 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, pursuant to Sections 8(a) and 8.2 of the Act, the reasonable and necessary medical treatment detailed in Petitioner's Exhibit 6 as it relates to Petitioner's right shoulder injury resulting from the March 10, 2020 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $18,399.21 for medical bills previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $710.40 per week for 29 6/7 weeks, from March 10, 2020 through October 4, 2020, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $639.36 per week for 50 weeks because the injuries sustained caused ten-percent (10%) loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $54,400.00. 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 the Circuit Court.

May 1, 2024
CAH/pm
O: 3/21/24
052

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

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

/s/ *Amylee Hogan Simonovich*
Amylee Hogan Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008667
Case Name	Mario Ferrell v. Healthcare Linen Services Group d/b/a Superior Health Linens, LLC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Crystal Caison, Arbitrator

Petitioner Attorney	Martha Niles
Respondent Attorney	Grace Di Gerlando

DATE FILED: 6/27/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 27, 2023 5.12%

/s/Crystal Caison, 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

Mario Ferrell
Employee/Petitioner

v.

Case # **20** WC **008667**

Consolidated cases: _____

Healthcare Linen Services Group d/b/a Superior Health Linens, LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Crystal L. Caison**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 24, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20WC008667

FINDINGS

On the date of accident, **March 9, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**55,411.20**; the average weekly wage was $**1065.60**.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**18,399.21** for other benefits, for a total credit of $**18,399.21**.

ORDER

The Arbitrator finds that the Petitioner failed to meet his burden of proving by a preponderance of credible evidence that his condition of ill-being of right shoulder injury after March 20, 2020 was directly caused or aggravated by the undisputed accident that occurred on March 9, 2020.

The Arbitrator finds the Petitioner's emergency room evaluation and March 2020 MRI scan to be reasonable and necessary. The Arbitrator further finds that Respondent has already paid for these treatments. As such, the Arbitrator denies all other medical bills submitted.

The Arbitrator finds the issue of nature and extent moot.

The Arbitrator finds that Respondent is entitled to a credit in the amount of $18,399.21 for all medical paid.

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

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

Crystal L. Caison

Signature of Arbitrator

JUNE 27, 2023

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Ferrell	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 20WC008667
Healthcare Linen Services Group	)	
d/b/a Superior Health Linens, LLC	)	
	)	
Respondent.	)	

PROCEDURAL HISTORY

This matter proceeded to hearing on October 4, 2022 before Arbitrator Crystal L. Caison. Issues in dispute include causal connection, medical bills, temporary total disability (TTD) benefits, nature and extent and respondent credit. (AX 1).

THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner's Testimony

Petitioner, Mario Ferrell provided a one-year history of his post-employment from working at Superior Health Linens LLC (herein "Respondent"). Petitioner testified that he was currently employed as a truck driver for J.B. Hunt, worked for FedEx as a truck driver and drove a tanker for Five Star Oil. (T. 22-23)

Petitioner testified that he was an employee of Respondent starting around July or August 2019. (T. 24) He said that he was a driver who delivered bed linens to Rush-Presbyterian Hospital. Petitioner testified that he would load the truck at Respondent's location in Cudahy Wisconsin, drive the truck and then unload it at Rush Hospital in Chicago.

Petitioner testified that as part of his job requirements, he would move carts which were approximately 5 ½ feet high, 3 feet long and about 2 ½ to 3 feet wide. (T.25) He testified

that these bins or carts would weigh between 500 and 800 pounds each. At Rush, he manually unloaded the carts, and pushed them down a narrow, 300 foot long, hallway at the hospital. (T. 26)

Petitioner testified that on or about March 9, 2020, he injured his right shoulder. Petitioner initially said that he never had a problem with his right shoulder but changed his response to "yes". (T. 27-29). Petitioner testified that he filed a workers' compensation claim for his right shoulder prior to the accident of March 9, 2020.

As it related to Petitioner's prior injury, he testified that approximately two weeks after he started working for the Respondent, his shoulder was hurting, sometime around August or September 2019. He testified that he went to ProCare around October 28, 2019 and was then referred to an orthopedic specialist. Petitioner said that he saw the specialist, Dr. Neubauer, and was provided with a shot and he also underwent an MRI; however, he did not know what the 2019 MRI showed. He testified that he also underwent physical therapy for his shoulder. (T. 29-33)

Petitioner testified that he settled a right shoulder workers' compensation claim on a denied/disputed basis late last year or earlier this year. He testified that he injured his shoulder in September of 2019 when he was pulling the carts. The petitioner testified that surgery was recommended for his September 9, 2019 accident, but he did not proceed with surgery in 2019 because "therapy was working pretty good." The petitioner testified that he was able to return to full duty work on or about March 1, 2020. (T. 33-36)

Petitioner testified that on or about March 9, 2020, he was performing his usual job and that he caught his foot on a pallet in the hallway and fell. He testified that he landed on his right side and hip. Petitioner testified that his right shoulder pain was greater than the pain he experienced in September 2019. (T. 36-40)

Petitioner testified that after he fell, he was taken via ambulance to the University of Illinois Hospital. He testified that x-rays were taken, he was given some pain pills and released. Petitioner testified that he reported his injury to the Respondent. (T. 40 -42)

Petitioner testified that he returned to Dr. Neubauer on March 11, 2020, but he did not recall if he returned to ProCare. He testified that Dr. Neubauer gave him some pain pills, prescribed an updated MRI and asked him if he wanted to have surgery. The petitioner testified that he did not believe he performed any therapy before he decided about surgery, but injections were performed prior to surgery. Petitioner said that he changed his mind about surgery at that time because his pain was stronger. (T. 42-46)

Petitioner testified that he got better with therapy after his September 2019 accident. Petitioner said that his pain got worse after his March 9, 2020 accident and he could not move his shoulder a lot. He testified that he thought his shoulder would improve after his May 26, 2020 surgery.

Petitioner said that he continued to follow up with Dr. Neubauer until he was released to full duty work on or about October 5, 2020. He testified that after he was released to return to work, he did not return to work for the Respondent because he was fired. While he was being treated by Dr. Neubauer, Petitioner testified that he was placed on work restrictions but did not receive any temporary total disability benefits. (T. 46-52)

After he was released to full duty work, he returned to work as a truck driver. He testified that when it got cold outside, it was hard to work with his shoulder and it got tired. Petitioner testified that it was hard to lift the landing gear on his truck and that sometimes he strained his shoulder, but most of the time it occurred when it was cold outside and it would get "kind of like rusty a little bit." When Petitioner said rusty, he testified that he meant stiff and achy. He also testified that sometimes it was hard to sleep on his right side. (T. 53-55)

Petitioner testified that when he first saw his primary care physician in October of 2019, he thought he gave a history of sleeping on his shoulder badly, but he was already having problems with it from work. When Petitioner was asked why he told his doctor he slept on it, he said that it wasn't hurting bad, and he forgot that he injured it. (T. 55-56)

On cross, Petitioner testified that he sought treatment at ProCare and with Dr. Neubauer relative to his injury of September of 2019 and that he also underwent an MRI in relation to that injury. He testified that Dr. Neubauer recommended surgery in October of 2019, but he did not recall if

he saw Dr. Neubauer in February of 2020. Petitioner testified that prior to his injury on March 9, 2020, he had a standing recommendation for right shoulder surgery. (T. 63-69)

Petitioner further testified that he did not recall if he was ever taken off of work by a doctor for his right shoulder prior to March 9, 2020. Other than ProCare and Dr. Neubauer, he testified that he had not treated with any other physicians for his right shoulder. Prior to March 9, 2020, Petitioner testified that he attended physical therapy on the east side of Milwaukee, but he did not recall the name of the location or how long he attended therapy. (T. 69-71)

Petitioner testified that he did not have any recollection of what occurred during an IME evaluation by Dr. Nikhil Verma on January 27, 2021. He testified that he fell onto his right hip on March 9, 2020, but he never received any treatment for his hip. When he was authorized off of work post March 9, 2020, he said that it was in relation to his right shoulder. He testified that he had not sought treatment in relation to his right shoulder since he was last seen by Dr. Neubauer in November of 2020. (T. 71-75)

On redirect examination, Petitioner testified that he attended physical therapy for his shoulder prior to March 9, 2020, "maybe for two or three months maybe, around there." (T. 76-77)

Medical

On October 7, 2019, Petitioner underwent a right shoulder MRI, which exhibited: 1) tendinosis and undersurface tearing of the supraspinatus, involving up to 50% of the cuff thickness; 2) tendinosis and intrasubstance tearing of the subscapularis with additional fraying; 3) tendinosis, tenosynovitis and longitudinal partial-thickness tearing of the long head of the biceps tendon; and, 4) irregularity and increased signal in the posterior superior labrum, which may represent degenerative fraying. (RX 2 93-94)

On October 8, 2019, Petitioner was evaluated by FNP Mara Schuh (herein "Schuh") of ProCare. Schuh noted that Petitioner was seen at the St. Mary's ER on September 3, 2019 with right shoulder pain, which had begun three weeks prior "after waking up in the morning and progressively worsened without known trauma or injury." (RX 2) Petitioner's MRI was reviewed,

and an orthopedic evaluation was recommended. Petitioner was assessed with a supraspinatus tear and a trial of Meloxicam was prescribed. (RX 2, 11-15)

On December 2, 2019, Petitioner returned to Schuh. Schuh noted that Petitioner had seen an ortho and the option for surgery was provided, but he wanted to hold off and participate in physical therapy first. Schuh also noted that his pain had improved some. Following his evaluation, physical therapy was prescribed. (RX 2, 16-20)

On February 14, 2020, Petitioner returned to Schuh and reported right shoulder pain. It was noted that he had received a shoulder injection with the orthopedic surgeon and his pain had significantly improved. (RX 2, 24-27)

Officer DiSanto was dispatched to lower level 2 of the Midwest Orthopaedic Building to check on a report of a person in need of medical attention. An Incident Report was prepared by the Rush University Security Services. It was noted that the Petitioner reported that while he was pushing a fully loaded linen cart, he tripped and fell landing on his right side. He complained of pain in the right hip and shoulder area. (PX 1)

Petitioner was evaluated at the University of IL Hospital emergency department. He provided a history of the work accident. Petitioner complained of pain in his right hip and right shoulder. It was noted that he had problems with his right shoulder in the past and had undergone steroid injections. X-ray of the right hip exhibited no evidence for acute fracture or dislocation. X-ray of the right shoulder exhibited that the subacromial space was widened. Petitioner was discharged with an orthopedic follow up. He was assessed with a mechanical fall, right AC joint sprain and right hip pain. (PX 3)

On March 11, 2020, Petitioner returned to Dr. Neubauer. After evaluating the Petitioner, Dr. Neubauer diagnosed him with right shoulder pain. Dr. Neubauer noted that his concern was that the Petitioner's fall of the preceding day may have made his tear worse. A right shoulder MRI was prescribed.

On March 13, 2020, the petitioner was released to return to work with restrictions. (PX 5, 2-4)

On April 2, 2020, Petitioner attended a telemedicine consultation with Schuh. Schuh noted that the Petitioner was initially seen in relation to his right shoulder pain in September of 2019. (PX 4, 8)

On April 8, 2020, Petitioner attended a telemedicine consultation about COVID as he had spent time with his girlfriend the preceding day and he found out after that she had tested positive for COVID. It was noted that the petitioner was hesitant to return to work as he was working in close quarters with other people. After evaluating the petitioner, Schuh recommended that he self-isolate at home for 14 days and until afebrile/asymptomatic for 24 hours. It was noted that a work fax would be sent. Relative to his supraspinatus tear, it was noted that he may be having surgery in the next month. Arbitrator notes that the tear was "not specified as traumatic." (PX 4, 11)

On April 22, 2020, Petitioner returned to Schuh and was released to return to work on April 23, 2020 without restriction. (RX 2, 28-34)

On May 4, 2020, Dr. Neubauer authored a note authorizing the petitioner off of work through approximately September 6, 2020. (PX 5)

On May 6, 2020, Petitioner underwent a right subacromial decompression, distal clavicle resection, rotator cuff repair and limited glenohumeral debridement with debridement of the superior labrum tear, which was performed by Dr. Neubauer. (PX 5, 29-31)

On May 18, 2020, Petitioner returned to Dr. Neubauer. It was noted that the Petitioner was doing well subjectively, but Dr. Neubauer was concerned because he was not wearing his sling. He was provided with a sling and again told to use it. Physical therapy was prescribed. (PX 5, 5-7)

On June 22, 2020, Petitioner returned to Dr. Neubauer and was prescribed medication. A new work note was provided, which included right hand assist with the elbow at the side. (PX 5, 8-10)

On August 4, 2020, Dr. Neubauer released Petitioner to return to light duty work with no lifting in excess of 20 pounds, no commercial driving and no over the shoulder work. He was advised to continue with physical therapy. (PX 5, 11-13)

On September 1, 2020, Petitioner returned to Dr. Neubauer who noted that the Petitioner's progress to date had been less than ideal, which gave Dr. Neubauer "concern for the repair." Petitioner was advised to follow up in 4 weeks and, if his symptoms were not improving, re-imaging would be considered. He was again released to return to work with restrictions. (PX 5, 14-16)

On September 29, 2020, Petitioner returned to Dr. Neubauer who noted that he was progressing but continued with some weakness. Work restrictions were again imposed. (PX 5, 17-19)

On October 5, 2020, Petitioner returned to Dr. Neubauer and it was noted that he had been making slow progress with therapy and had some intermittent difficulty with use of his shoulder. It was also noted that "over the last couple of weeks, he feels as though he has made some significant improvements in his function and strength. Dr. Neubauer released the Petitioner to return to work without restrictions. (PX 5, 20-22)

On October 26, 2020, Petitioner returned to Dr. Neubauer. After evaluating Petitioner, Dr. Neubauer noted that MMI was usually reserved for one year post surgery; however, if the petitioner was doing particularly well in 3 months, "end of healing" could be considered at that point. (PX 5, 23-25)

On November 16, 2020, Petitioner returned to Dr. Neubauer. He was to return in "about 10 weeks." (PX 5, 26)

On January 27, 2021, Petitioner underwent an IME with Dr. Nikhil Verma. He reported the same mechanism of injury occurring on March 9, 2020, but when asked about prior injuries to the right shoulder, the petitioner advised Dr. Verma that he was unable to answer because there was a "legal case…" Petitioner did not provide Dr. Verma with any information as to whether or not

he had prior shoulder pain, prior shoulder symptoms, prior shoulder treatment, etc. It was noted that Petitioner refused to answer questions regarding prior shoulder injuries and refused to answer whether any prior shoulder imaging had been performed. It was noted that the Petitioner had shoulder surgery in May of 2020 and reported that he was about 80% improved. (RX 1; Dep. Exhibit 2)

Per Dr. Verma's IME report noted that Petitioner was evaluated at the Orthopedic Institute of Wisconsin on October 14, 2019, at which time he reported a two-month history of pain in the right shoulder, increasing discomfort with daily activities.

After evaluating Petitioner and reviewing his records, Dr. Verma opined that Petitioner had a good functional recovery post-surgery. Dr. Verma noted that the Petitioner had a pre-existing shoulder condition that predated his injury of March of 2020. Dr. Verma opined that the findings on the two MRI scans reviewed, both demonstrated a partial rotator cuff tear with AC joint arthropathy and biceps involvement. Based upon the MRI reports, Dr. Verma noted that he did not see any distinct change in Petitioner's condition that resulted from the March of 2020 fall. Dr. Verma noted that he did not find a condition related to the Petitioner's injury of March 9, 2020. Dr. Verma also opined that he did not see evidence that the Petitioner's condition was either aggravated or materially worsened as a result of the fall. (RX 1; Dep. Exhibit 2)

Dr. Verma opined that Petitioner's current condition was unrelated to the work injury of March 9, 2020 and Dr. Verma saw no evidence of a work injury of September of 2019. Again, Dr. Verma noted that the Petitioner had a pre-existing, symptomatic rotator cuff condition with no material change as a result of his March 9, 2020 injury. Regardless of causation, Dr. Verma noted that the petitioner had reached MMI. In Dr. Verma's opinion, treatment was reasonable and necessary with regard to the right shoulder complaints; however, Dr. Verma found no relationship between the treatment and the alleged work injuries. Following the fall of March 9, 2020, Dr. Verma opined that appropriate treatment would include the emergency room evaluation with x-rays and follow up MRI to evaluate for any further structural change. However, according to Dr. Verma, the surgery that was performed was related to the Petitioner's pre-existing symptomatic condition as identified on prior MRI scans. Again, Dr. Verma noted that there was no evidence of

aggravation or material change in the Petitioner's condition. In Dr. Verma's opinion, the Petitioner could work full duty without restriction and he saw no permanent disability as it related to any alleged work injuries. (RX 1; Dep. Exhibit 2)

On November 23, 2021, Dr. Verma prepared an addendum report. Dr. Verma noted that he reviewed the Petitioner's right shoulder MRI of October 7, 2019, which exhibited significant subscapularis tendinopathy with biceps tendinosis, intrasubstance signal, proximal biceps partial tear, partial intrasubstance tearing in the anterior aspect of the supraspinatus, glenohumeral effusion, labral degeneration and AC joint arthropathy with secondary impingement. Dr. Verma noted that he reviewed Petitioner's MRI scan of March 20, 2020. After reviewing the updated records and MRI films, Dr. Verma noted that it remained his opinion that the Petitioner's condition was not work related. Dr. Verma opined that the Petitioner was at MMI and no further treatment was required. (RX 1; Dep. Exhibit 3)

TESTIMONY OF DR. NIKHIL VERMA

On February 9, 2022, the evidence deposition of Dr. Nikhil Verma was taken pursuant to agreement of the parties. (RX 1; p. 6)

Dr. Verma testified that he performed an independent medical examination of Mr. Mario Ferrell on January 27, 2021. He testified that he was provided with medical records from the Orthopedic Institute of Wisconsin, emergency room records from the University of IL, Concentra treatment records and diagnostic imaging reports for two MRIs. Dr. Verma testified that he took a history from Petitioner. Dr. Verma testified that Petitioner reported that his injury occurred largely on March 9, 2020 and that, at that time, he had been employed for about eight to nine months performing linen delivery. Dr. Verma testified that the Petitioner reported that he tripped over a skid and fell onto his right side with the onset of right shoulder pain but did not disclose any information about any prior shoulder issues. Dr. Verma testified that Petitioner had undergone surgery in May, reported an 80% improvement since the surgery and was released to work. Dr. Verma testified that the Petitioner's complaints were mild stiffness and mild pain over the front and side of the shoulder. (RX 1; pp 10-13)

Dr. Verma testified that he physically examined the Petitioner on January 27, 2021 and that he did not identify any atrophy or deformity. Shoulder motion was noted to be within 90% of the opposite side with very mild loss of elevation and rotation. Petitioner's strength was noted to be normal and there was no instability. X-rays taken at that time were essentially normal with very mild early evidence of arthritis and post-surgical changes of the bone spur debridement. (RX 1; pp 13-15)

Dr. Verma diagnosed Petitioner with a good functional recovery status post-surgery. He testified that, in his opinion, Petitioner's diagnosis was not causally related to his work injury of March 9, 2020 and, furthermore, he did not see any aggravation of any pre-existing conditions as a result of the petitioner's injury of March 9, 2020. (RX 1; pp 15-16)

Dr. Verma testified that he only reviewed Petitioner's MRI reports. He testified that he could not identify any distinct changes in the MRI report from October of 2019 and the MRI report that postdated the injury of March 9, 2020. Dr. Verma testified that no further treatment of Petitioner was required regardless of any injuries sustained. He also testified that he believed Petitioner's treatment during the emergency room evaluation and diagnostic imaging (including the MRI scan) in relation to the March 9, 2020 injury was reasonable and necessary regardless of causation, but nothing further. Dr. Verma testified that Petitioner was capable of working full duty without restrictions. (RX 1; pp 16-19)

Dr. Verma testified that after January 27, 2021, he never evaluated Petitioner again; but he did prepare an addendum report. Prior to authoring his addendum report of November 23, 2021, Dr. Verma testified that he was provided with medical records and diagnostic imaging, including the MRIs of the Petitioner's right shoulder dated October 7, 2019 and March 20, 2020. Dr. Verma testified that the MRI films of October 7, 2019 exhibited, "basically," tendinopathy within the rotator cuff and biceps, a partial rotator cuff tear, fluid within the joint itself, labral degeneration, and arthritis within the joint between the acromion and the clavicle resulting in impingement on the rotator cuff. He testified that his review of the Petitioner's MRI films of March 20, 2020 was "essentially the same." (RX 1; pp 20) Dr. Verma testified that the 2020 MRI exhibited the same degenerative conditions at the rotator cuff and AC joint and, "importantly, they did not show any evidence of an acute or structural injury, meaning there was no edema, there was no fracture,

there was no acuity findings such as hemorrhage or other signs of a traumatic injury to the shoulder." (RX 1; pp 19-23)

Dr. Verma testified that this was a rare case in which the petitioner had an MRI directly before his injury and directly after his injury and that "allowed for an objective comparison between the anatomic status of the shoulder before and after the injury." (RX 1; pp 22) Dr. Verma testified that he identified that "there was no structural change in the shoulder that resulted from the March 9, 2020 fall that would have been clearly visible on the March 20, 2020 MRI." (RX 1; pp 23) Additionally, Dr. Verma testified that there was "no evidence of a high-grade trauma, meaning you would expect to see soft tissue swelling or hemorrhage or other findings of a significant impact of the shoulder that might or could aggravate a pre-existing condition." (RX 1; pp 23)

After reviewing the MRIs, Dr. Verma testified that none of the opinions contained within his prior IME report changed. Again, Dr. Verma opined that Petitioner's right shoulder condition was not causally related to any injury of March 9, 2020. Dr. Verma testified that the Petitioner's medical record of February of 2020 indicated that the Petitioner had received a cortisone injection and had significantly improved. He testified that the cortisone injection would not have permanently resolved the Petitioner's right shoulder condition and the purpose of the cortisone injection was to decrease inflammation and was "designed to be a temporizing measure." (RX 1; pp 24) He testified that Petitioner was offered surgery and declined. Dr. Verma testified that such injections could last anywhere from a couple of weeks to maybe six months. (RX 1; pp 19-24)

On cross, Dr. Verma testified that he was asked to assess what injuries were sustained as a result of the March 9, 2020 injury. Dr. Verma admitted that there was no evidence of symptom magnification. (RX 1; 29) Dr. Verma said that "when assessing those injuries, especially in a case like this, it is materially relevant and important to understand the nature of that condition regardless of causation that existed to that shoulder immediately predating that injury." (RX 1; pp 30) In this case, Dr. Verma testified that he had objective evidence (i.e. a before and after MRIs), "so the only way one would make a determination that an aggravation occurred is if you can get a sense of the symptomatology, the condition of the shoulder, how it was functioning, etc., before we can then compare his answers to the medical record and then make a determination, if there was a symptomatic aggravation of the condition." (RX 1; pp 31)

Dr. Verma testified that after he drafted his addendum report of November 23, 2021, he was never provided with additional materials. Dr. Verma testified that he did not review any additional materials that were not reviewed in his reports. (RX 1; pp 34-39)

Dr. Verma testified that, based upon the information he had, all of Petitioner's conditions were cumulative and degenerative. Dr. Verma testified that within the entirety of the record he reviewed, he did not see any mention of an acute or traumatic injury and Petitioner specifically refused to discuss any possible acute or traumatic onset prior to March of 2020. (RX 1; pp 39-41)

On cross, Dr. Verma testified that Petitioner did not tell him that he injured his shoulder at work on September 16, 2019 and he did not see any evidence in the medical records of a work-related injury sustained by Petitioner on September 16, 2019. Dr. Verma testified that his opinions were "based on the facts in which the patient had a condition of the shoulder, he required surgery for his shoulder, he had been recommended surgery for his shoulder, he had an MRI before and after, the best objective data we have, and I don't see any differences. That is the basis for my opinion." (RX 1; pp 41-45)

On re-direct, Dr. Verma testified that his opinion was that Petitioner's right shoulder condition was not related to his injury of March 9, 2020 due to Petitioner having had "a pre-existing symptomatic shoulder condition that was expected to cause pain and disability or loss of function." Dr. Verma testified that "we have a rare case where we have objective anatomic imaging evidence of the condition of the shoulder prior to the injury and the condition of the shoulder after the injury, which I was able to directly compare and, A) I didn't see any change in the anatomic condition, and, B) I did not see any evidence of an acute or traumatic injury such as swelling, bruising, etc. that would indicate a high degree of trauma to the shoulder." (RX 1, 46-47)

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. Gilbert v. Martin & Bayley/Hucks, 08 ILWC 004187 (2010).

The Arbitrator observed Petitioner during the hearing and finds him not credible. Petitioner's testimony at arbitration was inconsistent. Petitioner initially said that he did not have any prior injuries to his right shoulder, but moments later stated that he did when he talked about his disputed prior workers' compensation claim for a right shoulder injury. Moreover, Petitioner admitted that right shoulder surgery was recommended by his treater, Dr. Neubauer, prior to his March 9, 2020 accident, but Petitioner said that he was not ready to proceed with surgery because physical therapy was "working good".

Petitioner testified that he got better with therapy after his September 2019 accident, but his pain got worse after his March 9, 2020 accident and he could not move his shoulder a lot. He also testified that he thought his shoulder would improve after his May 26, 2020 surgery.

The Arbitrator finds it significant that Petitioner provided inconsistent statements about his right shoulder history.

Dr. Verma's testimony was consistent with his reports, and he did not appear to be making any attempt to expand on his previously stated opinions or evade questions put to him on cross-examination. The Arbitrator finds it significant that Dr. Verma was able to directly compare the MRI's before and after the March 9, 2020 injury and found the films to be "essentially the same." The Arbitrator further finds that Dr. Verma was a credible and persuasive witness.

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).

Based on the above, the credible evidence, and the record taken as a whole, the Arbitrator finds Dr. Verma's IME Report more persuasive than the medical reports of Dr. Neubauer. Moreover, the medical reports of FNP Schuh do not appear to be complete. Specifically, Schuh's reports contain no reference of the Petitioner's March 9, 2020 injury.

Moreover, Dr. Verma opined that appropriate treatment would include the emergency room evaluation with x-rays and follow up MRI to evaluate for any further structural change. Dr. Verma further opined, the surgery that was performed was related to the Petitioner's pre-existing symptomatic condition as identified on prior MRI scans. Again, Dr. Verma noted that there was no evidence of aggravation or material change in the Petitioner's condition. In Dr. Verma's opinion, the Petitioner could work full duty without restriction, and he saw no permanent disability as it related to any alleged work injuries.

After reviewing the updated records and MRI films of March 20, 2020, Dr. Verma noted that it remained his opinion that the Petitioner's condition was not work related. Dr. Verma opined that the Petitioner was at MMI and no further treatment was required. (RX 1; Dep. Exhibit 3)

Thus, the Arbitrator finds that the Petitioner failed to meet his burden of proving by a preponderance of credible evidence that his condition of ill-being of right shoulder injury after March 20, 2020 was directly caused or aggravated by the undisputed accident that occurred on March 9, 2020.

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

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

Having found that Petitioner failed to meet his burden of proving by a preponderance of credible evidence that his condition of ill-being of right shoulder injury after March 20, 2020 was directly caused or aggravated by the undisputed accident that occurred on March 9, 2020, the Arbitrator finds the Petitioner's emergency room evaluation and March 2020 MRI scan to be reasonable and

necessary. The Arbitrator further finds that Respondent has already paid for these treatments. As such, the Arbitrator denies all other medical bills submitted.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Consistent with the prior findings, the Arbitrator finds this issue moot.

Issue N, whether Respondent is due any credit for benefits paid to Petitioner, the Arbitrator finds as follows:

The Arbitrator finds that Respondent is entitled to a credit in the amount of $18,399.21 for all medical paid.

It is so ordered:

Crystal L. Caison

Arbitrator Crystal L. Caison

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC029405
Case Name	Jose Trejo v. Greif Packaging, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0205
Number of Pages of Decision	21
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Adam Rosner
Respondent Attorney	Jeff Goldberg

DATE FILED: 5/2/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE TREJO,

Petitioner,

vs. NO: 21 WC 29405

GRIEF PACKAGING, LLC,

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

The Commission writes additionally on the issue of temporary total disability. The Arbitrator found that Respondent was liable for temporary total disability (TTD) benefits from October 16, 2021 through August 29, 2022, representing 45 and 3/7ths weeks of TTD benefits at a weekly rate of $495.73. The Arbitrator also found that Respondent shall be given a credit for $12,109.97 in TTD benefits already paid.

The Commission modifies this award downward. In this case, Petitioner testified that he was released to light duty from October 29, 2021 through November 9, 2021, though he lifted "heavy tanks experiencing back pain." Petitioner also stated that he has not worked for Respondent or any other employer since November 9, 2021. Petitioner's testimony is corroborated by Dr. Fernando Perez's November 1, 2021 note that Petitioner had returned to light duty work (a status continued by Dr. Perez), and Dr. Eugene Lipov's November 10, 2021 note taking Petitioner off work. Accordingly, the Commission concludes that Petitioner was not entitled to TTD benefits for the period from October 29, 2021 through November 9, 2021. Respondent also objects that the TTD period commencing November 10, 2021 should terminate on April 18, 2022, the date that it disclosed the Section 12 report from Dr. Wellington Hsu, who

opined that Petitioner had a resolved lumbar strain. The Commission affirms and adopts the Decision of the Arbitrator finding the opinions of Petitioner's treating physicians more persuasive that Dr. Hsu's opinion, and therefore agrees with the Arbitrator that TTD benefits should terminate on August 29, 2022. Accordingly, the Commission modifies the Decision of the Arbitrator to award TTD benefits from October 16, 2021 through October 28, 2021 and from November 10, 2021 through August 29, 2022, representing 43 and 5/7ths weeks of benefits at a weekly rate of $495.73. Respondent shall be given a credit for $12,109.97 in TTD benefits already paid.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator dated October 11, 2023, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $495.73 per week for 43 and 5/7ths weeks, commencing October 16, 2021 through October 28, 2021 and from November 10, 2021 through August 29, 2022, that being the period of temporary total incapacity for work under Section 8(b) of the Act. Respondent shall be awarded a credit of $12,109.97 for benefits already paid.

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

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

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

May 2, 2024
o: 4/25/24
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	21WC029405
Case Name	Jose Trejo v. Greif Packaging, LLC
Consolidated Cases	
Proceeding Type	
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Crystal Caison, Arbitrator

Petitioner Attorney	James McHargue
Respondent Attorney	Jeff Goldberg

DATE FILED: 10/11/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 11, 2023 5,32%

/s/Crystal Caison, 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

Jose Trejo
Employee/Petitioner

v.

Grief Packaging, LLC
Employer/Respondent

Case # **21** WC **029405**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Crystal L. Caison**, Arbitrator of the Commission, in the city of **Chicago**, on **June 7, 2023.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 12, 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 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 $**38,667.20** the average weekly wage was $**743.60.**

On the date of accident, Petitioner was **53** years of age, ***married*** with **1** dependent children.

Petitioner 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 $**12,109.97** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

The Arbitrator finds that Petitioner has proven by preponderance of credible evidence that his current condition of ill-being as it relates to his low back is causally related to the injury sustained on October 12, 2021.

The Arbitrator finds the Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment.

The Arbitrator orders Respondent to pay for the following outstanding medical services, pursuant to Sections 8(a) and 8.2 of the Act:

- Illinois Orthopedic Network ($20,450.00);
- Midwest Specialty Pharmacy ($2,682.41);
- La Clinica ($8,244.74);
- American Diagnostic ($2,250.00);
- Parkview Orthopaedic ($414.00); and
- Improved Functions Physical Therapy ($1,200.00)

The Arbitrator finds that Petitioner is entitled to TTD benefits from October 16, 2021 through August 29, 2022, representing 45 3/7 weeks of TTD benefits at a weekly rate of $495.73. The parties stipulated that Respondent paid $12,109.97 in TTD benefits (AX. 1)

The Arbitrator finds that Petitioner is entitled to maintenance benefits from August 30, 2022 through June 7, 2023, representing 40 and 2/7 weeks at a weekly rate of $495.73.

The Arbitrator finds Respondent liable for 45 3/7 weeks of TTD benefits and 40 2/7 weeks of Maintenance benefits at a weekly rate of $495.73, which corresponds to $42,491.15 to be paid directly to Petitioner and Petitioner's counsel.

The Arbitrator finds that Petitioner has been permanently disabled to the extent of 35% loss of person as a whole. Respondent shall pay Petitioner permanent partial disability benefits of $446.16/week for 175 weeks because the injuries sustained caused 35% loss of use of the person as a whole as provided in Section 8(d)2 of the Act. This corresponds to $78,078.00 to be paid directly to Petitioner and Petitioner's counsel.

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.
It is so ordered:

Crystal L. Caison

OCTOBER 11, 2023

Arbitrator, Crystal L. Caison

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Jose Trejo	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21WC029405
Grief Packaging, LLC	)	
	)	
	)	
Respondent.	)	

PROCEDURAL HISTORY

This matter proceeded to hearing on June 7, 2023 before Arbitrator Crystal L. Caison. Issues in dispute include causal connection, medical bills, maintenance and TTD benefits, and nature and extent (AX 1).

A decision and order were entered on October 3, 2023. Petitioner filed a timely19(f) petition requesting for the Arbitrator to issue a corrected decision to include the words, "Petitioner and Petitioner's counsel" after each respective amounts awarded to Petitioner for Temporary Total Disability, Maintenance and Permanent Partial Disability under issues "K" and "L". This corrected decision addresses those requested changes.

THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner's Testimony

Jose Trejo ("Petitioner") was a 53-year-old married male with no dependent children on October 12, 2021. He alleges that he sustained an accidental injury to his low back that arose out of and in the course of his employment by Respondent on October 12, 2021.

Petitioner testified that in 2021, he began working for Grief Packaging as a general laborer who did "everything". (Tr. 24-25). Petitioner testified that on October 12, 2021, he fell from a platform and onto the concrete floor as he was moving materials from one shelf to another. *Id*. at

26-27. Petitioner testified that he fell directly onto his buttocks, and he felt pain in his neck and low back upon impact. *Id*. at 27-28. Petitioner testified that he notified Dominick (Respondent's representative) about his injury. *Id*. at 28. Petitioner testified that he continued working that day and the rest of the week. *Id*. at 28-29. Petitioner testified that his pain from the injuries sustained on Monday persisted throughout the rest of the week, especially in his back. *Id*. at 29.

Petitioner testified that after being authorized to work light duty, he returned to Greif from October 29, 2021 to November 9, 2021 and testified that he lifted "heavy tanks experiencing back pain." (Tr. 33-34) Petitioner testified that he has not worked for Respondent or any other employer since November 9, 2021. *Id*. at 35. Petitioner testified the work conditioning provided temporary relief, but the pain came back. *Id*. at 38.

Petitioner testified that he had to lift and move over thirty pounds of iron from a box onto the top of the pallets. *Id*. at 43-44. Petitioner testified that he also had to move tanks. *Id*. at 44. Petitioner testified that he would lift the individual tanks off of the floor and carry them to a trailer. *Id*. at 45-46. Petitioner testified that when he moved multiple tanks at once, he tied them together and dragged them to the trailer. *Id*. at 46-47. Petitioner testified that he had to both push and pull the tanks when he moved them. *Id*. at 47. Petitioner testified that each individual tank weighed approximately fifteen to twenty pounds. *Id*. at 46. Petitioner testified he also had to test the bars that were in the welding machine and if the bars were not being welded in the machine correctly, he had to lift and take out the entire frame to check it. *Id*. at 47. Petitioner testified that the frame weighed about thirty pounds. *Id*. at 47-48. Petitioner testified that he had to clean up burnt plastic in the back room. *Id*. at 48.

Petitioner testified that he has been actively seeking employment elsewhere since he was released with permanent restrictions. (Tr. 55) Petitioner testified that as of the date of the hearing, he still does not feel well. (Tr. 60) Petitioner testified that bending down exacerbates his pain. *Id*. Petitioner testified that his back condition has affected his ability to complete daily life activities such as walking, running, and standing. *Id*. at 60. Petitioner testified that he is unable to complete chores such as mopping, which would not require greater than 25lbs. *Id*. at 60-62. Petitioner testified that prior to the accident, he never had any issues with his back or neck. *Id*. at 60-61. Petitioner testified he had no other accidents between October 12, 2021 and his discharge date. *Id*. at 61.

Petitioner testified that his wife has assisted him with the job application process by aiding in filling out the documentation needed. *Id*. at 57. Petitioner testified he does not speak or write any English. *Id*. at 56. Petitioner testified that he has been unable to obtain employment since he was released with permanent restrictions. Id. at 58. Petitioner testified that he has not received any maintenance benefits since he was discharged. *Id*. at 59.

On cross examination, Petitioner testified that he has never undergone any surgical operation on his back or neck. *Id*. at 62. Petitioner testified that Dr. Sampat's imposed work restrictions did not affect Petitioner's ability to mop and go up and down stairs. *Id*. at 63. Petitioner testified that his children, ages 26, 22, and 20, live with him and help to support him. *Id*. at 63-64. Petitioner testified that his entire job search and any record of it was presented by his counsel to the court. *Id*. at 65.

Petitioner testified that he has not presented to any additional doctors since he last saw Dr. Sampat. *Id*. at 71. Petitioner testified that he has not taken prescription medication or utilized a back brace since he was discharged from Dr. Sampat's care. *Id*. at 77.

Petitioner testified that many of the jobs he applied to were related to mechanics and welding, given his five years of related work experience. (Tr. 79-80) Petitioner testified that he sought employment within these fields as an assistant; a position that would require him to fulfill low-impact tasks such as handing the mechanic or welder tools. *Id*. at 81.

Medical

On October 15, 2021, Petitioner presented to Ingalls Occupational Health Clinic, diagnosed with a lumbar strain and was given work restrictions. (PX 1)

On October 16, 2021, Petitioner sought further care with Dr. Perez at La Clinica. (PX 1) Petitioner complained of persistent pain in his neck, mid back, and low back, rating it a 5-6/10 and 8/10 at its worst. *Id* On physical examination, Dr. Perez noted tenderness over the right sided cervical paraspinal musculature, right sided upper and mid thoracic paraspinal musculature and bilateral lumbar paraspinal musculature. *Id*. Dr. Perez also noted a decreased range of motion of the lumbar spine, cervical compression and distraction, and positive Kemps and bilateral straight leg raise tests. *Id* Dr. Perez diagnosed Petitioner with a lumbar strain, cervical spine strain, and thoracic spine pain. Dr. Perez recommended Petitioner start physical therapy and placed him off of work. *Id*

On October 18, 2021 Petitioner began physical therapy at La Clinica and underwent multiple courses through February 7, 2022.

On November 1, 2021, Petitioner presented to La Clinica for follow-up care. (PX 1) Petitioner complained of ongoing intermittent pain in his low back, rating it a 5-6/10. *Id.* On physical examination, Dr. Perez reported tenderness over the lumbar spine and hypertonicity in the mid thoracic and cervical/thoracic junction. *Id.* Dr. Perez also noted cervical compression, and positive Kemps and bilateral straight leg raise tests. *Id.* Dr. Perez recommended Petitioner undergo an MRI, continue physical therapy and remain on light duty work status. *Id.*

On November 3, 2021, Petitioner underwent an MRI of his lumbar spine at American Diagnostic MRI. (PX 2) The MRI showed lumbar spondylosis and mild scoliosis with disc bulging from L3-S1, most severe at L5-S1. *Id.*

On November 10, 2021, Petitioner had a telephonic consult with Dr. Lipov at Illinois Orthopedic Network. (PX 3) *Id.* Petitioner expressed low back pain at a 6/10 with radiating pain and numbness down the right leg. Dr. Lipov diagnosed Petitioner with low back pain and right-sided radiculitis. *Id.* Dr. Lipov recommended Petitioner continue physical therapy, referred him for a spinal consultation and placed Petitioner off work. *Id.*

On November 16, 2021, Petitioner presented to Dr. Sampat at Parkview Orthopaedic Group. (PX 1) Petitioner complained of low-back pain, right-sided buttock pain, greater trochanteric hip pain, and posterolateral thigh pain. Id. Petitioner described the pain as 75% in his back and 25% in his lower extremity. *Id.* On physical examination, Dr. Sampat noted tenderness over the right hip greater trochanteric area. *Id.* Dr. Sampat placed Petitioner off work and recommended he continue physical therapy and undergo a right hip greater trochanteric steroid injection. *Id.* Dr. Sampat noted that Petitioner's injury was caused by the work incident on October 12, 2021. *Id.*

December 21, 2021, Petitioner followed up with Dr. Sampat on with subjective complaints of pain in the right hip greater trochanteric area and tingling in the right lower extremity. (PX 1) Dr. Sampat reviewed the lumbar MRI from November 3, 2021 and reported it showed disc bulging, lateral recess, and neural foraminal stenosis at L5-S1. *Id.* Petitioner was unable to receive the previously recommended injection due to elevated blood sugar levels. *Id.* Dr. Sampat recommended proceeding with a right hip bursitis injection once Petitioner's blood sugar levels decreased, and recommended Petitioner undergo an EMG study. *Id.*

On January 8, 2022, Petitioner underwent the EMG study with Dr. Goldvekht, which was normal. *Id.*

On January 10, 2022, at the request of the insurance company, Petitioner underwent an independent medical evaluation (IME) with Dr. Hsu. (RX 3) At the IME, Petitioner complained of pain in his low back, right-sided hip, and foot. *Id.* Dr. Hsu reviewed the MRI and opined it showed age-appropriate spondylotic changes with no evidence of disc herniation, spinal stenosis, or nerve root compression. *Id.* Dr. Hsu diagnosed Petitioner with a lumbar strain and lumbar spondylosis. *Id.* Dr. Hsu recommended Petitioner undergo work hardening and return to work with light duty restrictions. *Id.* Dr. Hsu opined Petitioner's complaints were causally related to his work injury. *Id.*

On January 25, 2022, Petitioner followed up with Dr. Sampat with subjective complaints of low back pain with radiation down the right lower extremity. (PX 1) On physical examination, Dr. Sampat noted tenderness over the right hip greater trochanteric area and a positive straight leg raise on the right side. *Id.* Dr. Sampat recommended Petitioner continue physical therapy and he be reevaluated in March. *Id.*

On March 18, 2022, Dr. Hsu authored an addendum to his previous report. (RX 4). Dr. Hsu opined that Petitioner's: (1) treatment was sufficient in place of his recommended work conditioning, (2) lumbar strain had resolved, and (3) that Petitioner reached maximum medical improvement and was a full duty. *Id.*

March 28, 2022 through May 18, 2022, Petitioner underwent work conditioning at La Clinica. (PX 1)

On April 26, 2022, Petitioner presented to Dr. Sampat with continued low back pain since undergoing work conditioning. (PX 1) On physical examination, Dr. Sampat noted tenderness over the right hip greater trochanteric area, buttock pain during the straight leg raise and mechanical low back pain with lumbar flexion and extension maneuvers. *Id.* Dr. Sampat recommended Petitioner continue work conditioning. *Id.*

On May 17, 2022, Petitioner followed up with Dr. Sampat with continued low back pain, right-sided buttock pain, and posterolateral thigh pain and noted no improvement since work conditioning. (PX 1) Upon physical examination, Dr. Sampat noted tenderness over the right hip trochanteric area, low back pain with lumbar flexion and extension maneuvers, and mechanical

back pain with flexion and extension maneuvers. Id. Dr. Sampat recommended Petitioner undergo lumbar facet injections. *Id.*

On May 25, 2022, Petitioner underwent lumbar medial branch injections at L3, L4, L5 and S1 levels with Dr. Lipov. (PX 1)

On June 15, 2022, Petitioner presented to Dr. Lipov for a follow up appointment post-injection with temporary improvement of his back pain for a week, but the pain returned. (PX 1) On physical examination, Dr. Lipov noted pain on extension to twenty degrees and flexion to seventy degrees. *Id.* Dr. Lipov recommended Petitioner receive a RFA at L3 through S1. *Id.*

On June 21, 2022, Petitioner followed up with Dr. Sampat with similar complaints as that on June 15, 2023. (PX 1) Dr. Sampat recommended a clinical evaluation and functional capacities examination (FCE). *Id.*

On July 13, 2022, Petitioner had a telephonic consultation with Dr. Lipov with 6/10 band-like low back pain radiating into his buttocks, down the posterior thighs with associated numbness and tingling in the legs. (PX 1)

On July 26, 2022, Petitioner presented to Dr. Sampat with low back pain and right-sided greater trochanteric hip pain. *Id.* Dr. Sampat noted severe tenderness over the right hip greater trochanteric area and mechanical low back pain with flexion and extension maneuvers. *Id.* Dr. Sampat continued his recommendation of the FCE and continued Petitioner off work. *Id.*

On August 3, 2022, Petitioner underwent the FCE at Improved Functions. (PX 4) The FCE test came back valid placing Petitioner in the medium strength category, with Petitioner's job as a Factor Worker being in the heavy strength category. *Id.* The FCE placed Petitioner's maximum lifting capacity at 25.0 pounds and maximum carrying capacity at 25.0 lbs. *Id.*

On August 30, 2022, Petitioner presented to Dr. Sampat where Dr. Sampat reviewed the FCE and affirmed Petitioner could not return to work on a fully duty basis. (PX 1) Dr. Sampat reported Petitioner reached maximum medical improvement and could return to work with the restrictions outlined in the FCE report. *Id.*

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 had the opportunity to personally observe the Petitioner's testimony. The Arbitrator finds the Petitioner truthful in his assertion that his back condition began as a result of the work accident in a manner consistent with his testimony at trial.

The Arbitrator finds the treaters, Dr. Sampat, Dr. Lipov, and Dr. Perez to have been credible in their opinions in the medical records regarding the nature of Petitioner's injuries and their causal relationship to the claimed injury on October 12, 2021. The Arbitrator does find Dr. Hsu credible as to his opinions, but not as persuasive on Petitioner's diagnosis, treatment and MMI finding, as compared to the Petitioner's treaters.

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).

Petitioner credibly testified as to the events on October 12, 2021. Petitioner testified that he injured his hip, back, and neck as a result of this accident. Moreover, the medical records reflect that Petitioner presented to Ingalls Occupational Health Clinic on October 15, 2021 with sharp, shooting pains in his low back. Petitioner sought further treatment at La Clinica with Dr. Perez. Petitioner complained of pain in his neck, mid and low back regions. Physical examination findings showed tenderness over the right sided cervical paraspinal musculature, the right-sided upper and mid thoracic paraspinal musculature, and over bilateral lumbar paraspinal musculature. Dr. Perez recommended that Petitioner undergo physical therapy and an MRI, which was completed on November 3, 2021. The MRI showed lumbar spondylosis and mild scoliosis with disc bulging from L3-S1, most severe at L5-S1.

Petitioner presented to Dr. Sampat who examined Petitioner and found there to be tenderness over the right hip greater trochanteric area as well a limited flexion and extensions of the lumbar spine. Dr. Sampat recommended Petitioner continue physical therapy until he was able to receive injections. Petitioner completed multiple courses of physical therapy from October 18, 2021 through February 7, 2022, which did not alleviate Petitioner's symptoms. Dr. Sampat then recommended Petitioner undergo work conditioning which Petitioner underwent from March 28, 2022 through May 18, 2022. Per Dr. Sampat's recommendation, Petitioner received lumbar medial branch injections at the L3, L4, L5, and S1 levels on May 25, 2022 with Dr. Lipov, which provided temporary relief.

Petitioner continued to follow up with Dr. Sampat through August 30, 2022. Throughout the entirety of Petitioner's treatment with Dr. Sampat, Dr. Lipov and Dr. Perez, Petitioner consistently complained of pain in his low back, trochanteric hip, and buttocks. Moreover, all of Petitioner's treaters consistently noted positive physical examination findings such as tenderness in the lumbar spine and trochanteric hip area, positive Kemps, and straight leg raise tests. While Dr. Sampat opined surgery was inessential for Petitioner's condition, Petitioner's prolonged symptomatology (despite having attempted various conservative treatment options) and positive

examination findings over the course of nine months, prompted Dr. Sampat to recommend an FCE. Petitioner completed the FCE on August 3, 2022, and was discharged from Dr. Sampat's care on August 30, 2022 with permanent restrictions consistent with those outlined in the FCE. With respect to Petitioner's mechanism of injury and its causal relationship, Dr. Sampat noted "[he was] asymptomatic prior to his work injury and became symptomatic afterwards and therefore there appears to be a causal relation between his injury and the current symptomatology." (PX 3)

Throughout Petitioner's treatment, he consistently complained of low back pain, neck pain or trochanteric hip pain with correlating positive physical examination findings. Petitioner's treaters also noted his subjective complaints consistent with his mechanism of injury. Additionally, Petitioner credibly testified that he had no prior accidents or issues involving his neck or back. There were no medical records or reports introduced into evidence that indicated Petitioner had any prior lumbar or cervical complaints. Thus, as the medical records exhibit and all of Petitioner's treating physicians indicated, Petitioner's clinical picture is wholly consistent with Petitioner's subjective complaints being a result of the work accident.

Respondent relies upon their IME physician, Dr. Hsu, in rebutting the statements of Dr. Sampat, Dr. Lipov, Dr. Perez, and the radiologist. Dr. Hsu opined that Petitioner sustained a lumbar strain as a result of the work injury and he cited positive objective examination findings of Petitioner to corroborate such. (RX 3, 4). Thus, Dr. Hsu agrees that Petitioner's injuries and corresponding symptomatology are a result of the work accident. However, Dr. Hsu indicates Petitioner's MRI imaging conveyed age-appropriate spondylotic changes and didn't perceive there to be disc bulging nor stenosis. Both Dr. Sampat and the radiologist described disc bulging and foraminal stenosis at L5-S1. Further, the symptomatology of Petitioner correlated with such lumbar conditions as described by the objective findings of tenderness or decreased range of motion in these areas noted by all physicians who examined Petitioner, including Dr. Hsu.

Additionally, Petitioner was asymptomatic prior to the work accident and became symptomatic after the work accident, further supporting that Petitioner's work accident was the cause for his ongoing back complaints. In his March 18, 2022 addendum, Dr. Hsu indicates that Petitioner reached MMI and that Petitioner's diagnosis, lumbar strain, was resolved. (RX 4, 1) However, Dr. Hsu's addendum indicating Petitioner reached MMI did not include an examination, but Dr. Hsu's opinion was formed based solely on the fact that Petitioner had completed physical

therapy. In Dr. Hsu's original IME report, he opined Petitioner required work hardening for at least two weeks to reach MMI. (RX 3, 5). The Arbitrator notes that Dr. Hsu produced his addendum stating Petitioner had reached MMI before Petitioner had undergone work conditioning, which started on March 23, 2022. The Arbitrator further notes that Petitioner continued treating for five additional months and underwent an FCE, and none of that treatment or the FCE were considered by Dr. Hsu in his Addendum. Therefore, the Arbitrator finds Dr. Hsu's opinion less persuasive and less reliable because of the incomplete records in which Dr. Hsu's Addendum did not include.

Moreover, Dr. Hsu indicated that Petitioner's injury was a lumbar strain. (RX 4 1) When Dr. Hsu opined Petitioner to reach MMI, Petitioner had been treating consistently for over six months. Petitioner's extended period of treatment as shown by the medical records, Petitioner's testimony, and the statements from Petitioner's treating physicians all point to Petitioner's condition being more significant than a lumbar strain. The medical records support that Petitioner remained symptomatic for over a year, despite having undergone various courses of treatment. The FCE results conveyed Petitioner's permanent restrictions as a result of this accident that supports that Petitioner's injury was more than a lumbar strain.

Dr. Hsu noted two out of four positive Waddell signs when he examined Petitioner. RX 4, 5). Conversely, Dr. Sampat, Dr. Lipov, and the physicians at La Clinica never noted any signs of symptom magnification after having examined Petitioner numerous times. The Arbitrator finds the opinions of Petitioner's physicians who examined Petitioner over the course of a year to be more persuasive than that of Dr. Hsu.

Based on the above and the record taken as a whole, the Arbitrator finds that Petitioner has proven by preponderance of credible evidence that his current condition of ill-being as it relates to his low back is causally related to the injury sustained on October 12, 2021.

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

Section 8(a) of the Act states a Respondent is responsible …"for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were

necessary, and the expenses were reasonable. See Gallentine v. Industrial Comm'n, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

Having found the Petitioner's current condition of ill-being as it relates to his low back is causally related the injuries sustained on October 12, 2021, the Arbitrator finds the Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment.

As such, the Arbitrator orders Respondent to pay for outstanding medical services, pursuant to Sections 8(a) and 8.2 of the Act and as follows:

- Illinois Orthopedic Network ($20,450.00);
- Midwest Specialty Pharmacy ($2,682.41);
- La Clinica ($8,244.74);
- American Diagnostic ($2,250.00);
- Parkview Orthopaedic ($414.00); and
- Improved Functions Physical Therapy ($1,200.00)

Issue K, whether Petitioner is entitled to temporary total disability and maintenance benefits, the Arbitrator finds as follows:

TTD

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

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132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

Petitioner was initially placed off work by Dr. Perez on October 16, 2021. On August 30, 2022, Dr. Sampat released Petitioner at MMI per the permanent restrictions outlined in the FCE.

Consistent with prior findings, the Arbitrator finds that Petitioner is entitled to TTD benefits from October 16, 2021 through August 29, 2022, representing 45 3/7 weeks of TTD benefits at a weekly rate of $495.73. The parties stipulated that Respondent paid $12,109.97 in TTD benefits (AX. 1)

Maintenance

The appellate courts have found that it is not necessary that an employee prepare a written assessment of an appropriate rehabilitation program to prove entitlement both to vocational rehabilitation under the Workers' Compensation Act (820 ILCS 305/8(a)) as well as maintenance. *Roper Contracting v. Industrial Commission*, 349 Ill.App.3d 500, 812 N.E.2d 65, 285 Ill.Dec. 476 (5th Dist. 2004), citing 820 ILCS 305/8(a). The Petitioner in *Roper* performed a self-directed job search, which the Appellate Court affirmed the Commission's ruling that the self-directed job search was sufficient for Petitioner to be entitled to maintenance benefits.

The valid FCE on August 30, 2022 placed Petitioner in the medium strength category, with Petitioner's job for Respondent being in the heavy strength category. Per the FCE, Petitioner's maximum lifting capacity is 25.0 pounds and maximum carrying capacity is 25.0 lbs. Therefore, Petitioner could not return to his position for Respondent as Petitioner had to consistently carry over 25.0 lbs. and lift over 30.0 lbs. Petitioner's job duties included lifting/carrying iron (weighing around 30lbs); frames from the welding machines (weighing around 30 lbs.); and groups of tanks (weighing 15-20lbs each). Further, Dr. Hsu noted under the Occupational History in his January 11, 2022 IME report (RX 3) that Petitioner was a general laborer that had to lift up to 50.0 lbs. on a regular basis. Respondent offered no job description or witness to testify regarding Petitioner's job duties. Thus, the Arbitrator finds Petitioner's testimony as credible regarding his job duties.

Here, Petitioner performed a self-directed job search applying for positions with the assistance of his wife. (PX 6). Petitioner testified that he has five years of experience working with mechanics and welding. Thus, Petitioner applied for positions within these fields as an assistant, a position in which he could perform to fulfill low-impact tasks. Petitioner applied for these positions with the understanding that he could perform the tasks within his restrictions. Analogous to *Roper*, Petitioner performed a sufficient self-directed job search to be entitled to maintenance benefits.

Consistent with prior findings, the Arbitrator finds that Petitioner is entitled to maintenance benefits from August 30, 2022 through June 7, 2023, representing 40 and 2/7 weeks at a weekly rate of $495.73.

Based on the above, the Arbitrator finds Respondent liable for 45 3/7 weeks of TTD benefits and 40 2/7 weeks of Maintenance benefits at a weekly rate of $495.73, which corresponds to $42,491.15 to be paid directly to Petitioner and Petitioner's counsel.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Petitioner was ultimately diagnosed with lumbar disc bulging, lumbar foraminal stenosis at L5-S1, a cervical strain, thoracic spine pain, and radiculitis by Dr. Sampat, Dr. Lipov, and Dr. Perez. The Arbitrator assigns weight to the requisite Section 8.1(b) factors as follows:

(i) An AMA rating was not submitted into evidence. Therefore, the Arbitrator assigns no weight to this factor.

(ii) Petitioner worked at Greif Packaging as a general laborer. The Arbitrator notes Petitioner was working in a heavy strength category role and that this is a highly labor-intensive job. The Arbitrator assigns great weight to this factor.

(iii) At the time of injury, Petitioner was 53 years old. Petitioner had been working for Respondent for a few months and eventually could not return to work for Respondent due to his injury and permanent restrictions. The Arbitrator assigns moderate weight to this factor.

(iv) Petitioner has not alleged, nor is there evidence to indicate, any decrease in future earning capacity. The Arbitrator assigns minimal weight to this factor.

(v) Petitioner was discharged by Dr. Sampat with restrictions from a valid FCE placing Petitioner in the medium strength category. Petitioner testified that he is still in pain and is limited in his ability to do daily life activities. The Arbitrator assigns great weight to this factor.

Therefore, the Arbitrator finds that Petitioner has been permanently disabled to the extent of 35% loss of person as a whole. Respondent shall pay Petitioner permanent partial disability benefits of $446.16/week for 175 weeks because the injuries sustained caused 35% loss of use of the person as a whole as provided in Section 8(d)2 of the Act. This corresponds to $78,078.00 to be paid directly to Petitioner and Petitioner's counsel.

It is so ordered:

Crystal L. Caison

Arbitrator Crystal L. Caison

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034798
Case Name	John Miller v. Brand/Safway
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0206
Number of Pages of Decision	18
Decision Issued By	Christopher Harris, Commissioner, Carolyn Doherty, Commissioner

Petitioner Attorney	Casey VanWinkle
Respondent Attorney	Toney Tomaso

DATE FILED: 5/3/2024

/s/Carolyn Doherty, Commissioner

Signature

DISSENT: /s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN MILLER,
Petitioner,

vs. NO: 21 WC 34798

BRAND/SAFWAY,
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 jurisdiction, nature and extent and other: *res judicata*, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 10, 2023 is hereby affirmed and adopted.

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

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

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

May 3, 2024
O: 03/07/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

DISSENT

Petitioner's argument on review rests solely upon their interpretation of Rule 9020.90(e). Rule 9020.90(e) provides, in relevant part, "Nothing in this Section abridges the rights found in the applicable Statute of Limitations of the Illinois Workers' Compensation Act…" Under Petitioner's theory, Rule 9020.90 (a)–(d) has no significance so long as the statute of limitations period has not run, and a Petitioner can simply refile a new Application for Adjustment of Claim.

In her decision, the Arbitrator takes Petitioner's argument one step further and states that the doctrine of *res judicata* does not apply to claims dismissed for want of prosecution as long as Petitioner filed his subsequent Application for Adjustment of Claim within the three-year statute of limitations. The Arbitrator distinguished the instant case from *Farrar v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 143129WC. In that case, the Appellate Court affirmed the Commission's decision finding that a prior dismissal of a claim for want of prosecution had become a final judgment on the merits and that the newly filed claim was barred by *res judicata*. The only difference was that the claimant in *Farrar*, unlike the Petitioner herein, had filed the new claim *after* the statute of limitations had lapsed. The Court indicated that in allowing "the refiling of workers' compensation claims that have been dismissed for want of prosecution, beyond 60 days, up to a year after dismissal, after the statute of limitations has expired, and without a showing of any justification for refiling would render the requirements of Commission Rule 9020.90 meaningless." *Id.* at ¶ 17.

Rule 9020.90(a) provides, in part, that: "the parties shall have 60 days from receipt of the dismissal order to file a Petition to Reinstate..." The 60-day time limit for filing a petition to reinstate is jurisdictional in nature. *TTC Illinois, Inc./Tom Via Trucking v. Ill. Workers' Comp. Comm'n*, 396 Ill. App. 3d 344, 354 (2009). The Court in *Farrar* held that because the claimant failed to file a petition to reinstate her original claim pursuant to Commission Rule 9020.90, the Commission properly dismissed her refiled claim on two separate grounds of *res judicata* and statute of limitations. *Farrar*, 2016 IL App (1st) 143129WC, ¶ 18. The Court's primary consideration, however, rested on the Commission's Rules for reinstatement and stated that: "[A] claimant's failure to timely file a petition for reinstatement following a dismissal for want of prosecution results in a final judgment with respect to the claimant's rights to recover workers' compensation benefits arising from the claim." *Id.* at ¶ 14. As illustrated by *Farrar*, a case which is not timely reinstated is a final judgment on the merits under the Act and Rules. An analysis involving *res judicata* is not disregarded nor is it dependent on whether a new claim was filed before or after the statute of limitations.

Since *Farrar*, Rule 9020.90 has been amended to include section (e). However, its inclusion does not invalidate the *res judicata* effect of a non-reinstated dismissed claim. With that said, as Petitioner failed to timely file a petition to reinstate as required by Rule 9020.90 (a)-(d), I find the second Application barred under the doctrine of *res judicata.* I, therefore, respectfully dissent from the Majority.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034798
Case Name	John Miller v. Brand/Safway
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Casey VanWinkle
Respondent Attorney	Toney Tomaso

DATE FILED: 7/10/2023

THE INTEREST RATE FOR THE WEEK OF JULY 5, 2023 5.26%

/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

John Miller
Employee/Petitioner

v.

Brand/Safway
Employer/Respondent

Case # **21** WC **034798**

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 **4/25/23**. 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. ☒ 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 **Doctrine of *res judicata***

FINDINGS

On **1/3/19**, 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 $**15,776.42**; the average weekly wage was $**1,242.48**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**7,712.87** for TTD, $**0** for TPD, $**0** for maintenance, and $**12,473.83 in medical expenses paid**, for a total credit of $**20,186.70**.

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

ORDER

Pursuant to the stipulation of the parties, Respondent shall pay Petitioner's medical expenses as itemized in Petitioner's Group Exhibit 9, pursuant to the Illinois medical fee schedule, and under Section 8(a) of the Act. The parties stipulated that Respondent shall receive a credit in the amount of $12,473.83 in medical expenses previously paid.

Respondent shall pay Petitioner the sum of $**745.49**/week for a period of **250** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused permanent partial disability to the extent of **50% loss of use of Petitioner's body as a whole for loss of an occupation/trade**.

Respondent shall pay Petitioner compensation that has accrued from 12/6/19 through 4/25/23, 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.

JULY 10, 2023

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOHN MILLER,)
)
Employee/Petitioner,)
)
v.) Case No.: 21-WC-034798
)
BRAND/SAFWAY,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on April 25, 2023 on all issues. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 1/3/19, and that Petitioner's current condition of ill-being is causally connected to the injury. Respondent stipulated to liability for Petitioner's medical expenses contained in Petitioner's Group Exhibit 9. The parties stipulated that Respondent shall receive a credit for temporary total disability benefits paid in the amount of $7,712.87 and medical expenses paid in the amount of $12,473.83.

The issues in dispute are temporary total disability benefits, maintenance benefits, the nature and extent of Petitioner's injuries, and whether Petitioner's claim is barred by the doctrine of *res judicata*.

TESTIMONY

Petitioner was 38 years old, single, with two dependent children at the time of accident. Petitioner testified that he was working at a refinery on 1/3/19 when he stepped into a hole with his left leg. He stated the hole was filled with 180-degree water and his leg was submerged up to his knee. Petitioner immediately removed his boot and sock and rolled his pant leg up. He testified that the skin on his leg peeled off with his fingernails like hot wax and he nearly lost consciousness.

Petitioner has undergone significant treatment for burns and nerve damage, including skin grafting around his ankle that came from his left leg. He also underwent a nerve release in his left leg. He has daily sharp and dull pain in his leg, with swelling and throbbing. Petitioner elevates his leg when sitting on the couch to reduce his symptoms. He has difficulty bending his left knee, kneeling, and climbing stairs. Petitioner stated that the mobility in his left ankle is

limited, and he has to hop up stairs. He has difficulty with balance and his symptoms interrupt his sleep.

Petitioner testified that he has not worked since the date of his accident. He testified that since he underwent a Functional Capacity Evaluation, he has searched online a little bit to see what employment was available in his area within his permanent restrictions and background knowledge. He agreed he was producing evidence of his job search at arbitration and his last job search was approximately six months ago.

Petitioner identified an Application for Adjustment of Claim he filed in February 2019 through the assistance of his former attorney Thomas Ewick. Petitioner agreed that the 2019 Application related to his 1/3/19 accident. Petitioner agreed that Mr. Ewick withdrew his representation. Petitioner stated that at all relevant times he resided at the same Coronado Drive address in Jacksonville, Illinois. Petitioner testified that at the time he was not aware that Arbitrator Gallagher dismissed his original case. He did not recall receiving the Notice of Case Dismissal mailed to him by the Commission in December 2019.

MEDICAL HISTORY

Petitioner underwent emergency treatment for second and third degree burns to his left lower leg and foot. He followed up Dr. George Dirkers at Wood River Clinic where his wounds were cleansed and Polysporin was applied. (PX4) He was ordered to keep his leg elevated, change the dressing, and return to the clinic on Monday. Dr. Dirkers allowed Petitioner to work as tolerated. On 1/8/19, Dr. Dirkers noted the wound bed was red without periwound erythema with mild swelling in Petitioner's left ankle. He noted moderate serous drainage on the dressing. On 1/11/19, Petitioner underwent a debridement of his foot and ankle. On 1/16/19, Dr. Dirkers noted Petitioner had an appointment with a wound specialist.

On 1/18/19, Petitioner underwent skin grafting of his left ankle and foot by Dr. Mailey at SIU Medicine. Pre- and post-operative diagnosis was deep partial and full-thickness burns to the left ankle and dorsum of the left foot. (PX3, 5) On 1/29/19, Dr. Mailey noted Petitioner's grafting had nearly a 100% take and he was doing well. He transitioned Petitioner to using moisturizer and continued him off work.

On 2/26/19, Dr. Mailey noted Petitioner had 100% full thickness skin graft of the left ankle, with a Tinel's sign over a portion of the skin graft that caused shooting nerve pain within the distribution of the superficial peroneal nerve of the lateral foot. Dr. Mailey recommended compression socks for edema control due to tingling after ambulating more than five minutes. He prescribed Neurontin and released Petitioner to returned to work on 3/25/19 with restrictions of desk work only.

On 4/23/19, Dr. Mailey noted Petitioner had minimal improvement with Neurontin. He continued to have hypersensitivity in the peroneal nerve distribution. Dr. Mailey continued his light duty restrictions.

On 5/21/19, Dr. Mailey recommended that Petitioner continue desensitization therapy and undergo a superficial peroneal nerve decompression and neurolysis with fat grafting. Petitioner was continued on light duty restrictions.

On 7/24/19, Dr. Mailey performed a release of the left superficial peroneal nerve in Petitioner's ankle for treatment of compressive neuropathy; resection of neuroma off the superficial personal nerve for treatment of neuropathic pain; and fat grafting to the post skin grafted area above the nerve to prevent recurrent nerve scarring. Petitioner was placed off work.

On 8/9/19, Dr. Mailey removed Petitioner's sutures and noted he was improved. He placed Petitioner on light duty restrictions of wearing only a slipper or sandal on his left foot.

On 9/10/19, Dr. Mailey noted Petitioner continued to have hypersensitivity on the dorsal lateral aspect of his foot. Petitioner was able to wear a shoe and had swelling in his ankle after prolonged standing. Dr. Mailey released Petitioner to full duty work on a gradual basis, with working one day the first week, two days the second week, three days the third week, and so on as tolerated.

On 10/15/19, Dr. Mailey noted Petitioner was working his usual duties. Petitioner had some paresthesias on the left side of his foot that was improving. Petitioner noted a band like feeling around his ankle at the skin graft site. Dr. Mailey discussed the possibility of more skin grafting but recommended he give it more time.

On 12/6/19, Dr. Mailey noted Petitioner was back to work without restrictions. Petitioner reported pain in his foot with prolonged standing and he had issues climbing a ladder. Dr. Mailey advised it would take up to one year to heal and Petitioner would have residual swelling. Dr. Mailey recommended a compression garment. He noted Petitioner's hypersensitivity had resolved and Petitioner was doing excellent overall. However, Dr. Mailey referred Petitioner to a pain specialist and noted that if Petitioner had left lower leg pain, he should be allowed to take 15-minute breaks to elevate his leg. Petitioner was released at MMI.

Petitioner last saw Dr. Mailey on 1/2/20 at which time he noted occasional burning pain in his left leg that increased with standing. Petitioner had recently undergone a cardiac pacemaker implant that became infected and had to be replaced. Dr. Mailey noted Petitioner was being seen in the pain clinic and taking Neurontin 300 mg three times a day. He stated it was difficult to completely characterize Petitioner's pain and suspected symptom magnification. Dr. Mailey could not objectively quantify Petitioner's pain and opined that the only thing he had to offer was to completely take out the superficial peroneal nerve which would lead to permanent and complete numbness over the dorsum of Petitioner's foot. Dr. Mailey was hesitant to perform the procedure which could not be performed for another year. He recommended continued use of compression socks and pain management.

On 12/10/21, Petitioner underwent a Functional Capacity Evaluation at Athletico Physical Therapy. (PX6) It was noted that Petitioner's subjective complaints were consistent with the referring diagnosis with no evidence of symptom magnification. Petitioner demonstrated capabilities and functional tolerances within the medium physical demand level with a 40-pound

lifting limit. However, due to Petitioner's limitations with standing, walking, and balance, it was recommended that he be placed in a position of only occasional standing and walking and avoid uneven surfaces and ladders/heights, which would likely affect the type of work available to him within the medium physical demand level.

On 6/10/22, Petitioner underwent a vocational rehabilitation evaluation by Delorez Gonzalez. (PX7) Mrs. Gonzalez testified by way of deposition on 10/24/22. (PX8) She has 49 years of experience as a vocational rehabilitation counselor. Mrs. Gonzalez performs three to five evaluations per week and testifies in social security disability hearings 25 to 35 times per week. She serves as a clinical educator where she trains master's degree level students. Mrs. Gonzalez opined that Petitioner did not have transferable skills due to his significantly reduced residual functional capacity. She opined that Petitioner may be capable of performing a limited range of sedentary jobs in the local economy, including document preparer, escort vehicle driver, tube operator, cashier, and price marker, all with sit/stand options.

Mrs. Gonzalez testified that Petitioner earned $31.08 per hour working for Respondent. She opined that Petitioner's impairments have severely compromised his ability to return to work as a union insulator. She opined that Petitioner was capable of working an entry-level job earning a minimum wage of $12.00 per hour. She testified that Petitioner has an employment history of physically demanding labor and no secondary education beyond a four-year apprenticeship as an insulator which he can no longer perform.

On cross-examination, Mrs. Gonzalez testified she did not provide Petitioner with job placement services. She referred Petitioner to the Department of Rehabilitation Services and Challenge Unlimited for free job placement services and she is not aware if Petitioner utilized these services or if he subsequently obtained employment. She testified that Petitioner told him in June 2022 that he had not looked for employment.

CONCLUSIONS OF LAW

Issue (K): What temporary benefits are in dispute? (TTD and Maintenance)

Petitioner claims entitlement to temporary total disability and maintenance benefits from 12/19/19 through 4/24/23. Respondent disputed liability for TTD and maintenance benefits and demanded strict proof.

Dr. Dirkers allowed Petitioner to continue working as tolerated during the course of his treatment through 1/16/19. Petitioner was initially placed off work on 1/18/19 when he underwent skin grafting by Dr. Mailey. On 2/26/19, Dr. Mailey allowed Petitioner to return to work with light duty restrictions of desk work only. Petitioner was continued on those restrictions until he underwent a release of the left superficial peroneal nerve and fat grafting on 7/24/19 and was again placed off work. On 8/9/19, Dr. Mailey placed Petitioner on light duty restrictions of wearing only a slipper or sandal on his left foot. On 9/10/19, Dr. Mailey released Petitioner to full duty work on a gradual basis, with working one day the first week, two days the second week, three days the third week, and so on as tolerated. On 10/15/19, Dr. Mailey noted Petitioner was working his usual duties. On 12/6/19, Dr. Mailey noted Petitioner was back to

work without restrictions. On that date, Dr. Mailey recommended a compression garment and referred Petitioner to a pain specialist. He opined that Petitioner had reached MMI and if his left leg was painful, he should be allowed to take 15-minute breaks to elevate his leg.

Petitioner testified he has not worked since the date of his accident. He did not explain at arbitration whether he was or was not working as Dr. Mailey noted in his office notes of October and December 2019. However, the Functional Capacity Evaluation noted Petitioner last worked on 12/21/19. This is consistent with Dr. Mailey's office note of 12/6/19 that Petitioner was working without restrictions. There are no medical records addressing Petitioner's work status after Dr. Mailey's examination on 12/6/19 until he underwent the FCE two years later on 12/10/21. The FCE notes that Petitioner initially returned to light duty work, but he has not worked in over a year now, inferring he did work for a period of time following his accident. It was also noted that Petitioner had been treating with pain management and he was referred for an FCE to determine if restrictions were appropriate. Petitioner's physician was noted as Abby Cunningham, NP and that Petitioner was applying for disability.

The Arbitrator notes that when Petitioner returned to Dr. Mailey on 1/2/20 his work status remained unchanged. Dr. Mailey opined he did not have any significant additions or changes of care for Petitioner, and Petitioner should continue to perform his usual duties which may help him improve. Petitioner did not return to Dr. Mailey after 1/2/20 and underwent open heart surgery with pacemaker placement on 1/6/20.

Petitioner was initially evaluated for pain management at Passavant Area Hospital on 2/5/20. (PX2) On 4/9/20, the pain management specialist noted Petitioner was frustrated he could not return to work, and Petitioner felt he would not be able to work in the construction trade until his pain was controlled. Petitioner was not provided with any work restrictions from the pain management specialists. Petitioner underwent pain management treatment through 8/28/20, at which time he was referred to Dr. Cummings for a disability assessment. No medical records from Dr. Cummings were admitted into evidence.

Petitioner testified that since he underwent the FCE he has searched online a little bit to see what employment was available in his area within his permanent restrictions. He agreed he was not submitting evidence of his job search at arbitration and his last job search was approximately six months ago.

There was no evidence to rebut Petitioner's permanent restrictions set forth in the FCE performed on 12/10/21. Petitioner demonstrated capabilities and functional tolerances within the medium physical demand level with a 40-pound lifting limit. However, due to Petitioner's limitations with standing, walking, and balance, it was recommended that Petitioner be placed in a position of only occasional standing and walking and avoid uneven surfaces and ladders/heights, which would likely affect the type of work available to him within the medium physical demand level. There does not appear to be a dispute that Petitioner's permanent restrictions prevent him from returning to his pre-accident employment as a union insulator. Vocational Rehabilitation Counselor Delores Gonzalez provided unrebutted testimony that Petitioner's impairments have severely compromised his ability to return to work as a union insulator and he was capable of working only entry-level jobs within his permanent restrictions.

Petitioner did not claim entitlement to temporary total disability benefits prior to 12/19/19. (AX1) He reported to his pain specialist that he last worked on 12/21/19. There is no evidence Petitioner required work restrictions until he underwent the FCE on 12/10/21. Although there is no dispute that Petitioner's permanent restrictions prevent him from returning to work in his pre-accident position for Respondent, Petitioner admitted he performed a minimal job search following the FCE and provided no evidence of a job search.

Based on the evidence, the Arbitrator finds that Petitioner is not entitled to temporary total disability benefits or maintenance benefits for the claimed period 12/19/19 through 4/25/23.

Issue (L): What is the nature and extent of the injury?

Based upon the record taken as a whole, the Arbitrator finds that Petitioner has not met his burden of proof that he is permanently and totally disabled under Section 8(f) of the Act. The Arbitrator further finds that an award under Section 8(e) of the Act does not adequately compensate Petitioner for the loss sustained. Rather, the Arbitrator finds that the appropriate award should be for loss of an occupation/trade as provided in Section 8(d)2 of the Act. The Arbitrator finds that Petitioner is not able to return to his usual and customary duties as a union insulator. The Arbitrator is guided by the Commission's decision in *O'Leary v. City of Chicago*, 98-WC-8840, 07 IWCC 743 (2007), wherein the Commission affirmed the decision of the Arbitrator who awarded 40% loss to the person as a whole based upon Petitioner's loss of occupation as a result of a right ankle injury. The Commission Decision, which adopted the Arbitrator's award, discussed in detail a number of cases wherein an award under Section 8(d)2 was made for loss of occupation rather than Section 8(e). The *O'Leary* decision cited with approval *Barfell v. U.E. and C. Catalytic Inc*., 96 IIC 1299, wherein a 37 year old pipefitter who suffered a left torn meniscus that required surgery was placed on permanent work restrictions. The employer in *Barfell* provided Petitioner with fulltime work as a welder and earned union scale wages as a pipefitter. Nonetheless, the Commission concluded that a 40% loss of use under Section 8(d)2 rather than loss of use of a leg under Section 8(e) was appropriate. The commission cited *O'Leary, supra* with approval in *Ridgeway v. TLC*, 02 IWCC 65692, 11 IWCC 0920, 2011 WL 5014274.

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither party submitted an AMA impairment rating. Therefore, the Arbitrator places no weight on this factor.

(ii) **Occupation**: Petitioner was employed as a union insulator at the time of accident. On 12/10/21, Petitioner underwent a Functional Capacity Evaluation that

demonstrated capabilities and functional tolerances within the medium physical demand level with a 40-pound lifting limit. However, due to Petitioner's limitations with standing, walking, and balance, it was recommended that Petitioner be placed in a position of only occasional standing and walking and avoid uneven surfaces and ladders/heights, which would likely affect the type of work available to him within the medium physical demand level. Vocational Rehabilitation Counselor Delorez Gonzalez opined that Petitioner's impairments have severely compromised his ability to return to work as a union insulator. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 38 years old at the time of accident. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact 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**: Vocational Rehabilitation Counselor Delores Gonzalez testified that Petitioner earned $31.08 per hour working for Respondent. She opined that Petitioner was capable of working an entry-level job earning the state's minimum wage. She testified that Petitioner has an employment history of physically demanding labor and no secondary education beyond a four-year apprenticeship as an insulator which he can no longer perform. There was no evidence to rebut Mrs. Gonzalez's opinions. The Arbitrator places greater weight on this factor.

(v) **Disability**: As a result of the undisputed work accident, Petitioner sustained second and third degree burns to his left lower leg and foot. Petitioner underwent a debridement of his foot and ankle followed by skin grafting. He was diagnosed with deep partial and full-thickness burns to his left ankle and dorsum of his foot. Petitioner underwent a third procedure involving a release of the left superficial peroneal nerve in his ankle for treatment of compressive neuropathy; resection of neuroma off the superficial personal nerve for treatment of neuropathic pain; and fat grafting to the post skin grafted area above the nerve to prevent recurrent nerve scarring. Despite surgery, Petitioner continued to have hypersensitivity on the dorsal lateral aspect of his foot resulting in six months of pain management. Despite Dr. Mailey's opinion on 12/6/19 that Petitioner was doing well overall, he continued to note Petitioner had pain with prolonged standing and he had difficulty climbing ladders. He opined that Petitioner would have residual swelling and recommended a compression garment, pain management, and for Petitioner to be allowed to take 15-minute breaks to elevate his leg as-needed.

The FCE performed on 12/10/21 was unrebutted and demonstrated that Petitioner has permanent restrictions within the medium physical demand level with a 40-pound lifting limit. However, due to Petitioner's limitations with standing, walking, and balance, it was recommended that Petitioner be placed in a position of only occasional standing and walking and avoid uneven surfaces and ladders/heights,

which would likely affect the type of work available to him within the medium physical demand level. Vocational Rehabilitation Counselor Delorez Gonzalez provided unrebutted opinions that Petitioner could not return to his pre-accident employment as a union insulator due to his significantly reduced residual functional capacity. She opined that Petitioner may be capable of performing a limited range of sedentary jobs in the local economy, including document preparer, escort vehicle driver, tube operator, cashier, and price marker, all with sit/stand options, resulting in minimum wage earnings. 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 50% loss of use of his body as a whole, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 12/6/19 through 4/25/23, and shall pay the remainder of the award, if any, in weekly payments.

Issue (O): Whether Petitioner's claim is barred by the doctrine of *res judicata.*

On 3/12/19, Petitioner filed an Application for Adjustment of Claim alleging severe burns to his left leg when his leg went through a piece of plywood covering a hole on 1/3/19. (Case No. 19-WC-007490 - RX1) The Application provided Jacksonville, Illinois as the location of accident and the case was venued in Springfield. (RX1, 2). On 3/21/19, Attorney Thomas Ewick filed a Motion to Withdraw as attorney of record stating Petitioner requested that he no longer represent him in Case No. 19-WC-007490. On 6/19/19, Arbitrator Christina Hemenway entered an Order granting Attorney Ewick's Motion to Withdraw. (RX3)

On 9/20/19, Respondent's attorney Toney Tomaso filed a Motion to Dismiss and Notice of Motion and Order setting the matter for hearing on 12/11/19 in Springfield, Illinois. (RX4) Proof of Service indicated the pleadings were mailed to Petitioner via certified mail at his home address of 1112 Coronado Drive, Jacksonville, Illinois. On 12/11/19, Arbitrator Gallagher entered an order dismissing Petitioner's case due to Petitioner's failure to appear. On 12/12/19, the Commission mailed a Notice of Case Dismissal to Petitioner and Mr. Tomaso. (RX6) The Notice of Case Dismissal was mailed to Petitioner's address at 1112 Coronado Drive, Jacksonville, Illinois.

On 12/22/21, Petitioner filed a new Application for Adjustment of Claim alleging injuries to his left leg as a result of stepping backward into a hole filled with hot water on 1/3/19. (Case No. 21-WC-034798, AX2) The Application was signed by Petitioner's current attorney Casey VanWinkle. The parties stipulated that both Applications for Adjustment of Claim arise from the same accident and injuries that occurred on 1/3/19. The second Application filed on 12/22/21 alleges the accident occurred in Wood River, Illinois and the case was venued in Collinsville, which the parties stipulated was the proper venue.

On 1/27/22, Petitioner filed a Petition for Immediate Hearing under Sections 19(b) and 8(a). This Arbitrator scheduled a pre-trial hearing on 2/7/22 at which time the Section 19(b) Petition was continued upon Petitioner's request, and an order was entered for a date certain trial

on 5/11/22. On 5/9/22, this Arbitrator continued the Section 19(b) Petition hearing upon Petitioner's request and entered an order for a date certain trial on 6/16/22. On 6/15/22, Attorney Toney Tomaso entered his appearance on behalf of Respondent. Mr. Tomaso argued that Petitioner's subsequent claim (Case No. 21-WC-034798) was barred by the doctrine of *res judicata*. There is no dispute that Petitioner did not file a Petition to Resinstate his original claim (Case No. 19-WC-007490) that was dismissed for want of prosecution on 12/11/19.

On 7/1/22, the parties submitted written briefs regarding whether the doctrine of *res judicata* was a defense to the instant case. (RX7, 8) Respondent argued that the Order of Dismissal entered on 12/11/19 in Case No. 19-WC-007490 became a final judgment as Petitioner failed to file a Petition to Reinstate, and Petitioner's second claim is barred by the doctrine of *res judicata*. Petitioner argued that his subsequent claim was timely filed within the three-year statute of limitations as provided under Section 6(d) of the Act, and that the doctrine of *res judicata* is not a proper defense to the instant case pursuant to subsection (e) of Rule 9020.90.

The Arbitrator first addresses whether the doctrine of *res judicata* precludes Petitioner's present claim. *Res judicata* may be raised as a defense in proceedings before the Commission. *Scott v. Indus. Comm'n,* 184 Ill.2d 202, 219 (1998). The doctrine of *res judicata* arises "from the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose." *Hughey v. Indus. Comm'n*, 76 Ill.2d 577, 582 (1979). *Res judicata* requires: "(1) that the former adjudication resulted in a final judgment on the merits; (2) that the former and current adjudications were between the same parties; (3) that the former adjudication involved the same cause of action and same subject matter of the later case; and (4) that a court or administrative agency of competent jurisdiction rendered the first judgment." *City of Chi. v. Illinois Workers' Comp. Comm'n*, 2014 IL App (1st) 121507WC, ¶ 48.

There is no dispute that the last three elements of *res judicata* are satisfied. Petitioner's 2019 and 2021 claims involve the same parties, same cause of action and subject matter, and the Commission entered an order of dismissal for want of prosecution on 12/11/19 that became a final judgment on or about 2/9/20.

The issue is whether an order of dismissal for want of prosecution constitutes a final judgment *on the merits*. The doctrine of *res judicata* extends to matters actually decided and those that could have been decided. *Godare v. Sterling Steel Casting Co.*, 430 N.E.2d 571 (1989). "On the merits" refers to a judgment, decision, or ruling that a court makes based on the law, after hearing all of the relevant facts and evidence presented in court.

The Commission addressed this exact issue in *Gary Brown v. Consolidated Coal Co.*, 08-IWCC-0432. In *Brown,* Petitioner filed an application for adjustment of claim in 1992 that was dismissed for want of prosecution. Respondent argued that Petitioner's claim was fully decided and dismissed in 1996, and, therefore, Petitioner was prohibited from filing a subsequent claim in 2004. The Commission found there was never a hearing held on the merits in Petitioner's 1992 claim and a dismissal for want of prosecution is not considered a decision within the meaning of Section 19 of the Act. *Chicago Rawhide Mfg. Co. v. Industrial Comm'n*, 35 Ill.2d 595, 221 N.E.2d 289 (1966) As there was never a hearing on the merits of the 1992 claim, the

Commission held that the theories of res judicata and collateral estoppel did not apply to the subsequent action.

The Commission further held in *Brown*, there is nothing in the Act or Commission Rules that prohibit a claimant from filing more than one application for adjustment of claim for the same injury. *Johnson v. Illinois Dept. of Transportation*, 06 IWCC 0991 (in affirming a denial of a motion to reinstate a case that was dismissed for want of prosecution, the Commission noted that the claimant may proceed with filing another claim for the same injury so long as the claim is filed within the statute of limitations). Further, the Commission noted that Respondent had not cited to anything in the Act, Commission Rules, or case law in support of its position. Respondent asserted that Section 6(d) of the Act prohibited Petitioner from filing two claims. The Commission disagreed and found that Section 6(d) did not limit the number of times a Petitioner may file an adjustment of claim as long as the claim is timely filed. The Commission found that Petitioner's subsequent claim filed in 2004 was timely as it was filed within two years of the last payment of compensation.

In the present case, there is no evidence before this Arbitrator that Petitioner's original claim filed in 2019 was submitted to hearing under any section of the Act. Respondent paid Petitioner temporary total disability benefits from 1/18/19 through 4/4/19, with no evidence of a Section 19(b) hearing. (RX10) The parties agree that Petitioner filed his second Application for Adjustment of Claim within the three-year statute of limitations, which would have run on 1/3/22. Respondent argues that the Commission's decision in *Brown* is not persuasive because it fails to acknowledge the Illinois Supreme Court's more recent decision in *S.C. Vaughan Oil Co.*, holding that when a suit is dismissed for want of prosecution and the *refiling period expires*, the dismissal constitutes a final judgment on the merits. 181 Ill. 2d at 502. Respondent appears to ignore the fact that Petitioner's refiling period had not expired when he filed his subsequent Application for Adjustment of Claim.

Respondent's reliance on *Farrar v. United Airlines* is also misplaced and distinguishable from the facts in the present case. The Commission in *Farrar* considered whether the petitioner's application for adjustment of claim was untimely or, alternatively, barred by the doctrine of *res judicata*. 12 IL. W.C. 13163, 2014 WL 948431, *2 (Ill. Indus. Comm'n Feb. 19, 2014). On April 28, 2011, the Arbitrator dismissed the petitioner's claim for want of prosecution and she did not file a petition to reinstate. *Id*. Instead, one year later, after the statute of limitations had run, the petitioner filed another application for adjustment of claim arising out of the same work accident. *Id*. The respondent argued that the dismissal of the first claim became final upon the expiration of the period to file a petition to reinstate and operated as *res judicata* in the second claim. *Id*. Alternatively, the respondent argued that the second claim was filed outside the statute of limitations. *Id*. at *3. The Commission explained that the Illinois Supreme Court in *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 502 (1998), held in a civil case that when a suit is dismissed for want of prosecution and *the refiling period expires*, the dismissal constitutes a final judgment on the merits because the order effectively ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. *Farrar*, 2014 WL 948431, at *3. The Commission concluded that the dismissal of the first claim was a final judgment with respect to the petitioner's right to recover workers' compensation benefits from the respondent arising out of the work accident and operated as *res judicata* in the second claim arising out of

the same work accident. *Id*. at *4. The Commission found further that the second claim was filed after the statute of limitations ran. *Id*.

On appeal, the Illinois Appellate Court held that "the Commission properly dismissed her refiled claim on *res judicata* and statute of limitations grounds." *Farrar v. Illinois Workers' Comp. Comm'n*, 2016 IL App (1st) 143129WC, ¶ 18. The Court reasoned that because the 60–day limit for filing a petition to reinstate under Commission Rule 9020.90 is jurisdictional in nature, a claimant's failure to timely file a petition for reinstatement following a dismissal for want of prosecution results in a final judgment with respect to the claimant's rights to recover workers' compensation benefits arising from the claim. *Id*., ¶ 14. The Court explained that "[t]he wording of Commission Rule 9020.90 in its entirety reveals the Commission's intent that Commission Rule 9020.90 be the sole means for *reviving* a workers' compensation claim that is dismissed for want of prosecution." *Id*., ¶ 17. As for the statute of limitations, the Court concluded that "[t]he application of section 13–217 of the Code to allow the refiling of workers' compensation claims that have been dismissed for want of prosecution, beyond 60 days, up to a year after dismissal, *after the statute of limitations has expired*, and without a showing of any justification for refiling would render the requirements of Commission Rule 9020.90 meaningless." *Id*.

In the instant case, Petitioner's refiling period had not expired when he filed his subsequent claim. He did not attempt to *revive* his previous claim by filing a Petition to Reinstate under Section 9020.90 but chose to make a new filing within the three-year statute of limitations period. As the Commission held in *Brown,* Section 6(d) does not limit the number of times a petitioner may file an adjustment of claim as long as the claim is timely filed. Further, the plain language of subsection (e) of Rule 9020.90 makes it clear that Petitioner has the right to file a new claim within the statute of limitations period regardless of whether he exercised his rights under subsections (a) through (d) to revive his previously dismissed claim.

Rule 9020.90(e) provides, "Nothing in this Section abridges the rights found in the applicable Statute of Limitations of the Illinois Workers' Compensation Act (Section 6(d) of the Act) or Section 6(c) of the Illinois Occupational Diseases Act." 50 Ill. Adm. Code 9020.90(e). Interpretation and application of 9020.90(e) appears to be one of first impression when a Petitioner fails to seek reinstatement of a dismissed claim under 9020.90(a) through (d), but files a new claim within the statute of limitations period set forth in Section 6(d).

The plain language of 9020.90(e) implies that if Petitioner's claim is not reinstated under Rule 9020.90 it shall have no effect on his right to file a claim within the statute of limitations period set forth in Section 6(d). Again, the Commission held in *Brown*, there is nothing in the Act or Commission Rules that prohibit a claimant from filing more than one application for adjustment of claim for the same injury. *Johnson v. Illinois Dept. of Transportation*, 06 IWCC 0991 (in affirming a denial of a motion to reinstate a case that was dismissed for want of prosecution, *the Commission noted that the claimant may proceed with filing another claim for the same injury so long as the claim is filed within the statute of limitations*).

Therefore, the Arbitrator finds that Petitioner's claim is not barred by the doctrine of *res judicata* and was properly and timely filed pursuant to Section 6(d) of the Act and Rule 9020.90(e).

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC012964
Case Name	Casandra Jones v. Palos Community Hospital
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0207
Number of Pages of Decision	30
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Kirk Kuhns

DATE FILED: 5/6/2024

/s/ Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASANDRA JONES,

Petitioner,

vs. NO: 21 WC 01296

PALOS COMMUNITY HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical, TTD, average weekly wage, and prospective medical, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 15, 2023 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $34,487.03. 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.

May 6, 2024

KAD/swj
O 4/16/24
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	21WC012964
Case Name	Casandra Jones v. Palos Community Hospital
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	27
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Scott Goldstein
Respondent Attorney	Kirk Kuhns

DATE FILED: 9/15/2023

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

/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)

Casandra Jones
Employee/Petitioner

v.

Palos Community Hospital
Employer/Respondent

Case # **21** WC **012964**

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 16, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,086.33**; the average weekly wage was $**386.28**.

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 $**2,480.38** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**2,480.38**.

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

ORDER

- **Respondent shall pay reasonable and necessary medical services of $35,636.82, as provided in Section 8(a) of the Act. Respondent shall pay, pursuant to the fee schedule, $26,543.28 to Persistent RX, $8,860.54 to Orland Park Orthopedics, and $233 to Palos Hospital, as provided in Sections 8(a) and 8.2 of the Act.**
- **Respondent shall pay Petitioner temporary total disability benefits at the rate $266.67 representing the statutory minimum for a Petitioner with no dependents and said benefit shall be paid from December 18, 2020 through January 24, 2021, a period of 5 and 3/7 weeks, with Respondent receiving a credit for temporary total disability benefits already paid.**
- **For reasons set forth in the Attached Decision, although the Arbitrator finds the overall condition of Petitioner's right knee related to the accident, the Arbitrator declines to award the specific prospective medical care requested by Petitioner – the arthoscopic surgery to treat Petitioner's meniscal tear - on the basis Petitioner's meniscal tear in her right knee is not causally related to the work accident on December 16, 2020.**

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 15, 2023

Signature of Arbitrator

ICArbDec19(b)

THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASSANDRA JONES,
Plaintiff

Case Number 21 WC 012964

v.

PALOS COMMUNITY HOSPITAL,
Defendant

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Charles Watts. The issues in dispute were causal connection, average weekly wage, medical bills, TTD benefits, and prospective medical care.

FINDINGS OF FACT

The parties stipulated Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and had an employer/employee relationship on December 16, 2020, and on that date Petitioner sustained an accidental injury that arose out of and in the course of her employment. The parties stipulated that Respondent was notified of Petitioner's December 16, 2020 accident within the time limit stated in the Act and that Petitioner was 51 years old, single, and had zero dependent children. The Petitioner and the Respondent also agree that Respondent paid $2,480.38 in Temporary Total Disability benefits to the Petitioner for which a credit would apply. The parties also noted neither penalties nor attorney fees were being sought at this time relative to this claim, request that a written Decision pursuant to Section 19(b) of the Act and agreed to receipt of the Arbitration Decision and any subsequent decision and opinion on review via email.

Petitioner testified that she was employed as a part-time Certified Nurses Aide at Palos Community Hospital on December 16, 2020. She had been employed on a part-time basis for many years. Her job duties required her to make sure patients are cleaned up, washed up, ready for breakfast and lunch, pass out trays, feed patients that can't feed themselves, clean them up if they

have accidents, and make sure their stay at the hospital is comfortable. On December 16, 2020 Petitioner was transferring a patient from a cart/wheelchair to a bed – she was located at the foot of the bed – facing the bed – assisting a transporter and a nurse. The transporter was on one side of the cart/wheelchair and the nurse was on the other side, and Petitioner was in the middle of the cart/wheelchair and the bed. Petitioner had the patient's legs as they were sliding patient from the cart/wheelchair over to the bed. She planted herself and twisted her body and hit her right knee on the bottom part of the bed. Petitioner testified that she twisted her lower body and upper body at the same time when the accident occurred.

After the lifting event on December 16, 2020 Petitioner reports she was able to complete her shift that day and did not report an injury. She took ibuprofen that night and the next morning before her shift. She confirmed the following morning – December 17, 2020 – as she was starting her shift she was not experiencing any pain or symptoms. Specifically, Petitioner stated "I didn't feel nothing like when I got there, but as I was working, I started feeling it." Specifically, she reports she started feeling pain in her right knee.

Petitioner reported the incident to her employer and completed an "Employee Incident Report" on December 17, 2020 and the accident/injury was described as follows:

> "Hit my leg and shin on bed while transferring patient to cart trying to prevent patient from hitting her bad leg."

(RX 1)

Petitioner confirmed that she wrote the description of the accident on the form, and subsequently, signed and dated said form on December 17, 2020. Petitioner was referred to Occupational Health wherein she reported the work incident and was referred to a medical provider for further evaluation. Petitioner met with Karen Kratzenberg, a nurse at Palos Community Hospital, on December 17, 2020 and provided the following description of the work incident:

> "We were transferring a patient from a bed to a cart. I was on the bed side. As we slid her onto the cart, I was moving to the foot of the bed to guide her leg. I hit my leg on the footboard. It hurt, but I didn't pay much attention to it. I finished my shift without a problem. Last night while I was in bed it really started hurting. It's hurting really bad right now."

(RX 2).

Petitioner testified that she did not initially write anything about twisting her knee because she felt a pain when she struck her knee on the bed. Petitioner confirmed she was evaluated by Dr. David Cornell at Palos Hospital and was referred to Dr. Neel Pancholi for further evaluation. Dr. Pancholi administered a right knee injection and recommended a MRI evaluation.

Petitioner testified she was out of work from December 17, 2020 through January 24, 2021 at which time she returned to work in a light duty position in the Purchasing Department at Palos Hospital. Ultimately, she became employed as a Patient Service Representative in June 2021 at Palos Hospital in a full-time capacity and has remained employed in that capacity through the present.

Petitioner testified prior to December 16, 2020 she had arthritic knee pain and was advised by "Dr. Peters" to take over the counter anti-inflammatory medication. Petitioner denied an evaluation with Dr. Salem Makdah relative to her bilateral knee pain, but medical documentation confirmed Petitioner was evaluated on September 8, 2020 at which time she reported increasing pain in both knees. (RX 9, pg. 9) Subsequently, Petitioner would take ibuprofen 400 mg. in the morning and 400 mg. in the evening, typically on the days she would have to work. Petitioner testified prior to December 16, 2020 she would have pain that she rated as a 1 or 2 out of 10 on the pain scale for which she would not take ibuprofen, and when the pain would increase to a 4 out of 10 she would take the ibuprofen. Petitioner acknowledged her knee pain was a 1 to 4 out of 10 on the pain scale prior to December 16, 2020.

Petitioner was evaluated by Dr. David Cornell on December 18, 2020 and the History recorded outlined the following:

> "Patient hit her right knee against a bedframe on the hard rails when moving a patient on December 16, 2020. She believes she also may have bent her knee inwards and twisted it." (RX 6, pg. 6)

Petitioner was referred to Dr. Neel Pancholi for further evaluation and on December 18, 2020 the History outlined the following:

> "Patient states she injured her right knee at work on December 16, 2020 when she struck her knee on a bedrail while moving a patient."

Petitioner denied feeling or hearing a "pop." Severity of the pain was rated as a 6 out of 10. Petitioner was diagnosed with moderate to severe osteoarthritis of the right knee with acute osteoarthritic flare-up. Dr. Pancholi recommended a cortisone injection. (RX 5, pg. 7, 10)

Petitioner continued to follow-up with Dr. Pancholi for ongoing medical management, and ultimately, a MRI was recommended. A right knee MRI was completed on January 13, 2021 and the findings relative to the "Medial Compartment" outline the following:

> "There is degeneration and degenerative tearing of the body segment of the medial meniscus with virtually complete extrusion of the body segment. There is severe chondromalacia in the medial compartment with moderately severe subchondral osseous reaction of the medial femoral condyle and medial tibial plateau. The medial collateral ligament is intact."

(RX 4, pg. 538)

Petitioner returned to Dr. Pancholi on January 18, 2021 and he reviewed the MRI and noted it revealed severe medial compartment osteoarthritis, moderate patellofemoral arthritis, no ligament tear, and a loose body posterior to patellar collateral ligament. Dr. Pancholi recommended physical therapy and work restrictions. (RX 5, pg. 41, 42)

Petitioner underwent an initial physical therapy assessment on January 25, 2021 wherein the history outlined the following:

> "December 16, 2020 – Cassandra states that she was helping a patient transfer from a cart to a bed; she states that she hit her right knee on the bed; unsure if she twisted her knee."

Petitioner reported her current pain level was a 2 out of 10. (RX 4, pg. 560) Petitioner follows up with physical therapy on the following dates and her pain level is recorded as noted:

- February 2, 2021 – denied pain upon arrival. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 581)
- February 4, 2021 – she believes that her pain is improving. Pain before treatment – 3. Pain after treatment – 0. (RX 4, pg.596)
- February 8, 2021 – denied pain today. Stated she had tightness earlier but no pain. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 611)
- February 10, 2021 – Denies pain upon arrival but had pain in the middle of the night when she turned. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 626)
- February 18, 2021 – States she was feeling better, however, she slipped on ice two days ago. Had increased pain on her right knee rated 8/10. Pain before treatment – 3 and 4. Pain after treatment – 0. (RX 4, pg. 656)

- February 25, 2021 – Current pain level – 3. (RX 4, 762)
- March 8, 2021 – Patient in today with right knee pain, 2/10 today. Pain before treatment – 2. Pain after treatment – 0. (RX 4, pg. 792)
- March 10, 2021 – Patient in today with complaint of dull ache in her right knee. Pain before treatment – 2. Pain after treatment – 2. (RX 4, pg. 808)
- March 30, 2021 – Reports 50% to 60% better since the start of therapy. In the past two weeks only had one time when the right knee locked and gave out – pain at 6/10 when it happened and only lasted for 15-minutes. Denied pain before session.
  Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 841)
- April 1, 2021 – Pain in right knee rated at a 3/10 before treatment. Pain after treatment – 0. (RX 4, pg. 860).
- April 13, 2021 – Patient reports she only experienced pain twice today. Once after she was sitting too long, and her knee just tightened up and the other time when she was walking and her knee just felt unsteady. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 875).
- April 15, 2021 – Patient reports she has not had any episodes of pain today. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 891)
- April 21, 2021 – Patient in today and reports no pain in right knee today. Patient able to work light duty shifts without pain. Patient reports she is sitting the majority of the time at a computer. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg. 907).
- April 29, 2021 – Patient reports right knee buckled today during work. States the pain went up to a 4-5/10 but did decrease quickly after that period. States no knee pain right now. Pain before treatment – 0. Pain after treatment – 0. (RX 4, 923).
- May 5, 2021 – She reports no knee pain today. Pain before treatment – 0. Pain after treatment – 0. (RX 4, pg.938)

During the course of Petitioner's therapy she returned to Dr. Pancholi on March 1, 2021 and he noted the following:

> "I had an extensive discussion with the patient about surgical options if she does not improve, my recommended surgery would be a total knee arthroplasty, but she would likely need to lose weight to be eligible for that surgery. Knee arthroscopy with partial medial meniscectomy is an option due to her mechanical symptoms, however, I told her this surgery would unreliability get rid of her pain due to the severity of arthritis in her knee and symptoms and would not be the recommended surgery." (RX 5, pg. 64)

Petitioner returned to Dr. Pancholi on April 5, 2021 and she reported physical therapy had been helping her knee pain and that her knee does not give out as frequently and is not as painful and that she has been working light duty. Dr. Pancholi recommended another six weeks of physical therapy with follow-up thereafter. (RX 5, pg. 82, 84).

Respondent sent Petitioner for an Independent Medical Examination with Dr. Troy Karlsson, orthopedic surgeon at DMG Orthopedics Bone, Joint and Spine Center, on April 19, 2021. After completion of the examination he prepared a report wherein he diagnosed Petitioner with severe

tricompartmental osteoarthritis and degenerative fraying and tearing of the free margin of the medical meniscus, and opined said right knee condition was not causally related to the incident on December 16, 2020. Specifically, he noted at most Petitioner would have sustained a contusion to her knee. He opined the factual and medical evidence confirms severe arthritic changes within the knee without an acute component. Dr. Karlsson referenced a 1cm chronic loose body in the posterior recess of Petitioner's knee which he noted was chronic given its rounded nature and the fact that there is no donor site to correspond to the size of the loose body. Dr. Karlsson confirmed Petitioner will likely need a knee replacement at some point in the future, but the need for said knee replacement is not causally related to the work incident on December 16, 2020. (RX 7)

Petitioner sought a second opinion with Dr. Blair Rhode, orthopedic surgeon at Orland Park Orthopedics, on May 10, 2021 and he diagnosed Petitioner with pain in right knee, derangement of posterior horn of the medial meniscus due to old tear or injury, and right knee unilateral primary osteoarthrosis and recommended an arthroscopic partial medial meniscectomy and opined said condition was due to the work injury on December 16, 2020. (PX 2). Petitioner testified she would like to proceed with the surgery recommended by Dr. Rhode.

With respect to expert medical testimony, Dr. Troy Karlsson testified via deposition on August 29, 2022 and confirmed the diagnostic x-ray images and MRI images revealed no acute changes to the right knee and noted the following findings:

> "These again showed severe osteoarthritis. On these views, it was near complete loss of medial clear space and back of the kneecap, but these were non-weight bearing views. So, they can understate the amount of cartilage loss. Again, there was a 1cm bony density at the back of the knee which appeared chronic and there were no acute changes and no fractures or dislocations."

(RX 8, pg. 19-20)

Throughout the medical records and during Dr. Karlsson's examination, Petitioner reported medial-sided knee pain. Dr. Karlsson confirmed said examination findings are consistent with the diagnostic images and arthritic findings. (RX 8, pg. 21). With respect to the MRI images and the reference to the degenerative tearing of the medial meniscus Dr. Karlsson confirmed his review of the images

was consistent with the findings by the radiologist. (RX 8, pg. 22) Dr. Karlsson opined the medial meniscus tear was due to degenerative findings in the right knee. Specifically, Dr. Karlsson noted the following:

> ". . . There was severe arthritis in the joint with osteophytes or bone spurs throughout the entire joint and there was full-thickness loss of cartilage on the inner or medial side of the joint and severe thinning of the cartilage elsewhere."

(RX 8, pg. 23-24)

Dr. Karlsson confirmed after completion of his examination that he diagnosed Petitioner with severe tricompartmental osteoarthritis of the knee with degenerative fraying and tearing of the free margin of the medial meniscus. Additionally, he opined the work incident on December 16, 2020 did not cause Petitioner's right knee condition and based his opinion on the following:

- The mechanism described would have caused at most a contusion to her knee.
- There were no acute changes found on MRI or x-rays.
- A typical acute meniscal tear will be a single plain tear that extends not just from the free edge but into the thicker portion of the meniscus – she did not have anything like that.
- All of the changes seen on the x-ray and MRI were chronic degenerative changes. (RX 8, pg. 27)

Dr. Karlsson admits that she could have sustained a temporary aggravation of her arthritic/chronic knee condition as it is reasonable to expect it to worsen her already existing pain, but there would be no material change to the structure of the knee or anything from this accident that would lead to long-term problems with the knee. (RX 8, pg. 28)

With respect to the arthroscopic surgery as recommended by Dr. Rhode, Dr. Karlsson addressed whether an arthroscopic partial medial meniscectomy is medically necessary or warranted given the severity of Petitioner's arthritis in her right knee and he noted the following:

> "She has bone-on-bone arthritis. There is no large displaced meniscal fragment. At most, she has fraying and blunting of the free edge. So there is no large mechanical lesion there. Even with a large mechanical lesion, if one were present, with that degree of arthritis, an arthroscopic surgery is essentially doomed to failure in terms of any long-term improvement."

When asked what the success rate would be if Petitioner were to undergo the arthroscopic partial medial meniscectomy for pain relief Dr. Karlsson testified, "Nearly zero percent." (RX 8, pg. 29-30).

Dr. Karlsson testified Petitioner had no mechanical locking or catching during his examination, but opined even if she had those symptoms, he noted Petitioner's degree of arthritis in and of itself could cause locking and catching because the cartilage surface not only gets thinner and eventually down to zero with bare bone, but the surfaces get irregular and when you go from a smooth surface to a bumpy surface it can be like rubbing two washboards over each other, where it can catch, pop, and have a ratcheting effect." (RX 8, pg. 31).

Dr. Karlsson was also asked to assume there was a "twist" involved at the time of the work incident on December 16, 2020, and whether that would change any of his opinions and he responded, "No." His opinion was based on the following:

- There was no structural change to her knee relative to the work incident.
- She had a degenerative tear in the meniscus and severe degenerative osteoarthritis.
- There was nothing from striking the knee or twisting the knee that would cause any structural change or any long-term change to her knee.
- No evidence of any change in the knee that would cause long-term worsening to the knee. (RX 8, pg. 54, 58).

Dr. Karlsson also testified that twisting of the knee could aggravate a pre-existing degenerative knee condition. He testified that Petitioner was symptomatic at the April 19, 2021 Section 12 exam because she had difficulty bending her knee, would feel increased pain when she turned quickly, and had reported some buckling in her knee a few weeks prior. (RX8, pg. 38). Dr. Karlsson testified that these symptoms he noted at the exam four months after the accident were a temporary aggravation to Petitioner's knee. (Id., pg. 51). He testified Petitioner's symptoms were significant. (Id.) Dr. Karlsson testified Petitioner reported 40-60% improvement since the accident and that she had continued to improve up to the date of the Section 12 exam. He testified Petitioner would not be a candidate for a total knee replacement surgery at the time he examined her because Petitioner's condition was improving. "Until she ceases to improve, and then she may be a candidate." (Id. Pp. 40-41). Petitioner was still limited to sedentary work and was not at maximum medical improvement. (Id. Pp. 41-42).

Dr. Blair Rhode testified via deposition on July 14, 2022 and confirmed he recommended an

arthroscopic partial medial meniscectomy based on his review of the MRI. Specifically, he noted the following:

> "I thought the patient had underlying degenerative joint disease superimposed with a new onset medial meniscus tear which was, at that point, causing her primary complaint, which was locking, catching and giving way."

(PX 4, pg. 12-13).

Dr. Rhode confirmed his opinion for the arthroscopic partial medial meniscectomy was based upon the fact that the MRI supports a medial meniscus tear. (PX 4, pg. 17) Dr. Rhode testified it was his understanding Petitioner had no knee complaints prior to December 16, 2020. (PX 4, pg. 25). Additionally, Dr. Rhode confirmed that Petitioner does not suffer from severe degenerative joint disease. (PX 4, pg. 25). Although Petitioner came to him for a second opinion when he initially evaluated Petitioner Dr. Rhode acknowledged that he did not investigate the extent of Petitioner's prior medical history. (PX 4, pg. 26 – 29). Dr. Rhode also acknowledged that if Petitioner was reporting increasing knee pain prior to December 16, 2020 that it could possibly change his opinion. Specifically, the following was noted:

> "Q: Ok. Doctor, in your May 10, 2021 medical report you also referenced, 'Sudden onset of medial-sided knee pain.' Do you make that reference because that is what the patient reported to you?
>
> A: I believe so, yes.
>
> Q: Ok. And again, that's in the face of her not acknowledging any prior right knee history on her intake form, correct?
>
> A: Correct.
>
> Q: And that is also in the face of you not asking her any specific information about her prior medical history relative to where, relative to the knee, that she had prior knee complaints, correct?
>
> A: Correct.
>
> Q: And so, she may have had right-sided medial knee pain prior to December 16, 2020, but you just don't know, correct?
>
> A: It's possible.
>
> Q: Ok. Do you know whether or not she reported worsening – worsening knee pain several months prior to December 16, 2020?

A: I don't have that documented.

Q: Ok. That would be relevant to you, though, would it not, Doctor, if that were true?

A: Yes.

Q: Ok. And if she reported worsening knee pain, wouldn't you want to know specifically where that pain was?

A: It would be helpful.

Q: And if it was medial-sided knee pain, that would be important to you as well, correct?

A: Yes.

Q: And that could or might change your opinion, correct?

A: It's possible.

(PX 4, pg. 36, 37)

Dr. Rhode confirmed during his physical examination of Petitioner on May 10, 2021 that she had a normal patellofemoral exam, normal ligamentous exam, and that the only abnormal finding was relative to Petitioner's medial meniscus. Specifically, she reported tenderness and Dr. Rhode confirmed said tenderness could be due to Petitioner's degenerative joint disease in her right knee. (PX 4, pg. 38)

Dr. Rhode reviewed the MRI relative to the medial meniscus and despite the radiologist confirming a degenerative tearing of the body segment of the medial meniscus Dr. Rhode stated, "my opinion is it is not degenerative." (PX 4, pg. 39). Dr. Rhode was asked/questioned regarding the radiologist's report documenting degeneration and a degenerative tearing of the body segment of the medial meniscus, also confirmed by Dr. Troy Karlsson, and he opined he disagreed with the radiologist and Dr. Karlsson in their interpretation of the MRI. Dr. Rhode supported his opinion by stating:

"Yes, but my opinion is that MRIs are not a good tool to diagnose the amount of degenerative joint disease. The best study is the – the standing x-ray."

(PX 4, pg. 39-40).

Dr. Rhode also testified the MRI report relative to the medial compartment confirmed significant

degenerative findings; specifically, severe chondromalacia in the medial compartment, severe sub-chondral osseous reaction of the medial femoral condyle, a sub-chondral osseous reaction to the medial tibial plateau and acknowledged such findings are commonly associated with underlying degenerative meniscal tears. (PX 4, pg. 40-41).

Dr. Rhode testified that his opinion supporting a surgical procedure; specifically, an arthroscopic partial medial meniscectomy is based on Petitioner's reports of "locking and catching" relative to the right knee. However, Dr. Rhode confirmed all follow-up medical evaluations with Petitioner after June 7, 2021 have no documented evidence of any continued problems relative locking and catching (PX 4, pg. 48) Petitioner's physical exam is essentially the same – normal physical examination relative to right knee with the exception of the meniscal exam demonstrating medial joint line tenderness. This finding is also consistent with severe degenerative joint disease in the right knee. (PX 4, pg. 49).

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 recover compensation under the Act, an employee must prove by preponderance of the evidence all elements of her claim, including a causal connection between the injury and her employment. *Boyd Electric v Dee,* 356 Ill App. 3d 851, 860, 826 N.E. 2d 493, 292 Ill. Dec. 352 (2005). Whether a causal relationship exists between the Claimant's employment and her condition of ill-being is a question of fact. *Certi-Serve, Inc. v Industrial Comm'n* 101 Ill. 2d 236, 244, 461 N.E. 2d 954, 78 Ill. Dec. 120 (1984). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses and resolve conflicts in the evidence. *Hosteny v Illinois Workers'*

Compensation Comm'n, 397 Ill. App. 3d 665, 674, 928 N.E. 2d 474 (2009). 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).

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 with an easy and direct manner. Petitioner's body language and eye contact was consistent with her testimony. Petitioner's demeanor remained the same during cross examination. Petitioner's testimony is consistent with the medical records in this case. The Arbitrator in finding this is cognizant that there are some medical records indicating that Petitioner merely struck her knee when assisting a heavy patient while other records – notably a history given

to a physician two days after the accident - indicate that she twisted her lower body in the process. Petitioner testified at trial she twisted her knee and the Arbitrator finds that testimony credible. There are more specific factual matters that are discussed further below and Petitioner's credibility is further analyzed.

The credibility of the medical witnesses is discussed below as well.

ISSUE F: CAUSAL CONNECTION

In support of the Arbitrator's Decision relating to (F) is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

To recover compensation under the Act, an employee must prove by preponderance of the evidence all elements of her claim, including a causal connection between the injury and her employment. *Boyd Electric v Dee,* 356 Ill App. 3d 851, 860, 826 N.E. 2d 493, 292 Ill. Dec. 352 (2005). Whether a causal relationship exists between the Claimant's employment and her condition of ill-being is a question of fact. *Certi-Serve, Inc. v Industrial Comm'n* 101 Ill. 2d 236, 244, 461 N.E. 2d 954, 78 Ill. Dec. 120 (1984). It is the function of the Commission to decide questions of fact, judge the credibility of witnesses and resolve conflicts in the evidence. *Hosteny v Illinois Workers' Compensation Comm'n,* 397 Ill. App. 3d 665, 674, 928 N.E. 2d 474 (2009).

The Arbitrator finds that Petitioner did sustain a right knee injury on December 16, 2020 as a result of a work-related incident, specifically, a contusion and twisting injury that aggravated her pre-existing right knee pathology. The Arbitrator finds that Petitioner's medial meniscal tear for which arthoscopic surgery has been recommended is not causally connected to the December 16, 2020 work incident. The Arbitrator also finds that Petitioner's current worsened condition of her pre-existing arthritic right knee is related to the work incident. This is simply a case where Respondent takes Petitioner as they find her – an obese person with very bad knees who had a work-related accident – and, under Illinois law, accept that the accident caused a change in the condition of Petitioner – in this case, perhaps, the straw that broke the camel's back – such that the condition of her right knee has changed.

Petitioner admits and acknowledges that she has preexisting arthritis for which she sought an evaluation with "Dr. Peters" some time prior to the work incident and who recommended anti-inflammatory medication. Additionally, Petitioner was evaluated by Dr. Salem Makdah on September 8, 2020 "complaining of increasing pain in both knees." Dr. Makdah noted Petitioner had x-rays done in the past and was told she had osteoarthritis. A physical examination revealed "crepitus in both knees." (RX 9, pg.9, 11). Petitioner acknowledged her knee symptoms prior to December 16, 2020 was a 1 to 4 out of 10 on the pain scale, and that she typically required 400 mg. of ibuprofen in the morning and 400 mg. of ibuprofen in the evening on days that she worked to mitigate the pain.

On December 16, 2020 Petitioner was assisting a nurse and a transporter in moving a patient from a cart/wheelchair to a bed, and she was holding the patient's legs and had planted her feet on the ground, and as she turned and twisted, she hit her right knee on the bed and felt pain in her knee. Petitioner testified that she felt pain in her right knee when her right knee struck the bed.

Petitioner testified that she also twisted her right knee. The initial Employee Incident Report completed by Petitioner on December 17, 2020, does not document a "twisting" incident. (RX 1). Additionally, the Palos Community Hospital Injury or Illness Incident Recap Report completed by Ms. Karen Kratzenberg outlines the work incident history provided by Petitioner and does not document a "twisting" incident. (RX 2, pg. 1). Petitioner was questioned as to why she did not write anything about twisting her knee when she initially reported the work incident and confirmed and acknowledged the pain immediately began after she struck her knee on the bed.

Petitioner was initially evaluated by Dr. Beatrice Uta on December 17, 2020 at Palos Hospital and the history notes she hit her right knee on a bed – no report of a "twisting" incident. (RX 4, pg. 494). Additionally, a physical examination is completed and there are no noted abrasions, bruising, or any other findings supportive of an acute injury. The only positive finding is tenderness to palpation over the anterior aspect of the right knee along with diffuse edema that is more characteristic of Petitioner's preexisting severe degenerative osteoarthritis. (RX 4, pg. 495).

Petitioner is evaluated by Dr. David Cornell on December 18, 2020, and reports she hit her right knee against a bedframe on the hard rails when moving a patient on December 16, 2020, and also notes "believes she may have also bent her knee inwards and twisted it." (RX 6, pg. 6). This recorded history indicates uncertainty as to whether she "twisted" her knee. Subsequently, Petitioner is evaluated by Dr. Neel Pancholi on December 18, 2020, and again, she reports she struck her knee on a bedrail while moving a patient without any mention of a "twisting" incident. (RX 5, pg. 7). Ultimately, Dr. Pancholi refers Petitioner to physical therapy and upon her initial evaluation on January 25, 2021 the therapist notes Petitioner is "unsure if she twisted her knee." Again, the medical evidence confirms uncertainty as to whether Petitioner "twisted" her knee. The multiple records that are without a reported "twisting" incident contrast with Petitioner's testimony wherein she was questioned regarding the certainty of whether she "twisted" her right knee and she stated, "I know I twisted it."

Nonetheless, the Arbitrator finds Petitioner's testimony in this regard is credible. The Arbitrator finds the greater weight of the factual and medical evidence supports a finding that Petitioner twisted her right knee based upon Petitioner's credible testimony and simple logic. The Arbitrator tried to conceive of how one might twist their body without twisting one's knee and determined that perhaps a high-level gymnast could twist their body from the hip on up without putting twisting pressure on the knees but that a mere normal person could not accomplish such a twisting from the waist on up without putting twisting force on the knee. Petitioner, an obese middle-aged woman, would have put twisting pressure on her knee when twisting her body. The remaining question is whether Petitioner's current condition at trial is related to the accident – was her injury a temporary aggravation or is her current condition a result of the accident.

The Arbitrator also finds this whole issue of whether Petitioner twisted her knee as well as struck her knee while exerting herself when moving a heavy patient to be a bit of red herring. Petitioner hurt her knee and had not recovered four months later when Dr. Karlsson performed a

Section 12 exam. Petitioner testified at trial that the condition of her knee remained worse than it had been before the accident.

Petitioner's medical history regarding the knee in question is important. Petitioner testified and acknowledged that prior to December 16, 2020 she experienced pain at a 1 – 4 out of 10 on the pain scale. When Petitioner is evaluated by Dr. Neel Pancholi on December 18, 2020 her pain was rated a 6 out of 10. This supports an aggravation of her preexisting arthritis. (RX 5, pg. 7). Petitioner's physical therapy records from January 25, 2021 through May 5, 2021 document a myriad of pain levels. There are some records that indicate improvement in her right knee condition and pain levels that are similar to her pain levels prior to December 16, 2020. There are some physical therapy records that note increased pain with a buckling incident. There is even a 2/18/21 physical therapy record where Petitioner reports she slipped on ice two days prior and experienced increased pain in her right knee rated 8/10 – the highest recorded pain level in those records and due to a non-work related event. Petitioner's pain complaints returned to the prior range shortly after and the Arbitrator notes there is no evidence presented that this falling incident rises to the level of an intervening cause that would sever the causal link to the December 16, 2020 accident.

Additionally, the diagnostic evaluations completed subsequent to December 16, 2020 document a chronic preexisting condition without any evidence of an acute injury. X-rays of the right knee were completed on December 17, 2020 and revealed "moderate tricompartmental degenerative joint disease in the right knee without any displaced fracture or dislocation. Additionally, there was narrowing of the medial compartment with mild genu varus deformity of the knee." (RX 4, pg. 496). A right knee MRI was completed on January 13, 2021, and relative to the "medial compartment" the following was noted:

- There is degeneration and degenerative tearing of the body segment of the medial meniscus with virtually complete extrusion of the body segment.
- There is severe chondromalacia in the medial compartment with moderately severe subchondral osseous reaction of the medial femoral condyle and medial tibial plateau.
- The medial collateral ligament is intact. (RX 4, pg. 538).

The x-rays and MRI demonstrate significant degenerative changes in the medial compartment of the right knee without any noted acute findings. Essentially, the diagnostics do not document any structural change to Petitioner's right knee as a result of the December 16, 2020 work incident.

Petitioner returned to Dr. Neel Pancholi on March 1, 2021 and he notes he reviewed the MRI to rule out "additional knee pathology" and confirms "we found a degenerative medial meniscus tear along with osteoarthritis." (RX 5, pg. 62). Dr. Pancholi diagnosed Petitioner with "moderate to severe osteoarthritis of right knee with acute pain after injury." (RX 5, pg. 64). Dr. Pancholi did not reference or indicate Petitioner had anything other than "acute pain" after injury and did not opine that any of the findings documented on the diagnostics were related to the work incident.

Dr. Troy Karlsson, orthopedic surgeon at DMG Orthopedics, completed a Section 12 Examination on April 19, 2021, and diagnosed Petitioner with severe tricompartmental osteoarthritis of the right knee with degenerative fraying and tearing of the free margin of the medial meniscus. (RX8, pg. 27). Regardless of whether Petitioner hit her right knee on the bed or had a twisting incident, Dr. Karlsson opined Petitioner's right knee condition was not causally related to the work incident on December16, 2020, and provided an objective and competent basis to support his opinion. Specifically, Dr. Karlsson noted the mechanism of injury as described by Petitioner would not have caused anything more than a contusion to her right knee, there were no acute changes found on the MRI or x-rays, a typical acute meniscal tear will present as a single plain tear that extends not just from the free edge but into the thicker portion of the meniscus and Petitioner did not have anything like that, and that all the changes seen on the x-ray and MRI were chronic and degenerative changes. (RX 8, pg. 27). Dr. Karlsson acknowledged the work incident on December 16, 2020 would have temporarily aggravated Petitioner's preexisting arthritic/chronic knee, but there was no material change in the structure of the knee. (RX 8, pg. 28).

Petitioner sought a second opinion evaluation with Dr. Blair Rhode, orthopedic surgeon at Orland Park Orthopedics, and although he testified Petitioner had a "new onset medial meniscal tear" that requires an arthroscopic partial medial meniscectomy his opinion in this regard is not

credible or competent. Specifically, Dr. Rhode is unable to reconcile diagnostic findings confirming a degenerative tear of the medial meniscus relative to his opinion that Petitioner sustained a "new onset medial meniscal tear." Dr. Rhode was asked to explain whether or not the MRI demonstrated any evidence of acute pathology, and he explained the truncated medial meniscus is commonly associated with an acute event or acute finding, but also confirmed and agreed he was unable to determine whether the "truncated meniscus" was there prior to December 16, 2020. (RX 4, pg. 45-46). Dr. Rhode confirmed there was no effusion or swelling noted on the MRI to confirm acute trauma. (PX 4, pg. 52)

Most important in establishing Dr. Rhode's lack of credibility relative to his opinion regarding the cause of the medial meniscal tear is his contrary opinion that the tear is not degenerative. The radiologist who read the MRI noted "degenerative tearing of the body segment of the medial meniscus." Dr. Neel Pancholi reviewed the MRI on March 1, 2021 to rule out "additional knee pathology" and confirms "we found a degenerative medial meniscus tear along with osteoarthritis." (RX 5, pg. 62). Dr. Troy Karlsson reviewed the MRI and documented the meniscal tear as degenerative. Despite the definitive findings noted on the MRI diagnostic report and images Dr. Rhode renders an opinion that Petitioner has a "new onset medial meniscal tear" that is not corroborated by the medical evidence. As such, Dr. Rhode's opinion in this regard is not credible and the Arbitrator gives greater weight to the opinions of the MRI radiologist, Dr. Pancholi, and Dr. Karlsson.

In addition to the above, Dr. Rhode's opinions regarding surgery are not credible or competent. Dr. Rhode is recommending an arthroscopic medial meniscectomy in a knee that has documented severe tricompartmental degenerative arthritis and other pathological findings. This defies logic and common sense. Removal of a portion of the medial meniscus will do nothing to alleviate the pain/symptoms/pathology documented by the severe tricompartmental osteoarthritis of her right knee. Petitioner had pain and symptoms prior to December 16, 2020 and it is reasonable to assume she will continue to have said pain and symptoms irrespective of the surgical procedure as

recommended by Dr. Rhode. Dr. Rhode's explanation and reason for the surgical procedure is that Petitioner reports "catching and locking" symptoms relative to her right knee and that said surgery would alleviate those symptoms. However, Petitioner is evaluated by Dr. Rhode approximately 15 different times since June 7, 2021 and at no time documents any "locking or catching" type symptoms that would support the recommended surgery. Dr. Rhode's medical records confirm Petitioner was seen on a consistent basis over a 16-month period of time without any documented "locking and catching" type symptoms. Lack of such documentation does not support the recommendation for the surgery. In fact, the medical evidence demonstrates Petitioner continues to report medial sided knee pain which is consistent with her severely arthritic knee and symptoms prior to December 16, 2020.

Additionally, Dr. Neel Pancholi, orthopedic physician at Palos Hospital, noted on March 1, 2021 that a partial medial meniscectomy is an option due to her mechanical symptoms, but he specifically stated "I told her this surgery would unreliably get rid of her pain due to the severity of the arthritis in her knee and symptoms and would not be the recommended surgery." (RX 5, pg. 64) Dr. Karlsson was questioned regarding the surgery as follows:

> Q: Ms. Jones had followed up with Dr. Blair Rhode and he recommended an arthroscopic partial medial meniscectomy. Do you have an opinion as to whether such an operation is medically necessary or warranted given the severity of the arthritis in Ms. Jones' knee?
>
> A: Yes. I do not think it is warranted or necessary or likely to lead to any improvement whatsoever.
>
> Q: And why is that Doctor?
>
> A: She has bone on bone arthritis. There is no large displaced meniscal fragment. At most, she has fraying and blunting of the free edge. So, there is no large mechanical lesion there. Even with a large mechanical lesion, if one were present, with that degree of arthritis, an arthroscopic surgery is essentially doomed to failure in terms of any long-term improvement.
>
> Q: Based on what you know about Ms. Jones, what would be the success rate if she were to undergo an arthroscopic partial medial meniscectomy for pain relief?
>
> A: Nearly zero percent."

(RX 8, pg. 29-30)

Importantly, Dr. Karlsson also noted the "locking and catching" symptoms that serve as the basis for

the surgery can also be due to the degree of arthritis in Petitioner's right knee. Dr. Karlsson explained, "… this degree of arthritis in and of itself can cause locking and catching because the cartilage surface not only gets thinner and eventually down to zero with bare bone, but the surfaces get irregular. So, you go from a smooth surface to a bumpy, irregular surface. So it can be like rubbing two washboards over one another where it can catch, pop, and have a ratcheting effect." (RX 8. Pg. 31) As such, Petitioner is likely to experience "catching and locking" associated with her preexisting severe tricompartmental degenerative joint disease with or without the surgery as recommended by Dr. Rhode. Based on the greater weight of the factual and medical evidence the Arbitrator hereby finds Dr. Troy Karlsson and Dr. Neel Pancholi's opinions relative to the diagnostic evaluations revealing a "degenerative tear" of the medial meniscus and that an arthroscopic medial meniscectomy is not medically warranted or reasonable as more competent and credible than the opinions provided by Dr. Rhode.

The Arbitrator finds Petitioner's current right knee condition relative to a medial meniscal tear and need for arthroscopic surgery is not causally related to the work incident on December 16, 2020. The greater weight of the factual and medical evidence supports a finding that Petitioner's medial meniscal tear is "degenerative" and has no relationship to her striking her knee or twisting her knee on December 16, 2020. The lack of a causal connection is supported by the factual and medical evidence; specifically, the diagnostic findings and opinions provided by the MRI radiologist, Dr. Pancholi, and Dr. Karlsson which collectively confirm a degenerative tear of the medial meniscus without any relationship to the work incident on December 16, 2020.

Having found Dr. Karlsson's opinions on the issue of whether the meniscal tear was causally related to the accident and whether surgery to repair that meniscal tear is appropriate to be credible, the Arbitrator is left with having to find whether Petitioner's current condition is causally related to the accident.

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. *R & D Thiel v. Workers' Compensation Comm'n*, 398 Ill. App. 3d 858, 867 (2010).

Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. *Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 948 (2011). An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. Id. 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. *Schroeder v. Ill. Workers' Comp. Comm'n*, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

Petitioner was still limited to sedentary work when Dr. Karlsson examined her four months later. Dr. Karlsson opined that Petitioner was still improving. That was a snapshot in time. Petitioner testified at trial a year and a half later that she was still symptomatic with regard to her right knee. Consistent with the case law above and the Arbitrator's finding that Petitioner is credible, the Arbitrator finds – without in doing so finding Dr. Karlsson not credible – that the weight of the evidence supports a finding that Petitioner's current right knee condition – excepting the meniscal tear – is causally related to the December 16, 2000 acccident.

ISSUE G: PETITIONER'S EARNINGS

In support of the Arbitrator's Decision related to (G), what were Petitioner's earnings, the Arbitrator finds the following:

On December 16, 2020 Petitioner was employed on a part-time basis as a Certified Nurses Aide. Petitioner had been employed in this capacity for "many years." Typically, Petitioner would work no more than three days per week on a part-time basis.

It is well settled case law that for part-time employees the Average Weekly Wage calculation is based on the total earnings divided by the number of weeks in which there were

earnings. Rules concerning weeks and parts thereof as outlined in Section 10 of the Act do not apply as part-time employees do not have the same benefits as to the wage calculation. Specifically, part-time employees are not considered to have "lost" days because they are not regularly scheduled to work five days a week. Petitioner worked for Respondent on a part-time basis; and as such, her Average Weekly Wage is calculated based on taking the total wages and dividing said wages by the number of weeks thereby establishing the correct Average Weekly Wage. *2012 Ill. Wrk. Comp. Lexis 1448; 12 IWCC 1406. Ricketts v. Industrial Commission*, 251 Ill.App.3d 809, 623 N.E.2d 847 (4th Dist. 1993) (AWW for employee who worked four days over three-week period to be calculated as total earnings divided by three weeks) *Valentine v. Giltech*, 2009 Ill. Wrk. Comp. LEXIS 1293 (November 5, 2009) (when employment is non-continuous or less than full-time, earnings divided by entire workweek even if employee worked mere portion of week); and *Fraley v. Favorite Health Care Staffing, Inc.*, 2010 Ill. Wrk. Comp. LEXIS 1176; 10 IWCC 1133 (November 17, 2010); *Essebo v. Tyson Fresh Meats, Inc.,* 11 IWCC 956, 2011 Ill. Wrk. Comp. LEXIS 962 (September 26, 2011) (part-time claimant's AWW calculated by dividing total applicable earnings by number of weeks in which work was performed).

A wage audit referenced as RX 3 documents Petitioner's wages from December 16, 2019 through December 16, 2020, and outlines a pay period every two weeks. A review of the wage audit indicates Petitioner worked no less than 34.42 hours every two weeks and no more than 41.25 hours every two weeks. The wage audit corroborates Petitioner's testimony that she was employed on a part-time basis and worked approximately 19.94 hours per week. Petitioner claimed her earnings during the year preceding the injury were $20,086.33. (Arb. X 1) Respondent does not dispute Petitioner's total earnings in this regard as the wage audit confirms total wages less the "AD bonus" equals $20,086.33. There are 26 pay periods and each pay period represents a two week pay history. Thus, Petitioner worked 52 consecutive weeks on a part-time basis prior to December 16, 2020. The total wages($20,086.33)divided by 52-weeks

establishes an Average Weekly Wage in the amount of $386.28.

The Average Weekly Wage as proposed by Petitioner's attorney; specifically, $933.43 would create a significant windfall for Petitioner and provide her benefits in an amount greater than she would have received in gross pay for the year preceding her injury. The purpose of the Act is to compensate or make whole an injured employee; not to provide a profit for being injured. To hold otherwise "would create a situation which is more advantageous, financially, to be injured than to be employed." *Cook v Industrial Commission, 231 Ill. App. 3D 729; 596 N.E. 2nd 746 (3rd District 1992), quoting Hasler v Industrial Commission, 97 Ill 2nd 46, 52, 454 N.E. 2nd 307 (1983)* Based on the above, the Arbitrator finds Petitioner's Average Weekly Wage is $386.28.

ISSUE J: MEDICAL TREATMENT/EXPENSES

In support of the Arbitrator's Decision relating to (J) were the medical services provided to the Petitioner reasonable and necessary and has the Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

The Petitioner submitted medical billing into evidence and seeks to have Respondent held responsible for those outstanding balances (PX 1). The outstanding unpaid medical expenses submitted by Petitioner stem directly from Petitioner's current condition of ill-being. Petitioner's treatment to date has been reasonable and necessary and Respondent has not paid all appropriate charges. Petitioner's treatment has consisted of doctor's appointments, diagnostic testing, injections, physical therapy, and pain medications. The Arbitrator notes that Respondent's Section 12 Examiner found that the treatment and care of Petitioner was reasonable.

The Respondent has not paid all of Petitioner's medical bills for her reasonable and necessary treatment and the Arbitrator awards, pursuant to the fee schedule, Petitioner $35,636.82 in outstanding medical bills (Pet. Ex. #1).

ISSUE K: PROSPECTIVE MEDICAL CARE

In support of the Arbitrator's Decision relating to (K) is Petitioner entitled to prospective medical care, the Arbitrator finds the following:

The Arbitrator finds Petitioner is entitled to prospective care that is reasonable and necessary. The proposed surgery by Dr. Rhode is neither reasonable or necessary and is not awarded.

The Arbitrator adopts the opinion of Dr. Karlsson that the specific arthoscopic surgery proposed by Dr. Rhode and requested to be awarded by Petitioner is not appropriate.

ISSUE L: TTD BENEFITS

In support of the Arbitrator's Decision relating to (L) what temporary benefits are in dispute, the Arbitrator finds the following:

Medical evidence indicates Dr. David Cornell referred Petitioner to Dr. Neel Pancholi, orthopedic physician, on December 18, 2020 for further evaluation, and advised Petitioner she should remain out of work until cleared by orthopedics. (RX 6, pg. 8) Dr. Pancholi evaluated Petitioner on December 18, 2020, but makes no reference relative to Petitioner's ability to return to work. (RX 5, pg. 7-11) Petitioner returns to Dr. Pancholi on January 4, 2021, and references "will write a letter for work saying off until MRI is reviewed with patient." (PX 5, pg. 27) The Arbitrator finds it is reasonable to conclude Petitioner was kept out of work from December 18, 2020 through the date she returned to work for Respondent in a light duty capacity on January 24, 2021. Said period represents 5-3/7ths weeks for which Petitioner shall be entitled to payment of Temporary Total Disability benefits, less a credit for Temporary Total Disability benefits previously paid by Respondent.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC037388
Case Name	Zofia Parys v. Rich's Fresh Market
Consolidated Cases	
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	24IWCC0208
Number of Pages of Decision	18
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Menchetti
Respondent Attorney	Jason Kolecke

DATE FILED: 5/6/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ZOFIA PARYS,

Petitioner,

vs. NO: 17 WC 037388

RICH'S FRESH MARKET,

Respondent.

DECISION AND OPINION ON CIRCUIT COURT REMAND

This cause comes before the Commission on remand pursuant to the Honorable Daniel P. Duffy's October 30, 2023, Order filed in Circuit Court of Cook County, Law Division – Tax and Miscellaneous Section, Case No. 2022L050582. The case was before the Commission twice previously. The first time the case came before the Commission was on Petitioner's Review of the Arbitrator's §19(b)/§8(a) Decision finding that the Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with the Respondent on December 2, 2017. Based on this determination, no benefits were awarded. Petitioner's Petition for Review included the issues of temporary disability (causal connection and extent), medical expenses (causal connection, reasonableness, necessity and prospective medical) and permanent disability (causal connection and nature and extent). A Commission Decision and Opinion on Review was issued, Case No. 17 IWCC 0364, affirming and adopting the Arbitrator's Decision. Petitioner appealed to the Circuit Court, where the Commission's Decision was affirmed. Petitioner appealed to the Appellate Court, which reversed, holding that the Commission's finding that she failed to prove that she sustained accidental injuries on December 2, 2017, was against the manifest weight of the evidence. The Court remanded the case to the Commission for further proceedings. *Parys v. Ill. Workers' Comp. Comm'n*, 2021 IL App (1st) 210601WC-U.

On remand, based on the same facts, a Decision and Opinion on Appellate Court Remand was issued by the Commission on September 27, 2022, Case No. 22 IWCC 0367. After considering the Remand Order, and the entire record, the Commission reversed the Decision of the Arbitrator, finding that Petitioner sustained an accident arising out of and in the course of her employment by Respondent on December 2, 2017; that Petitioner's condition of ill-being through the date of Dr. Lami's Section 12 evaluation on January 29, 2018, is causally related to the accident on December 2, 2017; that Petitioner is entitled to 8- 2/7 weeks of temporary total disability benefits for the period between December 3, 2017, and January 29, 2018, that Petitioner sustained 2.5% loss of use of a person under Section 8(d)2 of the Act; and Petitioner is entitled to medical expenses for reasonable related medical treatment to Petitioner's lumbar back from December 3, 2017, through January 29, 2018, under Section 8(a) and Section 8.2 of the Act.

Petitioner again appealed to the Circuit Court of Cook County, the subject of this remand. The Circuit Court recounted the facts of this case gleaned from the Appellate Court record as noted in the background information below. After considering the entire record, the October 30, 2023, Circuit Court Order states as follows:

> That the Commission's Decision is SET ASIDE with respect to the findings of permanent partial disability contained at pages 15-16;
>
> That the Commission's Decision is CONFIRMED in all other respects;
>
> That the matter is REMANDED to the Commission;
>
> That, upon remand, the Commission is to re-issue its Decision, striking the section captioned "Nature and Extent" appearing on pages 15 and 16. The Commission shall include language in its re-issued Decision remanding the case to the Arbitrator for further proceedings for a determination of any additional 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);
>
> That the matter is disposed. See *Kudla v. Indus. Comm'n,* 336 Ill. 279, 282 (1929) (holding that, following review, the circuit court exhausts its statutorily-conferred jurisdiction and any "attempt to retain further jurisdiction [is] void.");
>
> That this order is without prejudice to any future appeal following this remand taken pursuant to 820 ILCS 305/19(f).

Thus, pursuant to the Circuit Court Order in Case No. 2022L050582, the Commission reverses the Decision of the Arbitrator and finds that Petitioner sustained an accident arising out of and in the course of her employment by Respondent on December 2, 2017; that Petitioner's condition of ill-being through the date of Dr. Lami's Section 12 evaluation on January 29, 2018, is causally related to the accident on December 2, 2017; that Petitioner is entitled to 8-2/7 weeks

of temporary total disability benefits for the period between December 3, 2017, and January 29, 2018; and that Petitioner is entitled to medical expenses for reasonable related medical treatment to Petitioner's lumbar back from December 3, 2017, through January 29, 2018, under Section 8(a) and Section 8.2 of the Act. 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).

Background

The Appellate Court recited the following facts relevant to disposition of the appeal taken from the evidence adduced at the arbitration hearings held on April 19, 2018, and May 15, 2018.

> The claimant's medical treatment prior to the events giving rise to this action are relevant to the issues in this appeal. On December 21, 2014, the claimant had three episodes of "nearsyncope" (*sic*) with hyperventilation. Her medical records also reflect that she had a history of hypertension for which she was prescribed Amlodipine.
>
> On March 10, 2015, the claimant sought medical treatment for left ankle pain resulting from an injury that had occurred 3 weeks prior. She also complained of hip and pelvis pain. The claimant had an EMG on March 19, 2015, which revealed acute bilateral L4-5 and L5-S1 radiculopathy which was noted to be chronic. There was no evidence of peripheral neuropathy. The test report noted a two-month history of left foot and ankle pain after twisting and falling on ice.
>
> On March 24, 2015, the claimant had an MRI scan that reflected a large sequestered L4-5 disc fragment causing severe compression of the thecal sac and probable compression of the left L5 nerve root. Also noted was a mild disc-osteophyte at L3-4 producing mild canal and mild bilateral neuroforaminal stenosis. The claimant saw Dr. Benson Yang on March 25, 2015, complaining of intractable pain in the left leg radiating into the ankle and foot. According to the doctor's records, the claimant's pain started in the low back. She reported that she was in extreme pain and could barely move. Dr. Yang recommended surgery, and on April 2, 2015, the claimant underwent a left L4-5 microdiscectomy, which was performed by Dr. Yang. A large, extruded disc fragment was noted at L4-5.
>
> On April 15, 2015, Dr. Yang noted that the claimant reported almost full recovery of her left foot motor function and that her left leg pain had resolved. He also noted that the numbness the claimant was experiencing could take time to resolve and might be permanent depending on the amount of nerve damage she had suffered. In his notes, Dr. Yang also recorded the claimant's history of high blood pressure. The claimant, however, denied suffering from hypertension or currently taking blood pressure medication.
>
> In his August 19, 2015 notes, Dr. Yang recorded the claimant's complaints of increased back pain for several weeks. The claimant reported that she was

experiencing pain extending down her left leg when she flexes to put on socks, but the pain subsides when she straightens her leg. Dr. Yang was of the opinion that the pain the claimant was experiencing was musculoskeletal in nature. He recommended that the claimant undergo therapy and have an MRI of her spine. Dr. Yang also prescribed valium for pain.

In his notes of the claimant's December 30, 2015 visit, Dr. Yang recorded the claimant's complaints of back pain and that she reported feeling worse after physical therapy. His neurological exam of the claimant was normal. He also noted that the December 21, 2015, MRI of the claimant's spine, when compared to her March 24, 2015 MRI, revealed that the previously seen L4-5 disc protrusion had been removed with a remaining very small right protrusion with minimal encroachment on the thecal sac. The MRI also revealed a new disc protrusion at L3-4 with diffuse bulging, resulting in a moderate thecal sac encroachment on the inferior margins of the bilateral neuroforamina, slightly greater on the right. A new left sided pelvic cyst was also revealed by the scan. According to Dr. Yang's notes, the MRI showed degenerative disc disease at L4-5 greater than at L3-4. Dr. Yang's notes state that he discussed the possibility of the claimant having a spinal fusion, but that she rejected the suggestion at that time. Dr. Yang recorded an opinion that the back tightness and pain the claimant was experiencing was likely caused by her muscles. He recommended that the claimant exercise.

The claimant denied seeking treatment for back pain from December 2015 until December 2017.

The events giving rise to the instant litigation occurred on December 2, 2017. The claimant testified that she was employed by Rich's as a buffet worker and had been so employed since May 2015. She stated that, about 3 weeks prior to December 2, 2017, she was assigned to a substitute position as a food re-packer and labeler. According to the claimant, the position required her to unload and lift heavy items such as food pallets weighing 70 to 100 pounds multiple times in an 8-hour shift. The claimant also testified that she would weigh salads, place them in containers, place the containers on a cart, and place the containers either in the store or in a walk-in cooler.

On Saturday, December 2, 2017, the claimant was scheduled to work a normal shift from 8:00 a.m. until 4:00 p.m. The claimant testified that, at approximately 10:00 a.m., she went to the cooler to get some salads; no cart was available for her use. She stated that she went into the cooler and picked up two boxes or crates when she felt a sudden back pain. She testified that there was no one else in the cooler at the time. According to the claimant, she dropped the boxes and screamed, but did not know if anyone heard her. She testified that she slid the boxes on the floor to her workstation, and when her back pain increased, she yelled out: "I'm in pain and cannot continue doing this." The claimant stated that her co-workers, Janina Kruzolek and Wanda Ostrowska came to help her, and she told them that she was experiencing back pain. However, she admitted that she did not say how it happened. The claimant testified that she asked Kruzolek to call the

manager and told Ostrowska that she wanted to leave her workstation to tell the manager. According to the claimant, the manager, Anita Paluch, arrived, and she told Paluch that she hurt her back. She stated that Paluch never asked her how she hurt her back. The claimant testified that Paluch said that she could see that something was wrong with her, sat her in a chair, and advised her to call her daughter. The claimant testified that she called her daughter, Natalia Parys, and told her to come and pick her up because she had lifted some boxes and could not walk home. According to the claimant, Paluch was present when she called her daughter and overheard what she said. The claimant stated that her back pain worsened as she waited the 20 or 25 minutes before Natalia arrived. The claimant described how Paluch and Ostrowska helped her up and out of the store. The store video shows the claimant being supported from both sides by Paluch and Ostrowska. The claimant testified that Natalia took her home, helped her to the bathroom, and helped her to bed. She admitted that, despite her pain, she sought no medical treatment on December 2 or 3, 2017, as she believed that the pain would go away.

Natalia testified that the claimant called her on December 2, 2017, and stated that she was in severe pain and asked her to come and pick her up. According to Natalia, when she arrived at Rich's, she was greeted by Paluch who escorted her to where the claimant was seated. Natalia testified that the claimant was pale and appeared to be in pain. She stated that the claimant pointed to her back and said that it hurt. She testified that she heard the claimant tell Paluch that she hurt her back but could not recall if the claimant stated how she hurt her back. Natalia stated that the claimant was unable to get up on her own and that she took the claimant home. Kruzolek, Rich's kitchen manager and chef, testified that she saw the claimant between 7:30 a.m. and 8:00 a.m. on December 2, 2017. She described the claimant as pale with dry lips, moving slowly, and appearing weak and faint. According to Kruzolek, the claimant told her that she was feeling ill due to high blood pressure and that she had not slept well the night before. Kruzolek testified that she asked the claimant why she had come to work, and the claimant replied that she thought that she would feel better. Kruzolek stated that she checked on the claimant from time to time because she was aware that on a previous occasion the claimant left work in an ambulance due to high blood pressure. Kruzolek recounted a second conversation with the claimant who again stated that she did not want to go home. Kruzolek testified that she asked the claimant's manager, Paluch, to look at the claimant because she did not appear well. She stated that she was asked by Art Hajdus, one of Rich's managers, to prepare a written statement of her observations on December 7, 2017. That statement was consistent with her testimony. In that statement, Kruzolek wrote that the claimant often complained of high blood pressure, stating that it was a family problem. According to Kruzolek, the claimant never told her on December 2, 2017, that she had injured her back. Kruzolek testified that she wrote the statement in Polish and that it was later translated into English. She acknowledged that she was not in the cooler with the claimant on

December 2, 2017, and that the claimant could have injured herself when she was not present.

Wladyslawa Trznadel, testified that she works at Rich's as a vegetable peeler and that she works in the same room as the claimant. According to Trznadel, she saw the claimant in the morning of December 2, 2017, at approximately 8:00 a.m. when they both started work. She testified that the claimant looked pale and that the claimant stated that she did not feel well but did not say why. Trznadel stated that the cooler was about 20 meters from her workstation and that she never heard the claimant scream on December 2, 2017. Trznadel testified that she never saw the claimant slide any crates or boxes on the floor. She did witness Paluch sit the claimant down in a chair and call her daughter. Trznadel testified that she never heard the claimant say that she had hurt her back on that day or that her back hurt. She stated that she observed the claimant working on December 2, 2017, and periodically saw her go to the cooler and bring back boxes and crates using a cart. According to Trznadel, the claimant did not appear to be in pain at any time when she came back from the cooler. Trznadel admitted that she could not see the cooler from her workstation and did not see the claimant while she was in the cooler. She testified that she had no knowledge as to whether the claimant was injured while in the cooler on December 2, 2017. Trznadel also gave a written statement in Polish that was translated into English. The written statement was consistent with her testimony. In that statement, Trznadel wrote that she had seen the claimant with the same problems on prior occasions and that she had to go home due to high blood pressure. Trznadel also wrote that the claimant had complained to her many times of having high blood pressure.

Ostrowska testified that she is employed by Rich's as a cook and that, on December 2, 2017, she saw the claimant in the kitchen several times that morning. At approximately 10:00 a.m., she saw the claimant seated in a chair with Paluch and Natalia, the claimant's daughter, present. According to Ostrowska, the claimant did not look well, and she complained of a headache and feeling faint. Ostrowska testified that she did not hear the claimant complain of back pain either while she was seated or when she and Paluch helped the claimant walk to Natalia's car. Ostrowska admitted that she did not see the claimant while she was in the cooler and did not see her have an accident. Ostrowska also gave a written statement in Polish that was translated into English. The written statement was consistent with her testimony. Ostrowska wrote that the claimant often complained of having high blood pressure.

Eliza Zacharow, Rich's customer service manager, testified that she saw the claimant on December 2, 2017, at approximately 8:00 a.m. and that she he did not look well. According to Zacharow, the claimant had complained of hypertension on prior occasions. She testified that, other than that initial encounter, she did not see the claimant again on December 2, 2017, and had no knowledge as to whether the claimant was injured while working on that date. Zacharow also prepared a written statement in English. The statement was consistent with her testimony and

also noted that when she spoke to the claimant on December 2, 2017, the claimant complained of a headache due to hypertension. Zacharow also testified that she was the person who had translated the other witnesses' statements from Polish to English.

Paluch testified that the claimant was sent home from work on December 2, 2017, at approximately 10:00 a.m. after complaining of high blood pressure. According to Paluch, this was not the first time the claimant had been sent home complaining of high blood pressure. She stated that the claimant often spoke about her hypertension that she had apparently inherited from her mother and that an ambulance was called for the claimant on two occasions prior to December 2, 2017. Paluch testified that, at approximately 9:00 a.m. on December 2, 2017, she was notified by Kruzolek that the claimant "feels bad again." She stated that, when she got to the claimant's workstation, she found the claimant standing and labeling soups. Paluch testified that the claimant told her that she had high blood pressure and that she had not slept the entire night before. According to Paluch, it was at that point that she told the claimant to sit down. She testified that the claimant did not tell her that she was injured lifting crates or report experiencing back pain, and she did not hear the claimant tell anyone else that she was injured while working or that she had a back problem. Paluch stated that there were three other employees in the kitchen at the time: Kruzolek, Trznadel, and Ostrowska. Paluch testified that she told the claimant to call her daughter and that the claimant's daughter, Natalia, arrive about 20 to 30 minutes later. According to Paluch, the claimant had to be assisted out of the store. In a written statement that Paluch wrote for Rich's insurance carrier concerning the events of December 2, 2017, she stated that the claimant "did not even tell me that she felt bad that day." According to her written statement, it was another worker that notified her concerning the claimant's condition. Paluch admitted that the claimant was assisted out of the store. The claimant denied telling Paluch on December 2, 2017, that she was having an episode of high blood pressure.

The claimant testified that, on Monday, December 4, 2017, Natalia took her to the office of Dr. Bohdan Dudas, her family physician. Dr. Dudas's notes of that visit state that the claimant reported acute low back pain and that she had "picked up big boxes of salads Saturday at work." She complained of low back pain, radiating to her left leg with spasms. Lumbar x-rays were taken that revealed stable mild to moderate spondylitic changes of the mid to lower lumbar spine with greatest involvement at L4-5 when compared to films taken in December 2015. The x-rays also revealed that the milder disc space narrowing at L3-4 and L5-S1 was unchanged. Dr. Dudas diagnosed a lumbar strain, prescribed medication, and placed the claimant on off work status. The claimant testified that Dr. Dudas referred her to Dr. Yang.

On December 6, 2017, the claimant presented to Dr. Yang. In his notes of that visit, Dr. Yang wrote that the claimant gave a history of having developed pain in her back 5 days earlier after lifting a heavy object at work. The claimant reported

that her pain had improved but that she was still experiencing pain across her low back extending upwards, along with left outer foot numbness. Dr. Yang noted the claimant's 2015 L4-5 discectomy. He recorded that the results of his neurological exam of the claimant appeared normal. Dr. Yang's impression on examination was that the claimant had stable mild spondylitic changes of the mid to lower lumbar spine with the greatest involvement at L4-5. He diagnosed a herniated disc. In a separate note, Dr. Yang diagnosed lumbar disc displacement without myelopathy and a lumbar strain. He prescribed physical therapy for the claimant and held her off from work. He also noted that, if the claimant did not improve with therapy, she should have a lumbar MRI.

The claimant had the recommended MRI on December 29, 2017. The radiologist's report states that the scan revealed: a broad-based 4 to 5 mm L3-4 disc herniation with extruded pulposus and generalized spinal stenosis and neuroforaminal narrowing; a posterior and right sided 2 to 3 mm L4-5 disc herniation indenting the thecal sac with bilateral neuroforaminal stenosis, right greater than left, and discogenic endplate changes with loss of disc height; and a road-based 3 to 4 mm posterior L5-S1 herniation indenting the thecal sac with mild bilateral foraminal narrowing.

The claimant next saw Dr. Yang on January 5, 2018. The claimant reported some improvement in her symptoms with physical therapy and that her left knee pain had resolved. She still complained of low back pain radiating to her right side when she moved. Dr. Yang noted the MRI findings and wrote: "I continue to suspect her back pain is likely muscular in origin." He did not recommend a spinal fusion. He also noted that the claimant reported being uncomfortable if her legs were still, and he recommended that she see her primary care physician or a neurologist about restless leg syndrome.

On January 8, 2018, Dr. Dudas completed a form so that the claimant could obtain a disability placard from the Secretary of State. In that document, Dr. Dudas indicated that the claimant: cannot walk without an assistive device or human assistance; is severely limited in her ability to walk due to an orthopedic condition; and cannot walk 200 feet without stopping to rest.

The claimant was next seen by Dr. Dudas on January 9, 2018. The doctor's notes of that visit state that the claimant was crying and that she stated that her "life is completely different." She complained of constant low back pain with left leg radiculitis. Dr. Dudas noted that the claimant was wearing a back brace and was taking Amlodipine for high blood pressure. Dr. Dudas again recorded a history of the claimant having moved large boxes at work and having experienced a sudden onset of back pain on December 2, 2017. Dr. Dudas noted that "Dr. Yang will not operate" and recommended that the claimant get a second opinion from Dr. Clay. He again placed the claimant on off-work status.

Dr. Yang's January 9, 2018 notes state that Dr. Dudas had expressed concern that the claimant was in so much pain. Dr. Yang called the claimant's daughter and advised her that he would issue a prescription for the claimant to

receive an epidural injection at L4-5. He noted that, if an epidural injection failed, an L3 to L5 fusion could be considered, the odds of success being 50/50.

The claimant did not see Dr. Clay as recommended by Dr. Dudas; rather, on January 18, 2018, she saw Dr. Mark Sokolowski, an orthopedic surgeon. The notes of that visit reflect that the claimant gave a history of an onset of severe back and leg pain after picking up containers of soup and salad while working on December 2, 2017. Dr. Sokolowski's notes state that the claimant reported that she screamed for her coworkers and was helped to a chair in the managers (*sic*) office. She told him that physical therapy had provided some relief, but she still experiences severe low back pain. The claimant also reported that she had low back surgery in 2015 after which her symptoms improved, and that she was able to work for nearly 2 years thereafter until December 2, 2017. According to Dr. Sokolowski's notes, the claimant had a history of hypertension. Dr. Sokolowski reviewed the radiologist's report of the claimant's MRI, noting that it revealed moderate stenosis at L3-4 and a large left L4-5 herniation with relative protrusion of the disc height. Dr. Sokolowski found that the claimant's pre and post 2015 MRI's showed interval resolution of the L4-5 disc herniation. He diagnosed the claimant as suffering from lumbar pain and radiculopathy. He also noted his belief that, since the claimant had no symptoms for two years after surgery and her MRI showed resolution of the disc post-surgery, the work accident rendered her L4-5 disc changes and foraminal stenosis symptomatic, precipitating the onset of lumbar pain and radiculopathy. Dr. Sokolowski prescribed 4 more weeks of physical therapy and a Medrol dosepak for the claimant and recommended that she remain off of work until February 20, 2018. He noted that, if the claimant showed no improvement, the claimant should have an epidural injection at L4-5.

At the request of Rich's, the claimant was examined on January 29, 2018, by Dr. Babak Lami, an orthopedic surgeon. He testified that the claimant reported that she was moving boxes while working when she experienced back pain. He also testified that the claimant reported repetitive lifting of boxes as the cause of her pain but did not report a specific incident, either verbally or in her intake form. Dr. Lami stated that the claimant complained of back pain, pain in her left leg below the knee, and numbness. She also reported having undergone back surgery in 2015 and that she had a history of hypertension. Dr. Lami testified that he reviewed the claimant's medical records and found his neurological exam of the claimant to be normal. He diagnosed the claimant as suffering from low back pain without radiculopathy and left ankle pain. He also noted some residual numbness in her distal left leg. According to Dr. Lami, the claimant's condition, both before and after her alleged accident, involved degenerative lumbar changes. He stated that the claimant's December 4, 2017 x-rays showed lumbar arthritis with no significant changes from her 2015 films. He stated that, even if the claimant had an acute lifting incident on December 2, 2017, it would have involved an acute back sprain, at most. Dr. Lami admitted that a lifting incident can aggravate a preexisting back condition but asserted that a strain and an aggravation of a preexisting condition are not the

same. He acknowledged that Dr. Yang's post-surgical report of April 15, 2015, noted that the claimant reported no leg pain and only numbness on the left dorsal foot. However, he concluded that Dr. Yang's note of December 30, 2015, stating that he discussed the possibility of the claimant having a spinal fusion, suggested that her back condition had progressed post-surgery. Dr. Lami admitted that he found no records of any treatment for, or complaints of, back pain following the claimant's August 18, 2015 visit with Dr. Yang until her December 4, 2017 visit with Dr. Dudas. He also admitted that he found no information reflecting that the claimant was unable to work during that time period but stated that because the claimant was able to work did not mean that she had no ongoing symptoms. Based upon his review of the claimant's post December 2, 2017 MRI, her subjective complaints, demeanor and behavior, Dr. Lami concluded that the claimant's complaints are out of proportion to her condition. He testified that: "I really didn't find an injury to her back given the amount of pain she reports, her objective findings on exam and her MRI." Dr. Lami testified that the claimant's December 2017 MRI did not indicate any acute findings. It did reveal degenerative changes from L3 to S1, moderate at L3-4, severe at L4-5, and mild at L5-S1. According to Dr. Lami, the claimant had no clinical condition related to an L3-4 herniation. Although Dr. Lami had not reviewed the actual films of the claimant's December 21, 2015 MRI, from the radiologist's report of that scan he found no difference from the results of the claimant's 2017 scans. Dr. Lami was of the opinion that the claimant was not a surgical candidate, she did not require further treatment as a result of the December 2, 2017 event, and she had reached maximum medical improvement.

The claimant next saw Dr. Sokolowski on February 20, 2018, and reported steady improvement in her symptoms with therapy. Dr. Sokolowski continued the claimant on off-work status through April 18, 2018, and advised her to continue with physical therapy to be followed by a work conditioning program.

Matt Morgan, a private investigator, testified that he was engaged to conduct surveillance of the claimant. He stated that, on February 23, 2018, he videotaped the claimant. That video shows the claimant backing her car out of her garage at 11:19 a.m. and driving to a hair salon, arriving at 11:28 a.m. The video depicts the claimant walking unassisted and with no discernable limp from her car to the salon; a distance of approximately 83 feet. Morgan acknowledged that he did not observe the claimant while she was in the salon. At approximately 12:30 p.m., the claimant is seen exiting the salon and walking back to her car. The claimant then drove to Quest Physical Therapy (Quest), arriving at 12:41 p.m. She is seen exiting her car and walking into the facility unassisted and with no discernable limp. Morgan testified that he did not observe the claimant while she was in Quest. At approximately 1:51 p.m., the claimant exited Quest and drove to a TJ Maxx store. She parked her car and walked approximately 310 feet to the store. The claimant was in that store from 2:27 p.m. until 3:20 p.m. Morgan stated that he did not observe the claimant while she was in the store. The claimant admitted that, while

she was in the store, she was either walking or standing. Upon exiting the store, the claimant returned to her car and is seen opening both doors on the passenger side of the vehicle and then leaning into the rear seat while standing on only her right leg. Morgan testified that, during the time that he observed the claimant, she did not appear to have any physical difficulties. He admitted that he could not always see the claimant's face or whether she was grimacing.

In a note dated March 13, 2018, Dr. Sokolowski wrote that the claimant had called requesting an urgent appointment due to increased back and leg pain. He advised the claimant not to begin work conditioning and prescribed a left L4-5 epidural injection.

On April 11, 2018, the claimant reported to Dr. Sokolowski that she continued to experience back pain, and he again recommended that she receive an epidural injection. Dr. Sokolowski's notes of that date indicate that he continued the claimant on off work status and ordered a functional capacity evaluation.

The claimant next saw Dr. Sokolowski on May 10, 2018, complaining of back and leg pain. According to Dr. Sokolowski's notes of that visit, the claimant had an antalgic gait and a positive left straight leg raise. He also noted that the epidural injection he recommended had not yet been authorized by Rich's insurance carrier. Dr. Sokolowski continued the claimant on off duty status, again recommended an epidural injection, and prescribed Tramadol. The claimant testified that Dr. Sokolowski also referred her to a pain specialist, Dr. Kurzydlowski.

Eric Flanagan testified that he is a vocational consultant and that he was retained to prepare a video job analysis of the claimant's job duties as a soup labeler and the tasks involved in moving soup from the cooler. He identified the video that he prepared. According to Flanagan, the buffet position at Rich's falls into the light physical demand category. He testified that he determined that a soup worker would lift crates 30 to 50 times during an 8-hour shift. He stated that the crates containing 15 soups weighed approximately 18 pounds. He admitted that he was not aware of any products other than soup being moved and did not weigh any other products at the store.

The claimant testified that her pain level fluctuates. She stated that she takes painkillers when needed, but that there are days when she does not require medication. *Parys v. Ill. Workers' Comp. Comm'n*, 2021 IL App (1st) 210601WC-U, P4-P34, 2021 Ill. App. Unpub. LEXIS 1955, ¶ 2-25.

The Appellate Court further notes that Petitioner "was treated for lumbar pain and radiculopathy from December 4, 2017, through May 10, 2018, by Drs. Dudas, Yang, and Sokolowski, and the x-rays taken of the claimant's spine on December 4, 2017, and the MRI scan of her spine taken on December 29, 2017, both reflect that she suffers from a condition of low-back ill-being. Further, Dr. Sokolowski opined that the claimant's work accident rendered her L4-5 disc changes and foraminal stenosis symptomatic, precipitating the onset of lumbar pain and radiculopathy." *Parys*, 2021 IL App (1st) 210601WC-U P41.

Finally, the Court notes, "[c[learly, there are inconsistencies in the claimant's testimony relating to her hypertension and there are unresolved issues relating to the nature and extent of her condition of low-back-ill-being, whether the claimant's current condition of low-back-ill-being is causally related to her alleged work-related accident of December 2, 2017, and notice." *Parys*, 2021 IL App (1st) 210601WC-U P42.

Conclusions of Law on Circuit Court Remand, Case No. 2022 L050582

Notice

The Request for Hearing reflecting the parties' trial stipulations was entered into evidence as Arbitrator's Exhibit 1 (ArbX1). Petitioner claimed and Respondent agreed that notice was given of the accident within the time limits stated in the Act thus stipulating that Notice was not disputed by Respondent. (ArbX1)

Petitioner's Credibility

As the Appellate Court noted, there were inconsistencies in the Petitioner's testimony relating to her hypertension, however, there were other inconsistencies that also taint Petitioner's credibility. For instance, the surveillance video taken on February 23, 2018, shows Petitioner went to a hair salon, followed by therapy and then walking and shopping in a store for just short of an hour. The Commission notes that the investigator, Morgan, conceded he did not observe Petitioner in the store, however, Petitioner conceded that, while she was in the store, she was either walking or standing. Upon exiting the store, the claimant returned to her car and is seen opening both doors on the passenger side of the vehicle and then leaning into the rear seat while standing on only her right leg. Morgan testified that, during the time that he observed the claimant, she did not appear to have any physical difficulties. He admitted that he could not always see the claimant's face or whether she was grimacing. Nonetheless, the Commission finds that while the surveillance video is limited, the several hours of video also belies Petitioner's testimony regarding her condition.

The Commission finds that the surveillance activity does not comport with what Petitioner was telling her treating physician, Dr. Sokolowski, at that time. Further, at the time of trial the Arbitrator noted Petitioner was unable to ambulate without physical assistance, and testified to debilitating pain. On January 8, 2018, Dr. Dudas provided Petitioner with a Certification for Parking Placard/License Plates to be submitted to the Secretary of State that represented that Petitioner could not walk more than 200 feet unassisted for a period of six months. The surveillance video impugns the medical records especially Dr. Dudas's certification.

Petitioner also testified to wearing a back brace as a result of her condition, and testified that it was provided by physical therapy yet there is no mention in the therapy records of a back brace being provided. (PX5) Petitioner did not wear the brace at either of the hearings. (T. 102)

Petitioner told Dr. Dudas on January 9, 2018, that the brace was from therapy and reported to Dr. Dudas that Dr. Yang would not operate. (PX2) Dr. Dudas referred Petitioner to Dr. Clay, yet Petitioner did not consult Dr. Clay.

Causal Connection

After her lumbar spine surgery in March 2015, Dr. Yang noted at his April 15, 2015, office visit that Petitioner recovered almost complete motor function in the left foot and her left leg pain had resolved. Dr. Yang documented that he told Petitioner numbness takes a much longer period to resolve and may be permanent if there is sufficient nerve damage prior to surgery. On August 19, 2015, Petitioner reported to Dr. Yang she also started to feel pain extending down her left leg which occurred when she flexes to put on socks, and sometimes with episodic numbness which recovers. (PX3) When Petitioner saw Dr. Yang on January 5, 2018, he conducted a physical exam. Dr. Yang's "Plan" documented that Petitioner had no radicular pain at that time and he did not recommend spinal fusion for axial back pain typically at that time. (PX3)

When Dr. Lami examined Petitioner on January 29, 2018, he found she had low back pain without any radiculopathy or any symptoms corresponding to known dermatomes. (RX11, 17, 18) Dr. Lami testified that Petitioner reported "some symptoms which involved the distal left leg. That's below the knee on the left side. She described pins and needles on the outside of the left leg, which is the lateral aspect of the knee, to the ankle, and aching which involved her ankle and her toes on the left side. She did not have any symptoms or pain from her left buttock to the knee." (RX11, 11-12)

Dr. Lami testified that he reviewed Petitioner's MRI of the lumbar spine from March 24, 2015, the MRI of the lumbar spine from December 21, 2015, December 4, 2017, x-rays and images and the report from the MRI of the lumbar spine from December 29, 2017. (RX11, 13-14, 21) Dr. Lami reviewed the December 2015 lumbar spine radiology report. Dr. Lami explained from the previous surgery she had some residual numbness in her distal left leg. (RX11, 18) He went on to explain the purpose of an epidural steroid injection is to help radicular symptoms, whereas Petitioner has mostly central axial back pain. (RX11, 19) Dr. Lami would not operate on her, and opined that her condition is not amenable to surgical correction. Assuming that her job requires her to lift up to 20 pounds, there would be no reason Petitioner would not be able to perform that job based upon his examination of her. Dr. Lami opined that at the time he saw her, she did not require any further treatment. (RX11, 20) Dr. Lami further opined Petitioner reached a state of maximum medical improvement as it relates to December 2017. (RX11, 21)

Dr. Lami also testified that he did not find an injury to her back given the amount of pain she reports, her objective findings on exam and her MRI. (RX11, 21) Dr. Lami found no acute findings, however, similar to the radiologist, he found the December 29, 2017, lumbar spine MRI showed degenerative changes mainly at L3-4 and L4-5. At L4-5 were severe degenerative changes, L3-4 were moderate, and mild degenerative changes at L5-S1. He did not find a herniated disc as "like an acute finding, rather degenerative changes, with discs that protrude and herniate"

and Dr. Lami opined Petitioner did not ever have clinical symptoms from a herniation at L3-4, neither verbalized to him nor any other doctor at the time of his exam. (RX11, 22)

Dr. Lami clarified that he relied on the radiologist's interpretation of the 2015 MRI and did not review the actual images. Dr. Lami opined "the description written by radiology appears to be similar to what we –what we see in 2017." (RX11, 23)

On cross examination, Dr. Lami opined that his review of a medical record from February 20, 2015, is relevant to his opinion because the 2015 note documents that a podiatrist diagnosed Petitioner with "RSD on the left side." Dr. Lami opined in 2018, she is complaining about left leg pain that could be RSD. (RX11, 40.) When asked what contradicts the claim that Petitioner did well after her 2015 surgery, Dr. Lami testified that it was not the visits, it was the repeat MRI after surgery that is not a sign of someone doing well. The MRI was on December 21, 2015, and then on December 30th, she saw Dr. Yang. Dr. Lami opined that "someone being offered a possible L3-4, L4-5 fusion is not a sign of someone who is doing really well." And although Dr. Lami was not aware of any records after that visit, he opined that "symptoms do not spontaneously go away the next day." (RX11, 49) Dr. Lami acknowledged that he knew she worked and he conceded that he had no records that she was unable to work between December 2015 and December 2017. Dr. Lami opined it was not necessarily true that you could assume she was asymptomatic. (RX11, 50) The fact that there would be no records was not unusual, since Petitioner did not want the fusion surgery Dr. Yang had suggested in December 2015, and he saw no reason Petitioner would continue to treat thereafter, and no reason to not work even if she had symptoms. (RX11, 51,68)

Dr. Lami testified that Petitioner's diagnosis after the December 2, 2017, accident was a back sprain. (RX11, 55, 57)

On redirect examination, regarding the x-ray of December 4, 2017, Dr. Lami opined his interpretation of that report was that Petitioner had stable moderate degenerative narrowing at L4-5 and disc space narrowing at L3-4 and L5-S1, similar and unchanged from the previous MRI from December 2015. (RX11, 64, 65) Dr. Lami reviewed the December 30, 2015, MRI report and noted Dr. Yang ordered the MRI. He agreed that between August 19, 2015, and December 30, 2015, Dr. Yang felt the Petitioner needed an MRI of her lumbar spine. Dr. Lami agreed that on December 30, 2015, Dr. Yang discussed the possibility of a posterior interbody fusion at L3-L4 and L4-L5. The notes from Dr.Yang's office visit dated January 9, 2018, document that there was a discussion of interbody fusion at L3-4 and L4-5, the same procedure discussed two years prior. (RX11, 68-69)

Dr. Lami opined that a physician treats the patient based on the MRI findings, physical exam findings and subjective complaints to improve their status. Based on the multiple mechanisms of injury provided to him he diagnosed Petitioner with a back sprain and that she is not a surgical candidate. (RX11, 71)

"Dr. Sokolowski opined that the claimant's work accident rendered her L4-5 disc changes and foraminal stenosis symptomatic, precipitating the onset of lumbar pain and radiculopathy." *Parys*, 2021 IL App (1st) 210601WC-U, P41. Dr. Sokolowski did not testify and offered his opinion solely through his treating records. Although Dr. Sokolowski's initial office notes reveal that he reviewed Petitioner's December 21, 2015 MRI report, he did not review the actual image as he did of her pre-surgical lumbar MRI dated March 24, 2015, and the December 29, 2017, lumbar spine MRI. (PX6, 13) He also reviewed only the report of the December 4, 2017, lumbar x-ray, not the images. (PX6, 12)

On February 20, 2018, Dr. Sokolowski noted improvement in her radiculopathy with therapy that no injection was recommended. Dr. Sokolowski ordered an FCE on April 11, 2018, to "delineate her capabilities." (PX6) Finally, On May 10, 2018, Dr. Sokolowski referred Petitioner to a pain specialist. (PX6)

The Quest Physical Therapy notes from December 13, 2017 through March 9, 2018, reflect Petitioner's number one diagnosis is lumbar sprain/strain and number two diagnosis is muscle spasm of back. On December 13, 2017, the notes reflect left leg pain, however, Petitioner denied numbness or tingling of bilateral legs. On March 19, 2018, the Quest Physical Therapy typed notes reflect Petitioner reported lumbar pain and left leg radiculopathy to the left foot, however, when describing, she notes tingling and numbness sensation below knee and in her left foot. Petitioner also reported having pain increase after one block walking and at that time per the doctor's order, Petitioner was to stop therapy. All the notes under Functional Assessment appear to be "cut and pasted" since the re-evaluation note of January 17, 2018. (PX5)

The Commission finds Dr. Lami is more credible than Dr. Sokolowski based on the fact that Dr. Lami's opinions comport with those of Dr. Yang, Petitioner's treating orthopedic surgeon in 2015, who initially treated Petitioner after the December 2, 2017 accident. Shortly after the accident, on December 6, 2017, Dr. Yang's first impression after examining the Petitioner was that she had a muscle sprain. On January 5, 2018, Dr. Yang's notes, in the section "History of Present Illness" document that Petitioner had pain in her low back with a little radiation to the right side, however, under his "Plan" he notes she has no radicular pain at this time. He continued to suspect her back pain "is likely muscular in origin" and noted he "did not recommend spinal fusion for axial back pain typically." (PX3, 1, 3) The Commission acknowledges that in a subsequent note of telephone encounter with Petitioner's daughter, Dr. Yang recommended Petitioner could be referred to try epidural steroid injection and if injections fail, a spinal fusion from L3-L5, although he emphasized the success rate would be in the 50% range. This was the same surgery he recommended in 2015.

Petitioner returned to her PCP, Dr. Dudas and reported that Dr. Yang would not operate, and although Dr. Dudas referred her to Dr. Clay, Petitioner instead chose to treat with Dr. Sokolowski. Dr. Lami's opinions, specifically that Petitioner had no radiculopathy and that Petitioner is not a surgical candidate, comport with Dr. Yang's notes. Dr. Lami opined that an epidural steroid injection would not be beneficial for Petitioner's symptoms of central axial back

pain, and are not prescribed for radicular pain. (RX11, 19) The Commission finds these opinions more reliable than Dr. Sokolowski who was consulted only after Dr. Yang opined that Petitioner had a muscle sprain. His notes indicate he relied solely on Petitioner's self-reported medical history with no documentation regarding her prior left leg and ankle complaints or diagnosis of RSD. (PX6) The Commission finds Dr. Sokolowski's causation opinion is, therefore, not as credible as Dr. Lami's who benefited from review of Petitioner's pre-accident medical records. (RX11, 13) Therefore, Dr. Sokolowski's opinion is entitled to little weight. *See*, *e.g.*, S*unny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC, 14 N.E.3d 16, 383 Ill. Dec. 184. (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

Medical Bills

Petitioner attached to the Request for Hearing a summary of those outstanding medical bills purported to be related to Petitioner's injuries sustained as a result of the accident of December 2, 2017. (ArbX1) Petitioner also submitted into evidence Petitioner's Exhibit 8, documents to support the summary of unpaid medical bills attached to the Request for Hearing. Respondent had no objection regarding the amount of bills listed as unpaid charges per the Illinois Workers' Compensation Fee Schedule, however, disputed liability for those bills based upon a causation dispute.

Petitioner was seen by Dr. Babak Lami on January 29, 2018, pursuant to §12 of the Act and based upon Dr. Lami's opinion that Petitioner was at MMI at that time, the Commission finds that Respondent is liable for the medical bills listed in the attachment to the Request for Hearing (ArbX1) and supported by the records in Petitioner's Exhibit 8, for treatment related to Petitioner's lumbar back strain from December 2, 2017, through January 29, 2018.

Temporary Total Disability

Petitioner was seen by Dr. Babak Lami on January 29, 2018, pursuant to §12 of the Act and based upon Dr. Lami's credible opinion Petitioner was at MMI at that time. That opinion was bolstered by the video surveillance from February 2018, in contrast to the contemporaneous records of Dr. Sokolowski. Therefore, the Commission finds that Petitioner has sustained her burden of proving that she is entitled to temporary total disability for the period commencing December 3, 2017, through January 29, 2018, representing 8 2/7 weeks, at a rate of $320.02 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission's prior Decision and Opinion on Review is reversed on the issue of accident and modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.02 per week for a period of 8-2/7 weeks, commencing from December 3, 2017, through January 29, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for reasonable, related and necessary low back medical expenses under §8(a) and §8.2 of the Act as itemized in Petitioner's Exhibit 8 from December 3, 2017, through January 29, 2018.

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 $5,500.00. The party commencing the proceeding in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 6, 2024

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KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014327
Case Name	Mark Bilich v. Custom Steel Processing Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0209
Number of Pages of Decision	29
Decision Issued By	Amylee Simonovich, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	John Hustava
Respondent Attorney	Steven J. Costello

DATE FILED: 5/6/2024

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, 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 Accident; Causal Connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK BILICH,

Petitioner,

vs. NO: 21 WC 014327

CUSTOM STEEL PROCESSING, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Statement of Facts, however, views the evidence differently than the Arbitrator. Based upon a review of the entire record, the Commission modifies the Arbitrator's Decision and finds that Petitioner failed to sustain his burden of proving a repetitive trauma accident and causal connection between his work activities and his current condition of ill-being, rendering all other issues moot, for the following reasons.

Conclusions of Law

The Commission strikes the Arbitrator's Conclusions of Law in their entirety and substitutes the following:

Accident/Causation

A claimant who suffers from a pre-existing condition may recover benefits under the Act where an accident aggravates or accelerates her condition. *International Vermiculite Company v. The Industrial Commission,* 77 Ill. 2d 1 (1979). Further the accident must be a factor which contributes to the disability. *Caterpillar Tractor Co.* v. *The Industrial Commission,* 92 Ill. 2d 30 (1982). Mere correlation of symptoms is not enough as causation between the accident and the resulting disability must exist. *Long v. The Industrial Comm'n,* 76 Ill. 2d 561 (1979). Further, as the Supreme Court of Illinois noted in *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." In this case, Petitioner failed to prove his condition is work related.

Petitioner alleges a repetitive trauma injury with a manifestation date coinciding with the first time he saw Dr. Bradley on May 20, 2021. In a seminal case, the Illinois Supreme Court set the standard in determining the manifestation date of the repetitive trauma accident as follows:

> The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. See *General Electric Co. v. Industrial Comm'n*, 190 Ill. App. 3d 847, 857, 546 N.E.2d 987, 137 Ill. Dec. 874 (1989). However, 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*, 176 Ill. App. 3d at 610. *Durand v. Indus. Comm'n* (RLI Ins. Co.), 224 Ill. 2d 53, 72, 862 N.E.2d 918, 929.

As far back as October 28, 2008, after a recent MRI showed a labrum retear, Petitioner told his pain management physician, Dr. Smith that his orthopedic doctor wanted to do surgery. (RX4) Petitioner complained that his pain was increased with throwing, overhead activity, weight lifting, and picking up steel at work. (RX4) On October 19, 2020, Petitioner saw Dr. Hong and denied any recent injury. The Commission finds Petitioner's labrum retear condition and pain were present shortly after his third shoulder surgery in 2008, ongoing and exacerbated by a weight lifting incident in the summer of 2020. In the fall of 2020, Petitioner asked his supervisor to change his position from recoiler. Petitioner first saw Dr. Hong on October 19,

2020, with complaints of bilateral shoulder pain. He was excused from work by Dr. Hong from October 19, 2020 through November 2, 2020. (PX3, T. 112) His last day worked was March 5, 2021. (RX8) When he saw Dr. Hong on March 8, 2021, Dr. Hong completed the Physician's portion of Petitioner's short-term disability form application. (RX8) The plant manager checked boxes indicating the disability was not caused by employment and no workers' compensation claim had been filed. *Id.* Dr. Hong checked the box indicating that the Petitioner's condition was due to sickness and not accident/injury, and more importantly, Dr. Hong represented that Petitioner's symptoms began in July 2020 and that the disability was not work related. (RX8, T. 190) Petitioner was off and paid short-term disability from March 9, 2021, through April 22, 2021, coinciding with the dates Dr. Hong put on the short term disability application. (RX9, RX8)

The Appellate court has stated that "fact of the injury" is not synonymous with "fact of discovery." *Oscar Mayer*, 176 Ill. App. 3d at 611, citing *Peoria County*, 115 Ill. 2d at 531. The Court held that he date on which the employee notices a repetitive-trauma injury is not necessarily the manifestation date. Instead, the date on which the employee became unable to work, due to physical collapse or medical treatment, helps determine the manifestation date. *Oscar Mayer*, 176 Ill. App. 3d at 611. The facts in repetitive trauma cases must be closely examined to ensure a fair result to all parties. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 49, 556 N.E.2d 261, 265 (1989).

Petitioner's date of hire with Respondent was May 13, 2019, according to his short term disability application. (RX8) Petitioner's last day worked was March 5, 2021. (RX8, ArbX1) The Commission concludes that Petitioner has failed to prove his physical collapse or condition of ill-being is causally related to his alleged date of accident. In so concluding, the Commission relies upon the testimony of Jeffery Dwyer. Dwyer testified that he was Petitioner's supervisor sometime prior to September 2019. (T. 79) He testified that Petitioner started working for Respondent in May 2019. (T. 80) Dwyer testified that he worked with Petitioner from when he started in 2019 until the time when Petitioner went off on leave in March 2021. (T. 83) Dwyer testified that in the summer of 2020, Petitioner asked to be removed from the recoiler position due to right arm and shoulder pain. (T. 84) Dwyer testified Petitioner wanted to move to the pack line. According to Dwyer, Petitioner told him his request to move positions had nothing to do with the job, but that he hurt his shoulder lifting weights. (T. 85). Dwyer also testified that in the summer of 2020, Petitioner grabbed his arm and told Dwyer that he had been working out but had not been going to work out "because he had hurt his arm the last time he went." (T. 86) The Commission notes that Dwyer's testimony, that Petitioner told him that he hurt his arm weightlifting in the summer of 2020, comports with Dr. Hong's short-term application representation that Petitioner's symptoms began in July 2020 and that the disability was not work related. (RX8)

Dwyer's testimony is also supported by some of Petitioner's medical histories and Petitioner's own testimony which confirm Petitioner has been a weightlifter for years. The Commission cites Dr. Smith's October 28, 2008, office note where Petitioner complained of

increased pain with throwing, overhead activity, weight lifting, and picking up steel at work. (RX4) Further, the Commission notes on April 18, 2012, Petitioner's initial shoulder surgeon, Dr. Paletta, documented that he discussed with Petitioner a modified upper body lifting program. (RX5) Petitioner testified he was a weightlifter but had not lifted weights since the day he started working for Respondent. (T. 5)

The Commission finds the 2008 and 2012 medical histories lend credence to Dwyer's testimony that Petitioner told him that he hurt his shoulder weightlifting, precipitating Petitioner's request for a switch of his job duties. The Commission is not persuaded by Petitioner's denial of weightlifting "since working for Respondent." (T. 45) N The Commission finds Jeffery Dwyer's testimony was credible comporting with certain entries in the Petitioner's medical history and his own admission he was a weightlifter. The Commission does, however, note that Dwyer's testimony confirmed Petitioner had not worked out since hurting his shoulder at his prior working out.

The issue of causation, including whether an accident aggravated or accelerated a preexisting condition, is a factual question to be decided by the Commission. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665. In resolving disputed issues of fact, including issues related to causation, 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. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474; *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242.

Based on the totality of the evidence and review of the record as a whole, the Commission finds that the Petitioner failed to establish a causal connection between his current condition of ill-being and a repetitive trauma injury at work. In so concluding, the Commission further relies upon Dr. Anthony Frisella's opinions which are based, in part, upon his review of Petitioner's past medical history including Petitioner's prior right shoulder surgical recommendation in 2008.

While there is little evidence of treatment for his bilateral shoulders prior to presenting to Dr. Hong on October 19, 2020, Petitioner testified that he received injections after 2012—"probably a year later." (T. 12) Thus, Petitioner clearly had some known treatment in the intervening years and there is evidence that he had other medical conditions and also took narcotics during those intervening years.

Beginning October 28, 2008, Petitioner consulted Dr. Stephen Smith from Midwest Pain Center for neck pain, right shoulder and foot pain. (RX4, T. 190) Dr. Smith noted that Petitioner was taking Vicodin, given to him by Dr. Dave. Dr. Dave wanted to put Petitioner on Methadone but Petitioner did not want to take it. *Id*. Petitioner complained of constant, dull, achy pain in his posterior greater than anterior right shoulder that does not radiate. He had occasional numbness and tingling in his right 4th and 5th fingers. His pain was increased with throwing,

overhead activity, weight lifting, and picking up steel at work. He was sleeping poorly secondary to his pain. *Id.* Petitioner was given continued prescription for Vicodin ES tablet.

On January 19, 2009, Petitioner presented to Midwest Pain Center and consulted Jennifer Canale, NP for evaluation and "consideration of further opioid therapy for intractable pain." It was noted he takes Vicodin ES with relief and Dr. Ritchie wants to do a 4th surgery to the torn right labrum. Petitioner reported that he needed to wait until later in the year due to work. (RX4, T. 192) Petitioner returned to Midwest Pain Center on April 2, 2009, and November 12, 2009, for Vicodin refills. (RX4)

Petitioner testified that he was taking Norco in January 2017 for migraines related to seizure and stroke, however, the record shows that Dr. Hong, his treating physician, saw Petitioner on January 31, 2017, for chronic pain. Dr. Hong's office note confirmed that Dr. Ali, Petitioner's neurologist, would no longer prescribe Norco. The history reflects Petitioner reported chronic shoulder and neck pain. He stated that he has remote history of neck injury. The note further reflects that Petitioner "used to take Norco from neurology but he no longer gets it prescribed from neurology." (RX6, T. 280) He told Dr. Hong that he no longer sees Dr. Ali anymore. Patient reported that he had a stroke and he has seizure and used to see Dr. Ali but he told me he wants to see neurology from Barnes so he's not seeing Dr. Ali anymore. Petitioner advised Dr. Hong he was on Keppra and he had not had any seizure for a long time. Petitioner further advised that that he has left shoulder slap tear and "ortho recommended surgery but he could not afford to be down for so long." *Id.* Petitioner then advised that his previous PCP would not give him Norco for pain control. He used to take QID Norco for pain control. He stated that his previous MD does not care about his needs. He has 7/10 pain daily around left shoulder. The January 31, 2017, office note concludes as follows:

Assessment/Plan:

1.	Assessment	Chronic Pain syndrome (G89.4)
	Patient Plan	Chronic neck and left shoulder pain. I still don't understand why he left Dr. Ali. I told him his explanation does not make any sense. I told him if Dr. Ali was giving him Norco in the past, he should continue to see him for pain control. Pt told me he's changing neurology to Barnes for his seizure, which he is on Keppra for and he told me he's not had any seizure for long time, just does not make any sense. I suspect that he was discharged by Dr. Ali for some reason but I cannot confirm it at this point. In either case I told him there is no indication for him to take Norco on daily basis. He needs to see his ortho and get his shoulder fixed by surgery if necessary. I also told him he needs to go back and see Dr. Ali for pain management if needed.
2.	Assessment	Opioid Dependence uncomplicated
	Patient Plan	Pt continues to argue about getting Norco for his pain. I again told him I WILL NOT give him Norco since there is no clear indication

> for him to get Norco for pain control on daily basis. I told him he needs to go back to Dr. Ali for pain management, who was giving him Norco until recently. He has been without Norco for several weeks and I gave him small amount of Tylenol #3 PRN for pain today and told him I will not take over his pain control and he needs to find a different PCP. If he wants chronic pain control with Norco. I told him he may call Molina and find new PCP if he likes. Patient is very unhappy and is borderline being rude at this point. I told him again I will not give him any pain meds in the future after today. Pt Left very unhappy. (RX6, 82)

The Commission finds that given Midwest Pain Center's records, the Petitioner's testimony does not outweigh the implications by Dr. Hong. At minimum, if Petitioner was taking opioids prescribed by Midwest Pain Center in 2009 and Norco as late as 2017, those medications would mask, or manage, Petitioner's shoulder pain.

When Petitioner first consulted Dr. Yamaguchi on April 22, 2021, he provided his past medical history and long history of issues with his right shoulder. He reported that he spontaneously started having pain about a year prior and it had gotten progressively worse. Most recently the pain had gotten so bad that he could not work. It was noted he worked in a manual labor capacity. Dr. Yamaguchi first proposed a posterior labral procedure on May 6, 2021. (PX1)

When Petitioner returned to Dr. Hong on May 18, 2021, for a referral, he reported that Dr. Yamaguchi proposed a total right shoulder replacement which Petitioner did not want. Petitioner wanted to see Dr. Matthew Bradley. (RX6) When Petitioner consulted Dr. Bradley on May 20, 2021, the notes document that per Dr. Yamaguchi's chart notes, he had recommended surgical fixation of his posterior labrum. Dr. Bradley was in agreement that repair of the posterior labrum would be the best treatment option given the patient's age and desire to do heavy manual labor with his right arm. In Dr. Bradley's November 11, 2021, office note, Petitioner reported that he and Dr. Yamaguchi had discussed shoulder arthroplasty but dismissed that course of treatment, in part, because of Petitioner's age and his desire to continue to do heavy manual labor.

The Commission notes in Dr. Bradley's initial May 21, 2021, office note, he documented the following history:

> Mr. Bilich comes to the clinic today with pain in his right shoulder. He has worked for Custom Steel Processing for the last 2 years and works on the recoiler. This job requires significant overhead use where he is repetitively picking up between 50 and 70 lb. and lifting it over to shoulder level. He also is repetitively bending cuts and having to twist a nut off a machine that is constantly getting stuck. He does not report any specific injury but notes over the last year he has had the onset and worsening of some posterior shoulder pain.

> - Mr. Bilich has a history of right shoulder injury dating back to 2002. Per report he has had three surgeries on his shoulder by Dr. George Paletta. The first two surgeries were to address labral tears and the third surgery was to address some fraying and was a "clean out" type of procedure. After his last surgery in 2005, he was doing well and returned to work in a high-capacity manual labor type job. He reports some dull aching pain in his shoulder with repetitive use but states the pain he is currently experiencing is significantly different from the pain he had on a daily basis dating back to 2005. Mr. Bilich states that he was able to easily perform all of the necessary job requirements and activities with his shoulder until the onset of this new pain. (PX4, T. 156)
> In that same May 20, 2021, office note, Dr. Bradley opined, "It is my opinion that the chronic repetitive overhead heavy manual lifting and labor work that he has been doing has contributed to the re-tear of his posterior labrum." (PX4, 156, 157)

This first history highlights Petitioner's lack of credibility. Petitioner reported to Dr. Bradley he was doing well after his 2005 surgery, however, he was not doing well. In fact, in 2008, his treating surgeon recommended a fourth surgery after identifying a labral retear, and he was taking opioids thereafter as documented in Midwest Pain Center's records. It is apparent he was also taking Norco in the interim, all facts Petitioner omitted when giving Dr. Bradley his initial history. The Commission infers Petitioner had ongoing pain for years.

At the next office visit on October 18, 2021, Petitioner brought Dr. Bradley the MRIs from May 20, 2008 and June 3, 2008. Dr. Bradley's Assessment and Plan indicated Petitioner agreed to undergo surgery. At the next office visit, on November 11, 2021, Petitioner brought Dr. Frisella's opinion report to Dr. Bradley. Dr. Bradley's note states, "[h]e also brought video clips of another individual demonstrating the work requirements done by Mr. Bilich." Dr. Bradley documented that Petitioner stated that the video is not completely accurate as he reported he does the bend in a slightly different way. "He demonstrates a pushing motion from his chest level to overhead and he states that it was this motion that created his pain. He denies any interval trauma." (PX4, T. 163)

Petitioner testified, however, that the job videos depict "pretty much" what he does at work. (T. 26.) Petitioner testified that he does the job "a little bit differently" but essentially the same. The weights or height of where the work activity takes place does not change. (T. 26-27)

In his Assessment and Plan on November 11, 2021, Dr. Bradley offered the following causation opinion:

> Mr. Bilich is having significant pain and catching within his shoulder preventing him from doing his activities of daily living and necessary job requirements. It is my medical opinion and per report Dr. Yamaguchi's medical opinion, that surgery is indicated for Mr. Bilich and would likely provide increased function and decreased pain. Dr. Frisella opines that the work activities Mr. Bilich describes

> are not related to his current condition and that his current condition is pre-existing his work with Custom Steel Processing. Mr. Bilich certainly has a history of injury to that shoulder including a labrum that was repaired by Dr. Paletta as well as a subsequent secondary surgery for some debridement. Mr. Bilich states he recovered well from those surgeries. He does notice some intermittent achiness in pain after a hard day's work however the current pain he is having includes significant mechanical symptoms of catching and clicking that he denies having after his two surgical procedures. Certainly given the repetitive pushing and overhead use of his shoulder, it is not unreasonable to conclude that his job requirements are at least contributing to his current symptoms and need for surgical intervention. (PX4)

The Commission finds that Dr. Bradley's statements confirm that he is relying solely on Petitioner's history given to him and the history has significant omissions. Petitioner underwent three prior surgeries, not two, on his right shoulder. More importantly, Petitioner did not recover well from those surgeries and was recommended to undergo a fourth surgery. Thus, Dr. Bradley's opinion was not based on accurate information, nor reliable. See *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87 ([e]xpert opinions must be supported by facts and are only as valid as the facts underlying them).

Dr. Frisella took Petitioner's medical and work histories, reviewed not only Petitioner's medical records, but also personally reviewed Petitioner's diagnostics and also the videos of the jobs Petitioner performed for Respondent. (RX3, RX7) Dr. Frisella's September 16, 2021, opinion report documents his diagnosis and causation opinion as follows:

> The patient has developed right shoulder osteoarthritis as a result of: 1) multiple injuries; 2) multiple surgeries; and 3) the passage of time. Further, the patient has a large, chronic, labral tear that pre-existed his work for Custom Steel Processing. I base my opinion on the following reasoning:
>
> The patient had had severe right shoulder complaints for years prior to his work for Custom Steel Processing, well-documented in the medical records. These include:
> 2008 note from Dr. Smith documents persistent posterior shoulder pain.
> 2009 note from NP Canale documents baseline right shoulder pain of 8/10.
> 2017 note from Dr. Hong documents chronic shoulder pain requiring narcotics. Baseline with pain complaints ranging from 8/10 to 10/10 in the past.
>
> Multiple 2009 notes from Nurse Practitioner Canale document a labral tear, and the patient was considering surgery for the torn right labrum as far back as 2009. This indicates that the labrum tear seen on current MRI was chronic, was present more than 10 years ago, and that the prior surgery to repair the

> labrum was not successful. Also, the activities reviewed on the videos provided would not cause a labral tear. (RX3)

In his report, in answer to interrogatories, Dr. Frisella opined there is no causal connection between the Petitioner's work activities to an alleged date of injury on May 20, 2021. Dr. Frisella opined that the medical records document a chronic, ongoing problem with the right shoulder that pre-existed the patient's work with Custom Steel Processing. Dr. Frisella noted that "there is documentation of right shoulder pain as long ago as 2008 and of a labral tear in 2009. The work activities I reviewed regarding the recoiler machine would not cause arthritis or a posterior labral tear." *Id*.

With respect to whether or not Petitioner's work activities leading up to an alleged date of injury on May 20, 2021 aggravated any preexisting findings in the right shoulder, Dr. Frisella opined they did not. He explained that "[u]se of the right arm for heavy and overhead work is expected to cause pain in a patient with arthritis, but it did not cause, contribute to, worsen, or permanently aggravate any diagnosis in the right shoulder." *Id.*

Dr. Frisella opined medical treatment has been reasonable and necessary to address the osteoarthritis and chronic labral tear in the right shoulder. Treatment was not the result of the Petitioner's work activities leading up to May 20, 2021, but rather the result of a pre-existing chronic, degenerative process in the right shoulder.

Further, Dr. Frisella did not recommend surgery. Dr. Frisella opined that Petitioner was too young for shoulder replacement surgery and "would best be served by conservative treatment with cortisone injection, physical therapy, and anti-inflammatories. The need for treatment is not needed to cure and relieve the effects of the petitioner's work activities leading up to May 20, 2001, but rather an ongoing and pre- existing degenerative problem in the right shoulder." *Id.*

Lastly, Dr. Frisella opined that Petitioner did not require work restrictions as it relates to his right shoulder. He explained, use of the arm for heavy or overhead work will not permanently worsen or damage the shoulder, but may cause pain because the Petitioner has a degenerated shoulder. *Id.*

After review of the entire record, including the Petitioner's job description and the videos showing Petitioner's job duties, (RX1, RX2) the Commission agrees with Dr. Frisella's opinions regarding causation. The Petitioners job activities did not accelerate Petitioner's symptoms and contribute to the need for surgical intervention. As Dr. Frisella explained, use of the arm for heavy or overhead work, may cause pain, but the need for surgery was established many years prior to working for Respondent. Petitioner failed to show that the injury is work related and not the result of a normal degenerative aging process as required by *Peoria Belwood*. (The employee must show that the injury is work related and not the result of a

normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Com*m'n., 115 Ill. 2d 524, 505 N.E.2d 1026.)

Further, on the short-term disability application Dr. Hong completed on March 17, 2021, the form asked Petitioner's treating physician for the "Date symptom first appeared" and Dr. Hong wrote "July, 2020." (RX8, T. 290) Dr. Hong also specified that the disability was not due to accident/injury but to sickness and that the disability was not work related. Therefore, the Commission affords great weight to Dwyer's credible testimony that Petitioner admitted his shoulder was injured while weightlifting in the summer of 2020.

For all the afore-referenced reasons, the Commission reverses the Arbitrator's Decision regarding accident and causal connection, rendering all other issues moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 3, 2022, is hereby modified for the reasons stated herein, reversed regarding accident and causal connection, rendering all other issues moot, and is otherwise affirmed and adopted. All benefits are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award with respect to medical services and medical expenses as provided in §8(a) and §8.2 of the Act, outlined in Petitioner's Exhibit 5, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award with respect to prospective §8(a) medical services and medical expenses as recommended by Dr. Bradley is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award with respect to temporary total disability benefits as provided in Section 8(b) of the Act, is hereby vacated.

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

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

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

As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. *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.

May 6, 2024

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

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the well-reasoned Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met his burden of proving he sustained a repetitive trauma injury. While Petitioner had a pre-existing right shoulder condition, "[t]he salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Schroeder v. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, ¶ 26. Notwithstanding Petitioner's prior history related to his right shoulder, and his hobby as a weightlifter, he had been using this arm to work full duty, and had not sought treatment for eleven years, until he filled in on the recoiler machine, performing a significant percentage of job duties at or above shoulder level. As the Arbitrator correctly noted, accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003).

I also respectfully disagree with the inferences drawn by the majority regarding Petitioner's narcotic use in 2017. The record of January 31, 2017, states this medication was for chronic neck and left shoulder pain, the opposite arm at issue here. Even if the use of Norco was masking right shoulder pain, Petitioner was refused this medication in 2017, over three years before seeking treatment for his right shoulder again. The majority also highlights that Petitioner was not "doing well" following his 2005 surgery. While an additional surgery was recommended in 2008, Petitioner never underwent this procedure, and was certainly doing well enough to return to manual labor for the next eleven years without any medical records of right shoulder treatment during that time. In fact during those years, he underwent a left shoulder surgery with subsequent chronic left shoulder pain requiring narcotics through 2017.

I found the Arbitrator fairly weighed any conflicting evidence, and I would affirm her Decision.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC014327
Case Name	BILICH, MARK v. CUSTOM STEEL PROCESSING, INC.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	John Hustava
Respondent Attorney	Steven J. Costello

DATE FILED: 5/3/2022

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

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARK BILICH
Employee/Petitioner

Case # **21-WC-014327**

v.

Consolidated cases:

CUSTOM STEEL PROCESSING, 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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **2/16/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/20/21**, Respondent was operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**44,720.00**; the average weekly wage was $**860.00**.

On the date of accident, Petitioner was **33** years of age, **single** with **0** dependent children.

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

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

Respondent is entitled to a credit of $**4,525.72 in short-term disability benefits paid to Petitioner from 3/16/21 through 5/20/21,** under Section 8(j) of the Act.

ORDER

Respondent shall pay the medical expenses outlined in Petitioner's Exhibit 5, as provided in Section 8(a) and Section 8.2 of the Act, pursuant to the medical fee schedule. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that no medical expenses were paid through Respondent's group plan for which Respondent would be entitled to an 8(j) credit.

Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Bradley, including, but not limited to, a right posterior labral repair with chondroplasty glenoid and post-operative treatment until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**573.33**/week for **49-3/7th** weeks, representing the period **3/8/21 through 2/16/22**, as provided in Section 8(b) of the Act.

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

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

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

MAY 3, 2022

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARK BILICH,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 21-WC-014327
	)	
CUSTOM STEEL PROCESSING, INC.,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on February 16, 2022, pursuant to Section 19(b) of the Act. The issues in dispute are accident, causal connection, medical bills, temporary total disability benefits, prospective medical care, and 8(j) credit for short-term disability benefits. All other issues have been stipulated.

TESTIMONY

Petitioner was 33 years old, single, with no dependent children at the time of the accident. Petitioner was hired by Respondent on 5/13/19. Petitioner testified he had three surgeries on his right shoulder between 2002 and 2007. In 2002, Petitioner went over the handlebars of a bicycle and sustained a broken clavicle and labral tear resulting in a right shoulder surgery. In 2003, he sustained a right shoulder injury playing football that was repaired surgically. Petitioner continued to have shoulder issues and underwent an arthroscopy to remove part of the bursa in 2007. Petitioner testified he has always had shoulder pain following his surgeries, but it did not prevent him from doing things. Petitioner testified he was taking Norco in January 2017 for migraines related to a seizure and stroke. Petitioner testified he received injections in his right shoulder following his last surgery.

Petitioner testified he worked in the recoiler position for Respondent. He stated that steel sheets come out of an overhead operator that he cut into sections and manually placed the steel into a recoiler. Petitioner testified he had to wiggle and hammer the steel into the recoiler that rolls the steel. Once the steel is rolled, he cuts and bends it. The steel comes in different gauges and the .112-gauge is harder to bend than the .077-gauge steel. Petitioner grabs the steel that is positioned above eye level and bends it into a U shape. He stated he can manually bend all gauges except .25-gauge which he uses a crowbar to bend. Petitioner then bands the steel rolls by placing a band on each cut he made and puts a clip on each band. He has to pull the steel tight

during this process. Petitioner then bands the steel roll to a cart and pushes it onto the recoiler. He reaches above shoulder level to loosen a bolt which frequently requires a wrench or chisel and hammer.

Petitioner testified that all of his job duties are performed at or above shoulder level, other than watching the steel roll up. He lifts between 20 to 100 pounds. Petitioner testified he had problems with his neck, right shoulder, and right ankle in 2008 and treated with Dr. Smith and his primary care physician Dr. Hong. He treated with Dr. Hong on 10/19/20 for right shoulder symptoms and reported a history of his work duties. Dr. Hong placed Petitioner off work for two weeks. Petitioner did not receive treatment again until he returned to Dr. Hong on 3/8/21. Dr. Hong placed Petitioner off work again and referred him to Dr. Ken Yamaguchi.

Petitioner saw Dr. Yamaguchi on 4/22/21 and reported his prior right shoulder surgeries. Dr. Yamaguchi placed Petitioner off work and ordered an MRI and recommended right shoulder surgery. Petitioner saw Dr. Bradley on 5/20/21 who told Petitioner his condition was work-related and recommended surgery. Petitioner is right hand dominant. He desires to undergo the recommended surgery. Petitioner has been off work since 3/8/21.

Petitioner testified he received short term disability benefits of $4,525.72 from 3/16/21 through 5/20/21. The premium payments were deducted from his paycheck. Petitioner stated he filled out the first three pages of the STD paperwork, his supervisor Ron Moussette filled out page 4, and Dr. Hong filled out pages 5 and 6. Petitioner testified that Mr. Moussette would text him for medical updates and he responded to the texts. Petitioner denied being offered work accommodations of no use of his right arm. Petitioner testified he told Mr. Moussette in October 2020 that his shoulder hurt and he could not perform his recoiler duties. Petitioner stated that Mr. Moussette told him there was no light duty work available he continued his job duties.

Petitioner testified that he reviewed the job duty videos that were admitted into evidence, and he agreed they accurately depict his job duties although he performs them a little differently. He agreed that the weights and height of the work activities were accurate.

Petitioner testified that Jeff Dwyer was his supervisor in the summer of 2020. Petitioner did not recall telling Mr. Dwyer twice that his shoulder was sore due to working out. Petitioner did not recall having a discussion with plant supervisor Ron Moussette that his right shoulder symptoms were related to a prior injury involving lifting weights. Petitioner testified he submitted Dr. Hong's medical expenses from 2020 through March 2021 to his private health insurance. Petitioner testified he has not lifted weights since he started working for Respondent.

Ronald Moussette testified on behalf of Respondent. Mr. Moussette is Respondent's plant manager. He testified that Petitioner was transferred to an assistant operator in the recoil department in late 2019. Mr. Moussette testified Petitioner was not required to lift overhead but was required to perform overhead activity when banding the steel. The banding is 1.25 inches wide and weighs less than one pound. The banding is pulled off a spool and slid over the arm which requires overhead activity. He stated that the arm of the recoiler had to be changed 8 to 10 times per day and weighed 50 to 70 pounds depending on what tooling is on it. Mr. Moussette testified that the arm is not above chest level.

Mr. Moussette testified that Petitioner worked on the recoiler for three months while another employee was on a leave of absence. He stated that in late 2020 Petitioner started complaining of shoulder pain and he rotated Petitioner off the recoiler position as much as possible. Mr. Moussette testified that Petitioner did not give him a reason for his shoulder pain, and he was aware Petitioner had prior shoulder surgeries when he hired him. He stated Petitioner took disability for eleven days in October 2020 to undergo physical therapy and then returned to his regular job duties as an assistant operator. Mr. Moussette testified he told Petitioner in late February 2021 he should apply for short term disability and Petitioner wanted to wait to see if his shoulder improved. Mr. Moussette stated he filled out page 4 of the disability paperwork. He stated that Respondent paid part of the STD premiums.

Mr. Moussette testified that after April 2021 he started texting Petitioner weekly to request work status and medical updates. He stated Petitioner never replied to him until June 2021 when Petitioner told him he could not respond because he had an attorney. On cross-examination, Mr. Moussette admitted Petitioner did reply to his text on 5/21/21 and stated he saw the surgeon a few days ago and surgery was being scheduled. He agreed that Petitioner texted him in late June and advised his surgery had not been approved and he could not speak to him because he had an attorney. Mr. Moussette agreed that he replied to Petitioner, "what kind of shit are you trying to pull?" Mr. Moussette testified that Petitioner quit his employment and was not fired. Mr. Moussette was shown a Termination Notice dated 10/21/21.

Jeffery Dwyer testified on behalf of Respondent. Mr. Dwyer is a supervisor for Respondent and oversees sixteen employees. Mr. Dwyer has worked for Respondent for 16 years and worked second shift with Petitioner from 2:00 p.m. to 10:00 p.m. Mr. Dwyer supervised Petitioner from the date he was hired and initially placed on the pack line. He stated Petitioner was not required to lift overhead on the pack line. He lifted skids that weighed 20 to 45 pounds at or below chest level. Mr. Dwyer supervised Petitioner in the recoiler position and stated Petitioner was not required to lift above shoulder level. He stated Petitioner had to reach above his head when banding the steel rolls. He testified that Petitioner had to lift the over arm of the operator chest high 2 to 10 times per day. He stated the over arm weighed 40 to 50 pounds.

Mr. Dwyer testified that Petitioner requested to be moved off the recoiler position in the summer of 2020 because he hurt his shoulder lifting weights. Mr. Dwyer testified that on one occasion in the summer of 2020 Petitioner almost dropped the over arm. Petitioner told him he had not been working out because he hurt his shoulder the last time he went [to the gym].

Mr. Dwyer agreed that after one week of working the packing line, Petitioner was put into training in the recoiler position on first shift for one month. He stated Petitioner would float back and forth between job positions as needed.

MEDICAL HISTORY

On 10/28/08, Petitioner treated with Dr. Stephen Smith who noted Petitioner had three right shoulder surgeries prior to the age of 21. (RX4) Dr. Smith referenced a 2002 labrum tear, a second muscular tear from a football injury, and a third surgery to remove the bursa. Dr. Smith noted

Petitioner's pain continued following this second and third surgeries. A recent MRI showed a labrum tear. Petitioner was taking Vicodin and reported increased pain with overhead activity, weightlifting, and lifting steel at work. Dr. Smith administered a trigger point injection into Petitioner's right shoulder and prescribed amitriptyline, Vicodin ES, and Flector patches. He noted a history of neck and right foot pain.

On 1/19/09, Nurse Practitioner Jennifer Canale noted Petitioner's chief complaints of neck, right shoulder, and right foot pain. Petitioner reported undergoing three trigger point injections in October 2008 and his pain returned to baseline at 8/10. He reported that Dr. Ritchie wanted to perform a fourth surgery to repair the torn right labrum. Petitioner reported he needed to wait until later in the year due to work. His medications were refilled. He was diagnosed with osteoarthritis of the right shoulder. (RX4) On 4/2/09, it was noted Petitioner planned to wait until later in the year to undergo surgery when he had more vacation time.

On 11/12/09, Petitioner presented to NP Canale for further opioid therapy for intractable pain. He reported Vicodin decreased his pain by 50% and his pain is 5-6/10 with medication.

On 10/19/20, Petitioner treated with his primary care physician, Dr. Jim Hong, for chronic headaches and chronic bilateral shoulder pain. Dr. Hong noted Petitioner had three right shoulder surgeries and one left shoulder surgery due to labrum tears. Dr. Hong noted Petitioner does a lot of lifting at work. He denied any shoulder injury, loss of range or motion, or radiculopathy. Petitioner reported that his shoulder pain was worse when lifting at work. (PX3) Dr. Hong placed Petitioner off work through 11/2/20 per Petitioner's request. Physical therapy was ordered for bilateral shoulder pain. Dr. Hong stated Petitioner could return to work on 11/3/20 without restrictions.

On 3/8/21, Petitioner returned to Dr Hong and reported constant dull and sharp pain that had worsened over the last several months. He rated his pain 9/10. Dr. Hong noted Petitioner missed work frequently due to his symptoms. Petitioner denied injury. Dr. Hong ordered bilateral shoulder x-rays and ultrasound. He noted that physical therapy did not improve his symptoms. Dr. Hong referred Petitioner to Dr. Yamaguchi and placed him off work through 3/23/21 per Petitioner's request. Dr. Hong advised Petitioner to apply for FMLA or short-term disability.

On 3/17/21, Dr. Hong noted Petitioner had an appointment with Dr. Yamaguchi on 4/22/21 who recommended he not undergo an ultrasound, but x-rays were appropriate. Dr. Hong completed short-term disability forms and placed Petitioner off work through 4/22/21 due to "medical condition". He deferred to Dr. Yamaguchi for further work status.

On 3/17/21, Dr. Jim Hong filled out pages 5 and 6 of Petitioner's short term disability application. (RX8) Dr. Hong checked the boxes indicating Petitioner's disability was due to sickness and not accident/injury and was not work related. Dr. Hong wrote Petitioner had an appointment with an orthopedic surgeon scheduled for 4/22/21. Petitioner's short term disability application was approved, and he was paid $4,525.72 in benefits from 3/16/21 through 5/20/21. (RX9)

On 4/22/21, Dr. Yamaguchi examined Petitioner and noted severe right shoulder pain, with a significant prior surgical history. He reported that Petitioner had a spontaneous increase in his right shoulder symptoms about one year ago that progressively got worse. Dr. Yamaguchi found the x-rays showed early signs of osteoarthritis. He ordered an MR Arthrogram of the right shoulder and placed Petitioner off work. The MR Arthrogram was performed on 5/5/21 and revealed a displaced posterior labral tear and moderate-to-severe loss of cartilage on the posterior aspect of the glenoid and humeral head. Dr. Yamaguchi opined it is more likely than not that a posterior labral procedure would be recommended; however, he would contact Petitioner after an indications conference to determine how to proceed.

On 5/18/21, Petitioner returned to Dr. Hong and reported that Dr. Yamaguchi recommended a total right shoulder replacement. Petitioner stated he did not want to undergo the surgery and Dr. Yamaguchi recommended another orthopedic surgeon. Petitioner requested to be referred to Dr. Bradley. Dr. Hong continued Petitioner off work until he was evaluated by Dr. Bradley. (PX3)

On 5/20/21, Petitioner was examined by Dr. Bradley who noted Petitioner worked for Respondent for two years and performed significant overhead activities, repetitively lifted 50 to 70 pounds, and repetitively lifted over his shoulder. (PX4) He noted Petitioner repetitively bends, cuts, and has to twist a nut off a machine that constantly got stuck. Dr. Bradley noted Petitioner did not report any specific injury, but his posterior shoulder pain worsened over the last year. Dr. Bradley noted that following Petitioner's third shoulder surgery he returned to work in a high-capacity manual labor job. Petitioner reported that the pain he is currently experiencing is significantly different that the pain he had on a daily basis dating back to 2005. Petitioner reported he was able to easily perform all of his necessary job duties until the onset of his new pain. Petitioner had achiness in his shoulder after a hard day's work; however, his symptoms now are mechanical with catching and clicking which he did not have following his prior surgeries. Dr. Bradley agreed with Dr. Yamaguchi's recommendation for a surgical labral repair and that a shoulder arthroplasty, although an option, was not recommended due to Petitioner's age and need to be physically active. Dr. Bradley opined that a posterior labral repair with chondroplasty glenoid was appropriate to increase stability and decrease pain. He felt Petitioner was unable to perform all of his job duties and Petitioner advised he was recently terminated for "abandoning" his position. Dr. Bradley did not find symptom magnification. He opined that Petitioner's job duties of repetitive pushing and overhead use of his shoulder contributed to his current symptoms and need for surgical intervention.

On 9/16/21, Petitioner was examined by Dr. William Frisella pursuant to Section 12 of the Act. (RX3) Dr. Frisella performed a physical examination, reviewed Petitioner's medical records, and reviewed four videos and three photos of Petitioner's job duties. Dr. Frisella concluded Petitioner has osteoarthritis and a chronic labral tear in a multiple-operated shoulder. Dr. Frisella noted Petitioner had right shoulder pain since 2008 and a labral tear since 2009. He opined that Petitioner developed right shoulder osteoarthritis due to his prior multiple injuries, multiple surgeries, and the passage of time. He stated that Petitioner's large, chronic, labral tear pre-existed his work for Respondent. Dr. Frisella noted the 2008 records from Dr. Smith contained a history of persistent posterior shoulder pain, the 2009 records from Nurse Practitioner Canale documented baseline right shoulder pain of 8/10, and 2017 records from Dr.

Hong documented chronic shoulder pain requiring narcotics, along with baseline pain of 8-10/10. Dr. Frisella concluded that Petitioner's labrum tear seen on his current 5/5/21 MR arthrogram was chronic and present more than ten years ago. Dr. Frisella noted that Petitioner's prior labrum repair was not successful.

Dr. Frisella opined that any treatment Petitioner received due to his alleged 5/20/21 injury was related to a pre-existing chronic, degenerative process in his right shoulder. He opined Petitioner's work activities did not aggravate his pre-existing condition. He opined that Petitioner's use of his right arm would cause pain due to his arthritis, but his work activities did not cause, contribute to, worsen, or permanently aggravate the arthritis. Dr. Frisella opined that Petitioner's job activities he reviewed in the video would not cause a labral tear. Dr. Frisella did not believe Petitioner should have a fourth arthroscopy or a shoulder replacement. He believed conservative treatment with cortisone injection, physical therapy, and anti-inflammatories was appropriate to treat his degenerative, pre-existing condition.

On 10/18/21, Dr. Bradley noted no significant change in Petitioner's condition, and he continued to have catching in his shoulder. Petitioner brought copies of his prior MRI scans from 5/20/08 and 6/3/08. He reported he was able to return to full duty work without restrictions following his last shoulder surgery. Dr. Bradley continued Petitioner off work pending surgery. (PX4)

On 11/11/21, Dr. Bradley reviewed the MRI dated 5/5/21 and agreed that surgery was appropriate to increase function and decrease pain in Petitioner's shoulder. He reviewed Dr. Frisella's Section 12 report and video clips of Petitioner's work requirements. Petitioner told Dr. Bradley the video was not completely accurate because he does the bend in a slightly different way, showing Dr. Bradley a pushing motion from his chest level to overhead and told Dr. Bradley this motion created pain. (PX4) Dr. Bradley opined that Petitioner's condition was related to repetitive pushing and overhead use of his right arm at work. He felt that his work activity at least contributed to his current symptoms.

Respondent admitted into evidence job descriptions for a package line worker and assistant machine operator. (RX1). A package line worker has to move material from a machine recoiler to package line arms, and mark material to identify size, gauge, and parent coil number. The physical requirements involve occasional or frequent lifting between 10 and 100 pounds, occasional or frequent carrying, pushing and/or pulling, climbing and/or balancing; frequent stooping, kneeling, crouching, bending and/or crawling; and significant hand and finger dexterity. A package line worker frequently operates a forklift.

An assistant machine operator has to secure material into a recoiler gripper and overarm separator and observes the slitting and rewinding operation. (RX2) The worker must bend and tape steel on the un-coiler and re-coiler and communicate with the operator and packaging concerning special instructions. The physical demands involve occasional or frequent lifting between 10 and 100 pounds, occasional or frequent carrying, pushing and/or pulling, climbing and/or balancing; frequent stooping, kneeling, crouching, bending and/or crawling, high level of hand eye coordination, good eyesight, and significant hand and finger dexterity.

Respondent admitted job videos into evidence. (RX7) The first video is 6:40 minutes in length and depicts a person working on a recoiler machine. The thin steel banding is placed on the top of the rolled steel and the person uses a long metal rod to maneuver or place the banding into position. The employee reaches overhead and appears to use force while pushing the steel rod up. He then feeds the banding above the recoiled steel which requires reaching overhead for 1 to 2 seconds. The banding is then completed at or below chest level. Nothing the man in the video is lifting or moving overhead appears to be of any significant weight. The job allows a worker to move about the machine as needed.

A second video is 12:39 minutes in length. (RX7) The video depicts a person performing the same banding process. The person is seen forcefully shaking the fastening machine to remove the machine from the band. Other times the fastening machine is easily removed from the band. He then pulls and shakes a metal rod with significant force to dislodge the rod from the side of the steel roll. He does not appear to lift any significant weight above his shoulders or head. Slices of thin paper material are also carried in strips. The man in the video moves around the recoiler and operates a machine to control movement of the thin steel banding.

A third video lasts 3:52 minutes in length. (RX7) The man in the video removes an overarm from the operator. He removes bolts/screws from the end of the overarm at chest level and slides the overarm off the mount. The overarm is long and appears to be heavy. He carries the overarm at chest/neck level to a shelf which is approximately six steps from the machine. He then takes another overarm from the shelf and mounts it on the operator.

The fourth video is 13 seconds long. (RX7) It depicts a man removing metal discs from the end of a long metal pipe. The discs appear to be of minimal weight and the metal pipe is at shoulder level.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

In a repetitive trauma case, issues of accident and causation are intertwined. Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture, 99 I.I.C. 0961. In order to better define "repetitive trauma" the Commission has stated: "The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the variance in job duties is not as important as the specific three, flexion and vibratory movements requisite in Petitioner's job." Craig Briley v. Pinckneyville Corr. Ctr., 13 I.W.C.C. 0519 (2013).

"[I]n no way can quantitative proof be held as the sine qua non of repetitive trauma case." Christopher Parker v. IDOT, 15 I.W.C.C. 0302 (2015). The Appellate Court's decision in Edward Hines Precision Components v. Indus. Comm'n further highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as

sufficiently "repetitive" to establish causal connection. Edward Hines, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." Id. at N.E.2d 780. Similarly, the Commission recently noted in Dorhesca Ranclell v. St. Alexius Medical Center, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. Randell citing All Steel, Inc. v. Indus. Comm'n, 582 N.E.2d 240 (1991) and Edward Hines, supra.

The Appellate Court in Darling v. Indus. Comm'n even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. Darling v. Industrial Comm'n, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. Id. at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." Id. at 1142. Additionally, the Court noted that such information "may" carry great weight "only where the work duty complained of is a common movement made by the general public. Id. at 1142. The evidence shows that Petitioner's job duties involve the performance of tasks distinctly related to his employment for Respondent, many of which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In City of Springfield v. Illinois Workers' Comp. Comm'n, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five hours out of an eight hour work day. City of Springfield v. Illinois Workers' Comp. Comm'n, 901 N.E. 2d 1066, (Ill. App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in the City of Springfield, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." Id.

Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. Sisbro, Inc. v. Indus. Comm'n, 207 Ill.2d 193, 205 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[A] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." Fierke v. Indus. Comm'n, 309 Ill.App.3d 1037 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. Land & Lakes Co. v. Indus. Comm'n, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. A.C. & S. v. Industrial Comm'n, 710 N.E.2d 837 (Ill. App. 1 Dist. 1999),

citing General Electric Co. v. Industrial Comm'n, 433 N.E.2d 671, 672 (1982). The Supreme Court in Durand v. Indus. Comm'n noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. Durand v. Indus. Comm'n, 862 N.E.2d 918, 925 (Ill. 2006).

The Commission has also recognized that a claimant's employment may not be the only factor in his or her development of a condition of ill-being. The Commission awarded benefits in a case where the claimant was involved in martial arts activity outside of his employment (see Samuel Burns v. Pinckneyville Corr. Ctr., 14 0482 (2014)), and in another case where the claimant was involved in weight-lifting outside of his employment. See Kent Brookman v. State of Illinois/Menard Corr. Ctr., 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of Fierke, the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. Id. at N.E.2d at 849. The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant" Id.

Petitioner testified that the Job Description of an assistant machine operator and the video footage accurately described his job duties, although he performs then a little differently. He agreed that the weights and height of the activities were accurate. Petitioner testified that all of his job duties are performed at or above shoulder level, other than observing the steel being rolled. He stated he has to manually placed the steel into the recoiler, which requires him to wiggle and hammer the steel. He has to bend the steel gauges by hand and uses a crowbar to bend the heavier steel. He places a band around the steel roll and clips the band with a machine. He has to reach above shoulder level to loosen a bolt which frequently requires a wrench or chisel and hammer. He stated he lifts 20 to 100 pounds.

The job description for an assistant machine operator requires occasional or frequent lifting between 10 and 100 pounds, occasional or frequent carrying, pushing and/or pulling, climbing and/or balancing; frequent stooping, kneeling, crouching, bending and/or crawling, high level of hand eye coordination, good eyesight, and significant hand and finger dexterity.

The Arbitrator notes that the job videos are consistent with Petitioner’s testimony. The videos depict a significant percentage of duties performed at and above shoulder level. A thin steel banding is placed on the top of the rolled steel situated overhead. A long metal rod is used to maneuver or bend metal into position. The employee reaches overhead with the steel rod and uses significant force to bend the metal in an upward position. The employee then reaches overhead to feed the banding over the top of the steel roll. The banding is then clipped with the use of a machine at chest level. The video depicts forcefully shaking of the fastening machine to remove it from the band. Other times the fastening machine is easily removed from the band. The employee pulls and shakes a metal rod with significant force to dislodge the rod from the side of the steel roll. Although the employee does not appear to lift any significant weight above shoulder level, the Arbitrator appreciates a significant amount of forceful use of the upper extremities and overhead activities. The overarm on the operator appears to be at least five feet in length and requires the use of both hands and upper body strength to remove, lift, and carry. The overarm is carried at upper chest/chin level. Mr. Moussette testified the overarm has to be changed 8 to 10 times per day and weighs 50 to 70 pounds depending on what tooling is on it.

The Arbitrator does not find Mr. Moussette's testimony to be credible. Mr. Moussette testified Petitioner was not required to lift overhead but was required to perform overhead activity when banding the steel. The Arbitrator agrees the job videos do not depict lifting any significant weight overhead; however, the videos do depict many overhead activities aside from banding the steel. Mr. Moussette testified that Petitioner worked on the recoiler for three months while another employee was on a leave of absence. Petitioner complained of shoulder pain in late 2020 and he was rotated off the recoiler position as much as possible. Mr. Moussette testified that Petitioner did not tell him why his shoulder was hurting. Petitioner did receive treatment on 10/19/20 with Dr. Hong and reported shoulder pain that worsened with lifting at work.

Mr. Moussette initially testified that Petitioner never responded to his texts requesting medical updates. He later clarified that Petitioner never responded to his texts after surgery was recommended. However, he agreed that on 5/21/21 Petitioner told him he saw a surgeon a few days ago and surgery was being scheduled. Petitioner texted him in late June and advised his surgery had not been approved and he would not respond further because he had an attorney. Mr. Moussette agreed that he replied to Petitioner, "what kind of shit are you trying to pull?" Mr. Moussette testified that Petitioner quit his employment and was not fired. However, Mr. Moussette was shown a Termination Notice dated 10/21/21, that suggests Petitioner's employment was terminated.

Jeffery Dwyer also testified that Petitioner was not required to lift above shoulder level. He did not testify as to the frequency of overhead activities, other than Petitioner had to reach overhead to put the band on the steel roll. Mr. Dwyer agreed that Petitioner had to change the overarm 2 to 10 times per day and the overarm weighed 40 to 50 pounds. Mr. Dwyer testified that after one week of working the packing line, Petitioner was put on training in the recoiler position for one month. He stated Petitioner floated between job positions as needed.

There is no dispute Petitioner had significant pre-existing right shoulder injuries that resulted in three surgeries in 2002, 2005 and 2007. In October 2008, Dr. Smith noted Petitioner continued to have pain following the second and third surgery and a recent MRI showed a labrum tear. Petitioner was taking Vicodin and reported increased pain with overhead activity, weightlifting, and lifting steel at work. Dr. Smith administered trigger point injections into Petitioner's right shoulder and prescribed amitriptyline, Vicodin ES, and Flector patches.

In January 2009, Petitioner reported to his primary care provider that his pain returned to baseline at 8/10 following the injections. He reported that Dr. Ritchie recommended a fourth right shoulder surgery to repair the torn labrum. The Arbitrator notes that Dr. Ritchie's medical records were not admitted into evidence. Petitioner postponed the surgery due to his work schedule. Petitioner continued to treat throughout 2009 with opioids for intractable pain. He reported Vicodin decreased his pain by 50% and he rated his pain 5-6/10 with medication.

There is no evidence Petitioner received medical treatment for his right shoulder for eleven years prior to presenting to Dr. Hong on 10/19/20. Dr. Hong noted Petitioner had chronic bilateral shoulder pain and Petitioner reported increased pain while lifting at work. Petitioner began working for Respondent in May 2019 and was trained on the recoiler machine one month later. In

March 2021, Dr. Hong noted Petitioner had a constant dull and sharp pain in his right shoulder that had worsened over the last several months. Dr. Hong noted that Petitioner's pain caused him to frequently miss work. Dr. Hong noted no injury and filled out short-term disability paperwork that indicated Petitioner's condition was due to sickness and not accident/injury and was not work related.

In April 2021, Dr. Yamaguchi noted Petitioner had a spontaneous increase in his right shoulder symptoms about one year ago that progressively got worse. An MR Arthrogram revealed a displaced posterior labral tear and moderate-to-severe loss of cartilage on the posterior aspect of the glenoid and humeral head. Although Petitioner testified that Dr. Yamaguchi recommended a total right shoulder replacement, the records reflect that a labral repair was recommended, and it was advised that Petitioner should avoid a total arthroplasty due to his young age and need to be physically active.

In May 2021, Dr. Bradley noted Petitioner worked for Respondent for two years and performed significant overhead activities, repetitively lifted 50 to 70 pounds, and repetitively lifted over his shoulder. Dr. Bradley noted that following Petitioner's third shoulder surgery he returned to work in a high-capacity manual labor job. Petitioner reported that the pain he is currently experiencing is significantly different that the pain he had on a daily basis dating back to 2005. Petitioner reported he was able to easily perform all of his necessary job duties until the onset of his new pain. Prior to working for Respondent, Petitioner had achiness in his shoulder after a hard day's work; however, his symptoms now are mechanical with catching and clicking which he did not have following his prior surgeries. Dr. Bradley agreed that a posterior labral repair with chondroplasty glenoid was appropriate to increase stability and decrease pain. He felt Petitioner was unable to perform all of his job duties and Petitioner advised he was recently terminated for "abandoning" his position. Dr. Bradley did not find symptom magnification. He opined that Petitioner's job duties of repetitive pushing and overhead use of his shoulder contributed to his current symptoms and need for surgical intervention.

The Arbitrator finds the above opinions of Dr. Bradley to be more persuasive than those of Dr. Frisella. Dr. Frisella opined that Petitioner's chronic right shoulder condition, including a large labral tear as seen on imaging in 2009, pre-existed his work for Respondent and Petitioner's work duties did not cause, contribute to, or aggravate his shoulder condition. Dr. Frisella based his opinion in part on a review of medical records from 2008 and 2009 that contained a history of persistent posterior shoulder pain and baseline right shoulder pain of 8/10. Dr. Frisella relied on treatment records of Dr. Hong from 2017 that documented chronic shoulder pain requiring narcotics, along with baseline pain of 8-10/10. However, Petitioner testified he was treating for his left shoulder at that time and underwent left shoulder surgery in 2017. Dr. Frisella opined that the use of Petitioner's right arm would cause pain due to arthritis, but the use of his right arm during work activities were not a contributing factor to his current symptoms. Despite his causation opinion, Dr. Frisella opined that conservative treatment was appropriate and Petitioner was not a surgical candidate.

Based on the testimony and objective medical evidence, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with

Respondent and that his current condition of ill-being is causally connected to his work injuries which manifested on 5/22/21.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based upon the above findings as to accident and causal connection, the Arbitrator finds that the care and treatment Petitioner received has been reasonable and necessary. Respondent shall therefore pay the medical expenses outlined in Petitioner's Exhibit 5, as provided in Section 8(a) and Section 8.2 of the Act, pursuant to the medical fee schedule. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits. The parties stipulate that no medical expenses were paid through Respondent's group plan for which Respondent would be entitled to an 8(j) credit.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Bradley. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, a right posterior labral repair with chondroplasty glenoid and post-operative treatment until Petitioner reaches maximum medical improvement.

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

Issue (N): **Is Respondent due any credit?**

In order to be eligible for temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill.App.3d 1087, 1090 (1996).

Petitioner was placed off work on 3/8/21 by Dr. Hong and was continued off work by Dr. Yamaguchi and Dr. Bradley pending surgery. The Arbitrator finds Petitioner is entitled to temporary total disability benefits for the period 3/8/21 through 2/16/22, representing 49-3/7th weeks, at the TTD rate of $573.33/week.

Section 8(j) of the Act states, inter alia, when an employee receives benefits from a non-occupational disability plan contributed wholly or partially by the employer that the employer receives credit against compensation for TTD in the amount received by Petitioner. It is undisputed that Petitioner and Respondent contributed to the payment of the short-term disability premiums. Therefore, the Arbitrator finds that Respondent shall receive a credit of $4,525.72 for short term disability benefits paid to Petitioner from 3/16/21 through 5/20/21.

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

Arbitrator Linda J. Cantrell

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC008021
Case Name	Kim Allen v. Dolton School District 148
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0210
Number of Pages of Decision	24
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	James Marszalek
Respondent Attorney	W. Britt Isaly

DATE FILED: 5/7/2024

/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

KIM ALLEN,

Petitioner,

vs. NO: 09 WC 8021

DOLTON SCHOOL DISTRICT 148,

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, prospective medical care, temporary total disability (TTD) benefits and the nature and extent of Petitioner's disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof.

The Commission affirms in part the Arbitrator's Decision with respect to causal connection. Petitioner testified to and the medical records documented at great length her subjective complaints. However, the reliability of those complaints conflicted with the various clinical observations and physical exam findings noted throughout the medical evidence. Further, although Petitioner's treaters had diagnosed her with radiculopathy, their physical examinations and clinical tests were also based on subjective information. Neither Drs. Foreman, Snitovsky, Malek nor Anwar testified or explained the objective basis that correlated with Petitioner's subjective complaints and need for extensive treatment. The physicians additionally reviewed the imaging tests that Dr. Wehner had described and noted the same spinal bulging, stenosis and degenerative disc disease. However, none of Petitioner's physicians testified in this claim or provided further information regarding their review of the imaging tests to effectively counter Dr. Wehner's opinions.

As such, the Commission finds that although Petitioner proved work-related injuries to her cervical spine, lumbar spine and left shoulder, she did not prove that her current conditions in these three areas, together with any chronic pain conditions, were causally related to the January 6, 2009 work accident. Having said that, the Commission modifies the Arbitrator's Decision to find causation for Petitioner's spine condition through Dr. Wehner's March 11, 2011 examination. As

of this date, Dr. Wehner had full consideration of her past evaluation, Petitioner's current complaints, her treatment to date, her clinical examination and diagnostic imaging and opined with certainty that her current condition could no longer be tied back to the January 6, 2009 work accident. With respect to Petitioner's left shoulder, the Commission finds that Petitioner's left shoulder condition was causally related to the work accident through Dr. Tonino's final February 10, 2011 Section 12 examination. Dr. Tonino's opinions on this date paralleled what each of Respondent's experts had noted regarding the inconsistencies between Petitioner's subjective complaints and the objective evidence and clinical observations. By February 10, 2011, Dr. Tonino opined that Petitioner's complaints of pain were not due to any shoulder condition.

Based on the Commission's findings related to causal connection, the Commission further modifies the Arbitrator's award of medical and TTD benefits.

Petitioner's medical treatment for the left shoulder and any related charges were no longer causally related to the January 6, 2009 work accident after February 10, 2011. Respondent is thus not responsible for the medical bills incurred for the left shoulder after February 10, 2011. Similarly, the Commission finds that Petitioner's medical treatment for the cervical spine and lumbar spine and any related charges were no longer causally related to the January 6, 2009 work accident after March 11, 2011. Respondent is not responsible for the medical bills incurred for the spine after that date. The Commission affirms the Arbitrator's award of Section 8(j) credit to Respondent in the amount of $186,133.14 per the parties' stipulation on the Request for Hearing form.

In regards to TTD benefits, the Commissions modifies the TTD period to July 10, 2009 through March 11, 2011 – the date of Dr. Wehner's final Section 12 examination. Based on the medical records, Petitioner was either given light duty restrictions, with no evidence that Respondent could or would accommodate those restrictions, or she was taken off work by her treating physicians. Although Dr. Tonino opined that Petitioner was at MMI for her left shoulder on February 10, 2011, Dr. Wehner confirmed on March 11, 2011 that Petitioner was at MMI for her remaining injuries to her spine and testified that Petitioner could return to work without restrictions. The Commission also affirms the Arbitrator's award of credit to Respondent in the amount of $43,327.49 for TTD benefits previously paid to Petitioner and as stipulated by the parties on the Request for Hearing form.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 6, 2023 is hereby modified as stated and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary, and related medical bills consistent with this Decision and pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $606.46 per week for 87 1/7 weeks, from July 10, 2009 through March 11, 2011, 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.

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.

May 7, 2024

CAH/pm
O: 4/25/24
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	09WC008021
Case Name	Kim Allen v. Dolton School District 148
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	James Marszalek
Respondent Attorney	W. Britt Isaly

DATE FILED: 7/6/2023

THE INTEREST RATE FOR THE WEEK OF JULY 5, 2023 5.26%

/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

Kim Allen
Employee/Petitioner

v.

Dolton School District 148
Employer/Respondent

Case # **09** WC **008021**

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 **November 29, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 6, 2009**, 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 $**47,303.88**; the average weekly wage was $**909.69**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**43,327.49** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**43,327.49**.

Respondent is entitled to a credit of $**186,133.14** under Section 8(j) of the Act.

ORDER

Having considered all the evidence, the Arbitrator finds that Petitioner proved injuries to her cervical spine, lumbar spine, and left shoulder, but failed to prove that her current conditions of ill-being as to her cervical spine and lumbar spine, including any chronic pain conditions, are causally related to the January 6, 2009 injury and failed to prove that her current conditions of ill-being as to her left shoulder are causally related to the January 6, 2009 injury after the date that Dr. Tonino found Petitioner to be at MMI, or October 15, 2010. The Arbitrator further finds that Petitioner is not entitled to any medical treatment for her cervical spine or lumbar spine after March 25, 2009 and that she is not entitled to any medical treatment for her left shoulder after October 15, 2010.

Petitioner is entitled to temporary total disability benefits of **$606.46/week** for **66 1/7 weeks**, commencing July 10, 2009 through October 15, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$545.81/week** for **87.5 weeks**, because the injuries sustained caused a **17.5% loss of the person as a whole**, as provided in Section 8(d)2 of the Act.

See Arbitration Decision order for case number 05WC018413, incorporated herein by reference.

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

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

Ana Vazquez

_____

Signature of Arbitrator

JULY 6, 2023

PROCEDURAL HISTORY

The instant claim, 09WC008021, is consolidated with claim number 05WC018413. This matter proceeded to arbitration on November 29, 2022 in Chicago, Illinois before Arbitrator Ana Vazquez. Issues in dispute include (1) accident, (2) causal connection, (3) unpaid medical bills, (4) temporary total disability ("TTD") benefits, and (5) the nature and extent of the injury. Arbitrator's Exhibit ("Ax") 2. All other issues have been stipulated.

FINDINGS OF FACT

Petitioner is right-handed. Transcript of Proceedings on Arbitration ("Tr.") at 15. Petitioner testified that she was employed as a supervisor coordinator for the reading and math tutoring program by Respondent on January 6, 2009. Tr. at 20. Petitioner testified that she worked district-wide at seven schools. Tr. at 20. Petitioner testified that the position required her to travel every day to the different schools. Tr. at 21, 47. Petitioner testified that as a supervisor coordinator, she had 26 instructional aides and 10 retired teachers that were tutoring. Tr. at 21. Petitioner testified that she would gather material, take the material to them, and check to make sure that they were tutoring the students. Tr. at 21. Petitioner testified that the materials she took to the instructional aides and retired teachers included books, papers, pencils, files, and kits. Tr. at 21. Petitioner testified that she would work with students, as well as with the instructional aides and retired teachers, and that she would also make sure they had everything they needed. Tr. at 21. Petitioner testified that she would have to lift and carry materials weighing over 10 pounds and that she would bend and twist while working with students. Tr. at 22, 48-49. Petitioner agreed that it was fair to say that she would lift between 10 and 20 pounds of material when she was working in 2009. Tr. at 49. Petitioner testified that there was not a time when she had to lift 50 pounds. Tr. at 49. Petitioner worked from 8:00 a.m. to 4:00 p.m. Tr. at 23.

Summary of treatment records prior to January 6, 2009

Petitioner offered records of treatment from Advocate Health Center covering Petitioner's treatment from February 2, 2005 through November 29, 2006. Petitioner's Exhibit ("Px") 2.

Overall, the records within Px2 document that Petitioner was seen multiple times for complaints of headaches, diffuse body aches, muscle spasms, and neck pain. The records document that Petitioner was diagnosed with migraine headaches and fibromyalgia, and that a history of severe osteoporosis and depression was consistently noted. See Px2 at 68-72. The records also document that Petitioner underwent cervical spine, thoracic spine, and lumbar spine x-rays on March 23, 2005, following a motor vehicle accident. Px2 at 53-55. The cervical spine x-rays demonstrated minimal degenerative disc changes at C5-6 and the thoracic spine and lumbar spine x-rays were normal. Petitioner also underwent a cervical spine CT on May 19, 2005, which showed (1) a moderate sized broad based disc protrusion without stenosis at C4-5, (2) a disc bulge superimposed right foraminal protrusion and uncovertebral osteophytes causing right foraminal stenosis at C5-6, and (3) bilateral uncovertebral osteophytes, left greater than right, narrowing the left foramen at C6-7. Px2 at 43. Petitioner also underwent an EMG/NCV on December 11, 2006 for cramping and spasms in her legs, which was normal. Px2 at 48.

January 6, 2009 accident

Petitioner testified that on January 6, 2009, she left her office at a school in Riverdale, Illinois and drove to Harriet Tubman School, also in Riverdale. Tr. at 23-24. Petitioner testified that she parked in a secondary lot at Harriet Tubman School because the primary lot was full. Tr. at 24-25, 49. Petitioner testified that the secondary lot was provided for employees' use and that it was maintained and controlled by Respondent. Tr. at 25. Petitioner described the conditions in the secondary lot as "[i]t was a lot of snow covered with ice." Tr. at 25.

Petitioner testified that when she exited her car after parking, she held tutoring materials in her hand, and that she slipped and fell as she walked in front of her car. Tr. at 26. Petitioner testified that she fell on her left side and hit her head. Tr. at 26-27. Petitioner testified that she noticed pain in her head, neck, lower and upper back, whole left side, and left shoulder after she fell. Tr. at 27-28.

Summary of treatment records post January 6, 2009

i. Ingalls Memorial Hospital

Petitioner offered treatment records from Ingalls Memorial Hospital ("Ingalls") as Px3. The records reflect that Petitioner was initially seen at Ingalls Occupational Health Center on January 7, 2009. Px3 at 7-14. A consistent accident history is documented. Px3 at 10. Petitioner underwent a CT of the head and cervical spine. Px3 at 269-270. The head CT was unremarkable and without acute findings and the cervical spine CT revealed degenerative disc disease with a mild posterior ridge complex at C5-6. Petitioner's diagnoses were fall, cervical pain/strain, and trapezius spasm/strain. Petitioner returned to Ingalls on January 9, 2009, January 14, 2009, January 22, 2009, January 30, 2009, February 4, 2009, February 24, 2009, March 5, 2009, March 10, 2009, and April 14, 2009. Px3 at 70-73, 77-82, 89-111, 113-119, 120-126, 127-132, 139-143, 144-148, and 149-162. Petitioner was placed on restricted duty from January 7, 2009 through April 14, 2009, at which time she was released to full duty.

Petitioner participated in 16 sessions of physical therapy at Ingalls Outpatient Rehabilitation Services from January 8, 2009 to February 25, 2009. Px3 at 29-63.

Petitioner presented at Ingalls on June 30, 2010 for complaints of lower and upper back pain and neck pain. Px3 at 163-171. Petitioner's diagnosis was acute on chronic back and neck pain.

Petitioner next presented at Ingalls on October 13, 2010, at which time she was admitted for the diagnoses of intractable back pain and atypical chest pain and was discharged on October 19, 2010. Px3 at 209-403.

Petitioner again presented at Ingalls on August 21, 2011 and September 8, 2011. Px3 at 173-189, 191-209. On September 8, 2011, Petitioner's diagnosis was noted as chronic pain reported and query drug seeking behavior. It was also noted that Petitioner began screaming and pulling out her intravenous fluid when told she was being discharged. Px3 at 183, 187-188.

Petitioner was seen for lumbar radiculitis and sciatica on June 7, 2014. Px3 at 763-766. Petitioner underwent a lumbar spine MRI, which demonstrated minimal disc bulges at L4-5 and L5-S1. Px3 at 766.

Petitioner was seen for cervical radiculopathy on January 18, 2016, at which time a cervical spine MRI revealed multilevel cervical spondylosis resulting in up to mild narrowing at the right neural foramen at C4-5 without significant central stenosis. Px3 at 427-433. Petitioner was seen on February 24, 2016 for complaints of left shoulder pain. Px3 at 427-433. A left shoulder MRI was obtained, which demonstrated (1) mild interstitial tear along the musculotendinous junction of the supraspinatus tendon, (2) posterosuperior labral tear, and (3) mild subacromial/subdeltoid bursitis. Px3 at 432.

ii. Beverly Park Medical Center/Dr. Michael Foreman

The records of Beverly Park Medical Center and Dr. Foreman were offered as Px4. Petitioner was under Dr. Foreman's care from April 1, 2009 through July 13, 2009. A consistent accident history is documented. Px4 at 3.

In his note of May 22, 2009, Dr. Foreman noted decreased range of motion of the cervical spine, spasms and tenderness to the thoracic spine, the lumbar spine, and right paracervical area on exam. Px4 at 3-5. Petitioner had a positive straight leg raise test on the right. On exam of the left shoulder, Dr. Foreman noted a painful range of motion in forward elevation and abduction and internal and external rotation at extremes. There was diffuse glenohumeral joint tenderness with parascapular and supraspinatus muscle spasms and tenderness of the deltoid and triceps muscles. Dr. Foreman's diagnoses were post-traumatic cephalgia, post-traumatic cervical spine strain with disc disease, post-traumatic thoracic spine strain, post-traumatic lumbar spine strain, post-traumatic left shoulder/arm strains, clinical radicular symptoms to the right and left upper extremities secondary to the cervical spine component, clinical radicular symptoms to the left lower extremity secondary to a lumbosacral strain. Dr. Foreman noted that Petitioner was treating with Dr. Ronald Silver for her left shoulder and that she had been receiving epidural injections from neurosurgeon, Dr. Malek. Px4 at 6. Petitioner participated in physical therapy at Beverly Park Medical Center from May 12, 2009 to June 17, 2009. Px4 at 16-33. Petitioner testified that while treating with Dr. Foreman, she noticed that she was still in a lot of pain in her back, neck, left shoulder, and left side. Tr. at 31.

iii. Dr. Ronald Silver

Petitioner offered the records of Dr. Ronald Silver as Px5. Petitioner was under the care of Dr. Silver from July 10, 2009 to February 10, 2015. On July 10, 2009, Dr. Silver documented a consistent accident history. Px5 at 3. Dr. Silver's diagnosis was rotator cuff impingement. Dr. Silver recommended an arthroscopic subacromial decompression, and he placed Petitioner on restrictions of no use of the left arm above shoulder level and no lifting with the left arm. Px5 at 3-4. Petitioner followed up with Dr. Silver on September 2, 2009 and October 14, 2009, and a subacromial cortisone steroid injection was administered on each visit. Px5 at 5-6.

On December 2, 2009, Petitioner underwent a (1) arthroscopic subacromial decompression-partial anterior acromioplasty, coracoacromial ligament transection, and subacromial synovectomy, (2) arthroscopic debridement, and (6) arthroscopic distal clavicle resection. Px5 at 48-49. Petitioner's postoperative diagnosis was rotator cuff impingement of the left shoulder. Petitioner testified that Dr. Silver sent her to Rapid Rehab for physical therapy from February 2010 through October 2010. Tr. at 33. Records from Rapid Rehab were not offered.

Petitioner presented for monthly follows up with Dr. Silver in 2010 through 2011. Px3 at 7-31. Petitioner was doing well following surgery and was making progress, however, on March 17, 2010, Dr. Silver noted that Petitioner had a set back in physical therapy when she strained her neck and upper back when lifting weights. Px5 at 10. On May 12, 2010, Dr. Silver noted that Petitioner had lost flexion to 90 degrees due to recurrent inflammation, and he administered a subacromial cortisone injection into Petitioner's left shoulder. Px5 at 12. On June 30, 2010, Dr. Silver noted that Petitioner's left shoulder had regressed due to lack of physical therapy, and he administered another subacromial cortisone injection. Px5 at 14.

On July 28, 2010, Dr. Silver noted that Petitioner was not ready to proceed with a functional capacity evaluation ("FCE") and that she had not reached MMI. Px5 at 16. Petitioner underwent an FCE on August 11, 2010, which documented that she gave a reliable effort and that she was unable to perform all the physical requirements of her job. Px5 at 56-57; Tr. at 33. On August 25, 2010, Dr. Silver noted that Petitioner had undergone an FCE and that the restrictions reflected in the FCE were permanent lacking any further physical therapy. Px5 at 17. On September 24, 2010, Dr. Silver noted that Petitioner's left shoulder had deteriorated after she felt that her left shoulder was wrenched during the FCE. Px5 at 18. Another subacromial cortisone injection was administered into Petitioner's left shoulder. On October 27, 2010, Dr. Silver noted that Petitioner would be referred to a pain management clinic. Px5 at 19. Petitioner underwent additional subacromial cortisone injections on March 23,

2011 and August 12, 2011. Px5 at 24, 29. On September 16, 2011, Dr. Silver recommended a revision arthroscopy. Px5 at 29. Petitioner testified that she did not undergo the second surgery recommended by Dr. Silver. Tr. at 34.

Dr. Silver administered another subacromial cortisone injection on August 8, 2012. Px5 at 33. On November 21, 2012, Dr. Silver noted that he had reviewed Dr. Konowitz's IME and that he agreed with Dr. Konowitz's recommendation of an MR arthrogram of the left shoulder. Px5 at 34.

Petitioner underwent an MR arthrogram of the left shoulder on December 7, 2012, which demonstrated (1) limited examination due to repetitive motion, (2) probably intravasation of contrast into the subscapularis tendon without evidence of a full thickness rotator cuff tear, (3) no definite labral tear, and (4) COPD in the left lung. Px5 at 52. On December 12, 2012, Dr. Silver noted that the MRI arthrogram demonstrated further partial thickness tearing of the rotator cuff, which had been the cause of Petitioner's continued symptoms. Px5 at 35. He continued to recommend further arthroscopy. Petitioner followed up with Dr. Silver in December 2013 and almost monthly from February 2013 through November 2013. Px5 at 36-44. Dr. Silver gave causal connection opinions in his records of July 17, 2013 and November 20, 2013. Px5 at 44-45.

Petitioner returned to Dr. Silver on January 21, 2015, at which time he noted that he would proceed with surgery on Petitioner's personal insurance. Px5 at 46. The last record of Petitioner's treatment with Dr. Silver is of February 10, 2015, at which time he noted that an MRI would be obtained. Px5 at 47. Petitioner testified that she stopped seeing Dr. Silver in 2016 because he retired. Tr. at 34-35.

Dr. Silver placed Petitioner on light duty with restrictions through March 22, 2011 and kept Petitioner off work beginning March 23, 2011 through July 17, 2013. Px5 at 58.

iv. Dr. Michel Malek

Petitioner offered the records of Dr. Michel Malek as Px6. Petitioner was referred to Dr. Malek by Dr Foreman. Px6 at 6-8. Petitioner initially saw Dr. Malek on May 7, 2009, at which time he documented a consistent accident history and diagnosed Petitioner with status post fall with left cervical and left lumbar radiculopathy. Dr. Malek kept Petitioner off work. Dr. Malek administered cervical epidural steroid injections at C6-7 on May 21, 2009, June 4, 2009, and June 18, 2009. Px6 at 9-14.

Petitioner followed up with Dr. Malek on July 2, 2009, and he continued to keep Petitioner off work. Px6 at 15-16. Dr. Malek administered a caudal epidural steroid injection and left L5-S1 transforaminal epidural steroid injection on July 2, 2009 and a left L5-S1 transforaminal epidural steroid injection on July 20, 2019. Px6 at 17-22. Petitioner testified that the injections administered by Dr. Malek did not help at all, and that she noticed that she still had pain and did not get any relief. Tr. at 37.

v. Dr. Peter Snitovsky

Petitioner offered the records of Dr. Peter Snitovsky as Px7. Petitioner saw Dr. Snitovsky on May 7, 2009 and July 7, 2009. Px7 at 1-4. A consistent accident history is documented in the May 7, 2009 record. Px7 at 1. Dr. Snitovsky's diagnosis on May 7, 2009 was cervical spine radiculitis and his diagnoses on July 7, 2009 were cervical spine radiculitis and lumbar spine radiculitis. Px7 at 1. On July 7, 2009, Dr. Snitovsky recommended an EMG scan of the left lower extremity and recommended restrictions of no pushing, pulling, or lifting over 5 pounds.

vi. Pain Management Institute/Dr. Zaki Anwar

Petitioner offered the records of Pain Management Institute and Dr. Zaki Anwar as Px8, Px29, and Px32. The first visit recorded is August 28, 2009. Px8 at 23-25. On that date, Dr. Anwar administered a sciatic nerve block. Petitioner continued to treat with Dr. Anwar on an almost monthly basis through October 2022. Most of Dr. Anwar's records do not document any physical examination findings.

Dr. Anwar administered L5-S1 bilateral transforaminal lumbar epidural steroid injections on October 30, 2009, April 6, 2010, May 28, 2010, July 16, 2010, December 21, 2011, March 21, 2012, August 7, 2013, and January 15, 2014. Px8 at 31-32, 44-45, 49, 53, 87-88, 96-97, 135-136, 144-145.

Dr. Anwar administered L4-5 and L5-S1 bilateral transforaminal lumbar epidural steroid injections on July 16, 2014, December 3, 2014, June 3, 2015, June 7, 2017, January 24, 2018, October 17, 2018, February 13, 2019, July 17, 2019, September 16, 2020, and September 27, 2022. Px8 at 148-149, 153-154, 159-160, 188-189, 214-215, 252-253, 264-265, 278-279, 319-320; Px32 at 56-57.

Dr. Anwar administered bilateral facet joint injections at L4-5 and L5-S1 on August 5, 2020. Px8 at 313-314.

Dr. Anwar administered left cervical transforaminal epidural steroid injections at C4-5, C5-6, and C6-7 on November 10, 2009, December 18, 2009, August 6, 2010, September 7, 2011, February 27, 2013, June 19, 2013, December 4, 2013, October 23, 2019. Px8 at 34-35, 37-38, 55, 75-76, 121-122, 131-132, 141-142, 285-286

Dr. Anwar administered left cervical transforaminal epidural steroid injections at C3-4, C4-5, and C5-6 on April 25, 2018. Px8 at 226-227.

Dr. Anwar administered left cervical facet joint injections at C4-5, C5-6, and C6-7 on April 23, 2010 and June 24, 2020. Px8 at 48, 307-308.

Petitioner was given a sciatic nerve block on April 14, 2011. Px8 at 65.

Dr. Anwar administered right cervical medial branch (facet) radiofrequency thermal ablation at C5-6 and C6-7 on November 7, 2011. Px8 at 81-82.

Dr. Anwar administered left cervical facet joint injections at C3-4, C4-5, C5-6, and C6-7 on May 7, 2014 and January 14, 2015. Px8 at 146-147, 155-156.

Dr. Anwar administered left cervical medial branch (facet) radiofrequency ablation at C3-4, C4-5, and C5-6 on April 13, 2016. Px8 at 165-166.

Dr. Anwar administered right cervical medial branch (facet) radiofrequency thermal ablation at C3-4, C4-5, and C5-6 on October 5, 2016. Px8 at 171-72.

Petitioner was given a subscapular nerve block and trigger point injections into the supraspinatus muscle of the left shoulder on May 12, 2011. Px8 at 66-67. Petitioner also underwent PRP injections into her left shoulder on October 19, 2017, February 22, 2018, and May 29, 2018. Px8 at 205-206, 219-222, 232-234.

On January 23, 2020, Petitioner was administered a lumbar paravertebral TPI hemocyte autologous injection. Px8 at 293-295.

Dr. Anwar prescribed Petitioner anti-inflammatory medications, muscle relaxants, neuropathic medications, and opioid medications for pain relief, including morphine and Percocet.

Dr. Anwar also referred Petitioner for psychiatric evaluation and treatment with Dr. Timothy McMannus and Dr. Wajid Khan. Px8, 29, 32; Tr. at 39. Petitioner testified that she was under the care of Dr. Khan from March 23, 2011 through December 12, 2012. Tr. at 39. Petitioner testified that Dr. Kahn would talk to her about handling her pain. Tr. at 40. The records of Dr. McMannus and Dr. Khan were not offered.[1]

On September 16, 2010, Petitioner reported having severe pain in her neck, shoulder, left arm, and back following an FCE done the week prior. Px8 at 57.

On December 20, 2012, Dr. Anwar noted that Petitioner should see a gastrointestinal physician for GI upset which had developed over the years due to using high doses of anti-inflammatory medications. Px8 at 117.

On March 16, 2017, Petitioner reported an aggravation of back, leg, neck, and left shoulder pain after a recent motor vehicle accident. Px8 at 183-184. Petitioner reported that she had noticed worsening pain in her neck and low back since the accident. Petitioner continued with the same reporting of an aggravation of pain following a motor vehicle accident on May 4, 2017, June 12, 2017, July 20, 2017, August 14, 2017, and September 11, 2017. Px8 at 185-186, 190-192, 194-196, 197-200, 201-204.

On May 9, 2019, Dr. Anwar noted that Petitioner's drug screens for the past six months had negative results for opiates, and that Petitioner reported taking more pills than usual and running out early. Dr. Anwar noted that if Petitioner was not consistent with her opiate medication management in the future, he would consider discharging her from his practice. Px8 at 272-274.

On July 16, 2020, Petitioner complained of an aggravation of low back pain, after a slip and fall injury with a right ankle sprain and that Petitioner presented for recommendations. Px8 at 309-310.

Petitioner reported a new onset of right shoulder pain on January 25, 2021. Px29 at 46-49. On April 26, 2022, Dr. Anwar noted that Petitioner was not capable of working due to her neck, low back, and right shoulder pain. Px32 at 33-36. The last record of treatment offered is of October 27, 2022, at which time Petitioner's diagnoses were cervical spondylosis without myelopathy or radiculopathy, lumbosacral radiculopathy, pain in the left shoulder, and lumbar degenerative disc disease. Px32 at 11-13.

vii. Dr. Kevin Dolehide

Petitioner offered the records of Vista Medical Group, which includes the records of Petitioner's treatment with Dr. Dolehide, as Px10. Within Px10 are records of Petitioner's treatment for unrelated conditions with Dr. Kara Davis.

The records document that Petitioner saw Dr. Dolehide for abdominal pain related complaints on January 8, 2014, January 29, 2014, March 19, 2014, August 25, 2014, March 4, 2015, June 14, 2016, February 15, 2017, and May 7, 2018. Px10 at 59-63, 115-120, 126-130, 169-172, 209-212, 218-221, 227-231, 232-235.

[1] At arbitration, Petitioner offered Petitioner's Exhibit 21, Dr. Timothy McMannus' bill for $400.00. Respondent objected to the admission of Petitioner's Exhibit 21, and the Arbitrator reserved ruling on the admission of Petitioner's Exhibit 21 at Petitioner's request. As the records of Dr. McMannus were not offered, Respondent's objection is sustained, and Petitioner's Exhibit 21 is rejected.

Within Px10 are records from MetroSouth Medical Center documenting Petitioner presenting to the Emergency Department on September 7, 2018 following a motor vehicle accident, where she was rear ended. Px10 at 376-384. Petitioner reported that she was thrown forward and struck the back of her head against the headrest. She denied back pain or any injuries to her extremities. A cervical spine MRI was obtained, which demonstrated minimal scattered degenerative changes and no acute findings or abnormalities. Px10 at 379.

viii. ATI Physical Therapy

Petitioner offered the records of ATI Physical Therapy as Px9. Petitioner participated in eight sessions of physical therapy from October 21, 2015 to December 2, 2015. Px9 at 123. Petitioner participated in 10 sessions of physical therapy from January 19, 2016 through March 8, 2016. Px9 at 82-122. Petitioner participated in 17 sessions of physical therapy from May 14, 2019 through July 15, 2019. Px9 at 23-81.

FCE Report dated September 8, 2010

Respondent offered into evidence an FCE performed by Petitioner on September 8, 2010. Respondent's Exhibit ("Rx") 3. The report documents that Petitioner had a very low level of physical effort during the assessment. According to the FCE, Petitioner was unable to lift greater than eight pounds. The report also documents that Petitioner showed inconsistent and unreliable reports of pain and disability, including (1) an inability to squat, crouch or stoop, (2) that she could not lift overhead, but was able to do so in certain circumstances, and (3) that Petitioner reported that she was unable to sit or stand greater than five to 10 minutes, but the therapist noted that Petitioner was able to sit and stand throughout the entire testing day of 4.5 hours. Rx3 at 2. The FCE results, along with clinical observations, questioned the reliability and accuracy of Petitioner's report of pain and disability. Rx3 at 3. The report also noted that it was believed that Petitioner could do more than she stated or perceived. Rx3 at 3.

Motor vehicle accidents post January 6, 2009

On cross examination, Petitioner testified that since the 2009 work accident, she had additional injuries from car accidents. Tr. at 56. Petitioner testified that she had not reinjured her neck, back, or left shoulder in these accidents, and that she had reinjured her back. Tr. at 56. Petitioner testified that she mentioned the car accidents to Dr. Anwar. Tr. at 57. When asked if it sounded correct that she was involved in one car accident in 2009, in two car accidents in 2014, in one car accident in 2015, and in one car accident in 2017, Petitioner responded "[p]robably." Tr. at 57.

Petitioner remembered that after the February 12, 2009 car accident, her car insurance declared her car a total loss. Tr. at 57. When asked if she remembered being taken by ambulance to Saint Margaret Hospital following that accident, Petitioner responded "[p]robably. I don't remember." Tr. at 57-58. Petitioner testified that just her low back was involved in that car accident. Tr. at 58.

Regarding the February 12, 2014 car accident, Petitioner did not remember the accident, but remembered that she was driving and that her car was hit in the front. Tr. at 59. Petitioner testified that she thought her back was injured in that accident, but that she did not remember because there were some accidents where she was not injured. Tr. at 59. Petitioner did not remember seeing a doctor for that accident. Tr. at 59.

Petitioner testified that the May 1, 2014 accident involved her daughter, and that she was not involved in that accident. Tr. at 60.

Petitioner did not remember the November 12, 2015 car accident. Tr. at 60. Petitioner then testified "[i]n 2015 that's probably the one that happened in South Holland, and it was just a car that bumped into my car." Tr. at 61. Petitioner testified that she did not remember what body part was injured and that she did not think she injured any body part. Tr. at 61. Petitioner did not remember if she saw any doctors for this accident. Tr. at 61.

Regarding the February 22, 2017 car accident, Petitioner remembered being admitted and discharged several times from Franciscan Health following that car accident. Tr. at 61-62. On redirect examination, Petitioner testified that she returned to her "baseline" following the car accidents, and that after the February 2017 accident, it took just a couple of weeks to return to her pain baseline. Tr. at 72-73.

Respondent offered Rx7, GEICO records of Petitioner's motor vehicle accidents between 2009 and 2017, and Rx8, Franciscan St. Margaret Health medical records from 2017.

The GEICO records contain documents which reflect five motor vehicle accidents having occurred on February 12, 2009, February 14, 2014, May 1, 2014, November 28, 2015, and February 22, 2017. The records also reflect that Petitioner was transported to St. Margaret via ambulance following the February 12, 2009 motor vehicle accident, and that following the February 22, 2017 accident, Petitioner was seen at the emergency room of Franciscan Alliance- Franciscan Health Hammond ("Franciscan Alliance") for complaints of pain in the left leg, back, and left shoulder and worsening headaches, and that she participated in several sessions of physical therapy at ATI for her cervical spine and lumbar spine. Rx7 at 193-315, 323-345,

The records of Franciscan Alliance reflect that Petitioner sought treatment at the emergency room on February 22, 2017, having been transported by CCFD. Rx8 at 8. Petitioner complained of head, neck, back, and left shoulder pain. Rx8 at 8. A cervical spine CT was obtained which showed degenerative changes at C4-5 and C5-6, with severe at C5-6 level. The C5 disc space was noted to be mildly narrowed and no significant foraminal stenosis was identified. Rx8 at 13. X-rays of the lumbar spine, thoracic spine and left shoulder were obtained and were negative. Rx8 at 13-14. Petitioner's diagnoses were acute cervical strain and traumatic myalgia. Rx8 at 15. Petitioner was admitted for observation and was discharged on February 23, 2017, with the discharge notes indicating that Petitioner needed outpatient physical therapy for her left leg and a rolling walker. Rx8 at 55, 214.

Petitioner then presented at the emergency room on April 24, 2017 for complaints of chest pain after left shoulder therapy, which the Petitioner reported was different than the chronic left shoulder pain. Rx8 at 355. The admitting records note that Petitioner was 56 years old with a history of chronic neck and shoulder pain following a mechanical fall many years ago, and that the pain worsened after a minor motor vehicle accident in February 2017. It was noted that Petitioner had a pain management appointment already scheduled, and that she was asked to keep the appointment. It was also noted that Petitioner was ambulating with a cane, which was her baseline. Rx8 at 242. Petitioner was again admitted and was discharged on April 27, 2017. Petitioner's diagnoses were chest pain with moderate risk for cardiac etiology and chronic left shoulder pain. Rx8 at 245.

Petitioner again presented at the emergency room on May 6, 2017, for complaints of pain to her head, neck, whole back, and whole left side. Rx8 at 601-602. Petitioner was ambulatory with a walker. Petitioner reported that the pain was worse than usual, that she had a fall in 2009 which started the pain, and that in February 2017 she had a car accident which exacerbated the pain. Petitioner was again admitted and was discharged on May 8, 2017. Petitioner's diagnoses were intractable pain, low back pain radiating to left leg, chronic neck pain, and chronic left shoulder pain. Rx8 at 607. It was noted that it was discussed with Petitioner, who reported only minimal relief with pain medication, and after review of medical records that there was no obvious, identifiable cause for her pain that had been elicited with testing up to that point. Rx8 at 605.

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Petitioner testified that she tried working with the restrictions given to her at Ingalls, and that while working, she noticed that the pain was getting stronger and that she could hardly move her shoulder and left arm. Tr. at 29-30.

Petitioner testified that she never worked again after July 10, 2009, and that she worked light duty until that date. Tr. at 32. Petitioner testified that Dr. Silver took her off work. Tr. at 32. Petitioner testified that she has not worked at all since July 9, 2009. Tr. at 43-44, 52. On cross examination, however, Petitioner testified that in 2021, she did some consulting work for a business, where she answered and made phone calls from her home. Tr. at 52. Petitioner testified that "it was just a one-time thing just making some calls for a grant program that the government was giving out." Tr. at 52. Petitioner testified that she was paid and she received a check, and that she worked for two months. Tr. at 53.

Current condition

Petitioner testified that the left shoulder surgery did not help and that it got worse. Tr. at 35.

Petitioner testified that at the time of arbitration, she continued to treat with Dr. Anwar, and that he continued to prescribe her pain medication, including hydrocodone and tramadol. Tr. at 41-42. On cross examination, Petitioner testified that the epidural steroid injections given to her by Dr. Anwar give her "probably about 50 percent relief." Tr. at 51. On redirect examination, Petitioner testified that the relief from the injections lasts around two months. Tr. at 71.

Petitioner testified that Dr. Dolehide continued to prescribe her medication for her stomach because of the pain medication, including gabapentin and ranitidine, and that Dr. Davis prescribes her muscle relaxers, medication for stress and blood pressure because of the pain, and Voltaren. Tr. at 43, 66.

Petitioner testified that at the time of arbitration, she noticed that she was she was constantly in pain, and that the pain was in her left leg, left side, shoulder, back, neck, and head. Tr. at 44. Petitioner testified that it hurts when she lifts items and that it hurts to walk. Tr. at 45. On cross examination, Petitioner testified that she is constantly in pain, and that she hurts while trying to wash dishes or trying to stand up. Tr. at 73-74. Petitioner testified that she washes her own dishes because she does not have a dishwasher. Tr. at 74. Petitioner testified that standing for short periods is difficult, and that sitting bothers her because it hurts her back, neck, and leg. Tr. at 74. Petitioner testified that her pain at the time of arbitration was a seven or eight out of 10. Tr. at 69.

The Arbitrator took notice that Petitioner sat for the entirety of arbitration, which was over an hour in duration, and that Petitioner cried twice during her testimony. Tr. at 75.

Evidence deposition of Dr. Julie Wehner, Respondent's Section 12 physician

Dr. Julie Wehner testified by way of evidence deposition on June 17, 2011. Rx1. Dr. Wehner is a board-certified orthopedic surgeon. Rx1 at 4.

Dr. Wehner examined Petitioner on March 25, 2009. Rx1 at 5. On March 25, 2009, Petitioner provided Dr. Wehner with a consistent accident history and Dr. Wehner performed a physical examination of Petitioner. Rx1 at 6-7. Dr. Wehner also reviewed Petitioner's cervical spine MRI of February 10, 2009, that showed some minimal bulging, some hypertrophic spurring, and minimal listhesis of C5 in relation to C4. Rx1 at 8. Dr. Wehner testified that these were all minimal changes and consistent with the normal aging process. Rx1 at 8. Dr. Wehner testified that they were not clinically significant findings and not expected to be pain generators. Rx1 at 8. Dr.

Wehner also reviewed Petitioner's head CT scan of January 7, 2009, which was normal, and Petitioner's neck CT scan of January 7, 2009, that showed degenerative disc disease at C5-6. Rx1 at 8. Dr. Wehner testified that these test results were not clinically significant. Rx1 at 8.

Dr. Wehner testified that her diagnosis was head contusion and cervical sprain based on the mechanism of injury. Rx1 at 8. Dr. Wehner testified that she noted that Petitioner's complaints of diffuse pain radiating down both arms and her right leg did not correspond to any findings on MRI. Rx1 at 9. Dr. Wehner testified that a decreased activity pattern and six to 12 physical therapy sessions are recommended for contusions and sprains. Rx1 at 9. Dr. Wehner testified that at the time of her March 25, 2009 report, Petitioner was two and a half months out from her injury, and that she should have been able to return to work full duty. Rx1 at 9-10. Regarding her opinion as to causal connection, Dr. Wehner testified that Petitioner sustained a soft tissue injury related to the slip and fall, the course of treatment was appropriate, and that Petitioner's ongoing subjective complaints of pain appeared out of proportion to the injury and no longer appeared appropriate to the injury. Rx1 at 10. Dr. Wehner agreed that she found Petitioner to be at maximum medical improvement ("MMI") as of March 25, 2009. Rx1 at 10.

Dr. Wehner conducted a second examination of Petitioner on March 11, 2011 and she summarized her physical examination findings. Rx1 at 10-14. Dr. Wehner summarized the records she reviewed in conjunction with her second examination. Rx 1 at 14-17. Dr. Wehner testified that her diagnosis of Petitioner did not change after her second examination of Petitioner and her review of additional records. Rx1 at 17. Regarding the treatment that Petitioner had received, Dr. Wehner testified that she did not believe that the injection treatment by Dr. Malek and Dr. Anwar or the 90 visits of physical therapy were medically necessary or reasonable for the injury. Rx1 at 17. Regarding her assessment of Petitioner's complaints at the time of the second evaluation, Dr. Wehner testified that Petitioner's subjective complaints had increased, her clinical exam showed more self-limiting behavior patterns as well as more marked symptom magnification behaviors, and the subjective complaints and clinical findings on exam could no longer be explained based on the date of injury of January 6, 2009. Rx1 at 18. Dr. Wehner testified that her prognosis of Petitioner at that time was fair to poor because she had subjective complaints of pain that did not have a specific physical finding or radiographic finding to explain them. Rx1 at 18. Regarding her comments about markedly positive Waddell findings in her report, Dr. Wehner testified that Petitioner was markedly positive for all four Waddell tests. Rx1 at 19. Regarding Petitioner's ability to return to work, Dr. Wehner testified that her opinion on March 1, 2011 was that there were no medical limitations. Rx1 at 19. Dr. Wehner testified that she found Petitioner was still at MMI at the time of her March 11, 2011 evaluation, and that she did not find that anything changed from her March 25, 2009 exam. Rx1 at 19. Regarding her opinion as to Petitioner's need for further treatment, Dr. Wehner testified that Petitioner's treatment had been extensive and based on subjective complaints and not on any specific radiographic findings or clinical findings, that Petitioner had done poorly following the shoulder scope surgery and had higher pain complaints after the injections, so there was no medical reason to believe that any further treatment would change the course of her subjective complaints and she would not recommend any further medical intervention. Rx1 at 20.

On cross examination, Dr. Wehner testified that she did not have an independent recollection of the March 25, 2009 examination. Rx1 at 22. Dr. Wehner agreed that she did not indicate in her report that there was no spasm in Petitioner's neck. Rx 1 at 22. Dr. Wehner testified that she did not check Petitioner for tenderness in the neck, for range of motion of the shoulders, or for tenderness or crepitation of Petitioner's shoulder. Rx1 at 22. Dr. Wehner testified that she reviewed the film of the February 10, 2009 MRI, and that minimal disc bulging in and of itself does not produce symptoms. Rx1 at 23. Dr. Wehner testified that she knew that Petitioner had hypertrophic spurring at multiple levels, and that a pain condition is not assessed based on spurring. Rx 1 at 23. Dr. Wehner agreed that she noted that Petitioner had minimal listhesis of C5 in relation to C4 and testified that minimal listhesis does not produce symptoms. Rx1 at 24. Regarding the MRI of February 10, 2009, Dr. Wehner agreed that the radiologist made additional findings including compression at the C4-5, C5-6, and C6-7, and agreed that the radiologist noted it was causing spinal stenosis on the right and left foraminal compromise. Rx1

at 25. Dr. Wehner testified that stenosis can produce symptoms including neck pain and sometimes pain in a radicular distribution. Rx1 at 25. Dr. Wehner testified that there was no significant stenosis on the MRI. Rx1 at 25. Dr. Wehner testified that she reviewed the report of the April 17, 2009 MRI. Rx1 at 26. Dr. Wehner testified that mild degenerative changes cannot become symptomatic by trauma. Rx1 at 27. Dr. Wehner testified that she reviewed the report of the shoulder MRI. Rx1 at 28.

Evidence deposition of Dr. Alexander E. Obolsky, Respondent's Section 12 physician

Dr. Alexander E. Obolsky testified by way of evidence deposition taken on July 14, 2014. Rx6. Dr. Obolsky is a forensic psychiatrist and is board-certified in general psychiatry, forensic psychiatry, and addiction psychiatry. Rx6 at 4-7.

Dr. Obolsky testified that he was familiar with Petitioner because Petitioner was referred to him for an independent psychiatric examination, and that Petitioner was in his office on three different occasions, and that he personally interviewed Petitioner for two and a half hours on the third occasion on June 11, 2013. Rx6 at 11, 12. Dr. Obolsky reviewed Petitioner's medical records prior to meeting with Petitioner, including the emergency room records from January 7, 2009. Rx6 at 12-13. Petitioner reported a consistent accident history to Dr. Obolsky. Rx6 at 12. Dr. Obolsky testified that at the time he interviewed Petitioner, she reported headaches, spasms in her back on the left side more than the right, weakness and stiffness, difficulties with equilibrium and a limping gait, eye pain with her headaches, tachycardia with high levels of pain, increased blood pressure with high levels of pain, symptoms on the right side because of overuse, difficulty getting out of bed because of pain and spasms, pain levels of six or seven out of 10 on a regular basis and the highest level of pain above 10, and that she would go to the emergency room when her pain levels were above 10. Rx6 at 15. Regarding mental symptoms, Dr. Obolsky testified that Petitioner's mental symptoms coalesce around her overall complaints of depression and anxiety, and that Petitioner reported crying a lot, that she was tired of being in pain, that she wanted her life back, that she felt that her life was taken away from her, that she did not enjoy life anymore, that she slept more and did not spend as much time with her friends like she used to, and that she found herself isolating herself from her friends. Rx6 at 15-16. Dr. Obolsky testified that Petitioner also reported that two of her friends had passed away in the year prior to the interview. Rx6 at 16. Dr. Obolsky testified that his overall impression from his interview and from Petitioner's presentation was that Petitioner took care of herself hygienically and had some pampering. Rx6 at 19. Dr. Obolsky testified that "[i]n an individual who is suffering from major depression, we see a significant decrease in the person taking care of their hygiene or appearance, and that is because they no longer are able to experience pleasure. And so the fact that she does it on a regular basis indicates to me that there was an inconsistency between her report of how severe her depression was and her report to her psychiatrist and what I see when she walked into my office or was even in my office on three occasions." Rx6 at 19. Dr. Obolsky testified that he was specifically speaking of Dr. Khan, when he testified as to Petitioner's psychiatrist, and that Dr. Khan initially diagnosed Petitioner with mood disorder due to a degenerative condition and that Dr. Khan's final diagnosis was major depression. Rx4 at 20.

Dr. Obolsky testified that his office performed psychological and psychometric testing, and that the testing did not lead him to believe that Petitioner had a mood disorder or major depression. Rx4 at 21. Dr. Obolsky testified that the tests administered included the MMPI-2 and BHI-2. Rx6 at 21. The MMPI-2 looks at a person's psychological functioning now and over long term, and Petitioner had presented with significant depressive and anxiety symptoms on that test; however, Petitioner elevated on the scale that measures authenticity of the reported symptoms. Rx6 at 21. Dr. Obolsky testified that the result of the MMPI-2 indicated that Petitioner presented non-credible over reporting of psychiatric and physical symptoms. Rx6 at 22. Dr. Obolsky testified that the results of the BHI-2 demonstrated a very high level of depression and anxiety; however, Petitioner's results were so negative and extreme that she scored in the 99th percentile for individuals who were asked to exaggerate their symptoms, which is called "faking bad." Rx6 at 22. Dr. Obolsky testified that Petitioner's symptoms were

extremely exaggerated on both tests. Rx6 at 22. Dr. Obolsky testified that they also evaluated Petitioner's cognitive functioning, and Petitioner was in an average range, which was inconsistent with the kind of depression that Petitioner reported and endorsed. Rx6 at 24-25. Dr. Obolsky testified that they also performed the SIMS test for malingering, and that Petitioner was not malingering on that test. Rx6 at 26. Dr. Obolsky testified that Petitioner tested one point below the CogAT score for identification of suspected malingering. Rx6 at 26. Dr. Obolsky testified that he diagnosed Petitioner with malingering. Rx6 at 29.

On cross examination, Dr. Obolsky testified that he never performed a physical examination of Petitioner. Rx6 at 53. Dr. Obolsky testified that his diagnosis of malingering indicated that Petitioner's complaints of pain were incongruent with the evidence of her actual functioning, and that he relied on the physicians that performed physical examinations of Petitioner in making that diagnosis. Rx6 at 53-54. Dr. Obolsky testified that Drs. Silver, Malek, and Anwar did not conclude that Petitioner was malingering. Rx6 at 55-56. Dr. Obolsky testified that he was familiar with the August 11, 2010 FCE that concluded that Petitioner gave a reliable effort and that it was inconsistent with the diagnosis of malingering. Rx6 at 56-57. When asked if he had an opinion as to when Petitioner's malingering began, Dr. Obolsky responded that Petitioner's malingering was first identified by Dr. Wehner, during Petitioner's first IME. Rx6 at 57. Dr. Obolsky testified that it was impossible for him to say whether Petitioner was malingering after her IME with Dr. Wehner. Rx6 at 57. Dr. Obolsky testified that Petitioner's statement that she did not enjoy life was discrepant from other evidence that indicated that she did enjoy life. Rx6 at 61. Dr. Obolsky agreed that he did not review records from Dr. Silver after November 23, 2011. Rx6 at 58.

On redirect examination, Dr. Obolsky testified that overall, Petitioner did not show objective evidence of an individual who is not enjoying her life due to either severe physical complaints or depression or demoralization, and that Petitioner did not show symptoms of demoralization. Rx6 at 71-72.

Evidence deposition of Dr. Pietro Tonino, Respondent's Section 12 physician

Dr. Pietro Tonino testified by way of evidence deposition on December 16, 2019. Rx2. Dr. Tonino testified as to his education and credentials as an orthopedic surgeon. Rx2 at 4-6.

Dr. Tonino first examined Petitioner on September 28, 2009. Rx1 at 7. Dr. Tonino also reviewed medical records and provided a summary of the records he reviewed. Rx2 at 8-11. Dr. Tonino did not have the films or report of the left shoulder MRI. Rx2 at 9. Dr. Tonino physically examined Petitioner on September 28, 2009, he summarized his physical exam findings, and testified that he was not sure Petitioner was putting forth full effort on exam. Rx2 at 10. Dr. Tonino testified that his impression was a cervical strain and subjective left greater than right shoulder complaints. Rx2 at 11. Dr. Tonino testified that at that time, he thought Petitioner would benefit from seeing a cervical spine specialist as her complaints appeared to be mostly cervical in origin and radiating to both shoulder areas as opposed to coming primarily from her shoulder. Rx2 at 11. Dr. Tonino testified that his opinion at that time was that Petitioner's treatment had been reasonable, necessary, and appropriate for her clinical condition. Rx2 at 12.

Dr. Tonino testified that he reviewed the left shoulder MRI of April 17, 2009, but could not recall if he had looked at the films. Rx2 at 12-13. Dr. Tonino testified that on MRI he saw that Petitioner had rotator cuff tendinopathy, but no significant tears, and some subacromial bursitis, some mild to moderate acromioclavicular changes, and a small joint effusion of the left shoulder. Rx2 at 13. Dr. Tonino testified that his impression after review of the MRI was that he wanted Petitioner to still see a cervical spine specialist, and if that was cleared, that it would be reasonable for Petitioner to have an arthroscopy of the left shoulder. Rx2 at 13.

Dr. Tonino next examined Petitioner on June 7, 2010 and he reviewed additional medical records in conjunction with his exam. Rx2 at 14. Dr. Tonino summarized his exam findings. Rx2 at 15-16. Dr. Tonino testified that his impression as of June 7, 2010 was left shoulder pain. Rx2 at 16. Dr. Tonino testified that he was not worried about a frozen shoulder with Petitioner. Rx2 at 17. Regarding Petitioner's activity or work restrictions, Dr. Tonino testified that his opinion at that time was a 10-pound lifting restriction and no overhead or repetitive use of the left upper extremity. Rx2 at 17. Dr. Tonino testified that at that time, he found that Petitioner's treatment had been necessary and reasonable. Rx2 at 17.

Dr. Tonino testified that he had an opportunity to review Petitioner's left shoulder operative report and after his review of the operative report, he thought that Petitioner should undergo an FCE. Rx2 at 18.

Dr. Tonino testified that regarding his report of September 24, 2010, he was asked to review and comment on an FCE that was done on September 16, 2010. Rx2 at 19. Dr. Tonino testified that he did not think it was a valid exam because it was noted that Petitioner had not performed to her maximum capabilities. Rx2 at 20. Dr. Tonino testified that at that time, he thought that Petitioner could return to work full duty. Rx2 at 20-21. Dr. Tonino did not physically examine Petitioner on September 24, 2010. Rx2 at 22.

Dr. Tonino prepared a medical records review report dated October 15, 2010. Rx2 at 23-24. Dr. Tonino testified that following his review of Petitioner's left shoulder MRI and her FCE of September 2010, his opinion was that Petitioner could return to work full duty. Rx2 at 23-24. Dr. Tonino testified that his opinion as of October 5, 2010, was that Petitioner was at MMI for her left shoulder. Rx2 at 26.

Dr. Tonino prepared a medical records review report on February 4, 2011. Rx2 at 26. Dr. Tonino testified that he gave a causation opinion after his review of the additional medical records, and that his opinion was that he thought more probably than not that Petitioner's left shoulder complaints were related to the fall she sustained on January 6, 2009 and that there were no other injuries at that point that resulted in her left shoulder condition. Rx2 at 28-29.

Dr. Tonino examined Petitioner again on February 10, 2011 and he reviewed additional medical records. Rx2 at 29-30. Dr. Tonino summarized his physical exam findings. Rx2 at 31. Dr. Tonino testified that he was not sure Petitioner was putting forth full effort on examination. Rx2 at 31. Dr. Tonino testified that his impression on that date was that there was something going on with Petitioner's neck because she had significant restrictions of motion of her cervical spine. Rx2 at 32. Dr. Tonino testified that he did not feel that Petitioner's subjective complaints were consistent with her objective findings. Rx2 at 33. Dr. Tonino testified that at that time he opined that Petitioner had reached MMI as to her left shoulder and that she was capable of working within her restrictions of the FCE, although she could most probably perform at a higher level. Px2 at 33-34.

On cross examination, Dr. Tonino testified that his diagnosis of Petitioner's injury was that she hurt her neck-shoulder area when she fell. Rx2 at 34-35. Dr. Tonino agreed that there was mild to moderate diffuse tendinopathy seen on the MRI of April 17, 2009, and that it can be caused by trauma. Rx2 at 35. Dr. Tonino testified that a loss of range of motion can be explained by the arthroscopic procedure. Rx2 at 38. Dr. Tonino testified that he did not think that he had reviewed the FCE of August 11, 2010. Rx2 at 39. Dr. Tonino testified that he did feel that the shoulder condition he observed was related to Petitioner's fall at work and that her treatment subsequent to the surgery was reasonable. Rx2 at 39-40.

Evidence deposition of Dr. Howard Konowitz, Respondent's Section 12 physician

Dr. Howard Konowitz, testified via evidence deposition on November 6, 2019. Rx4. Dr. Konowitz is board-certified in anesthesia and internal medicine, with a sub-specialty in pain management. Rx4 at 5-6.

Dr. Konowitz examined Petitioner on April 9, 2012, and he produced two reports, one dated April 19, 2012 and the other dated October 15, 2012. Rx4 at 12.

Dr. Konowitz testified that Petitioner reported a consistent accident history. Rx4 at 16. Dr. Konowitz performed a physical examination of Petitioner, as well as the complex regional pain syndrome ("CRPS") exam, and he summarized his exam findings, including that there were no findings of CRPS. Rx4 at 18-22. Dr. Konowitz also reviewed medical records as part of his exam, and he summarized the medical records he reviewed. Rx4 at 23-24. Dr. Konowitz testified that his opinion as to a diagnosis was diffuse myofascial pain, and that he made additional comments including that additional workup for causation was needed and that he recommended Petitioner undergo an EMG and see Dr. Rechitsky, a neurologist. Rx4 at 24. Dr. Konowitz testified that he recommended an EMG to assess radiculopathy because Dr. Anwar's notes were missing his physical examination findings. Rx4 at 25-26. Dr. Konowitz testified that Petitioner's pain complaints did not present like a herniated disc or other axial disease, and that there were neck muscle and fascial symptoms consistent with exam findings. Rx4 at 28.

Regarding Petitioner's treatment, Dr. Konowitz testified that a short response time following injections did not justify repeat injections. Rx4 at 29-30. Dr. Konowitz testified as to Petitioner's objective findings, including piriformis, which he testified that along with the hip rotators, can irritate the sciatic nerve and give pain into the leg, and that he felt that better explained why Petitioner was having pain in her leg than anything in the lumbar MRI. Rx4 at 30. Dr. Konowitz testified that was why he recommended a pelvic MRI. Rx4 at 31. Dr. Konowitz did not have an opinion as to further treatment or whether Petitioner had reached MMI at that time because he wanted additional workup. Rx4 at 35. Dr. Konowitz testified that at that time, he placed Petitioner at sedentary duty based on the examination findings. Rx4 at 36.

Dr. Konowitz prepared an addendum report dated October 15, 2012, after reviewing additional medical records. Rx4 at 36. Dr. Konowitz testified that after his review of the additional medical records, his diagnosis was myofascial pain and symptom amplification, and he noted an example was the ER report of February 24, 2009. Rx4 at 38. Regarding causation, Dr. Konowitz testified that his opinion did not change since his previous exam, and that "[i]t said causation pending workup as recommended in Question Number 1 of the IME report dated 4/19 of 2012." Rx4 at 39. Dr. Konowitz testified that he disagreed with Dr. Anwar's treatment plan due to efficacy in his past treatment and clinical correlation to diagnostic studies, and because the right-sided complaints were not consistent with the original injury. Rx4 at 39. Dr. Konowitz testified that Petitioner's treatment had been reasonable, but not effective, and that he did not provide a relationship answer because he did not have a causation workup. Rx4 at 40.

On cross examination, Dr. Konowitz agreed that Petitioner was already taking depression medication when he saw her in April 2012. Rx4 at 44. Regarding the deficits in range of motion of Petitioner's left shoulder, Dr. Konowitz testified that there was a question of whether there was some fibroarthrosis or frozen shoulder symptoms after the surgery, adhesions and scar tissue after surgery were common, and that "I can say there's limitations, but it's probably multifactorial. Some probably from surgery, some from musculoskeletal." Rx5 at 47. Dr. Konowitz testified that Petitioner exhibited deficits in range of motion of her cervical spine and a right paracervical spasm was noted. Rx4 at 50-51. Regarding the lumbosacral exam, Dr. Konowitz testified that there was a deficit in forward flexion, which was consistent with the left lumbar paraspinal tightness. Rx4 at 52. Regarding inspection deformity, Dr. Konowitz testified that there was an irritable lumbar muscle on the left side. Rx4 at 52. Dr. Konowitz testified that Petitioner's sciatic nerve was painful to palpation, and that his exam finding of left sciatic notch tenderness was pointing to a musculoskeletal cause of why she was hurting there. Rx4 at 53. Dr. Konowitz testified that Petitioner was not malingering during examination. Rx4 at 54. Dr. Konowitz testified that causation aside, if Petitioner was his patient, he would recommend myofascial medications for treatment.

Rx4 at 55. Dr. Konowitz explained that the ineffectiveness of Dr. Anwar's injections lent credence to the musculoskeletal diagnosis. Rx4 at 55-56. Dr. Konowitz testified that diffuse myofascial pain can be caused by a slip a fall like the one that Petitioner reported. Rx4 at 58. When asked if it would be correct to say that there was a correlation between the left leg, left arm, and neck symptoms and the fall, Dr. Konowitz responded "[o]ver the time of the ER visits and what they were all documenting I didn't find other than those complaints." Rx4 at 59. When asked if it was correct that Petitioner was a chronic pain patient, Dr. Konowitz testified that Petitioner was showing a pattern of overneedling. Rx4 at 60.

On redirect examination, Dr. Konowitz testified that he purposely did not respond to whether Petitioner was a chronic pain patient "[b]ecause what's missing was all of my causation…" Rx4 at 63. When asked if when he saw Petitioner and all of her medical records, if he thought that she was a chronic pain management patient, Dr. Konowitz responded "[s]he - - so she meets the sub - - she meets the subjective criteria by definition. If you had pain three to four months beyond normal healing, there's - - from what they have here, normal healing has occurred." Rx4 at 64. Dr. Konowitz then explained that patients are not treated based only on their subjective pain and that he needed additional data. Rx4 at 64-65. He agreed that at the time, his diagnosis was not that Petitioner had some pain management problem. Rx4 at 65. Dr. Konowitz agreed that he did not give any kind of psychological diagnosis. Rx4 at 69.

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 her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders her evidence worthy of belief. 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 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).

Issue C, whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Having considered all the evidence, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she sustained an accident that arose out of and in the course of her employment with Respondent on January 6, 2009. The evidence demonstrates that (1) on January 6, 2009, Petitioner's position at Respondent was supervisor/coordinator for the reading and math program, (2) that as a supervisor/coordinator for the reading and math program, she worked district-wide at seven schools, which required her to travel daily to the schools, (3) that her duties included taking tutoring materials to the tutors at the different schools, (4) that on January 6, 2009, she traveled from her office to Harriet Tubman School and she parked in a secondary lot because the primary lot was full, (5) that the secondary lot was owned and maintained by Respondent and it was provided for employees' use, (6) that the lot was icy and covered in snow, (6) that after exiting her vehicle and as she walked in front of her car while holding tutoring materials, she slipped and fell on the ice, (7) that Petitioner fell onto the left side of her body and hit her head, and (8) that Petitioner noticed pain in her back, left

side, low back, upper back, neck, and left shoulder after the fall. The Arbitrator notes that Petitioner's testimony regarding her position at Respondent, her job duties including traveling, and the accident was unrebutted. The Arbitrator further finds that the record supports Petitioner's status as a traveling employee.

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

Having considered all the evidence, the Arbitrator finds that Petitioner proved injuries to her cervical spine, lumbar spine, and left shoulder, but failed to prove that her current conditions of ill-being as to her cervical spine and lumbar spine, including any chronic pain conditions, are causally related to the January 6, 2009 injury and failed to prove that her current conditions of ill-being as to her left shoulder are causally related to the January 6, 2009 injury after the date that Dr. Tonino found Petitioner to be at MMI, or October 15, 2010. The Arbitrator notes that there are inconsistencies between Petitioner's testimony and the medical evidence offered. Accordingly, the Arbitrator finds that Petitioner's testimony is unreliable as to her claims of ongoing conditions of ill-being as to her cervical spine and lumbar spine, including any chronic pain conditions, and her left shoulder. The Arbitrator further finds the opinions of Drs. Wehner, Obolsky, Tonino, and Konowitz more credible, and relies on same in support of her findings. In relying on the opinions of Dr. Wehner and in resolving the issue of causation, the Arbitrator further finds that in addition to a left shoulder injury, Petitioner also sustained a head contusion and cervical sprain as a result of the January 6, 2009 injury, and that she was at MMI for these conditions as of March 25, 2009. The Arbitrator further finds that Petitioner is not entitled to any medical treatment for her cervical spine or lumbar spine after March 25, 2009 and that she is not entitled to any medical treatment for her left shoulder after October 15, 2010.

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

Consistent with the Arbitrator's prior findings regarding the issues of accident and causal connection, the Arbitrator finds that Petitioner's medical treatment for her cervical spine and lumbar spine was reasonable and necessary through March 25, 2009 and finds that Petitioner's medical treatment for her left shoulder was reasonable and necessary through October 15, 2010. The Arbitrator further finds that Respondent is not liable for any cervical spine or lumbar spine treatment after March 25, 2009 and that Respondent is not liable for any left shoulder treatment after October 15, 2010.

Pursuant to the Parties' stipulation, Respondent is entitled to a credit in the amount of $186,133.14 pursuant to Section 8(j) of the Act.

Issue K, whether Petitioner is entitled to temporary total disability, the Arbitrator finds as follows:

Petitioner claims that she is entitled to TTD benefits from July 10, 2009 through November 29, 2022, the date of arbitration. Ax1. Respondent disputes Petitioner's claims for TTD benefits. Ax1.

Consistent with the Arbitrator's prior findings, and having considered all the evidence, the Arbitrator finds that Petitioner is entitled to TTD benefits from July 10, 2009 through October 15, 2010, the date Petitioner reached MMI for her left shoulder condition.

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

Having considered all the evidence, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 17.5% 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	22WC015416
Case Name	Brenda Beck (Guardian of WLK - Minor and sole heir of Grace Keeton, Deceased) v. Subway
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0211
Number of Pages of Decision	12
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	J. Kevin Wolfe
Respondent Attorney	Timothy Furman

DATE FILED: 5/7/2024

/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

BRENDA BECK, GUARDIAN OF WLK, A MINOR AND SOLE HEIR OF GRACE KEETON, DECEASED,

Petitioner,

vs. NO: 22 WC 15416

SUBWAY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, nature and extent, and all issues raised at trial, including death benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 21, 2023 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses listed in Petitioner's Exhibit 4, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay death benefits, commencing May 31, 2022 of $600.00/week on behalf of the minor child of the decedent, Willow Leanne Keeton, born January 29, 2021, to Brenda Beck, legal guardian of Willow Leanne Keeton because the injuries caused the employee's death, as provided in §7 of the Act. Respondent shall pay death benefits until Willow's 18th birthday or until her 25th birthday if she is enrolled as a full time student in an accredited educational institution.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $8,000.00 for burial expenses to the decedent's surviving child or the person(s) incurring the burial expenses, as provided in §7(f) of the Act. Respondent shall receive credit for any burial expenses previously paid.

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 §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 that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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

May 7, 2024

RAW/wde

O: 3/20/24

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/s/ *Raychel A. Wesley*

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC015416
Case Name	Brenda Beck Guardian of WLK, a minor v. Subway
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision Fatal
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	J. Kevin Wolfe
Respondent Attorney	Timothy Furman

DATE FILED: 9/21/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 19, 2023 5.30%

/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
FATAL

Brenda Beck, Guardian of WLK, a minor
Employee/Petitioner
v.
Subway
Employer/Respondent

Case # 22 WC 15416

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Jeanne L. AuBuchon, Arbitrator of the Commission, in the city of Springfield, on August 24, 2023. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of 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 Death Benefits

FINDINGS

On the date of accident, May 31, 2022, 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 $31,200.00; the average weekly wage was $600.00.

On the date of accident, Decedent was 23 years of age, single with 0 dependent children.

Respondent ***has not*** paid or will pay 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 any amounts previously paid for burial or death benefits.

The Arbitrator finds that Decedent died on May 31, 2022, leaving 1 survivor as provided in Section 7(a) of the Act, specifically her surviving minor child, WLK, whose guardian is Brenda Beck.

ORDER

Respondent shall pay death benefits, commencing May 31, 2022, of $600.00/week to Brenda Beck, as guardian of the person and estate of WLK, a minor.

Said death benefits are to be paid to the aforementioned beneficiary until and unless those benefits are extinguished for any reason(s) codified in the Illinois Workers' Compensation Act.

Respondent shall pay ***$8,000*** for burial expenses to Brenda Beck, as provided in Section 7(f) of the Act. Respondent is entitled to a credit for any burial expense benefits previously paid.

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

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

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

Jeanne L. AuBuchon

Jeanne L. Aubuchon

SEPTEMBER 21, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on August 24, 2023. This is a death case in which the disputed issues were: 1) whether an accident occurred that arose out of and in the course of employment – specifically if the Decedent's actions took her out of the scope of his employment; 2) liability for medical bills; and 3) payment of death benefits. The parties stipulated that at the time of her death, the Decedent was a travelling employee.

FINDINGS OF FACT

On May 31, 2021, the Decedent, Grace Keeton, was driving from the Respondent's Subway store in Gillespie, Illinois, to another store in Litchfield, Illinois, to deliver restaurant supplies. During the trip, she was involved in a collision, in which her vehicle ran into the rear of a lawfully stopped semi tractor. (RX1) The Decedent died as a result of blunt force trauma and was pronounced dead in the emergency room at Saint Francis Hospital in Litchfield Illinois. (PX1)

Emergency room records contain a nurses note of "no attempt to stop was made, and a notation of "distraction injury." (RX4) A Certified Illinois State Police Investigative Record stated that a firefighter at the scene collected a cell phone from the Decedent's vehicle and told the investigating officer it was playing a video when he picked it up. (RX1) The accident report noted cell phone use, no use of a safety belt, speeding and failure to reduce speed to avoid a crash. (RX1, RX2) A toxicology report in the Montgomery County Coroner's report showed cardiac blood testing was positive for 2.3 ng/mL of 11-Hydroxy Delta-9 THC (an active metabolite of marijuana); 13 ng/mL of Delta-9 Carboxy THC (an inactive metabolite of marijuana); and 4.8 ng/mL of Delta-9 THC (an active ingredient of marijuana. (RX3)

Dr. Ronald Henson, a consultant with Beron Consulting, Lab Works, and Media Services Inc. and an expert in drug and alcohol toxicology, physiology and pharmacology, reviewed the

police accident report, the coroner's preliminary death report and the toxicology report. His report noted: 1) that the toxicology testing was incomplete due to its failure to have a statement of the uncertainty in measurement; 2) that the American Board of Forensics guidelines state that impairment may not be based solely on lab results; 3) the difficulty in establishing a relationship between a person's THC levels and performance impairing effects without pattern of use evidence; 4) the poor correlation between blood THC and performance; and 5) the inadvisability of trying to predict effects based on blood THC concentrations alone. (PX3) He opined: "The blood THC findings in this case cannot conclude to a reasonable degree of scientific certainty the result is in anyway reliable to conclude impairment nor associated with the work-related accident in this case involving Ms. Grace Keeton." (Id.)

Brenda Beck, mother of the Decedent, is the maternal grandmother of Willow Keeton, date of birth January 29, 2021, whose mother was the Decedent. (PX2) Ms. Beck was appointed Guardian of the Estate and Person of the Decedent's minor surviving child, Willow Keeton, by order of the Fourth Judicial Circuit, Montgomery County, Illinois, case no. 2022 GR 11, entered February 21, 2023. (Id.)

CONCLUSIONS OF LAW

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

The issue is whether the actions of the Decedent took her out of the scope of her employment due to alleged speeding, distraction by use of a cell phone while driving and/or being under the influence of marijuana.

However negligent a claimant might be in the operation of a vehicle, that negligence does not remove him or her from the scope of employment or the protections of the Workers' Compensation Act (the Act). *McKernin Exhibits, Inc. v. Indus. Comm'n*, 361 Ill. App. 3d 666, 671,

838 N.E.2d 47, 297 Ill. Dec. 560 (1st Dist. 2005), citing *Stembridge Builders, Inc. v. Industrial Comm'n* , 263 Ill. App. 3d 878, 636 N.E.2d 1088, 201 Ill. Dec. 656 (2nd Dist. 1994). In order to remove the claimant from the protection of the Act, his actions must have been committed intentionally, with knowledge that they were likely to result in serious injury, or with a wanton disregard of the probable consequences. *McKernin*, 361 Ill.App.3d at 671.

McKernan involved a motor vehicle accident after which the claimant tested positive for cocaine. The Court held that for compensation under the Act to be denied on the basis that the claimant was intoxicated, the level of intoxication must be such that it can be said, "as a matter of law, that the injury arose out of his drunken condition and not out of his employment." *Id*., citing *District 141, International Ass'n of Machinists & Aerospace Workers v. Industrial Comm'n,* 79 Ill. 2d 544, 404 N.E.2d 787, 39 Ill. Dec. 196 (1980). Intoxication which does not incapacitate a claimant from performing his work-related duties is not sufficient to defeat recovery of compensation under the Act although the intoxication may be a contributing cause of his injury. *Id.*

In McKernan, a forensic pathologist reviewed medical records and toxicology reports and opined that there was no evidence that the claimant was impaired or intoxicated at the time of the accident. *Id*. at 669. There was no other evidence that the claimant was under the influence of cocaine to the extent that he was incapacitated from performing his work duties. *Id*. at 672. The Appellate Court affirmed the Commission's decision that the claimant's injuries arose out of and in the course of his employment. *Id*.

Likewise, in the instant case, Dr. Henson found no evidence of impairment, and there was no any other evidence – such as eyewitness testimony – that the Decedent was incapacitated from performing her work-related duties of driving. Therefore, the Arbitrator finds the Decedent having consumed marijuana – a legal substance – at some unknown time before the accident was not an

action performed with knowledge that it was likely to result in serious injury, or with a wanton disregard of the probable consequences and, thus, did not remove the Decedent from the scope of her employment.

As to the possibility that the Decedent was using a cell phone while driving, the evidence that a video was playing on her phone when a firefighter found it does not necessarily lead to the conclusion that the Decedent was actively watching it while the accident occurred. Without evidence such as eye-witness testimony, any such conclusion would be speculation. The Arbitrator did not find, nor did the parties cite, cases providing that using a cell phone while driving is wilful and wanton conduct. Although such actions are negligent and reckless, the Arbitrator finds that use of a cell phone while driving does not rise to the level of actions performed with knowledge that they were likely to result in serious injury or with a wanton disregard of the probable consequences and, thus, do not remove the Decedent from the scope of her employment.

Regarding speeding as an action that would make the Decedent's actions wilful and wanton, the Court in *Stembridge* stated:

> "…in a given case, speed itself might establish wilful and wanton conduct taking into consideration the degree of speed with reference to other surrounding facts and circumstances. Likewise, evidence of excessive speed also bears on the presence of negligent conduct. Thus, when speed is at issue, that which distinguishes wilful and wanton conduct from negligent conduct is the degree of speed. Where the speed is grossly fast for conditions, the conduct is wilful and wanton. Short of that, excessive speed constitutes negligent conduct. Indeed, plaintiff concedes that the presence or absence of wilful and wanton conduct often 'boils down' to the degree of flagrancy of the offending conduct."

Stembridge, 263 Ill.App.3d at 882, citing *Porro v. P.T. Ferro Construction Co.*, 72 Ill.App.3d. 377, 380, 390 N.E.2d 958, 28 Ill.Dec. 599 (3rd Dist. 1979)

The Court affirmed a finding that the claimant was within the scope of employment although he was driving 65-70 mph in a 40-mph zone. *Stembridge*, 263 Ill.App.3d at 878, 884.

In the instant case there is no indication of what speed the Decedent was travelling. Therefore, the Arbitrator is unable to determine the degree of flagrancy of the offending conduct and finds there is no showing that the Decedent's actions rose to the level of actions performed with knowledge that they were likely to result in serious injury or with a wanton disregard of the probable consequences and, thus, do not remove the Decedent from the scope of her employment.

For these reasons, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that the accident that caused the death of the Decedent occurred in the course of and arose out of her employment.

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

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

Based on the findings above, the Arbitrator finds that the medical services listed in the billing statements in Petitioner's Exhibit 4 were reasonable and necessary. Therefore, the Arbitrator orders the Respondent to pay those medical expenses.

Issue (O): Award of death benefits.

The Arbitrator concludes the Decedent sustained a work-related injury on May 31, 2022, which resulted in her death. She left a surviving minor child, whose guardian is the Petitioner. No other individual is entitled to benefits under the Act.

The Arbitrator concludes that the appropriate death benefit is $600.00 per week, pursuant to Section 7 of the Act. Said death benefits are to be paid to Brenda Beck until and unless those benefits are extinguished for any reason(s) codified in the Act.

The Respondent shall pay ***$8,000.00*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act. Respondent is entitled to a credit for any burial expense benefits paid prior to entry of this Arbitration Decision.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC011929
Case Name	Isidro Quintana v. Atlas Employment Service Inc
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0212
Number of Pages of Decision	15
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Timothy Furman

DATE FILED: 5/8/2024

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Isidro Quintana,

Petitioner,

vs. No. 18 WC 11929

Atlas Employment Service, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's award of permanent partial disability benefits. In our Section 8.1b(b) analysis, the Commission gives greater weight to factor (ii)—the occupation of the injured employee. Further, the Commission finds greater level of disability (factor (v)). Regarding factor (ii), the Commission finds it significant that Petitioner now performs much lighter work that does not involve lifting. Regarding factor (v), the Commission likewise notes that Petitioner no longer performs heavier activities of daily living or plays sports. The medical records from Concentra indicate that heavier activities increased Petitioner's back pain. The Commission therefore increases the permanent partial disability award from 3% disability to the person as a whole to 7.5% disability to the person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 22, 2023, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $366.67 per week for a period of 2 weeks, from April 18, 2018 through May 1, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $330.00 per week for a further period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to the extent of 7.5 percent of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,100.00. 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.

May 8, 2024
SJM/sk
o-04/10/2024
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	18WC011929
Case Name	Isidro Quintana v. Atlas Employment Service, Inc.
Consolidated Cases	
Proceeding Type	8(a)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Jason Allain

DATE FILED: 3/22/2023

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

/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
8(a)

Isidro Quintana Case # **18** WC **011929**
Employee/Petitioner

v.

Atlas Employment Service, 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 **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **July 21, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,600.00**; the average weekly wage was $**550.00**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **2** dependent children.

Respondent shall be given a credit of $**8,067.68** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**8,067.68**.

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 $366.67 per week for 2 weeks, commencing April 18, 2018, through May 1, 2018, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $8,067.68 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $330.00 per week for 15 weeks, because the injuries sustained caused the 3% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's claim for prospective medical care is denied.

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

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

Elaine Llerena **MARCH 22, 2023**

Signature of Arbitrator

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner is not a native English speaker and testified using an interpreter. (Tr. 6) Petitioner testified that on February 22, 2018, he was working for Respondent at a warehouse in Villa Park. (Tr. 9-10) His job involved selecting fruit from the shipments that arrived. (Tr. 10)

He testified that on February 22, 2018, he was working in the area near where the boxes were at a table, and was putting boxes on a skid, when another employee hit him from behind on the feet with a hand jack causing him to fall backwards. (Tr. 10-11, 13) He testified that he was carrying two boxes at the time, holding them above his head. (Tr. 11-12) He testified that when he fell backwards, he fell on his back. (Tr. 40) He initially testified that he felt pain in his entire back, but later added his shoulder as well. (Tr. 13-15)

Petitioner sought treatment at Concentra on February 23, 2018. (PXA, p. 22; Tr. 16) Petitioner reported moderate back pain from being hit with a skid and falling onto a pallet behind him. (PXA, p. 22) Petitioner was seen by Dr. Deborah O'Brien. Physical examination revealed tenderness in the left and right thoracic paraspinal with bilateral muscle spasms. He had no tenderness and full range of motion in the lumbosacral spine. (PXA, p. 23) Dr. O'Brien diagnosed Petitioner as having a thoracic strain, ordered physical therapy and placed Petitioner on restricted work. (PXA, p. 23) Petitioner presented for a follow-up on February 27, 2018, during which Petitioner's diagnosis and treatment were unchanged. (PXA, p. 27-28)

Petitioner began physical therapy on March 2, 2018. (PXA, p. 30) Petitioner complained of general back pain from the shoulder blades to the low back. (PXA, p. 30)

On March 6, 2018, Petitioner returned to Dr. O'Brien complaining of bilateral mid and lower back pain, greater on the right than the left. (PXA, p. 37) Petitioner reported he was working transitional duty and adhering to the work restrictions as prescribed. (PXA, p. 37) Dr. O'Brien diagnosed Petitioner with a lumbar strain and continued physical therapy. (PXA, p. 38)

At the March 9, 2018, therapy appointment at Concentra, Petitioner reported that he was continuing to get better and that his pain was down. (PXA, p. 40) He reported having no problems at work. (PXA, p. 40) Dr. O'Brien's diagnosis and course of treatment remained unchanged at the March 13, 2018, March 20, 2018, and March 27, 2018, follow-up visits. (PXA, p. 44)

On April 3, 2018, Dr. O'Brien noted Petitioner was at his functional goal and released Petitioner to return to full duty work, though he also noted that Petitioner was not at the end of healing. (PXA, p. 60) Petitioner returned on April 10, 2018, noting that he had been working regular duty. (PXA, p. 61) He continued to complain of back pain and Dr. O'Brien recommended an MRI of the lumbar spine. (PXA, p. 62) On April 17, 2018, Dr. O'Brien noted that Petitioner was close to being able to do the physical requirements of his job, but not quite all the way yet, and again placed work restrictions on Petitioner. (PXA, p. 64) At the April 20, 2018, therapy visit, Petitioner reported that he felt he had re-aggravated his back since his last therapy session. (PXA, p. 66) On April 24, 2018, Dr. O'Brien noted that Petitioner's healing was almost sufficient for the safe return to regular duty, but that he would require another recheck prior to discharge. (PXA, p. 72)

On April 25, 2018, Petitioner underwent an MRI of the lumbar spine at Bright Light Medical Imaging. (PXB, p. 3) The MRI showed mild lumbar spondylosis without significant canal or foraminal stenosis. (PXB, p. 3)

Dr. O'Brien released Petitioner to full duty work at the May 1, 2018, visit. (PXA, p. 77). Petitioner testified and the records reflect that he did not receive any treatment for his shoulder while treating at Concentra. (PXA; Tr. 41-42).

Petitioner sought treatment at La Clinica on May 9, 2018. (PXC, p. 9) Petitioner reported that on February 22, 2018, he was carrying two boxes that weighed less than 40-pounds total, when another employee using a handheld lift machine behind him bumped into the back of his legs and knocked him backwards onto some boxes. (PXC, p. 9) He felt low back pain and mentioned that he fell sitting down. (PXC, p. 9) He also reported that he was holding the boxes above shoulder level and still holding them when he fell backward with pain developing in his neck into the right side. (PXC, p. 9) Dr. Hamada Yehya, DC, diagnosed Petitioner as having cervical, thoracic, and lumbar sprains/strains as well as cervical radiculopathy. (PXC, p. 11) Dr. Yehya ordered chiropractic treatment consisting of active therapeutic exercises and passive medicine modalities. (PXC, p. 11) Dr. Yehya kept Petitioner off work and ordered MRIs of the lumbar and cervical spine. (PXC, p. 11) Petitioner underwent his chiropractic treatment at La Clinica. (PXC) The records note that he was treating for his neck and shoulder, although the treatment modalities appeared to be focused on the neck and low back. (PXC)

On May 17, 2018, Petitioner underwent an MRI of the cervical spine with Berwyn Diagnostic Imaging that showed multilevel spondylosis of facet arthrosis, and disc bulging at C3-7. (PX D, p. 3-4) Petitioner also underwent an MRI of the right shoulder which showed moderate grade intrasubstance partial tearing involving the posterior one-third of the supraspinatus tendon insertion, low grade undersurface partial tearing of the subscapularis tendon, moderate AC and mild glenohumeral degenerative changes, and a suspected focal non-displaced partial-thickness SLAP tear. (PXD, p. 5)

On May 25, 2018, Dr. Yehya recommended a TENS unit to Petitioner. (PXC, p. 21) On May 26, 2018, Petitioner underwent x-rays of the cervical spine and lumbar spine at Specialized Radiology Consultants as ordered by Dr. Yehya. (PXE, p. 3) The x-ray of the cervical spine showed spondylosis of the lumbar spine and biomechanical alterations and the x-ray of the lumbar spine showed biomechanical alterations. (PXE, p. 3)

Petitioner went for a pain management consultation with Dr. Rajesh Patel on June 6, 2018. (PXG, p. 3) Petitioner reported that another co-worker was driving a forklift behind him, and the co-worker struck a set of boxes which fell into Petitioner. (PXG, p. 3) Petitioner then fell backwards and had pain in the low back, neck, and right shoulder. (PXG, p. 3) Petitioner complained of neck pain that radiated into the right shoulder and low back pain that radiated into the bilateral buttocks and posterior thighs. (PXG, p. 3) Petitioner reported some relief from chiropractic treatment. (PXG, p. 3) Dr. Patel recommended that Petitioner continue chiropractic therapy and see an orthopedic surgeon for the right shoulder. (PXG, p. 4)

Petitioner saw Dr. Ronald Silver on June 6, 2018. (PXF, p. 4) Petitioner reported that he was working in a warehouse lifting boxes above his head when he tripped over a forklift behind him falling backwards, injuring multiple body parts including his right shoulder. (PXF, p. 4) Dr. Silver noted that the right shoulder MRI demonstrated partial thickness tearing of the rotator cuff as well as a SLAP tear of his labrum (PXF, p. 4) Dr. Silver recommended arthroscopic surgery, medications, therapy, and work restrictions. (PXF, p. 5)

Petitioner returned to La Clinica on June 7, 2018, at which time an EMG/NCV study of the upper and lower extremities was ordered. (PXC, p. 28-29)

Petitioner saw Dr. Cary Templin on June 15, 2018. (PXH, p. 2) Petitioner indicated he was coming in for treatment for a work accident on February 22, 2018, that occurred when he was carrying boxes when a pallet hit him from behind causing the boxes to fall on him. (PXH, p. 2) Dr. Templin reviewed the MRIs of the

lumbar and cervical spine and opined that the accident had aggravated Petitioner's lumbar degenerative condition. (PXH, p. 3). Dr. Templin recommended physical therapy, a right C7 transforaminal epidural steroid injection, and kept Petitioner off work. (PXH, p. 3)

Petitioner underwent the EMG/NCV study on June 20, 2018, the results of which showed moderate carpal tunnel syndrome on the left with potential mild carpal tunnel on the right with the remaining exams normal. (PX C, p. 40-41).

Petitioner followed up with Dr. Patel on June 27, 2018. (PXG, p. 6) He reported his pain was unchanged. (PXG, p. 6) Dr. Patel indicated the plan was to proceed with the injection that had been recommended by Dr. Templin. (PXG, p. 7)

The July 5, 2018, visit note from La Clinica indicates that Petitioner continued to show improvement with increased range of motion and strength and that the EMG/NCV revealed no evidence of radiculopathy from the cervical to lumbar spine. (PXC, p. 53) Petitioner's diagnosis was amended to include a rotator cuff tear and partial thickness SLAP tear on the right side. (PXC, p. 53)

On July 16, 2018, Petitioner returned to Dr. Patel. (PXG, p. 8). He reported 50% relief from the right C7 epidural injection on June 27, 2018. (PXG, p. 8) Dr. Patel recommended that Petitioner proceed with a second injection. (PXG, p. 9) On July 30, 2018, Petitioner reported approximately 80% relief from the second epidural steroid injection. (PXG, p. 11) The plan was for Petitioner to follow-up with Dr. Templin regarding his spine, Dr. Sliver for his shoulder pain, and continue with chiropractic therapy. (PXG, p. 12) Petitioner continued to follow-up with Dr. Patel who deferred treatment to Drs. Templin and Silver, and advised Petitioner on October 24, 2018, to follow-up on an as-needed basis. (PXG, p. 17)

Petitioner returned to Dr. Silver on August 4, 2018, September 7, 2018, October 12, 2018, and November 16, 2018, awaiting approval for the right shoulder arthroscopic surgery. (PXF, p. 12, 19, 25, 31) At the November 16, 2018, appointment, Dr. Silver indicated that conservative treatment was not providing relief. (PXF, p. 31)

Petitioner followed up at La Clinica on August 8, 2018, September 6, 2018, October 8, 2018, November 7, 2018, during which treatment remained unchanged. (PXC, p. 70, 83, 106, 123) The records from those visits reflect that Petitioner was continuing to make improvements with pain and mobility. (PXC, p. 83, 106) On December 5, 2018, Petitioner was noted to have resolving cervical disc displacement, lumbar facet arthropathy, right rotator cuff tear, and right partial thickness tear. (PXC, p. 135) At the January 18, 2019, recheck it was noted that Petitioner was continuing to make stable and steady improvement in his condition but that his pain remained overall his chief complaint. (PXC, p. 153)

Petitioner returned to Dr. Templin on November 16, 2018. (PXG, p. 19) Dr. Templin noted that Petitioner suffered an injury to his shoulder, a cervical herniation, and lumbar strain. (PXG, p. 19) Dr. Templin noted that Petitioner had a significant response to the epidural injections reporting that his arm pain was much better, but complained of continued neck pain extending down the arm. (PXG, p. 19) Petitioner also reported that his low back pain was better with no leg pain. (PXG, p. 19) Dr. Templin continued therapy on the cervical spine. (PXG, p. 19) Petitioner was advised to return in a month, and if he was doing well, then Dr. Templin would release him from care, otherwise there would be consideration for a CT of the cervical spine. (PXG, p. 19) Dr. Templin kept Petitioner off work. (PXG, p. 19)

Independent Medical Examination and Response

Petitioner underwent an independent medical examination (IME) by Dr. John L. Reilly at Respondent's request on August 15, 2018. (RX1, p. 4) At the examination, Petitioner, through a Spanish interpreter, provided a history, wherein he was working for a fruit company, lifting packages of fruits up on a pallet. (RX1, p. 23) On February 22, 2018, he was lifting some packings of fruit overhead with two hands, estimating that it weighed less than 40-pounds, when he was struck on the legs by a forklift which caused him to fall onto a pallet. (RX1, p. 23-24) He stated that his arms were overhead with the fruits, and he fell onto a pallet, landing on his buttocks, but remained with his arms overhead. (RX1, p. 24) He stated that he kept the packages overhead when he fell. (RX1, p. 24) He reported pain in the right shoulder and neck on the right side after the fall. (RX1, p. 24) During physical examination, Petitioner reported subjective complaints to palpation of the lateral aspect of the neck and posterior aspect in the midline and had full range of motion in the neck. (RX1, p. 25) Regarding the right shoulder, Petitioner reported subjective complaints to palpation anteriorly, laterally, posteriorly, and superiorly. (RX1, p. 25) Dr. Reilly noted that Petitioner had excellent strength but described discomfort during motor testing. (RX1, p. 25) There was some tenderness with the AC joint and subjective complaints with adduction across the chest. (RX1, p. 25) Petitioner had non-specific pain to palpation, with global discomfort with all rotator cuff testing. (RX 1, p. 25) Dr. Reilly noted that the medical records initially only discussed low back pain with a delay in treatment involving the shoulder and neck condition. (RX1, p. 29) Dr. Reilly diagnosed Petitioner with cervical spondylosis with disc bulging and an intrasubstance tear of the supraspinatus in the right shoulder, and possible low-grade undersurface partial tearing in the subscapularis, moderate AC arthritic change, and suspicion of a possible SLAP tear. (RX1, p. 29) Dr. Reilly indicated that the objective and subjective complaints regarding the cervical spine were consistent with cervical spondylosis, but that he did not see any signs by EMG or physical examination of radiculopathy. (RX 1, p. 29) He felt that degenerative changes in the neck were causing Petitioner's complaints with extremes of motion. (RX1, p. 29) Regarding the shoulder, Dr. Reilly indicated that Petitioner's complaints were diffuse and not localized to the supraspinatus or labrum. (RX 1, p. 29) However, he did note that there was objective evidence on the MRI that is typically seen with repetitive overhead use. (RX1, p. 29)

Regarding causation, Dr. Reilly opined that if Petitioner was complaining of shoulder and neck pain immediately after the alleged incident, then there may be a work-related incident wherein Petitioner exacerbated a preexisting condition of cervical spondylosis, intrasubstance supraspinatus degenerative change, or AC arthritis and the possibility of a labral pathology. (RX1, p. 30) Otherwise, if Petitioner did not have these complaints initially, and he did not start complaining of the symptoms until three months later, then he did not believe that they were work-related. (RX1, p. 30) Dr. Reilly opined that falling onto the buttocks with a crate overhead would not cause the degenerative changes seen in the cervical spine but could exacerbate a pre-existing condition on a temporary basis if he had complaints right after the event. (RX1, p. 30). If there was a delay of two to three months in reporting complaints, then the neck and shoulder conditions would not be work-related. (RX1, p. 30) With respect to treatment, he indicated that it would be appropriate to treat Petitioner's neck with physical therapy and medication. (RX1, p. 30). As to the shoulder, Dr. Reilly did not see that any physical therapy was rendered to the shoulder, and that this would typically be treated with a corticosteroid injection, for diagnostic and therapeutic purposes, and a conditioning program. (RX1, p. 30) Dr. Reilly indicated that he would not jump right to arthroscopic surgery since he was not convinced that there was a labral pathology, and the intrasubstance tearing could not be treated with an arthroscope, as it would not be visualized. (RX1, p. 30). He noted that Petitioner may have an impingement process that could be treated in the future arthroscopically, but that he would not begin with surgery if he had no conservative care yet for the shoulder, which he did not see was evident. (RX1, p. 30)

Dr. Reilly issued a supplemental report on September 21, 2018, regarding the objective necessity for any activity limitations as related to the work accident. (RX1, p. 33) Dr. Reilly indicated that Petitioner would benefit from avoiding repetitive overhead lifting because it could potentially aggravate some degenerative changes seen on the MRI. (RX1, p. 33) He also recommended avoiding repetitive neck extension, as he had

degenerative changes in his cervical spine. (RX1, p. 33) These limitations were due to degenerative changes noted on the MRIs and not the work accident. (RX1, p. 34) Dr. Reilly indicated that if Petitioner responded to the recommended treatment, then he may not need further restrictions in his shoulder if he had improvement, however, the neck restrictions may need to be longstanding due to preexisting degenerative changes. (RX1, p. 34)

On December 21, 2018, Dr. Silver issued a response to Dr. Reilly's report. (PXF, p. 36) Dr. Silver noted that Dr. Reilly neglected to consider that Petitioner already had two cortisone injections to the right shoulder and had been undergoing eight months of therapy. (PXF, p. 36) Dr. Silver further indicated that the MRI showed a partial thickness rotator cuff tear and SLAP tear. (PXF, p. 36) Dr. Silver stated that conservative treatment had been exhausted and that Petitioner required arthroscopic surgery. (PXF, p. 36)

Dr. Reilly testified via an evidence deposition on May 21, 2019. (RX1) Dr. Reilly's testimony was consistent with his reports.

Petitioner's Testimony

Petitioner testified that his shoulder feels bad and he cannot carry heavy things. (Tr. 25) He testified that he is currently working as a forklift operator for United Scrap, working approximately 32 hours per week, four days a week, and earning $13.00/hour. (Tr. 25-27, 43) He testified that other forklift drivers earn more but have also been working there longer. (Tr. 44) He testified he started working for United Scrap approximately one year ago. (Tr. 35) Prior to working for United Scrap, Petitioner testified that he was doing landscaping work, driving a truck in Melrose Park for a season earning $9.00/hour and working 40 hours per week. (Tr. 35, 48)

Regarding activities of daily living, Petitioner testified that his sons help him. (Tr. 29) Petitioner initially testified that he is left hand dominant, but later testified that he is right hand dominant. (Tr. 30, 32) Regarding the injections, Petitioner testified that the two epidural injections were into his neck and those were the only injections he received. (Tr. 32) He testified that he did not receive any injections into the shoulder. (Tr. 33)

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

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries to the right shoulder and neck arising out of and in the course of his employment with Respondent on July 7, 2018. However, he did sustain accidental injuries to the low back. The description of the alleged accident provided by Petitioner, both at trial and to the examining and treating physicians, indicate that he fell backwards, onto his back/buttocks, holding boxes above his head. There is no indication that he struck his right shoulder or neck or fell onto his hand or outstretched arm.

It is well-established that Petitioner carries the burden of proving his case beyond a preponderance of the evidence. "Preponderance of the evidence is evidence, which is of greater weight, or more convincing than the evidence offered in opposition of it; it is evidence which as-a-whole shows that the fact to be proved is more probable than not." *Houck v. Nationwide Rail Service*, 11 IWCC 249*, citing Jones v. J. Rubin*, 02 IIC 142; [Note, the compensability holding in *Houck* was overturned at the Circuit Court on other grounds] *Parro v. Industrial Commission*, 630 N.E.2d 860 (1st Dist. 1993); *Central Rug & Carpet v. Industrial Commission*, 838 N.E.2d 39 (1st Dist. 2005).

Among the factors to be considered in determining whether a claimant has sufficiently carried his burden, is the credibility of the declarant. *See, Houck, supra*. Credibility is the quality of a witness, which renders their evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the witness's demeanor and any external inconsistencies with testimony and/or medical evidence.

A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment. 820 ILCS 305/2. Both elements must be present in order, to justify compensation. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478 (1989). The phrase "in-the course of" refers to the time, place, and circumstances under which an incident occurred. *Orsini v. Industrial Commission*, 117 Ill. 2d 38 (1987). The words "arising out of" refer to the origin or cause of the incident and presuppose a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52 (1989).

Petitioner testified and the records reflect that on February 22, 2018, he was putting boxes on a skid, when he was hit from behind, at his feet, by another employee with a hand jack, causing Petitioner to fall backwards. He reported that he was holding the boxes above shoulder level and was still holding them when he fell backward. There was no evidence presented indicating that he struck his right shoulder or neck or fell onto his hand or outstretched arm.

The Arbitrator finds the opinions of Dr. Reilly to be the most credible here. Dr. Reilly noted that just holding a box overhead and falling onto the buttocks would not typically cause all the findings noted in Petitioner's right shoulder, which are usually degenerative in nature and happen over time with repetitive use and overhead activities. Dr. Reilly also noted that falling onto the buttocks with a crate overhead would not cause the degenerative changes seen in the cervical spine but could exacerbate a pre-existing condition on a temporary basis if he had complaints right after the event. However, if there was a delay of two to three months in reporting neck and shoulder complaints then the neck and shoulder conditions would not be work-related. The Arbitrator notes that there were no complaints involving the right shoulder or neck until Petitioner presented for medical care with La Clinica approximately three months after the February 22, 2018, work accident. Additionally, the Arbitrator notes that while an MRI of the right shoulder and cervical spine was ordered by La Clinica, there is nothing in the records to support the need for the right shoulder MRI. The Arbitrator notes that Petitioner was diagnosed by Dr. Yehya as having cervical, thoracic, and lumbar sprains/strains as well as cervical radiculopathy. There is no mention of the right shoulder. Further, the chiropractic records note that Petitioner was treating for his neck and shoulder even though the treatment modalities appeared to be focused on Petitioner's neck and low back.

Regarding Petitioner's neck treatment, the Arbitrator again relies on Dr. Reilly's opinions that while the mechanism of injury could aggravate Petitioner's pre-existing cervical degenerative condition, it would have done so on a temporary basis. However, as again explained by Dr. Reilly, if there was a delay of two to three months in reporting neck complaints, then it would not be related to the February 22, 2022, work accident. The Arbitrator notes that the medical records do not mention a neck condition until three months after the accident.

Based on the evidence, case law, and weighing the credibility of Petitioner, the Arbitrator finds that Petitioner failed to sustain his burden of proof by a preponderance of evidence that he sustained accidental injuries to the right shoulder and neck as a result of the February 22, 2018, work accident. The Arbitrator further finds that Petitioner sustained his burden of proof by a preponderance of the evidence that he sustained accidental injuries to his low back as a result of the February 22, 2018, work accident.

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

Based on the Arbitrator's finding on accident above, the Arbitrator finds that Petitioner failed to establish that his current condition of ill-being regarding his right shoulder and neck are causally related to the February 22, 2018, work accident.

The Arbitrator notes that Dr. Silver diagnosed Petitioner with a partial thickness tear of the rotator cuff and a SLAP tear of the labrum. However, Dr. Reilly opined that if Petitioner's right shoulder complaints did not start until three months after the accident, then the right shoulder condition was not work-related. He also explained that just holding a box overhead and falling onto the buttocks would not typically cause all the findings noted in the shoulder, which are usually degenerative in nature and happen over time with repetitive use and overhead activities. The Arbitrator notes that Petitioner made no mention of any right shoulder issues until about three months after the February 22, 2018, work accident. The Arbitrator finds the opinion of Dr. Reilly to be the most credible here.

Regarding the neck, the Arbitrator notes that Dr. Templin found that Petitioner suffered an aggravation of his lumbar degenerative condition as a result of the February 22, 2018, work accident. Yet, he recommended a C7 transforaminal epidural steroid injection with no diagnosis regarding the neck. The Arbitrator also notes that the description of the accident that Dr. Templin has differs from the one testified to by Petitioner and provided to Dr. Reilly and Concentra. Therefore, the Arbitrator relies on Dr. Reilly's findings and opinions on the matter, which are that while the mechanism of injury could aggravate Petitioner's pre-existing cervical degenerative condition, it would have done so on a temporary basis and a delay of two to three months in any neck symptoms would indicated that Petitioner's neck condition is not causally related to the February 22, 2018, work accident.

Regarding Petitioner's lumbar spine, the Arbitrator notes that, per the medical records, Petitioner suffered a back strain on February 22, 2018, which had resolved by May 1, 2018, when Petitioner was released to return to full duty.

Based on the above, the Arbitrator finds that Petitioner's current conditions of ill-being in the right shoulder and neck are not causally related to the February 22, 2018, work accident. The Arbitrator further finds that Petitioner's condition of ill-being regarding the lumbar spine was causally related to the February 22, 2018, work accident up through May 1, 2018.

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

Based on the Arbitrator's findings regarding accident and causation above, the Arbitrator finds that Respondent is liable for medical expenses incurred in the treatment of Petitioner's lumbar spine following the February 22, 2018, work accident through May 1, 2018.

The Arbitrator notes that the medical expenses in dispute are for medical expenses incurred after May 1, 2018, and for the treatment of Petitioner's neck and right shoulder. The Arbitrator finds that Respondent is not liable for the payment of these outstanding medical bills.

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

Based on the Arbitrator's findings regarding accident and causation above, the Arbitrator finds that Petitioner is not entitled to the prospective medical care in the form of right shoulder surgery as recommended by Dr. Silver.

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:

Petitioner claims he is entitled to temporary total disability benefits from February 23, 2018, through present. The Arbitrator notes that the parties stipulated that Respondent paid $8,067.68 in temporary total disability benefits for the period from April 18, 2018, to May 1, 2018, and May 9, 2018, to September 25, 2018.

For a claimant to be entitled to temporary total disability benefits under the Illinois Workers' Compensation Act (Act), the claimant must prove he is "totally incapacitated for work by reason of the illness attending the injury." *Mt. Olive Coal Co. v. Industrial Commission*, 129 N.E. 103, 104 (Ill. 1920). The Arbitrator notes that according to the medical records, Petitioner was working transitional duty/regular duty and had been adhering to the work restrictions as prescribed until the April 17, 2018, appointment. The Arbitrator declines to award benefits from February 23, 2018, to April 17, 2018, as Petitioner was working during this time for Respondent.

Petitioner was then provided with a full duty release on May 1, 2018, before being taken off work on May 9, 2018. The Arbitrator declines to award benefits from May 1, 2018, to May 9, 2018.

Thereafter, Respondent paid benefits until September 25, 2018, when it received Dr. Reilly's IME report.

Lastly, Petitioner testified that he worked for a season (4-5 months) doing landscaping work in 2020, and is currently working for United Scrap, where he has been working for approximately one year. Therefore, the Arbitrator finds that Petitioner was not totally incapacitated from working during these periods and declines to award temporary total disability benefits for the periods during which Petitioner was working.

Based on the above and the Arbitrator's findings regarding accident and causation, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from April 18, 2018, through May 1, 2018, which Respondent has already paid and is entitled to a credit for paying.

WITH RESPECT TO ISSUE (O), THE NATURE AND EXTENT OF PETITIONER'S DISABLITY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current

edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives this factor no weight.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a warehouse employee at the time of the accident and that he was able to return to return to work for a landscaping company, has worked driving a truck and now works as a forklift driver for a different employer. The Arbitrator gives this factor some weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 48 years old at the time of the accident. The Arbitrator gives this factor little weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner currently works 32 hours per week, earning $13 an hour with the possibility of a raise based on seniority with the company. The Arbitrator gives this factor some weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner initially diagnosed with a lumbar strain for which he was released to full duty on May 1, 2018. The Arbitrator also notes that while Petitioner currently complains of neck and right shoulder problems, these issues did not arise until three months after the February 22, 2018, work accident. The Arbitrator gives this factor significant weight.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005387
Case Name	Guadalupe Ruiz v. Nordstrom Rack
Consolidated Cases	20WC003441;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0213
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Robert Smith

DATE FILED: 5/8/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GUADALUPE RUIZ,

Petitioner,

vs. NO: 19WC005387

NORDSTROM RACK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses (including prospective), temporary total disability, "Current Condition of Ill-being," and "Payment of TPD benefits," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes clarifications and corrections as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We clarify that we are affirming the Arbitrator's finding regarding causation without relying on the opinion of Dr. Brian Cole whose December 2, 2019 report is confusing. *Rx2, T.627*. His assessment was "probable left upper extremity cervical radiculopathy" and he recommended a cervical spine evaluation and restrictions "due to the cervical spine component of this problem." He also specifically wrote, "She has pain up into the left side of the neck, trapezius muscles, and pain that radiates down the left arm, which is more consistent with a radicular problem of nerve origin. I do find that the claimant's condition, however, on a more likely than not basis, is related to the injury in question, but it is my opinion that her left shoulder is at MMI and does not need any further treatment from an orthopedic standpoint." However,

later in the report, Dr. Cole specifically disclaimed any opinion regarding the cervical spine by writing, "Further care may be necessary, but this would not be related to the left shoulder itself, but rather the cervical spine. The cervical spine is out of my scope of practice, and I will not comment on causal relationship nor need for specific further care with regard to the cervical spine." *Id. at 5, T.631*. Therefore, on page 4 in the fifth sentence of issue #1, we strike the phrase "and Respondent's other IME, Dr. Cole."

We also correct the following scrivener's errors:

1. Page 1, last paragraph, 1st sentence: strike "2018" and replace with "2019"
2. Page 2, first paragraph, 2nd sentence: strike "back" and replace with "neck"
3. Page 2, second paragraph, 2nd sentence: strike "join" and replace with "pain"
4. Page 3, second paragraph, 2nd sentence: strike "April 2" replace with "April 4"
5. In the "Findings" section, change Petitioner's age from "4" to "44" on the date of accident.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2023 is hereby affirmed and adopted with the clarifications and corrections noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 8, 2024
SE/
O: 3/26/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005387
Case Name	Guadalupe Ruiz v. Nordstrom Rack
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Robert Smith

DATE FILED: 3/1/2023

/s/Gerald Granada, Arbitrator

Signature

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 28, 2023 4.94%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GUADALUPE RUIZ
Employee/Petitioner

v.

NORDSTROM RACK
Employer/Respondent

Case # **19** WC **005387**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **1/19/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/14/18**, 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 $**29,643.12**; the average weekly wage was $**570.06**.

On the date of accident, Petitioner was **4** 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 $**10,858.85** for TTD, $**2,616.73** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**13,475.58**.

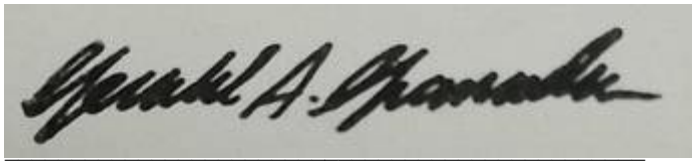
ORDER

- *Respondent shall pay Petitioner temporary total disability benefits in the amount of **$380.04**/week for **31-4/7** weeks, for the period of **May 15, 2018 through May 17, 2018; June 14, 2018 through August 20, 2018; and May 17, 2019 through September 22, 2019**, which is the period of temporary total disability for which compensation is due. Respondent shall receive a credit for all temporary total disability benefits paid.*
- *Respondent shall pay and has paid temporary partial disability benefits from **August 21, 2018 through August 31, 2018 and September 23, 2019 through January 31, 2020**, for **20-3/7** weeks, which is the period of temporary partial disability benefits which was due. Respondent shall receive a credit for all temporary partial disability benefits paid.*
- *Respondent shall authorize and provide payment for the medical treatment, including the radio frequency ablation, recommended by Petitioner's treating physicians, Dr. Sokolowski. The authorization shall be in writing and forwarded to Petitioner's attorney.*

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

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

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



Signature of Arbitrator Gerald Granada

March 1, 2023

FINDINGS OF FACT

This case involves Petitioner Guadalupe Ruiz, who alleges injuries sustained while working for the Respondent Nordstrom Rack on May 14, 2018 (19WC005387) and January 29, 2020 (20WC003441). This decision is on the May 14, 2018 accident in which the Respondent is disputing the following issues: 1) causation; 2) TTD; 3) TPD; and 4) prospective medical treatment. Petitioner testified at hearing via a Spanish interpreter.

Petitioner was employed by Respondent as a ground salesperson and in makeup on May 14, 2018. She had been employed by Respondent for 20 years. Her job duties for Respondent as a salesperson involved lifting, carrying, and hanging clothing. She also climbed step stools and lifted boxes overhead. She testified that on May 14, 2018, she injured her left arm when it was caught and pulled forward as she was pushing a shoe cart. Respondent does not dispute this accident.

On May 14, 2018, Petitioner initially sought medical treatment at Elmhurst Occupational Health, where she had noted complaints of pain in her left shoulder and lateral portion of her neck. (PX 1) She was given ibuprofen, taken off work and provided physical therapy from May 16, 2018 through June 6, 2018. (PX 2)

On May 24, 2018, Petitioner saw Dr. Tu who ordered and MRI on May 31, 2018 that showed grade I acromioclavicular joint sprain, extensive marrow edema, SLAP tear, nondisplaced tear of the labrum, mild subacromial bursitis and adhesive capsulitis. (PX 4) Dr. Tu noted that Petitioner had symptoms in her neck radiating to her hand and he recommended a cervical MRI. (PX 3). The cervical MRI revealed mild multilevel degenerative changes, C4-5 mild left neural foraminal stenosis, C6-7 mild left neural stenosis and C5-6 spinal canal stenosis. (PX 5) Dr. Tu took Petitioner off work. (PX 3). On June 28, 2018, Dr. Tu set forth an assessment of persistent left shoulder pain, possible labral tear, secondary impingement and possible cervical radiculopathy. (PX 3). He performed a cortisone injection to the left shoulder. (PX 3). Dr. Tu referred Petitioner to a pain management specialist. (PX 3). On July 12, 2018, Dr. Tu referred Petitioner to Dr. Belmonte. (PX 3).

On July 13, 2018, Dr. Belmonte examined Petitioner. (PX 6) Dr. Belmonte noted that Petitioner had left shoulder pain and left upper extremity radiculopathy, and assessed: cervical radiculopathy, cervical spinal stenosis, cervical spondylosis, cervicalgia, chronic migraine, pain radiating to the left shoulder, primary osteoarthritis of the left shoulder, labral tear and displacement of cervical intervertebral discs. He recommended Medrol dose pack. Dr. Belmonte noted that Petitioner was experiencing neck and upper extremity radiculopathy due to left C4-C7 foraminal stenosis following her work injury. He stated that she also had spondylosis and facet arthropathy that is contributing to the pain as well. He recommended an epidural steroid injection.

On July 15, 2018, Petitioner saw Dr. Martuscillo at Higher Health Chiro, who noted that Petitioner had decreased strength in her grip and weakness in the left upper extremity. (PX 7).

On May 17, 2018, Petitioner underwent left shoulder surgery performed by Dr. Tu at Loyola University Health. (PX 8). Dr. Tu performed a left shoulder arthroscopic subacromial decompression, distal clavicle excision and extensive debridement. The post-operative diagnosis was left shoulder impingement, AC joint arthropathy, partial thickness tear of the supraspinatus tendon, anterior, superior, posterior labral tearing. Petitioner underwent physical therapy at Total Rehab post-surgery from May 28, 2019 through August 19, 2019. She followed up with Dr. Belmonte for her neck condition.

On July 30, 2019, Dr. Belmonte performed a C5-C6 and C6-C7 facet joint injection. (PX 6) Petitioner reported feeling great with less back aching and improved range of motion following the injection. On August 20, 2019, Dr. Belmonte performed medial branch blocks on Petitioner. Dr. Belmonte noted that Petitioner had an 80% improvement from pain on September 20, 2019. The pain returned to baseline. Dr. Belmonte recommended radio frequency ablation. (PX 6)

On October 17, 2019, Petitioner saw Dr. Sokolowski for her neck pain on referral from Dr. Tu. (PX 3) Dr. Sokolowski noted Petitioner had impingement signs, limited internal rotation and C5-C7 facet joint join with neck extension. He assessed Petitioner with left shoulder pain, cervical pain and cervical radiculopathy and recommended an EMG and radio frequency ablation. (PX 11). The November 5, 2019 EMG EMG revealed muscle fiber membrane electronical instability that should be considered to determine early cervical radiculopathy, electrodiagnostic evidence of median neuropathy consistent with carpal tunnel syndrome and no electrodiagnostic evidence of cervical radiculopathy or brachial plexopathy. (PX 12)

On December 3, 2019, Petitioner was examined by Dr. Soneru for her hand. (PX 13). Dr. Soneru documented that Petitioner had mid-lower cervical radiculopathy demonstrated in the EMG. On January 7, 2020, Dr. Soneru opined that Petitioner's clinical examination was not consistent with carpal tunnel syndrome and was likely due to cervical radiculopathy. Dr. Soneru recommended that Petitioner continue treatment with Dr. Sokolowski.

On December 19, 2019, Petitioner was last examined by Dr. Tu. (PX 3). He stated that Petitioner's current symptoms are related to her cervical spine. He noted an impression of left shoulder post-surgery, left shoulder resolved adhesive capsulitis and possible cervical radiculopathy. He documented that Petitioner had reached maximum medical improvement for the left shoulder condition, and that she should continue to follow up with Dr. Sokolowski.

Petitioner continued to follow up with Dr. Sokolowski, who ordered an MRI on February 9, 2020 that revealed multilevel spondylotic changes from C4-C7, multilevel posterior herniation impinging the ventral thecal sac from C4-C6 and straightening of the normal cervical lordosis that may represent a muscle spasm or strain. (PX 14). The MRI also revealed C4-C5 facet arthropathy and C5-C6 facet arthropathy. On March 19, 2020, Dr. Sokolowski continued to recommend an RFA, physical therapy, and work restrictions for Petitioner. Dr. Sokolowski testified via evidence deposition on September 12, 2022. He diagnosed Petitioner with ongoing cervical symptoms at C5 to C7 and that based on Petitioner's pain management history, she would be a good candidate for an RFA. He further opined that Petitioner's cervical condition was causally connected to her May 14, 2018 accident, and that her medical treatment had been reasonable and necessary. Dr. Sokolowski recommended continued work restrictions and indicated that Petitioner had not yet reached MMI.

On January 10, 2019, Petitioner underwent an IME with Dr. Cole. (RX 1) Dr. Cole assessed Petitioner with left shoulder rotator cuff tendinitis, strain, and left shoulder myofascial pain, which were related to the May 14, 2018 incident. He recommended surgery for the left shoulder condition. He indicated that Petitioner's subjective complaints were consistent with the objective findings that were all causally connected to the work-related accident of May 14, 2018, for which Petitioner had not reached maximum medical improvement. Dr. Cole prepared a second report dated December 2, 2019 in which he did not recommend further treatment of the left shoulder; however, he recommended an evaluation of the cervical spine. He stated that the left shoulder condition was related to the injury for which Petitioner had reached maximum medical improvement as it relates to the left shoulder. However, he advised that Petitioner required further treatment and restrictions

related to the cervical spine condition. Dr. Cole noted that Petitioner required further evaluation of the cervical spine and pain management. He explained that ongoing pain management would be reasonable and related to the cervical spine and the injury in question. (RX 2).

On February 4, 2020, Dr. Butler conducted his initial exam of Petitioner at the request of Respondent for her neck and back. (RX 3) He diagnosed Petitioner with a cervical sprain, but that Petitioner had no objective findings or cervical radiculopathy. He opined that there was no causation between the cervical strain and the work injury, and that the cervical injections or the RFA were not reasonable or necessary. He did not recommend any further treatment. Dr. Butler testified via evidence deposition on November 7, 2022, which was consistent with his medical reports. (RX 7) In his deposition, Dr. Butler admitted that he was at a disadvantage because he did not review the actual MRI films, which he assumed the findings were fairly mild. He would defer to someone who read the film and was handicapped as it related to the instant case. (RX 7 at 59).

Surveillance videos and reports were admitted into evidence. (RX 10-13). The video of Petitioner for April 2, 6 and 7, 2022 was admitted into evidence. (RX 10-11). During this period of time, Petitioner was filmed for 8.5 minutes. (RX 10-11). On April 4, 2022, Petitioner exited her house with some trash and went entered her car. (RX 10-11). Petitioner was not observed further on that date. (RX 10-11). On April 6, 2022, Petitioner walked around her house, took out trash and went to her car. (RX 10-11). On April 7, 2022, Petitioner exited her car with a small bag. (RX 10-11). Surveillance for June 23, 24 and 28, 2022 was admitted into evidence. (RX 12-13). The first date on the report was listed April 4, 2022. (RX 12-13). That is inconsistent with the video, which stated that the date was June 23, 2022. (RX 12-13). Petitioner unloaded groceries from her car. (RX 12-13). Petitioner took her daughter to the Juice Bar. (RX 12-13). Petitioner also walked around her porch. (RX 12-13). On June 24, 2022, Petitioner left in her car and was not observed any further. (RX 12-13). On June 28, 2022, Petitioner drove to the Juice Bar and remained in her car. (RX 12-13). Petitioner took out her garbage and went to her doctor appointment. (RX 12-13). Petitioner went to the Juice Bar and dropped off someone at the mall. (RX 12-13). Petitioner also went to the flower shop. She bought a small plant and closed her car door. (RX 12-13).

Petitioner returned to work within restrictions. Petitioner was offered work with the 5 pounds lifting restriction on June 23, 2020. (RX 15). She signed the letter and accepted the offer of light duty work on June 26, 2020. (RX 15). The restrictions were accommodated by Respondent. On January 29, 2020, Petitioner was working in the jewelry department. Petitioner sustained a work-related accident involving her back on January 29, 2020. That case is pending under a separate claim. Petitioner was able to return to work with Respondent within her work restrictions in which she helps people and unloads clothes. Petitioner testified that she experiences pain in her back and neck while working. She has to take breaks. Petitioner testified that she is currently working 24 hours per week. Petitioner testified that she experiences pain in her neck, for which she rests, ices and stretches. Petitioner also has pain in her left shoulder. Petitioner testified that prior to May 14, 2018 she had not sustained any accidents or injuries involving her neck or left shoulder. Further, prior to May 14, 2018 Petitioner had not received any medical treatment for her neck or left shoulder. She testified that she would like to undergo the RFA recommended by Dr. Sokolowski.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence, which all indicate that Petitioner's cervical and left shoulder conditions are related to her May 14, 2018 work accident. The Arbitrator notes that Dr. Sokolowski, Dr. Belmonte and Dr. Cole (Respondent's IME) all agree that Petitioner's left shoulder and its related treatment are causally connected to the Petitioner's May 14, 2018 accident. Respondent's dispute on this issue is focused on the Petitioner's cervical condition based on the IME opinion of Dr. Butler. However, Dr. Butler's opinions on this issue are notably outweighed by the treating physicians and Respondent's other IME, Dr. Cole, who all indicated petitioner's cervical condition was also causally connected. Petitioner credibly testified to her physical complaints in her left shoulder and neck following her undisputed work accident on May 14, 2018. There was no evidence of any prior complaints or medical treatment to those body parts, nor was there any evidence of any intervening incidents that might break the causation chain. Given these facts, coupled with the preponderance of the medical evidence, the Arbitrator concludes that the Petitioner's current condition of ill-being in her left shoulder and cervical spine are causally connected to her May 14, 2018 work accident.

2. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was temporarily totally disabled from May 15, 2018 May 15, 2018 through May 17, 2018, June 14, 2018 through August 20, 2018, May 17, 2019 through September 22, 2019. This is supported by the Petitioner's unrebutted testimony and the medical evidence showing Petitioner was medically restricted from returning to work for these time periods and Respondent either did not or could not accommodate Petitioner's restrictions at the time. Respondent does not dispute that Petitioner is entitled to temporary total disability benefits for these periods. Accordingly, the Arbitrator awards payment of temporary total disability benefits from May 15, 2018 May 15, 2018 through May 17, 2018, June 14, 2018 through August 20, 2018, May 17, 2019 through September 22, 2019. Respondent shall receive a credit for any and all TTD benefits it has paid toward these time periods and the parties stipulate that all temporary total disability benefits were paid in connection with the instant case.

3. Regarding the issue of TPD, the Arbitrator finds that the Petitioner is entitled to payment of temporary partial disability benefits for the period of August 21, 2018 through August 31, 2018 and September 23, 2019 through January 31, 2020. This is supported by the Petitioner's unrebutted testimony and the medical evidence showing Petitioner was medically restricted from returning to work full duty for these time periods. Accordingly, the Arbitrator awards Petitioner TPD benefits for these time periods. Respondent does not dispute that Petitioner was entitled to temporary partial disability benefits for this period and shall receive a credit for any TPD benefits it has paid toward these time periods.

4. Regarding the issue of prospective medical care and consistent with the findings above, the Arbitrator further finds that the Petitioner's request for prospective medical care is reasonable and necessary in addressing her work-related cervical spine condition stemming from her undisputed May 14, 2018 work accident. This finding is supported by Petitioner's unrebutted testimony and the preponderance of the medical evidence. The Arbitrator finds the opinions of Dr. Sokolowki persuasive on this issue. Although Respondent relies on their IME Dr. Butler on this issue, his opinions are outweighed by the medical evidence, including Respondent's other IME, Dr. Cole. Accordingly, Respondent shall authorize and pay for the medical treatment proposed by Dr. Sokolowski, including the radio frequency ablation.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC003441
Case Name	Guadalupe Ruiz v. Nordstrom Rack
Consolidated Cases	19WC005387;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0214
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Robert Smith

DATE FILED: 5/8/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GUADALUPE RUIZ,

Petitioner,

vs. NO: 20WC003441

NORDSTROM RACK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses (including prospective), temporary total disability, and "Current Condition of Ill-being," and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes corrections as outlined below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

We correct the following scrivener's errors:

1. Page 1, paragraph 4, 2nd to last sentence: strike "May 19" and replace with "May 29"
2. Page 2, 2nd paragraph, 2nd sentence: strike "April 2" and replace with "April 4"
3. Page 3, Conclusions of Law #2, 1st sentence: strike "arm" and replace with "lumbar spine"

4. Page 3, Conclusions of Law #3: strike "November 14, 2022" and replace with "November 14, 2020."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed June 15, 2023 is hereby affirmed and adopted with the corrections noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,000.00. 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.

May 8, 2024

SE/
O: 3/26/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC003441
Case Name	Guadalupe Ruiz v. Nordstrom Rack
Consolidated Cases	19WC005387;
Proceeding Type	
Decision Type	***Corrected*** Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Gerald Granada, Arbitrator

Petitioner Attorney	Catherine Krenz Doan
Respondent Attorney	Robert Smith

DATE FILED: 6/15/2023

/s/Gerald Granada, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

GUADALUPE RUIZ
Employee/Petitioner

v.

NORDSTROM RACK
Employer/Respondent

Case # **20** WC **003441**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **1/19/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/29/20**, 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 $**22,889.36**; the average weekly wage was $**440.18**.

On the date of accident, Petitioner was **46** 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 $**10,270.04** for TTD, $**513.38** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,783.42**.

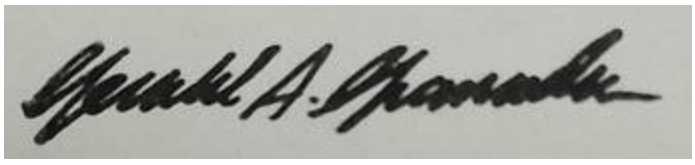
ORDER

- Respondent shall pay Petitioner temporary total disability benefits in the amount of **$357.67**/week for **67-4/7** weeks, for the period of **May 4, 2020 through June 25, 2020; July 12, 2020 through November 14, 2020; December 29, 2021 through January 1, 2022; and February 13, 2022 through July 16, 2022**, which is the period of temporary total disability for which compensation is due. Respondent shall receive a credit for any TTD paid for this period.
- Respondent shall pay temporary partial disability benefits from **February 1, 2020 through April 11, 2020; January 2, 2022 through February 12, 2022; and July 17, 2022 through September 24, 2022**, for **21** weeks, which is the period of temporary partial disability benefits which was due. All temporary partial disability benefits were paid for the period of February 1, 2020 through April 11, 2020. Respondent shall pay and additional **$1,986.68** for the remaining periods of temporary partial disability due.
- Respondent shall authorize and provide payment for the medical treatment, including the lumbar fusion, recommended by Petitioner's treating physicians, Dr. Darwish. The authorization shall be in writing and forwarded to Petitioner's attorney.

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

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

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



Signature of **Arbitrator Gerald Granada** **Date: 6/14/23**

June 15, 2023

FINDINGS OF FACT

This case involves Petitioner Guadalupe Ruiz, who alleges injuries sustained while working for the Respondent Nordstrom Rack on May 14, 2018 (19WC005387) and January 29, 2020 (20WC003441). This decision is on the January 29, 2020 accident in which the Respondent is disputing the following issues: 1) causation; 2) TTD; 3) TPD; and 4) prospective medical treatment. Petitioner testified at hearing via a Spanish interpreter.

On January 29, 2020, Petitioner was working for Respondent in the jewelry department. On that day, Petitioner was unloading a garbage can with clothes that was heavy. As she was bent down, trying to move the garbage can, its wheels were stuck on the rug, and she felt pain in her back. Petitioner testified that after the accident, she could not walk and felt pain in her back. At the time of her accident, Petitioner was working under restrictions provided by Dr. Sokolowski for an earlier accident. (See 19WC005387)

Petitioner initially sought medical attention at Elmhurst Occupational Health, where she was examined and subsequently released to return to work with restrictions. (PX 16)

On February 26, 2020, Petitioner saw Dr. Lorenz. (PX 17) Dr. Lorenz noted that Petitioner had lumbar back pain and left leg radiculopathy beginning after work related accident of January 29, 2020 and recommended an MRI of the lumbar spine along with work restrictions. The March 5, 2020 revealed an L4-L5 global disc bulge, L5-S1 grade 1 anterolisthesis with global disc bulge and superior imposed right paracentral disc protrusion and annular tear. (PX 18). The protrusion abutted the existing right S1 nerve root with no evidence of nerve displacement and bilateral neural foraminal narrowing. On April 13, 2020, Dr. Lorenz assessed Petitioner with a central disc herniation, L5-S1 annular tear and acute back pain, for which he recommended an epidural steroid injection at L5-S1, that was administered on May 19, 2020. On July 13, 2020, Dr. Lorenz recommended an FCE and referred her to Dr. Jain for pain management. (PX 19)

On July 20, 2020, Petitioner saw Dr. Jain on July 20, 2020, who provided an assessment of lumbar facet syndrome, discogenic pain and lumbosacral radiculopathy directly related to her injury. (PX 20) He further opined that Petitioner had an underlying degenerative condition that as a result of the injury was rendered symptomatic and in need of treatment that was accelerated, precipitated and aggravated. He noted that a delay in authorization could adversely affect the outcome in terms of habituation to medication, psychological decline and affliction; and decreased the likelihood of functional return to work. (PX 20) Dr. Jain recommended another ESI, which Petitioner underwent along with a selective nerve root block on September 30, 2020. Dr. Jain documented a decrease in the pain and subsequently recommended an L3-L5 medial branch block and physical therapy. Dr. Jain last saw Petitioner on November 11, 2020.

Petitioner was examined by Dr. Lorenz on December 7, 2020. (PX 17). He recommended that Petitioner follow the recommendations of Dr. Jain. He did not find that Petitioner was a surgical condition.

On February 16, 2021, Petitioner underwent a ESI at L5-S1 performed by Dr. Said. (PX 19) Dr. Said noted that Petitioner had radiating pain to the knee secondary to degenerative disease and lumbar radiculopathy. He also noted that there was an annular tear at L5-S1 with protrusion abutting the S1 nerve root.

Petitioner was last examined by Dr. Lorenz on March 22, 2021. (PX 17). He noted that Petitioner was not a surgical candidate and recommended an FCE.

Petitioner testified that between March 22, 2021 and August 26, 2021, she continued to experience pain in her back. Petitioner was examined by Dr. Darwish on August 26, 2021. (PX 21). Dr. Darwish took over medical

care from Dr. Lorenz because Dr. Lorenz retired. Dr. Darwish noted that Petitioner had ongoing pain in her back, and he assessed Petitioner with spondylolisthesis, herniated lumbar disc and lumbar radiculopathy, for which he recommended a lumbar fusion. Dr. Darwish continued to recommend work restrictions and the lumbar fusion throughout his continued treatment of Petitioner. Petitioner also participated in physical therapy at Premier Physical Therapy. Dr. Darwish last saw Petitioner on November 29, 2022, at which time she complained of low back pain that radiates to the left lower extremity and to the foot. Petitioner took meloxicam for the pain. Dr. Darwish diagnosed Petitioner with spondylolisthesis of the lumbar region, lumbar radiculopathy and other intervertebral disc displacement of the lumbar region, and again recommended the lumbar fusion and work restrictions. (PX 21). Dr. Darwish testified via evidence deposition on September 15, 2022. (PX 24) His testimony was consistent with his medical reports and he explained his reason for recommending the fusion surgery was based on Petitioner's continued symptoms and no improvement with conservative care for over a year. He explained that Petitioner's action of bending over and twisting along with pushing something heavy can squeeze down on the disc and cause a disc protrusion and defect or tearing in the annulus.

At the request of Respondent, Petitioner was examined by Dr. Butler on several occasions for her neck and back. Petitioner was examined by Dr. Butler for her back on October 13, 2020. (RX 4). Dr. Butler gave a diagnosis of lumbar strain with preexisting spondylolisthesis at L5-S1. He opined that there was no causal relationship between the work accident and the injury. He confirmed that Petitioner may have sustained a lumbar strain initially, but the spondylolisthesis had no nerve compression. He did not recommend any further treatment. He had not reviewed the MRI study. He believed that Petitioner had reached maximum medical improvement. (RX 4). On November 25, 2020, Dr. Butler reviewed the MRI film. (RX 5). He found minimal dissection at L5-S1 with a small annular tear at L5-S1, 3 mm of instability and no obvious pars defect – all of which did not change his prior opinions. On January 21, 2022, Dr. Butler again examined Petitioner and diagnosed her with a lumbar strain with symptom magnification, and trace lumber spondylolistheses at L5-S1 without nerve compression. (RX 6) He did not recommend surgery because of the Petitioner's symptom magnification, non-correlating radicular pain, mild spondylolisthesis and lack of any herniation. He did not believe there was any causal connection between Petitioner's condition and her alleged work accident. Dr. Butler testified via evidence deposition on November 7, 2022. (RX 7) His testimony was consistent with his medical reports. Dr. Butler testified that he believed Petitioner's MRI was normal as he did not see any herniation or nerve compression. He disagreed with the radiologist's reading of MRI. He believed that Petitioner sustained a back strain from moving a barrel and that strain should have resolved a few weeks afterwards.

Surveillance videos and reports were admitted into evidence. (RX 10-13). The video of Petitioner for April 2, 6 and 7, 2022 was admitted into evidence. (RX 10-11). During this period of time, Petitioner was filmed for 8.5 minutes. (RX 10-11). On April 4, 2022, Petitioner exited her house with some trash and went entered her car. (RX 10-11). Petitioner was not observed further on that date. (RX 10-11). On April 6, 2022, Petitioner walked around her house, took out trash and went to her car. (RX 10-11). On April 7, 2022, Petitioner exited her car with a small bag. (RX 10-11). Surveillance for June 23, 24 and 28, 2022 was admitted into evidence. (RX 12-13). The first date on the report was listed April 4, 2022. (RX 12-13). That is inconsistent with the video, which stated that the date was June 23, 2022. (RX 12-13). Petitioner unloaded groceries from her car. (RX 12-13). Petitioner took her daughter to the Juice Bar. (RX 12-13). Petitioner also walked around her porch. (RX 12-13). On June 24, 2022, Petitioner left in her car and was not observed any further. (RX 12-13). On June 28, 2022, Petitioner drove to the Juice Bar and remained in her car. (RX 12-13). Petitioner took out her garbage and went to her doctor appointment. (RX 12-13). Petitioner went to the Juice Bar and dropped off someone at the mall. (RX 12-13). Petitioner also went to the flower shop. She bought a small plant and closed her car door. (RX 12-13).

Petitioner returned to work within restrictions. Petitioner was offered work with the 5 pounds lifting restriction on June 23, 2020. (RX 15). She signed the letter and accepted the offer of light duty work on June 26, 2020. (RX 15). The restrictions were accommodated by Respondent. On January 29, 2020, Petitioner was working in the jewelry department. Petitioner sustained a work-related accident involving her back on January 29, 2020. That case is pending under a separate claim. Petitioner was able to return to work with Respondent within her work restrictions in which she helps people and unloads clothes. Petitioner testified that she experiences pain in her back and neck while working. She has to take breaks. Petitioner testified that she is currently working 24 hours per week. Petitioner denied any prior injuries or medical treatment to her back. She suffered a work-related accident involving her neck on May 14, 2018 (see 19WC005387). She continues to experience back pain and avoids heavy lifting. She sometimes walks with assistance. Petitioner testified that she wants to undergo the surgery recommended by Dr. Darwish.

CONCLUSIONS OF LAW

1. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony and the preponderance of the medical evidence, which all indicate that Petitioner's back condition is related to her January 29, 2020 work accident. The Arbitrator notes that Dr. Jain, Dr. Lorenz and Dr. Darwish all opine that Petitioner's back condition and its related treatment are causally connected to the accident in question. Respondent's dispute on this issue is based on the IME opinions of Dr. Butler, who opined that Petitioner sustained a back strain that should have resolved a few weeks after her accident, but that her current condition of ill-being is not related to her original accident. Dr. Butler goes on to dispute the need for surgery because of Petitioner's symptom magnification and his belief that her MRI was essentially normal as he disputed the radiologist's conclusions regarding the MRI results. However, Dr. Butler's opinions on this issue are notably outweighed by the evidence from the treating physicians. All the treating physicians have indicated that Petitioner's injury caused an aggravation of a pre-existing condition that has resulted in lumbar radiculopathy, lumbar spondylolisthesis and a herniated lumbar disc at L5-S1 with an annular tear abutting the S1 nerve root. The Arbitrator finds persuasive the testimony of Dr. Darwish in explaining how the mechanism of injury most likely caused the Petitioner's spinal condition, which is causing her current symptomology and need for surgery. Petitioner credibly testified to her physical complaints in her lumbar back and left leg following her undisputed work accident on January 29, 2020. There was no evidence of any prior complaints or medical treatment to her back, nor was there any evidence of any intervening incidents that might break the causation chain. Given these facts, coupled with the preponderance of the medical evidence, the Arbitrator concludes that the Petitioner's current condition of ill-being in her lumbar spine are causally connected to her January 29, 2020 work accident.

2. Consistent with the findings above, the Arbitrator further finds that the Petitioner's request for prospective medical treatment is both reasonable and necessary in addressing her work-related arm condition stemming from her January 29, 2020 work accident. Accordingly, Respondent shall authorize and pay for the surgery, as recommended by Dr. Darwish, and the attendant care, subject to the fee schedule and in accordance with the provisions of §8 and §8.2 of the Act.

3. Consistent with the findings above, the Arbitrator further finds the Petitioner was temporarily totally disabled from May 4, 2020 through June 25, 2020, July 12, 2020 through November 14, 2022, December 29, 2021 through January 1, 2022 and February 13, 2022 through July 16, 2022. This finding is supported by Petitioner's unrebutted testimony and the medical evidence that show Petitioner was given work restrictions during this time period. Therefore, the Arbitrator awards Petitioner TTD benefits for the aforementioned time periods and Respondent shall be credited for any TTD it has paid.

4. Consistent with the findings above, the Arbitrator further finds that the Petitioner is entitled to payment of temporary partial disability benefits for the periods of February 1, 2020 through April 11, 2020, January 2, 2022 through February 12, 2022 and July 17, 2022 through September 24, 2022. This is supported by the Petitioner's unrebutted testimony, the wage records, and the medical evidence showing Petitioner was medically restricted from returning to work full duty for these time periods. Petitioner testified that she was offered less hours when she was working with restrictions, which was confirmed by the wage statements. Accordingly, Petitioner was entitled to payment of temporary partial disability benefits. Therefore, the Arbitrator awards Petitioner TPD benefits for these time periods. Respondent shall receive a credit for any TPD benefits it has paid toward these time periods. The parties stipulated that Petitioner's average weekly wage was $570.08. For a two week period, the average weekly is $1,140.16. The Arbitrator notes that Petitioner was paid on a biweekly basis. For January 2, 2022 through January 15, 2022, Petitioner earned $634. 2/3 the difference of the average weekly wage less the earnings was $337.44. For January 16, 2022 through January 29, 2022, Petitioner earned $1,1014.40, and temporary partial disability benefits was $15.44. For January 30, 2022 through February 12, 2022, Petitioner earned $66.88 and the temporary partial disability benefits was $715.52. For July 17, 2022 through July 30, 2022, Petitioner's earnings were $647.57, and the temporary partial disability benefits due was $328.39. For July 31, 2022 through August 13, 2022, Petitioner's earning was $859.36 and the temporary partial disability benefits was $187.18. For August 14, 2022 through August 27, 2022, Petitioner earned $915.36 and the temporary partial disability benefits was $149.87. For August 28, 2022 through September 10, 2022, Petitioner earned $1,048.20 and the temporary partial disability benefits were $61.31. For September 11, 2022 through September 24, 2022, Petitioner earned $852.86 and the temporary partial disability benefits owed were $191.53. Thus, Petitioner is entitled to payment in the amount of $1,986.68 for the period of January 2, 2022 through February 12, 2022 and July 17, 2022 through September 24, 2022.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC028453
Case Name	Daisy Cruz v. Costco Wholesale
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0215
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Yosef Arviv
Respondent Attorney	Michelle LaFayette

DATE FILED: 5/9/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAISY CRUZ,

Petitioner,

vs. NO: 17 WC 028453

COSTCO WHOLESALE,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 20, 2023, is hereby affirmed and adopted.

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

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

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.

May 9, 2024
O032624
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC028453
Case Name	CRUZ, DAISY v. COSTCO WHOLESALE
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Yosef Arviv
Respondent Attorney	,Michelle LaFayette

DATE FILED: 1/20/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 18, 2023 4.68%

/s/Nina Mariano, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daisy Cruz
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **17WC 28453**

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 **Arbitrator Nina Mariano**, 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **8/20/2017**, 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 $**26,978.64**; the average weekly wage was $**518.82**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**33,896.62** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**33,896.62**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $311.29/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

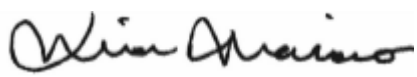
Respondent shall pay Petitioner temporary total disability benefits of $345.88/week for 104 weeks, commencing 9/15/2017 through 10/1/2017 and 11/2/2017 through 10/22/2019, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $33,896.62 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services outlined in the attached Conclusions of Law, as provided in Sections 8(a) and 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.



JANUARY 20, 2023

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

DAISY CRUZ,	)	
	)	
PETITIONER,	)	
	)	
v.	)	
	)	CASE NO. 17 WC 028453
COSTCO WHOLESALE,	)	
	)	
	)	
RESPONDENT.	)	

FINDINGS OF FACT

Respondent employed Petitioner as a cashier assistant. Petitioner's job duties included providing assistance to the cashiers and otherwise helping out where needed. This included retrieving shopping carts in the parking lot, assisting customers with the loading of carts and lifting in excess of 35 lbs. She had been with Respondent since 2012.

Petitioner testified she felt a sharp burning pain up to her right shoulder into her neck and across her collar bone when she pushed back an order on August 20, 2017. Petitioner reported the incident to management, and she was assigned other tasks for the remainder of her shift. She reached out to WorkCare, which triages injuries for Respondent. Due to her symptoms, she was directed to seek medical treatment on August 24, 2017.

Petitioner was seen at Concentra (Occupational Health Centers of Illinois) by Dr. Ayala on August 24, 2017. She reported sustaining an injury to her right shoulder when using her arm to push items on a conveyor. She described the pain as 7/10 and located in the right anterior shoulder and right posterior shoulder. The notes indicate associated symptoms include neck pain and stiffness. The diagnosis was a right shoulder strain. Petitioner was placed in a sling, released to return to work with restrictions and prescribed Motrin, over-the-counter muscle cream and cyclobenzaprine. Petitioner was referred to physical therapy 3 times a week for 2 weeks. (Pet'r Ex. No. 2)

On September 11, 2017, Petitioner was seen by Dr. Sajjad Murtaza with complaints of right neck pain and right shoulder pain with numbness, tingling and weakness of the right arm. Dr. Murtaza referred her for a cervical MRI, additional physical therapy, as well as medications for the pain.

She underwent an MRI of the cervical spine on September 20, 2017, which the radiologist indicated revealed disc herniations at C3-4, C5-6 and C6-7 without stenosis.

Petitioner transferred care to Dr. Larry Najera of Associated Medical Centers of Illinois (AMCI). On September 28, 2017. She complained of right neck, shoulder and arm pain. Dr. Najera diagnosed a cervical strain/disc herniation and right arm pain. He recommended an EMG/NCV, physical therapy, Naprosyn, Omeprazole and Gabapentin. Dr. Najera took Petitioner off work. (Pet'r Ex. No. 1)

An EMG/NCV study on October 5, 2017 reportedly demonstrated bilateral carpal tunnel syndrome, moderate acute C5, C6 and C7 radiculopathy on the right.

On October 12, 2017, Dr. Najera injected the right carpal tunnel. He recommended a cervical epidural steroid injection, which was non-certified by Utilization Review. Petitioner also began therapy under the direction of a chiropractic physician. The initial course of treatment began on October 3, 2017 and continued until June 6, 2018. Petitioner attended a total of 48 sessions. (Pet'r Ex. No. 1)

During the appointment on November 2, 2017, Petitioner reported no relief to the wrist/hand with the injection only providing relief of numbness and tingling for one day. She reported increasing pain with turning of the head, lifting, carrying and quick movements. She also had intermittent numbness in her right arm all the way to the face/neck. Dr. Najera prescribed Neurontin, Tramadol and Terocin patches. He recommended additional physical therapy and that Petitioner remain off work. (Pet'r Ex. No. 1)

On November 30, 2017, Petitioner presented to Dr. Najera for a follow up appointment. Petitioner had neck pain rated 7/10 and shoulder pain at 7/10. Dr. Najera noted that Petitioner had failed conservative treatment and she had electrodiagnostic evidence of radiculopathy. Dr. Najera recommended a C6-7 CESI injection and to remain off work until reevaluation on January 4, 2018. Dr. Najera performed the cervical injection on January 19, 2018. (Pet'r Ex. No. 1)

Petitioner presented for an independent medical examination with Dr. Frank Phillips on January 25, 2018. She described right shoulder pain radiating up toward the cervical spine, some numbness distal to the elbow radiating into the 3rd and 4th digits and no radiating upper extremity radicular symptoms. He noted a normal examination of the cervical spine. He reviewed the MRI study, noting well maintained disc height and signal intensity, tiny central millimeter disc bulges of no clinical significance and no evidence of nerve compression. Given the mechanism of injury and examination findings, he diagnosed shoulder pain only, no cervical spine condition, recommended no treatment for the cervical spine and opined she could return to work full duty. (RX 1)

On February 1, 2018, Petitioner returned to Dr. Najera and reported the cervical injection only provided 15% relief of the neck pain. She had persistent pain to the right shoulder with numbness and tingling into the face. Dr. Najera recommended no further cervical ESIs and suspended physical therapy, pending an MRI of the shoulder and to remain off work. (Pet'r Ex. No. 1)

The MRI of the right shoulder on February 13, 2018 demonstrated a full-thickness tear to the distal supraspinatus tendon, impingement of the supraspinatus at the acromioclavicular joint and subacromial and subdeltoid bursitis. (Pet'r Ex. No. 1)

On February 16, 2018, Dr. Najera referred Petitioner for a spine consultation due to her persistent pain. (Pet'r Ex. No. 1)

On February 21, 2018, Petitioner sought treatment with Dr. Kevin Koutsky of Elmhurst Orthopedics. She complained of pain radiating from the neck down the right upper extremity, numbness and tingling and right shoulder pain. She admitted to some weakness. Dr. Koutsky stated the MRI demonstrated stenosis from bulges at C5-6 and C6-7 and a bulge at C3-4. He diagnosed right C5-6 and C6-7 radiculopathy and a right rotator cuff tear related to the work injury. He recommended continued physical therapy and pain management for a second injection to the cervical spine. He administered an injection to the right shoulder and gave Petitioner work restrictions. (Pet'r Ex. No. 5)

On March 1, 2018, Dr. Najera saw the Petitioner, noting pain at 6/10. Dr. Najera diagnosed a cervical sprain, cervical disc herniation; shoulder/upper arm sprain; other muscle spasm; cervical radiculopathy; and rotator cuff tear, right shoulder. Dr. Najera stated that she is not to return to work until cleared by the shoulder and spine specialists. (Px. 1)

On 3/21/18 Dr. Koutsky noted right C5-C6, C6-C7 radiculopathy, rotator cuff tear after work-related injury in August 2017. Wait for authorization for rehabilitation and PT as well as second injection. RTC in 1 month. She did see Dr. Frank Phillips, Rush University for an IME in January of 2018. I respectfully disagree with Dr. Phillips regarding "Ms. Cruz has no cervical diagnosis." Clearly, she does have positive findings on her EMG which are consistent with cervical radiculopathy. I also disagree with Dr. Phillips's opinion that Ms. Cruz is at MMI with regard to her cervical spine. Clearly, she would benefit from continued pain clinic management for second injection as well as physical therapy for range of motion, strengthening, and stabilization. Dr. Koutsky opined that the Petitioner must remain off work as her 5lb lifting restrictions was difficult for the Petitioner. (Px. 5)

On 4/25/18 Petitioner had a follow up appointment with Dr. Koutsky. Dr. Koutsky notes a positive EMG test with consistent pathology on the MRI. Dr. Koutsky recommends another shoulder injection and additional physical therapy. Dr. Koustky gave her 5lb work restrictions. (Px. 5)

On 6/5/18 Petitioner saw Dr. Sompalli who returned for follow up of right shoulder pain due to work related injury on 8/20/17. Right shoulder exam was performed and right shoulder scope was recommended. She was given light duty restrictions. (*Per Dr. Phillips' 3/8/19 Report*- Rx. 1)

On 7/18/18 Petitioner underwent surgery with Dr. Sompalli. Petitioner underwent a right shoulder arthroscopy, arthroscopic subacromial decompression with release of the coracoacromial ligament, partial acromioplasty, and arthroscopic debridement of the subacromial space. Dr. Sompalli placed Petitioner off work. (Px. 4)

Petitioner saw Dr. Sompalli on July 24, 2018. (PX 4) The note indicates Petitioner was an established patient, had undergone surgery to the right shoulder 6-days earlier and was seen for post-operative follow-up care. Dr. Sompalli noted an accident date of August 20, 2018, and described the mechanism of injury to involve pushing groceries to fill a gap on the conveyor belt with her right forearm. This caused a sharp shooting pain in her right shoulder and numbness/tingling to her right middle finger. Dr. Sompalli's billing records indicate that she was evaluated on 7/6/18, but that record was not included in the copy of his certified records nor was the evaluation referenced in Dr. Phillips's report of 6/5/18. Further, physical therapy records from 4/6/18 from AMCI reference a physical therapy order from Dr. Sompalli, so it appears she was seen by Dr. Sompalli several times prior to the 7/24/18 record, which was the first record submitted into evidence of Dr. Sompalli by Petitioner.

On 7/25/18 Petitioner followed up with Dr. Koutsky for her cervical spine, prescription medications were given. Petitioner continued physical therapy for her cervical spine. (Px. 5)

On 8/21/18 Dr. Sompalli recommended discontinuing sling use and additional physical therapy for range of motion and strengthening. Petitioner to remain off work through 10/16/18. (Px. 4)

On 10/10/18 Dr. Koutsky recommended an additional injection for Petitioner's cervical spine and recommended additional physical therapy. (Px. 5)

On 10/16/18 Dr. Sompalli noted post-op pain 7/10 intermittent sharp and burning in quality with numbness and tingling to the right shoulder and bilateral hands. Petitioner indicates pain is aggravated with all movement and radiates to the right hand and neck. Petitioner to remain off work through 11/13/18. (Px. 4)

On 11/13/18 Dr. Sompalli notes indicates post-op pain 8/10 intermittent sharp and burning in quality with numbness and tingling to the right shoulder and bilateral hands. Petitioner indicates pain is aggravated with all movement and radiates to the right hand and neck. Petitioner noted that she has a hard time sleeping at night due to pain. Petitioner to remain off work through 12/11/18. (Px. 4)

On 11/14/18 Dr. Koutsky continues to seek authorization for a cervical injection which remained denied by the insurance, despite the first injection alleviating Petitioner's cervical pain. (Px. 5)

On 12/6/18 an MRI of the right shoulder was performed which showed heterogeneous partial tearing seen throughout the majority of the supraspinatus tendon and hypointense material within the long head of the biceps tendon sheath with indication of loose bodies. (Px. 12)

On 12/11/18 Dr. Sompalli reviewed the MRI and recommended a right shoulder scope debridement, mini open biceps tenodesis, and cuff evaluation for possible repair. Petitioner to remain off work through 1/22/19. (Px. 4)

On 12/19/18 Dr. Koutsky notes he continues to wait for cervical injection. Dr. Koutsky states if symptoms continue Petitioner would be a candidate for anterior cervical decompression and fusion with

instrumentation and bone graft. Dr. Koutsky notes the need for the surgery would be causally and directly related to her work injury. (Px. 5)

On 1/22/19 Dr. Sompalli notes continued right shoulder pain and weakness. Dr. Sompalli's diagnosis is incomplete rotator cuff tear/rupture of the right shoulder. Dr. Sompalli recommends to resubmit for authorization for right shoulder scope debridement, mini open biceps tenodesis, and cuff evaluation for possible repair. Dr. Sompalli has Petitioner remain off of work through 2/26/19. (Px. 4)

On 1/23/19 Dr. Koutsky notes continued pain in cervical spine and reiterates the need for anterior cervical decompression and fusion with instrumentation and bone graft. Petitioner to remain off work. (Px. 5)

Dr. Gregory Nicholson performed an independent medical examination on February 26, 2019 at the request of Respondent. He indicates that he originally evaluated Petitioner in 2018 and authored two reports. He indicates that Petitioner, "originally had a C7 right sided radiculopathy and shoulder issues." He further indicates with regard to her diagnosis that, "Clearly, she had a shoulder injury and brachial plexus issue or cervical radiculopathy that was concomitant." He evaluated Petitioner's right shoulder, concurring with the diagnosis of Dr. Sompalli as it relates to the right shoulder and also recommended surgery. Dr. Nicholson's 2018 IME reports were not submitted into evidence by Respondent. (Rx. 4)

Dr. Phillips performed a second examination of Petitioner on March 8, 2019. He noted shoulder pain with limited range of motion of the shoulder. She reported rotation of the shoulder aggravated her symptoms, causing diffuse radiating pain and paresthesia down the right arm in a nondermatomal pattern. He again stated she sustained an injury to the shoulder, not to the cervical spine. (Rx. 1)

On 4/11/19 Petitioner underwent a second right shoulder arthroscopy, arthroscopic type 2 SLAP repair with debridement by Dr. Sompalli. (Px. 4)

On 4/16/19 Dr. Sompalli noted continued pain and discomfort post-operation. Petitioner to continue sling use for right shoulder and to remain off work through 5/14/19. On 4/22/19 Petitioner began physical therapy at AMCI Beverly Park. (Px. 4)

On 5/14/19 Dr. Sompalli notes right shoulder pain as 7-8/10, intermittent sharp, shooting, sore, and tight in quality with numbness and tingling to the right shoulder radiating down the arm to the hand. Dr. Sompalli recommends that Petitioner return to work 5/15/19 with strict restrictions through 7/9/19. No use of right arm, no lifting, carrying, pushing, pulling with right arm. Must keep right arm in sling. Allowed to work only 5 hours 5 days per week. (Px. 4)

On 6/5/19 Dr. Koutsky notes continued pain in cervical spine with pain that radiates into bilateral upper extremities. Dr. Koutsky notes symptoms began after work injury in August of 2017. Dr. Koutsky released Petitioner with 10lb lifting restrictions. (Px. 5)

On 7/1/19 Dr. Koutsky notes that the pain in her neck and shoulder pain are much better after revision shoulder surgery. She reported that she did not have the neck symptoms that she did previously. Dr.

Koutsky indicated that Petitioner would continue to follow up with Dr. Sompalli. She has done well with conservative management with regard to her neck. Dr. Koutsky gave her an unrestricted work release and recommended she continue home exercises. (Px. 5)

On 7/9/19 Dr. Sompalli indicates Petitioner's pain is aggravated with all movement of the right arm with limitation in range of motion. Petitioner is unable to lift or reach overhead or behind. Patient continues with difficulties with activities of daily living, grooming, cooking, routine house chores and in particular with caring for her infant child due to increased pain and weakness when using right arm. Dr. Sompalli recommends a functional capacity evaluation to determine permanent restrictions. (Px. 4)

On 8/20/19 Dr. Sompalli reviewed the functional capacity evaluation and notes continued pain and discomfort and difficulty doing daily activities. (Px. 4)

On 9/20/19 Dr. Sompalli notes that Petitioner denies numbness but has tingling to the right shoulder radiating down the arm to the hand when she lifts her arm overhead. Dr. Sompalli states Petitioner can return to work with FCE restrictions through 10/25/19 and to complete a course of work conditioning. (Px. 4)

On 10/25/19 Dr. Sompalli notes that the right shoulder pain has resolved post surgery and the work conditioning healed her drastically with strength. Dr. Sompalli placed Petitioner at MMI full duty without restrictions on 10/25/19. (Px. 4)

On 11/22/19, Petitioner returned to Dr. Sompalli. She reported that her right shoulder pain has returned with muscle spasms. Dr. Sompalli indicated that she has developed myofascial pain and upper back pain and recommended massage therapy and referral to pain specialist. There was no change to her work status.

Petitioner returned to Dr. Sompalli on December 27, 2019. Assessment and recommendations were unchanged and appeared to be pending. He placed her on restrictions of no overhead use of the right arm and limited her lifting and pushing/pulling activities to 20 lbs. until January 24, 2020, at which time she is released to return to work full duty and to return as needed. According to Dr. Sompalli's records, she did not return to him for further treatment. (Pet'r Ex. No. 4)

A physician's assistant, Angie Osmanski, of Midwest Anesthesia & Pain Specialists saw Petitioner on January 3, 2020, under the supervision of Dr. Pontinen. She noted constant neck pain, throbbing and tight, intermittent tingling to the right arm/hand and intermittent right shoulder pain. The examination was positive for axial tenderness to the neck, right paraspinal tenderness with muscle rigidity. She recommended an MRI of the cervical spine, EMG/NCV, medication management and physical therapy for the neck. Petitioner resumed care with the chiropractor at AMCI.

On 1/17/20 Petitioner underwent an MRI for her cervical spine. The MRI showed disc herniations with 3 mm central focal disc protrusion at C5-C6 and mild central canal stenosis. (Px. 12)

She was evaluated two additional times by the PA on January 24, 2020 and February 21, 2020. On all three occasions she was noted to be returned to work based on the work status recommended by Dr. Sompalli. Treatment at AMCI ended on March 5, 2020. (Pet'r Ex. No. 10).

On direct examination, Petitioner testified she was "demoted" to the position of Member Service Assistant when she returned to work following the injury. On cross-examination, she admitted she returned to work as a cashier assistant, later sustained an unrelated injury to her knee and due to the restrictions she was given for her knee she was unable to continue working as a cashier assistant. She completed some college education, and she is certified as a pharmacy technician.

She testified she takes ibuprofen, if she has symptoms. She cannot lift anything heavy, and she cannot grab overhead. She described decreased range of motion in her shoulder. She testified she had pain when helping her daughter dress or get ready for school. Her daughter is seven years old. She testified she can no longer carry her child. She is not in active medical treatment.

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). Credibility is the quality of a witness which renders his evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his/her testimony. Where a claimant's testimony is inconsistent with his/her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009).

Arbitrator finds that Petitioner testified credibly and to the best of her ability. Overall, her testimony was corroborated by the medical records in evidence. Arbitrator observed Petitioner stretch and massage her neck during trial.

In Support of the Arbitrator's Decision relating to F, whether Petitioner's present condition of ill-being is causally related to the work injury, the Arbitrator finds the following:

The Arbitrator finds the Petitioner has met her burden of proof by the preponderance of the evidence that her current condition is causally connected to the injury of 8/20/2017.

Petitioner introduced medical records which demonstrate a clear and unbroken chain of complaints of injury to her right arm and cervical spine. As well, the causal opinions of Dr. Najera and Dr Sompalli was that the Petitioner had suffered a rotator cuff tear, SLAP Tear, impingement to the right arm which were caused specifically by her work accident.

Petitioner testified that she began feeling pain in her right arm and neck directly after her 8/20/17 work injury. This is corroborated by the initial medical records from Concentra on 8/24/17 where both right shoulder, arm and neck complaints are indicated. Petitioner testified that she had no previous injury to her right shoulder or cervical spine and this was also corroborated by the medical records.

With regard to the cervical spine, the MRI imaging shows multi-level disc herniations. The Arbitrator finds Dr. Koutsky's opinion as the treating doctor more persuasive than the opinion of the independent medical examiner Dr. Phillips. Dr. Phillips did not address the EMG findings which confirmed radiculopathy, which the Arbitrator found troublesome. Respondent's other IME, Dr. Nicholson, indicated in his 2/26/19 report that he believed petitioner to have a shoulder injury and a C7 radiculopathy. He had authored reports in 2018 regarding his initial evaluation and an addendum report and those were not submitted into evidence by Respondent.

While it is peculiar that Petitioner did not submit into evidence Dr. Sompalli's initial treatment records and Dr. Sompalli's certified records did not include them either, the totality of the medical treatment records show that Petitioner suffered a work injury on 8/20/17 which resulted in a combination of overlapping symptoms from both a right shoulder injury for which she underwent two surgeries and a cervical spine injury for which she underwent conservative care and was ultimately able to return to work full duty without restriction.

Therefore, the Arbitrator finds that Petitioner's right shoulder and cervical conditions are related to the work accident of 8/20/17.

In support of the Arbitrator's decision relating to J, whether all medical services were reasonable and necessary, the Arbitrator finds the following:

The Arbitrator finds that the Petitioner has proven by the preponderance of the credible evidence that the medical services provided were reasonable and necessary and relieved Petitioner of her ailments caused by the work accident of 8/20/17. In doing so, the Arbitrator adopts the position of Dr. Najera, Dr. Sompalli, and Dr. Koutsky noting that the Petitioner has received conservative treatment in the form of physical therapy and injections, and only when conservative treatment failed did they explore surgical options. Petitioner's shoulder and neck conditions improved following the treatment she received and she was able to return to work full duty without restriction as it relates to the work injury of 8/20/17. The Arbitrator has weighed the medical evidence and the testimony of the Petitioner. Having reviewed the IME and having weighed the IME against the medical records, the Arbitrator finds the testimony of the Petitioner persuasive, and gives greater weight to the Petitioner's treating physicians.

Regarding the bills, the Arbitrator finds that the Respondent has made payment of some bills, and that the Respondent is responsible for the remainder of the bills outstanding for AMCI in the amount of $22,474, ANCI in the amount of $5,649.64, Elite Orthopedics in the amount of $1,542.78, MRAD

Imaging in the amount of $1,950, Midwest Anesthesia and Pain Specialists in the amount of $625, Premier Healthcare Services in the amount of $3,418.36, Fullerton Kimball Medical & Surgical Center in the amount of $16,084.70, and Prescription Partners in the amount of $4,146, all to be paid pursuant to the Fee Schedule. Respondent shall be given a credit for any medical benefits that have been paid prior to trial. Respondent shall make any post-trial payments through the Petitioner's attorney, as per Rule 9080.20.

In support of the Arbitrator's decision relating to K, what temporary benefits are in dispute, the Arbitrator finds the following:

Respondent shall pay Petitioner temporary total disability benefits of $345.88/week for 104 weeks, commencing 9/15/2017 through 10/1/2017 and 11/2/2017 through 10/22/2019, as provided in Section 8(b) of the Act. Respondent shall receive a credit for all TTD previously paid.

In support of the Arbitrator's Decision relating to L, the nature and extent of injury, the Arbitrator finds the following:

Pursuant to Section 8.1(b) of the Act, the Act the Arbitrator must consider certain factors and criteria in assessing permanent partial disability, including the level of impairment under the AMA Guides, the occupation of the injured worker, the age of the injured worker, the future earning capacity of the injured worker and evidence of disability corroborated by the treating medical records. The Act provides that no single enumerated factor shall be the sole determinant of disability. With respect to the factors, the Arbitrator finds the following:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

Subsection (ii) of §8.1(b), regarding the occupation of the injured employee, is given some weight. The Petitioner returned to her prior position subsequent to her treatment with Dr. Sompalli and Dr. Koutsky. She did testify that she has some difficulty in performing her position as a result of her neck and right shoulder conditions.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 28 years old at the time of the accident. Because of Petitioner's young age and significant amount of work life ahead of her, the Arbitrator therefore gives moderate weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity, no evidence was offered by either party as it related to this factor, the Arbitrator therefore gives no weight to this factor.

Subsection (v) of §8.1(b), regarding the evidence of disability corroborated by the medical records, this factor is given significant weight. The Petitioner was diagnosed with a multi-level cervical disc herniations, a right shoulder rotator cuff tear, impingement syndrome with bursitis, Type 2 SLAP tear of

the right shoulder, requiring injections and two arthroscopic surgeries. Petitioner testified that she continues to struggle with daily activities, caring for her young child, and continues to experience pain, numbness, and tingling in her right arm and shoulder. The Arbitrator found her testimony regarding her difficulties credible.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% loss of use of the person as a whole pursuant to §8.2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC021030
Case Name	Richard Kapp v. Alberternst Construction
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0216
Number of Pages of Decision	26
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Nathan Becker, Mary Massa
Respondent Attorney	Paul Dykstra, James Kelly

DATE FILED: 5/14/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD KAPP,

Petitioner,

vs. NO: 21 WC 021030

ALBERTERNST CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein, and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, temporary total disability, and prospective medical care, and being advised of the facts and law, corrects and modifies the Decision of the Arbitrator as stated below and otherwise affirms 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 benefits, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission corrects the scrivener's error at page 15, paragraph 3 of the Arbitrator's Decision which should read "Petitioner's lumbar spine condition." instead of "cervical spine condition." All else is affirmed.

The Commission views the evidence differently and modifies Arbitrator's award to find Petitioner achieved maximum medical improvement on June 15, 2021. As such the Commission awards total temporary disability benefits commencing October 28, 2020, through June 15, 2021, and reasonable and necessary medical expenses commencing October 15, 2020, through June 15, 2021. The award of prospective medical care is vacated.

Petitioner is a carpenter and painter by trade who was employed with Respondent for 35 years. On October 15, 2020, Petitioner testified that he was trying to stop a man lift from rolling down a hill when the lift hit a tree and Petitioner was thrown to the ground. He immediately developed pain in his low back and leg. The issue of accident was stipulated. Petitioner consulted his primary care physician Dr. Klosterman on October 20, 2020. Dr. Klosterman diagnosed lumbar radiculopathy and prescribed steroids and physical therapy. Dr. Klosterman ordered a lumbar MRI on November 24, 2020.

By history Petitioner had undergone a lumbar fusion at L4-5 and L5-S1 levels in February 2017 secondary to a work-related accident and was cleared to return to work in May 2017. He testified that after he returned to work, he was able to do everything he did before the first injury and did not miss time from work. The workers' compensation claim arising from his 2017 injury settled on June 18, 2020.

Petitioner had an MRI on December 1, 2020. Dr. Klosterman subsequently referred Petitioner to Dr. Joanna Kemp, a neurosurgeon.

Petitioner was examined pursuant to Section 12 by Dr. Marchosky on January 19, 2021, at the request of Respondent. On examination Petitioner had restricted range of motion of the spine and decreased elevation of straight leg raising. According to Dr. Marchosky's interpretation, the December 2020 MRI showed a solid fusion from 2017. There was a small bulge at L3-4 that was lateralizing to the left and producing "minimal" reduction of the central canal space, and moderate narrowing of the foraminal canal.

Dr. Marchosky diagnosed an irritation of the L3-L4 nerve root, that was rubbing against a piece of bulging disc. Dr. Marchosky recommended a course of conservative therapy of weight loss and anti-inflammatory medication. It was his opinion that Petitioner' s symptoms could improve with disc regression over time and he could avoid further surgery.

Petitioner was examined by Dr. Joanna Kemp on February 11, 2021. Dr. Kemp read the MRI as showing multi-level degenerative joint disease, facet disease, and severe neuroforaminal narrowing on the left. Dr. Kemp ordered Petitioner off work and referred him to pain management for epidural steroid injections and an EMG/NCV of his lower extremities.

The EMG/NCS was essentially normal with borderline normal left peroneal nerve amplitude that could be due to local injury or previous surgery. A CT scan showed stable post-operative changes at the fusion site and multilevel degenerative joint disease.

Dr. Kristina Nasser, a pain medicine specialist, administered a series of three epidural steroid injections at the left L4-5 and L5-S1 levels as recommended by Dr. Kemp over the period from March 16, 2021, through May 3, 2021. In addition to pain management Petitioner was also attending physical therapy starting November 24, 2020, through June 10, 2021.

On April 1, 2021, Section 12 examiner Dr. Marchosky issued an addendum report following his review of updated medical records. Dr. Marshosky concluded that Petitioner's symptoms had resolved with regression of the disc. He noted that Petitioner was being administered epidural steroid injections.

Connie Kampmeier R.N., testified via evidence deposition that she is a nurse case manager that was hired by Erie Insurance on April 16, 2021, to perform case management telephonically on Petitioner's claim. She testified that she maintained regular telephone contact with Petitioner on at least a monthly basis. She testified concerning her conversations with Petitioner concerning his symptoms and progress in recovery from notes she maintained as part of her job.

Respondent retained an investigator, Mark McAelvey who conducted extensive surveillance on Petitioner commencing April 30, 2021, through June 6, 2021. The surveillance video comprised nearly seven hours over a six-day period. During this time Petitioner is seen engaged in a series of physically challenging activities, i.e. dragging a plastic tarp, moving a full-size kayak and lifting it onto a rack inside his truck, tying two kayaks onto his truck, carrying an ice cooler, climbing onto the truck bed, and carrying a trailer hitch. These activities do not comport with his reports to Nurse Kampmeier or his physical therapists concerning his pain level or disability. Furthermore, Petitioner's report to Nurse Kampmeier on June 7, 2021, states that he had "a bad week. Increased back pain didn't leave the house this weekend due to pain." On the same date Petitioner reported to his physical therapist that he "kayaked two miles Friday and Saturday on Carlyle Lake with his buddy at least two miles each day…Rick did not voice any complaints of back pain while he was kayaking however this morning he presents with increased tightness and feels it is because he overdid it this weekend."

The Commission regards the discrepancies between Petitioner's activities and his reports of pain and disability to his various providers as seriously undermining Petitioner's credibility. Dr. Kemp testified via evidence deposition on June 1, 2022. In her testimony Dr. Kemp states that she had counseled Petitioner that activities such as bending, lifting, or twisting could exacerbate his symptoms. She said she ordered him off work because of Petitioner's reports that doing lifting and doing his job was exacerbating his symptoms, and she expected that he would not improve until he attempted a course of conservative management. Dr. Kemp acknowledged that her opinion was based upon the assumption that Petitioner lived a relatively sedentary lifestyle from February 11, 2021, until July 8, 2021, and that he had ongoing and persistent symptoms that prevented him from performing heavy lifting and activity. Petitioner's activities, both self-reported and recorded on surveillance demonstrate that Dr. Kemp was misled by her patient.

On June 15, 2021, Dr. Marchosky prepared a second addendum to his Section 12 report after having reviewed updated medical records and six hours of surveillance videos taken while Petitioner was on a camping trip. Based upon the records and the surveillance Dr. Marchosky testified in his evidence deposition taken August 18, 2022, that Petitioner had made a remarkable

recovery of function, stamina, and physical ability since his prior evaluation. He testified to the opinion that Petitioner had reached MMI. Per Dr. Marchosky, Petitioner required no restrictions and could return to full work without restrictions.

Petitioner was seen in clinic by Dr. Kemp on July 8, 2021, reporting that his symptoms of severe low back pain with left leg numbness were unchanged although slightly improved with conservative management. He stated that the epidural steroid injections gave him 70% pain relief, but the effects lasted only for about a month. He further reported that he experienced urine leakage, sexual dysfunction, and used a cane due to his left leg giving out. He was encouraged to continue physical therapy and pain management. He was continued off work.

On July 12, 2021, Petitioner telephoned Dr. Kemp requesting a letter stating that he has no restrictions. He was provided with the letter as requested. He was warned that he could exacerbate his symptoms and verbalized his understanding. The combination of Petitioner's report on June 7, 2021, to his physical therapist, combined with the video evidence, Dr. Marchosky's opinion and the July 12, 2021, request to Dr. Kemp for release from restrictions is compelling. Based upon the foregoing the Commission finds that Petitioner achieved MMI on June 15, 2021. Contrary to the findings of the Arbitrator the Commission adopts the opinion of Dr. Marchosky and finds that Petitioner was entitled to no further TTD benefits or medical expenses after June 15, 2021. Furthermore, the Commission finds that the evidence does not support the award of prospective medical care.

The Commission having reviewed the record in its entirety including the extensive surveillance views the evidence differently from the Arbitrator and finds Petitioner reached MMI on June 15, 2021. The opinions expressed by Dr. Marchosky on the issue of Petitioner's recovery are persuasive. In fact, the Petitioner himself requested a release from restrictions in his telephone call to Dr. Kemp on July 12, 2021.

Based upon the foregoing analysis the Commission hereby corrects, and modifies the Decision of the Arbitrator and vacates the award of prospective medical care.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 11, 2023, is hereby corrected, and modified as stated herein, and otherwise affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $744.46 per week for a period of 33 weeks, for the period commencing October 28, 2020 through June 15, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit of $20,870.88 in TTD benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses as listed in Petitioner's Exhibit 8, pursuant to the medical fee schedule incurred commencing October 15, 2020, through June 15, 2021, for medical expenses under §8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of prospective medical care is vacated.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, 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.

MAY 14, 2024
SJM/msb
o-3/20/2024
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	21WC021030
Case Name	Richard Kapp v. Alberternst Construction
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Nathan Becker
Respondent Attorney	James Kelly

DATE FILED: 1/11/2023

THE INTEREST RATE FOR THE WEEK OF JANUARY 10, 2023 4.71%

/s/ Jeanne AuBuchon, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Richard Kapp
Employee/Petitioner

v.

Case # 21 WC 021030

Consolidated cases:

Alberternst Construction
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of Collinsville, on 8/26/2022. 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: Prospective Medical

FINDINGS

On **10/15/2020**, 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 **$54,271.30**; the average weekly wage was **$1,116.69**

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

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $20,870.88 for TTD, $ for TPD, $0 for maintenance, and $**0** for other benefits, for a total credit of $20,870.88.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as listed in Petitioner's Exhibit 8 as provided in Sections 8(a) and 8.2 of the Act.

Respondent to approve and pay for the future proposed continuing post-operative medical treatment, as ordered by Dr. Kemp.

Respondent shall pay Petitioner temporary total disability benefits of $744.46/week for 81 and 2/7 weeks, for the periods of October 28, 2020, through July 12, 2021, and from October 20, 2021, through August 26, 2022 , as provided in Section 8(b) of the Act. Respondent shall receive a credit of $20,870.88 in TTD benefits.

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

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

Jeanne L. AuBuchon

Jeanne AuBuchon, Arbitrator

JANUARY 11, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on August 26, 2022, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's lumbar spine condition; 2) payment of medical bills; 3) entitlement to TTD benefits after May 25, 2021; and 4) entitlement to prospective medical care to the Petitioner's lumbar spine. Possible injuries to the Petitioner's neck and shoulder were not addressed at arbitration nor by the doctors who testified.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 60 years old and employed with the Respondent as a painter and carpenter for 35 years. (AX1, T. 10) On October 15, 2020, the Petitioner was trying to stop a man lift from rolling down a hill when the man lift hit a tree, causing the Petitioner to fly in the air and hit the ground. (T. 10-13) He said his back started hurting right away and developed into leg pain – more on the left than right. (T. 13) He said his left leg didn't want to move right and his right foot and toes were numb. (T. 13-14)

The Petitioner acknowledged that he underwent a lumbar fusion in February 2017 at the L4-5 and L5-S1 levels. (T. 14) He said he was cleared for work in May 2017 and released from care in February 2018. (T. 15) He said that following the first month after returning to work, he had normal aches, pains and stiffness that came with his job. (Id.) He said that after his release, he never missed work, never slowed down and did everything that he did before the first injury. (T. 16) He said the injury was in connection with a workers' compensation claim for which he settled the case on June 18, 2020, for $35,966.51. (T. 37-38)

On October 20, 2020, the Petitioner saw his primary care physician Dr. Brian Klostermann at HSHS Family and Internal Medicine of Highland via a telehealth visit. (PX3) The Petitioner

testified that the lapse of time between the accident and seeing his doctor was because he could not get in to see him. (T. 37) At the visit, the Petitioner presented with low back pain characterized as acute and chronic. (PX3) He described the accident and said he was sore rest of the day, felt better next day and stiffened up over the next few days. (Id.) He did not complain of significant radiation of pain, numbness, tingling. (Id.) Dr. Klostermane diagnosed acute bilateral low back pain without sciatica and recommended continuing his current therapies. (Id.) At a follow-up visit on October 27, 2020, the Petitioner reported ongoing pain, radiation of pain into his left leg some left leg weakness and that he was struggling with walking/standing for prolonged periods. (Id.) Dr. Klostermann diagnosed lumbar radiculopathy, prescribed steroids, recommended continued use of over-the-counter analgesics and referred the Petitioner to physical therapy. (Id.)

On November 3, 2020, the Petitioner sought chiropractic treatment at ChiroPro for low back and neck pain. (PX5) He had additional visits on November 10, 2020, and November 11, 2020. (Id.)

On November 24, 2020, Dr. Klostermann ordered an MRI of the lumbar spine. (PX3) The MRI was performed on December 1, 2020, and Dr. Klostermann said it showed significant impingement on the left L4 nerve consistent with the Petitioner's current pain and weakness. (Id.) He referred the Petitioner to neurosurgery. (Id.)

The Petitioner underwent a Section 12 examination on January 19, 2021, by Dr. J.A. Marchosky, a neurosurgeon affiliated with St. Luke's Hospital. (PX1, Deposition Exhibit) Dr. Marchosky reviewed medical records and December 1, 2021, MRI and examined the Petitioner. (Id.) He opined that the Petitioner's injury was compatible with ligamental strain of the upper lumbar spine above the fused segments. (Id.) He said a protruding L3-4 disc on the left together with lateral recess-foraminal narrowing may have been further impinging on the nerve root at the

exit zone. (Id.) Dr. Marchosky could not determine whether the disc protrusion was new or antecedent to the accident because an MRI of that area prior to the accident was not available. (Id.) He said the mechanism of injury was compatible with the subjective complaints and objective findings. (Id.) He said the ligamental strain the Petitioner suffered during the accident may have further destabilized the L3-4 disc, resulting in impingement or irritation of the exiting nerve root. (Id.) He stated that whereas some degenerative changes may have been the natural progression of a pre-existing condition, the injury may have aggravated or precipitated the progression. (Id.) He said that whether the aggravation was permanent would depend on whether the protruding disc regresses or degenerates and is absorbed and the impingement fades away. (Id.)

Dr. Marchowski stated that all treatment until that time had been reasonable, necessary and related to the work injury and that the Petitioner would benefit from a consistent course of anti-inflammatory agents and weight loss. (Id.) Although he said it was difficult to give strict parameters as to work restrictions, Dr. Marchowski stated that the Petitioner was not currently ready or able to return to full work without limitations. (Id.) He said the Petitioner's work status should be by the Petitioner's self-reporting of symptoms and tolerance. (Id.)

On February 11, 2021, the Petitioner saw neurosurgeon Dr. Joanna Kemp at SLUCare, who read the MRI as showing multilevel degenerative disc disease, facet disease and severe neuroforaminal narrowing on the left. (PX1) She stated it was unclear what the source of the Petitioner's symptoms were, as his spine was incompletely imaged due to artifact from the prior fusion's hardware. (Id.) She planned to perform spine X-rays and a CT scan of the lumbar spine to evaluate overall alignment and the extent of fusion since the surgery in 2017. (Id.) She diagnosed lumbar radiculopathy, referred the Petitioner to pain management for epidural steroid

injections and recommended electromyography (EMG) and a nerve conduction study (NCS) of the Petitioner's lower extremities. (Id.) She ordered the Petitioner off work. (Id.)

The EMG/NCS was essentially normal with borderline normal left superficial peroneal (outer side of the calf) nerve amplitude that could be due to local injury or previous surgery. (Id.) The CT scan showed stable postoperative changes at the fusion site and multilevel degenerative disc and joint disease. (Id.)

Dr. Marchowsky authored a second report on April 1, 2021, after having reviewed updated records. (RX1, Deposition Exhibit) He noted that his recommendation of an oral anti-inflammatory regime was not followed and continued to recommend it. (Id.) He said that although epidural steroid injections would establish benefit or absence of benefit immediately, it is an invasive and expensive procedure with benefits of short duration. (Id.) He said the injections carry the risk of provoking or introducing infection. (Id.) He added that should either of these alternatives fail, the only alternative would be to proceed with extensive decompressive foraminotomies at L4-5 and L5-S1. (Id.)

Dr. Kristina Nasser, a pain medicine specialist at HSHS St. Elizabeth's Hospital, performed epidural steroid injections as recommended by Dr. Kemp at the left L4-5 and L5-S1 on March 16, 2021, and April 6, 2021. (PX4) After the March 16, 2021, injection, the Petitioner reported relief of approximately 50-60 percent and was moving better. (Id.) After the April 6, 2021, injection, he reported 100 percent relief for 10 days, that he was doing more activities, was sleeping well and was more active. (Id.) He said that during the following week, he noticed some increased pain and numbness. (Id.) On May 3, 2021, Dr. Nasser performed a bilateral epidural steroid injection at L5-S1. (Id.)

On May 4, 2021, the Petitioner informed Dr. Klostermann that he had some improvement in his pain and that his left leg was stronger. (PX3) The Petitioner brought up neck and left shoulder pain, and Dr. Klostermann believed there may have been rotator cuff issues. (Id.) In his testimony, the Petitioner agreed with the reports he made to Dr. Nasser about the relief he received from the injections. (T. 19-20) He testified that after the May 3, 2020, injection, he had 60-70 percent relief of his pain and more than 50 percent of his function. (T. 21)

The Petitioner underwent physical therapy at HSHS Physical Therapy from November 24, 2020, through June 10, 2021. (T. 17-18, PX6) On April 5, 2021, he reported having two days of being pain free following his last physical therapy session but feeling that he may have overdone it that past weekend, as he did more standing and walking, and had more pain and stiffness. (Id.) On April 8, 2021, and April 12, 2021, he reported that his pain improved after his April 6, 2021, injection. (Id.) On April 19, 2021, he reported increased back pain and bilateral toe numbness, stating that he felt that the injection was wearing off. (Id.) He said he drove an hour and a half one way to bring a tractor to his nephew – experiencing some back pain that was tolerable – and walked 14,000 steps mostly uphill and felt he overdid himself. (Id.) On April 21, 2021, he reported increased pain that morning but did not recall doing anything specific to cause increased pain other than sitting too much. (Id.) On May 5, 2021, he reported that the injection he received on May 3, 2021, did not make much of a difference, but said it usually took a week or so to feel the full effects of the shots. (Id.) On May 11, 2021, and May 15, 2021, he reported his back was feeling better. (Id.) On May 18, 2021, he presented with lower back stiffness and mild right-sided toe numbness and reported that he walked "a bunch" over the weekend, increasing his lumbar pain and radicular symptoms that subsided after taking medication. (PX6) On May 20, 2021, the Petitioner reported low back stiffness and mild numbness in his bilateral toes, but after therapy, he felt no low back

tightness, and his toe numbness decreased. (Id.) On May 25, 2021, he again complained of low back pain and stiffness and bilateral toe numbness, for which he had taken muscle relaxers. (Id.) He said he was walking more, which could have been the culprit for increased pain. (Id.) Petitioner continued to work at home despite the pain and planned to fix his daughter's dishwasher and go on a kayaking trip over Memorial Day with his family. (Id.) On May 27, 2021, the Petitioner said his back was very stiff that morning, the left toes were doing okay, but the right toes were still a little bit numb. (Id.) After therapy, he said his left toe numbness improved but the right toe numbness was worse. (Id.) On June 1, 2021, the Petitioner reported numbness in his right toes, but were not too bad over the weekend. (Id.) On June 3, 2021, he reported increased low back pai and numbness in the right toes and said he cut grass the day before. (Id.) On June 7, 2021, he reported kayaking two miles per day over two days and had increased tightness. (Id.) He felt better after therapy. (Id.) At his last therapy visit on June 10, 2021, the Petitioner's mobility and walking were better, but he still had numbness in his toes. (Id.) The therapist noted that the Petitioner improved overall but was not able to return to his pre-accident capabilities. (Id.)

At arbitration, the Petitioner acknowledged that he had informed his physical therapist of his activities as detailed above. (T. 35-36) He said he was not trying to hide any of his physical activities. (T. 36) He admitted that he "more than likely" went on several camping trips from April 2021 until June 2021. (T. 40) He said the injections and physical therapy did not make him "even close" to permanently better to the point where he was back to how he felt before the work accident. (T. 22) He said he started going back downhill and started using a cane again. (T. 23) He said he did not suffer any new injuries. (T. 22-24)

Private detective Mark McAelvey testified that he performed surveillance on the Petitioner on nine days between April 30, 2021, and June 6, 2021. (T. 52-54) He said he saw the Petitioner

lifting, carrying, bending, stretching, carrying a child, lifting and carrying a kayak, loading kayaks on a truck, lifting and carrying a barbeque pit, carrying firewood, playing with a child's bow and arrow and carrying a cooler – all of which he captured on video. (T. 55) On cross-examination, Mr. McAelvey testified that the video was altered after it left his possession – apparently to delete days on which there were no videos of the Petitioner. (T. 61-62)

The Petitioner testified that the video centered around a three-day camping trip he took on Memorial Day weekend in 2021, during which time he was still experiencing some of the benefits of the lumbar injections. (T. 27-28, 31) He said he still had low back pain and numbness at that time. (T. 28-30) He said that the periods of time where he was not shown on the video, he was in the camper using a heating pad and ice. (T. 30) He said he was using pain medication and muscle relaxers during the trip. (Id.) He stated that in doing the activities on the video, he was in pain, that it was obvious that he was limping, and that there were times when it looked like he had a board strapped to his back. (T. 31-32) He said the video showed him doing stretching to try to relieve the pain. (Id.) He said the heaviest thing he lifted was a kayak weighing about 40 pounds, and he did not know if he ever lifted the full weight – more or less sliding it from the tailgate of his truck to the rack where he stores it. (Id.) He said he carried his 4-year-old grandson's kayak that weighed less than 15 pounds. (Id.)

The videos covered nearly seven hours over a six-day period and included: dragging a plastic tarp for 40 seconds, pushing a two-wheeled cart for 15 seconds, putting a full-sized kayak on the cart and wheeling it to his truck for a minute; lifting the kayak onto a rack in the truck for about 10 seconds, tying down two kayaks on the truck for about five minutes, putting ice in a small cooler and dumping it into a large cooler twice for three minutes, helping someone put a kayak into a truck for 10 seconds; climbing in the bed of the truck, carrying a duffel bag 15-20 feet,

folding a playpen and carrying it into a camper for one minute, carrying a baby for one minute, carrying two pieces of firewood for 20 seconds, carrying an empty cooler 15 feet, carrying a child's kayak and putting it in a truck for 30 seconds, carrying a medium full cooler for 30 seconds, carrying a child's kayak for one minute, paddling the child's kayak for 20 seconds and carrying a trailer hitch for 10 seconds. (RX2)

Connie Kampmeier, a nurse case manager for Erie Insurance, testified that she performed telephonic case management for the company and was assigned to the Petitioner's case. (T. 43-45) She said that four days after the injection on May 4, 2021, the Petitioner reported that the first two days were really rough but was feeling much better and had no pain that day that he spoke to her. (T. 46) She said the Petitioner also told her about a camping and kayaking trip planned for the next day. (T. 47) Ms. Kampmeier testified the Petitioner told her on June 7, 2021, that his back pain had increased, and he was unable to leave his house that weekend. (T. 49)

Dr. Marchosky authored a third report on June 15, 2021, after viewing the surveillance videos. (PX1, Deposition Exhibit) He stated that the Petitioner appeared to have made a remarkable recovery of function, stamina and ability since "his last evaluation" April 1, 2021. (Id.) Dr. Marchosky opined that the Petitioner reached maximum medical improvement and released the Petitioner to return to full work without restrictions. (Id.)

On June 29, 2021, the Petitioner saw Dr. Klostermann and informed him that his symptoms improved but he continued to have some pain in his low back and down left leg. (PX3) He said the strength in his leg was improved and that he was taking a muscle relaxer and pain medication as needed. (Id.) He also reported ongoing left shoulder pain, and Dr. Klostermann recommended a left shoulder MRI. (Id.)

The Petitioner returned to Dr. Kemp on July 8, 2021, and reported that the injections provided 70 percent relief for one month, and physical therapy was helpful with mobility. (PX1) He still had radicular pain and complained of episodes of leaking urine and inability to tell when he had an erection. (Id.) He said his left leg went numb when walking any distance and would go out, causing him to fall. (Id.) He was using a cane for stability. (Id.) Dr. Kemp continued off-work orders through August 16, 2021. (Id.) On July 12, 2021, the Petitioner requested a letter from Dr. Kemp releasing him to return to work without restrictions. (Id.) Dr. Kemp's nurse wrote the letter but warned that the Petitioner could still exacerbate his symptoms. (Id.) The Petitioner testified that requested the letter to give to the insurance adjuster because his benefits had been stopped, but he never sent the letter. (T. 34-35)

The Petitioner underwent cervical and shoulder MRIs on August 30, 2021. (PX3) The cervical MRI showed mild degenerative disc disease, worse at C3-4, and the left shoulder MRI indicated that the rotator cuff was intact, but there was mild acromioclavicular (AC) joint degeneration without spur. (Id.)

Dr. Kemp reviewed the Petitioner's MRIs on September 2, 2021, and recommended fusion surgery from L3 to S1, which was performed on October 20, 2021. (PX1) At a follow-up visit on December 9, 2021, Dr. Kemp summed up the Petitioner's condition and treatment, stating that the Petitioner had adjacent segment disease, persistent lumbar radiculopathy at the L3, L4 and L5 nerve roots and persistent neural foraminal stenosis – prompting the need for extension of the prior fusion and further decompression of his neural foramina at each level. (Id.) On that date, the Petitioner reported that he felt great and was up to walking 10,000 steps some days. (Id.) He said he had some persistent tingling in his toes and did not have the range of motion in his low back that he used to have, but overall was significantly improved. (Id.) The radicular pain had resolved.

(Id.) The Petitioner reported significant improvement in his leg pain a follow-up visit on March 10, 2022, but continued to have intermittent back pain and stiffness that limited activity. (Id.) Off-work orders were continued for six months. (Id.)

Dr. Kemp testified consistently with her records at a deposition on June 1, 2022. (PX7) She said it was medically necessary to proceed with surgery because the Petitioner had clear structural problems that would produce neural compression and give him the symptoms that were consistent to those he described. (Id.) After hearing a recitation of the Petitioner's medical history and a description of the work accident, Dr. Kemp stated that she thought the Petitioner had some underlying back problems that were exacerbated by the work injury and produced the constellation of symptoms that he presented with that ultimately led to the surgery. (Id.) She pointed to the resurgence of symptoms after the steroid injections as another factor supporting her decision to perform surgery. (Id.) When informed of the activities the Petitioner participated in that were captured on the videos, she explained that temporary relief from injections can give patients the feeling that they can be more active, but they pay for that later with resurgence of symptoms. (Id.) She did not think that the Petitioner's ability to perform those tasks meant that he was completely recovered from the work injury. (Id.)

On cross-examination, Dr. Kemp said she would not necessarily expect the Petitioner to have low back and leg symptoms with activities of ordinary life due to the 2017 fusion. (Id.) She explained that adjacent segment disease happens in 10-15 percent of patients, and usually takes years to develop. (Id.) She acknowledged that persons with low-back degeneration and prior surgery are susceptible to aggravations with the performance of activities and that those aggravations can be temporary with a return to baseline over a period of time. (Id.) She agreed

that her treatment recommendations for the Petitioner depended on the amount of credible symptoms he related to her. (Id.)

Dr. Kemp stated that she did not believe she would have given the Petitioner any specific lifting restrictions because there was no evidence of an acute fracture or ligament injury. (Id.) She said she counseled the Petitioner that activities – such as bending, lifting or twisting – could exacerbate his symptoms. (Id.) She said she ordered him off work because of the Petitioner's reports that doing lifting and doing his job was exacerbating his symptoms, and she expected that he would not improve until he attempted a course of conservative management. (Id.) She agreed that her opinion was based on the assumption that the Petitioner lived a relatively sedentary lifestyle from February 11, 2021, until July 8, 2021, and that he had ongoing and persistent symptoms that prevented him from performing heavy lifting and activity. (Id.) She said that if the Petitioner had requested a release with no restrictions on February 11, 2021, she would have agreed. (Id.)

At a deposition on August 18, 2022, Dr. Marchosky testified consistently with his reports. (RX1) Although he is board-certified in neurosurgery, he has not performed surgery since 2007. (Id.) Regarding the potential disc regression Dr. Marchosky referenced in his first report, he explained that when there is wear and tear or trauma, the substance inside the disc is distended, allowing weight to crunch on that disc, which bulges out in different directions and can irritate the nerve root. (Id.) He stated that if there is long enough wait, the disc degenerates and regresses, shrinking down and removing it from contact with the nerve root and relieving the symptoms. (Id.) Dr. Marchosky could not say whether the Petitioner's disc had regressed or not – resulting in the improvement he saw on the videos – without imaging being performed. (Id.) He assumed

from watching the videos that the impingement had been relieved. (Id.) He also said the epidural steroid injections helped. (Id.)

Dr. Marchosky stated that based on the history from the Petitioner and what he saw on the videos, it appeared that the Petitioner returned to his pre-accident baseline condition, and that was the basis of his opinion that the Petitioner reached maximum medical improvement. (Id.) He agreed with Dr. Kemp's recommendation that the Petitioner return to work on July 12, 2021. (Id.) Dr. Marchosky also said that in his review of the videos, he did not see any behaviors or facial expressions by the Petitioner that would support the need for surgery. (Id.) He said the activities he saw in the videos could aggravate a lumbar degenerative disease and could contribute to a return of symptoms. (Id.) When asked if the work accident was related to the surgery the Petitioner underwent, Dr. Marchosky said it could be a contributing element. (Id.) He said there could have been residual dysfunction of the disc and he could not say there was not a small contribution by the work injury. (Id.) He said he could not tell for certain if the condition caused by the accident was 100 percent resolved – it could be 1 percent, it could be 20 percent. (Id.) However, he agreed that the activities portrayed on the videos could have been related to the need for surgery. (Id.)

On cross-examination, Dr. Marchosky stated that in preparing his April 1, 2021, report, he only reviewed a record from the pain management consultation. (Id.) He said he did not review Dr. Kemp's February 11, 2021, office note and had never reviewed the Petitioner's physical therapy notes. (Id.) Similarly, in preparing his June 15, 2021, report, he only reviewed the surveillance videos and did not know that the Petitioner had undergone injections. (Id.) He acknowledged that he did not have the benefit of knowing what the Petitioner told his doctors contemporaneous with the camping trip, nor did he assess the Petitioner himself and ask how those activities affected him. (Id.)

The Petitioner testified that after the surgery, he was great for the first four months, then started experiencing more back pain. (T. 24-25) He said his back pain, left leg pain, use of his left leg and right leg symptoms were better at the time of arbitration than they were before the surgery. (T. 25-26) He said he was still not back to his pre-injury baseline. (T. 26)

CONCLUSIONS OF LAW

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

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 ILL. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

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

The Petitioner had prior low back problems – as evidenced by his fusion surgery in 2017 – but there is no indication that he had problems since. He was able to perform his job duties before the accident and was unable to afterwards. Both Drs. Kemp and Marchosky opined that the work accident either caused nerve impingement that led to the Petitioner's lumbar radiculopathy symptoms or aggravated a pre-existing condition that led to his symptoms. Dr. Marchosky additionally opined that the Petitioner's bulging disc that was causing the symptoms could regress with conservative treatment and stop pressing on the nerve root, thereby resolving the Petitioner's symptoms. After viewing the surveillance videos, Dr. Marchosky found that the Petitioner appeared to have made a remarkable recovery of function, stamina and ability and opined that the Petitioner reached maximum medical improvement. But he could not say whether the Petitioner's disc had regressed without imaging being performed. He assumed from watching the videos that the impingement had been relieved.

The video evidence shows the Petitioner participating in activities that the Arbitrator characterizes as showing mild to moderate exertion for seconds or minutes at a time. The Petitioner disclosed his activities to the physical therapist, who did not note issues with the activities. Throughout physical therapy, the Petitioner's symptoms ebbed and flowed – with improvement after injections and worsening after various activities. At the Petitioner's last physical therapy visit on June 10, 2021, the therapist noted that the Petitioner improved overall but was not able to return to his pre-accident capabilities. The Arbitrator finds that in looking at the videos in conjunction with the physical therapy notes, it is apparent that the Petitioner's condition had not resolved to its pre-accident state, such that his symptoms continued to return after the documented activities.

Although Dr. Marchosky stated that based on the history from the Petitioner and what he saw on the videos, it appeared that the Petitioner returned to his pre-accident baseline condition, he ended up acknowledging that there could have been residual dysfunction of the disc from the accident and he could not tell for certain if the condition caused by the accident was 100 percent resolved.

In addition, there are several issues with Dr. Marchosky's opinions. By his own admission, he did not review many of the Petitioner's treatment records – including Dr. Kemp's records, the majority of the pain management records and any of the physical therapy notes. Similarly, in preparing his June 15, 2021, report, he only reviewed the surveillance videos and did not know that the Petitioner had undergone injections. He acknowledged that he did not have the benefit of knowing what the Petitioner told his doctors contemporaneous with the camping trip, nor did he assess the Petitioner himself to determine how those activities affected him. As the Petitioner's treating physician, Dr. Kemp had more opportunities to become familiar with the Petitioner, and her opinions deserve greater weight.

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

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

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

When asked if the work accident was related to the surgery the Petitioner underwent, Dr. Marchosky said it could be a "contributing element." In his first report, Dr. Marchosky stated that

if conservative treatment did not resolve his condition, surgery may be indicated. As stated above, it is apparent that his condition did not fully resolve, and Dr. Kemp used her professional judgment to determine an appropriate course of treatment.

Therefore, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary and orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 8. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based on the findings above regarding causation and medical services, the Arbitrator finds that continuing treatment is necessary to cure the effects of his injury. Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Kemp, including any follow-up treatment and therapy, and the Respondent shall authorize and pay for such care.

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

The parties dispute temporary total disability benefits after May 25, 2021, through the date of trial on August 26, 2022. An employee is temporarily totally incapacitated from the time an

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

Dr. Kemp had ordered the Petitioner off work and allowed him to return to work on July 12, 2021. For the reasons stated above regarding causation, the Arbitrator gives more weight to Dr. Kemp's opinions as to the release of the Petitioner to full duty. Dr. Marchosky agreed with Dr. Kemp that her release of the Petitioner was appropriate. Even if the Petitioner was capable of performing the activities portrayed in the videos, the Arbitrator will not substitute her judgment for the treating physician as to the Petitioner's release for work. The Petitioner was taken off work again for his surgery on October 20, 2021, and – at the time of arbitration – Dr. Kemp had not yet released him.

Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 81 2/7 weeks, from October 28, 2020 through July 12, 2021, and from October 20, 2021, through August 26, 2022.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC032663
Case Name	Bobby Brantley v. Compass Group USA, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0217
Number of Pages of Decision	25
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kyle Tulley
Respondent Attorney	Elaine Newquist

DATE FILED: 5/15/2024

/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

Bobby Brantley,

Petitioner,

vs. NO. 21WC 32663

Compass Group USA, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, prospective medical care, causal connection, 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 June 20, 2023, is hereby affirmed and adopted.

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

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

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

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.

MAY 15, 2024
SJM/sj
o-5/8/2024
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	21WC032663
Case Name	Bobby Brantley v. Compass Group USA, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Kyle Tulley
Respondent Attorney	Elaine Newquist

DATE FILED: 6/20/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/William McLaughlin, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bobby Brantley
Employee/Petitioner

v.

Compass Group USA, Inc.
Employer/Respondent

Case # **21** WC **32663**

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 **McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **4/11/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **11/24/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**25,819.97**; the average weekly wage was $**1,337.54**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**14,183.40** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $7,144.72, as provided in Section 8(a) of the Act and hold Petitioner harmless for payments made by his BlueCross BlueShield group health plan.

Respondent shall pay Petitioner temporary total disability benefits of $891.69/week for 71.857 weeks, commencing 11/25/21 through 4/11/23, as provided in Section 8(b) of the Act.

The Arbitrator determines all medical treatment rendered to date has been reasonable and medically necessary. Therefore, the Arbitrator orders Respondent to authorize and pay for the recommended surgery: total knee arthroplasty/replacement. The Arbitrator also orders Respondent to authorize and pay for any pre-operative testing and/or imaging Dr. Ehmke finds to be appropriate. The Arbitrator also orders Respondent to authorize and pay for any reasonable post-operative care Dr. Ehmke finds to be appropriate.

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 20, 2023

ICArbDec19(b)

FINDINGS OF FACT

At the time of injury on November 24, 2021, Bobby Brantley (hereinafter "Petitioner") was a 48-year-old employee of Compass Group USA, Inc. (hereinafter "Respondent"). He has worked for Respondent since December 1997. (Tx p. 9). His job title is Lead Steward. (Tx p. 10). He was pain free, working full duty, and was not under any medical care for his right knee at the time of injury. (Tx p. 13, 30, 34). Petitioner testified his job duties consisted of the following: (1) setting up banquets, (2) keeping the kitchen and banquet areas clean, (3) cleaning equipment, (4) taking out and emptying garbage, (5) lifting heavy items and equipment that weigh anywhere from 20 – 150 pounds, and (6) assisting his subordinates. (Tx p. 10-13).

Accident

On November 24, 2021, Petitioner began his shift at approximately 9:00 – 10:00 AM. (Tx p. 12). He was emptying two large garbage hoppers located at the loading dock when he was injured. (Tx p. 13). Specifically, Petitioner was squatting down to lift and dump the heaviest hopper when he heard a pop in his right knee followed by immediate excruciating pain. (Tx p. 15, 47-50). He reported the accident to his manager, Paul Huppenthal. (Tx p. 16). The Director of Operations, Stephanie Klafert, then completed an incident report. (Tx p. 16). Petitioner was unable to finish his shift because of his injury. (Tx p. 13).

Medical Treatment

Petitioner's Prior Medical History

Petitioner never suffered an injury to his right knee prior to November 24, 2021. (Tx p. 30). He was neither experiencing any pain, taking medication, nor in medical treatment specifically related to his right knee prior to the date of injury. (Tx p. 13, 30). He also had full usage and mobility of his right knee prior to the date of injury. (Tx p. 30-31).

AMITA Health St. Francis Hospital

Petitioner presented to AMITA Health St. Francis Hospital on November 24, 2021, with right knee pain. (Px 1, p. 137). Petitioner reported he was lifting a heavy garbage can to empty when he felt a sudden pop in his right knee. (Px 1, p. 137). He stated he felt his kneecap pop out of place. (Px 1, p. 137). Petitioner reported a 7/10 pain level. (Px 1, p. 142). During his physical examination by Dr. Scott Bickel, Petitioner had tenderness over the patella and suprapatellar region, along with swelling and clicking in that area. (Px 1, p. 139). He underwent an x-ray and was prescribed with a knee immobilizer and pain medication. (Px 1, p. 139-140). He was diagnosed with right knee anterior knee pain and suspected patellar dislocation. (Px 1, p. 141-142).

Erie Family Health

Petitioner called Erie Family Health on November 26, 2021, regarding a right knee injury at work. (Px 2, p. 64). Petitioner presented to Erie Family Health on November 29, 2021. (Px 2, p. 60). He reported right leg pain from a work accident while he was moving a large garbage can. (Px 2, p. 61). Specifically, Petitioner reported he bent his knees to lift it up, and then he heard a click and pop while squatting. (Px 2, p. 61). He was wearing a knee brace at this appointment. (Px 2, p. 61). Dr. Maryam Ahmad recommended Petitioner be seen by an orthopaedic doctor (Px 2, p. 62-63). Petitioner was provided with an off work note until he could be evaluated by an

orthopaedic doctor. (Px 2, p. 62). Petitioner presented again on April 28, 2022, for a pre-operative test involving his right knee. (Px 2, p. 45-50).

Chitown Orthopaedics & Sports Medicine – Dr. Edward Forman

Petitioner presented to Chitown Orthopaedics on December 2, 2021. (Px 3, p. 12). Petitioner reported to orthopaedic surgeon Dr. Edward Forman that, while working as a server, he was carrying some garbage out to be dumped when he felt his right knee give way following a pop. (Px 3, p. 12). He also denied any prior history of injury or trauma to his [right] knee. (Px 3, p. 12). Petitioner reported an 8/10 pain level as well as constant aching and weakness. (Px 3, p. 12). Petitioner stated his symptoms are made worse with moving, walking, and standing. (Px 3, p. 12). During physical examination, Petitioner had mild effusion, moderate tenderness along the medial joint line, mild tenderness to palpation over the medial retinaculum, limited range of motion secondary to pain and discomfort, a positive McMurray's test, and a positive Patellar Apprehension test. (Px 3, p. 13). Dr. Forman diagnosed Petitioner with internal derangement and early degenerative joint disease of the right knee. (Px 3, p. 14). Dr. Forman prescribed Petitioner with an MRI and recommended Petitioner remain off work. (Px 3, p. 14, 24, 26). Dr. Forman stated Petitioner's condition was work related. (Px 3, p. 26).

Petitioner returned to Dr. Forman on December 14, 2021, with continued right knee pain complaints. (Px 3, p. 15). Dr. Forman's physical examination findings did not change from Petitioner's previous appointment. (Px 3, p. 15). Petitioner's MRI showed evidence of a medial meniscal tear involving the midbody and posterior, an effusion, and early degenerative joint disease. (Px 3, p. 16; Px 4, p. 4-5). Dr. Forman's diagnosis, work status, and causation opinion did not change from Petitioner's previous appointment (Px 3, p. 15, 28). He prescribed a right knee arthroscopy and recommended Petitioner remain off work. (Px 3, p. 16, 28).
Petitioner returned to Dr. Forman on January 4, 2022, with continued right knee pain, discomfort, and swelling. (Px 3, p. 17). Dr. Forman's physical examination findings, diagnosis, treatment recommendation, work status, and causation opinion did not change from Petitioner's previous appointment. (Px 3, p. 17-18, 30).

Petitioner returned to Dr. Forman on February 1, 2022, with continued right knee pain and discomfort. (Px 3, p. 19). Dr. Forman's physical examination findings did not change from Petitioner's previous appointment. (Px 3, p. 19). Petitioner underwent a hydrocortisone injection of the right knee. (Px 3, p. 20). Dr. Forman reviewed Respondent's Independent Medical Examination that was performed by Dr. Brian Forsythe. (Px 3, p. 20). Dr. Forman noted Dr. Forsythe did not perform a McMurray's exam during his evaluation of Petitioner. Dr. Forman also disagrees with Dr. Forsythe's diagnosis. (Px 3, p. 20). Specifically, Dr. Forman states there is causation from the work injury involving an aggravation of Petitioner's pre-existing condition. (Px 3, p. 20). Dr. Forman prescribed Petitioner with physical therapy and released Petitioner to sedentary work with the following right leg restrictions: (1) seated work only, (2) no squatting, kneeling, or twisting, (3) no climbing stairs or ladders, and (4) no twisting, pushing, or pulling. (Px 3, p. 20, 32). Dr. Forman stated Petitioner's condition was work related. (Px 3, p. 32, 34).

Petitioner returned to Dr. Forman on April 13, 2022, with continued right knee pain and discomfort. (Px 3, p. 22). Petitioner reported neither physical therapy nor the hydrocortisone injection helped him. (Px 3, p. 22). During physical examination, Petitioner had mild effusion, moderate tenderness along the medial joint line, limited range of motion secondary to pain and discomfort, a positive McMurray's test, and a positive Patellar Apprehension test. (Px 3, p. 13). Dr. Forman recommended a right knee arthroscopy. (Px 3, p. 23).

Respondent's Section 12 Exam #1 – Dr. Brian Forsythe

a. Petitioner's Reported History

Dr. Forsythe evaluated Petitioner on January 13, 2022. (Rx 3, p. 116). Petitioner reported he injured his right knee at work while dumping out garbage on a loading dock. (Rx 3, p. 117). Specifically, Petitioner reported he lifted a wheeled cart to dump garbage when he felt a pop, followed by pain, in his right knee. (Rx 3, p. 117). He had difficulty with weight bearing following the pop in his right knee. (Rx 3, p. 117). Petitioner reported 100% right knee function prior to his date of injury as well as 7.5/10 pain level. (Rx 3, p. 117). Additionally, he rated his right knee at 30-40% of normal subjectivity. (Rx 3, p. 117). Moreover, he denies undergoing any right knee surgery or being evaluated by a physician prior to his date of injury. (Rx 3, p. 117).

b. Petitioner's Physical Examination

Range of Motion: Right knee range of motion while supine was 3 to 40 degrees and 90 degrees while seated. (Rx 3, p. 118). Contralaterally, Petitioner's left knee range of motion was 0 to 120 degrees. (Rx 3, p. 118).

Tenderness: Reported diffuse nonspecific and nonphysiologic tenderness to palpation. (Rx 3, p. 118). Dr. Forsythe stated there is diffuse medial-sided tenderness, but there is neither focal lateral joint line, patellar tendon, quadriceps tendon, nor patellar facet tenderness. (Rx 3, p. 118). Additionally, Dr. Forsythe reported the left knee is nontender. (Rx 3, p. 118).

Straight Leg Raise and Squatting: Demonstrated a 6-degree lag with a straight leg raise on the right side compared to a 3-degree lag later on. (Rx 3, p. 118). Petitioner did not report a lag with a straight leg raise on the left side. (Rx 3, p. 118). Petitioner was able to squat 30 degrees. (Rx 3, p. 118).

Specified Knee Tests: Petitioner had both a negative Clarkes exam and Patellar Apprehension exam. (Rx 3, p. 118). The McMurray's exam on the right side was deferred secondary to guarding. (Rx 3, p. 118). The McMurray's exam on the left side was negative. (Rx 3, p. 118).

c. Dr. Forsythe's Answers to Interrogatories

Dr. Forsythe diagnosed Petitioner with a right knee strain and severe pre-existing right knee arthritis. (Rx 3, p. 119). He recommended Petitioner proceed with a right knee intraarticular corticosteroid injection and four to six weeks of physical therapy. (Rx 3, p. 119). A right knee arthroscopy would not offer any clinical value. (Rx 3, p. 119). Following completion of the recommended treatment, Dr. Forsythe recommended a release to full duty. (Rx 3, p. 119). At the time of this evaluation, Dr. Forsythe opined Petitioner can return to work on desk duty. (Rx 3, p. 119). Regarding causation, he opined there had been no aggravation, acceleration, nor a material worsening of Petitioner's severe pre-existing arthritis as a result of the work injury. (Rx 3, p. 119).

Doctors of Physical Therapy

Petitioner underwent physical therapy at Doctors of Physical Therapy from February 4, 2022, through March 3, 2022. (Px 5). Petitioner reported he felt a pop in his right knee with immediate pain while squatting to lift the garbage can at work. (Px 5, p. 17). He had a positive Appley's Compression and McMurray's test at each appointment. (Px 5, p. 18, 22, 26, 30, 34, 38, 42, 46, 50). Throughout treatment, his active range of motion (AROM) in the right knee ranged from 40-46 degrees, compared to 90 degrees in the left knee. (Px 5, p. 18, 35, 51). Throughout treatment, Petitioner's passive range of motion (PROM) in the right knee was 60 degrees, compared to 100 degrees in the left knee. (Px 5, p. 18, 22, 26, 30, 35, 38, 42, 46, 51). On his last date of physical therapy, Petitioner's therapist reported the following:

> "The patient has not shown significant improvement with regards to R knee mobility, ROM, force generating capacity or tolerance to functional activities since beginning PT…Patient has likely reached maximum potential improvement from PT services at this time." (Px 5, p. 51).

Respondent's Section 12 Exam #2 – Dr. Brian Forsythe

a. Petitioner's Reported History

Petitioner returned to Dr. Brian Forsythe on April 5, 2022. (Rx 3, p. 120). Petitioner reported he underwent the recommended injection and physical therapy, but he was provided with minimal to no relief. (Rx 3, p. 120). Additionally, he reported nighttime pain, a 7.5/10 pain level, and rated his right knee at about a 30% of normal subjectivity. (Rx 3, p. 121).

b. Petitioner Physical Examination

Range of Motion: Right knee range of motion while supine was 4 to 20 degrees with active guarding, wincing, and groaning. (Rx 3, p. 121). Contralaterally, Petitioner's left knee range of motion was 0 to 120 degrees. (Rx 3, p. 121).

Tenderness: Reported diffuse non-localizing and nonanatomic tenderness to palpation. (Rx 3, p. 121).

Straight Leg Raise and Squatting: Demonstrated an 8-degree lag with a straight leg raise on the right side. (Rx 3, p. 121). Petitioner did not report a lag with a straight leg raise on the left side. (Rx 3, p. 121). He was able to squat 20-30 degrees with wincing, groaning, and labored breathing. (Rx 3, p. 121).

Specified Knee Tests: Petitioner had both a negative Clarkes exam and Patellar Apprehension exam. (Rx 3, p. 121). Petitioner displayed guarding with flexion during the McMurray's exam. (Rx 3, p. 121). The McMurray's exam on the left side was negative. (Rx 3, p. 121).

c. Dr. Forsythe's Answers to Interrogatories

Dr. Forsythe's diagnosis did not change from his previous evaluation. Petitioner did not warrant any further treatment and was capable of working full duty without restrictions. (Rx 3, p. 122). Regarding causation, Dr. Forsythe stated there had been no aggravation, acceleration, nor a material worsening of Petitioner's severe pre-existing condition as a result of the work injury. (Rx 3, p. 122). Petitioner's subjective complaints were not supported by the objective findings. (Rx 3, p. 122).

Illinois Bone and Joint Institute – Dr. Ronak Patel

Petitioner presented to Illinois Bone and Joint Institute on May 5, 2022. (Px 6, p. 5). He reported to orthopaedic surgeon Dr. Ronak Patel that, while working, he was carrying garbage out to the dock to be emptied when he felt a pop in his right knee. (Px 6, p. 5). Petitioner denied any previous injury to the right knee. (Px 6, p. 5). He reported a 7/10 pain level as well as sharp, dull, and aching pain around the medical aspect of the knee, stiffness, instability, nighttime pain, and clicking. (Px 6, p. 5). His pain is exacerbated by stairs, walking, bending, and squatting. (Px 6, p. 5). During physical examination of the right knee, Petitioner had trace effusion, patellofemoral tenderness,

medial joint line tenderness, medial femoral condyle and medial tibial plateau tenderness, IT band tenderness, a positive McMurray's test, and a positive Appley's test. (Px 6, p. 7-8). Petitioner's range of motion of the right knee was 0 to 40 degrees. (Px 6, p. 7). Dr. Patel diagnosed Petitioner with unilateral primary osteoarthritis of the right knee. (Px 6, p. 9-10). He prescribed Petitioner with an unloading brace and Medrol Dosepak, and recommended Petitioner remain off work. (Px 6, p. 9-10, 33). Dr. Patel stated Petitioner's condition was work related and he likely exacerbated his underlying osteoarthritis. (Px 6, p. 10).

Petitioner returned to Dr. Patel on May 19, 2022. (Px 6, p. 13). Petitioner reported an 8/10 pain level as well as sharp pain around the medical aspect of the knee. (Px 6, p. 13). Dr. Patel noted Petitioner has been compliant with activity restrictions, brace usage, and rehabilitation protocol. (Px 6, p. 13). Also, Petitioner reported 35% improvement with the brace usage during weightbearing. (Px 6, p. 14). Dr. Patel's physical examination findings did not change from Petitioner's previous appointment. (Px 6, p. 15-16). Dr. Patel prescribed a right total knee arthroplasty given Petitioner's failure with conservative treatment, and provided him with a referral to total joint surgeon, Dr. Andrew Ehmke. (Px 6, p. 17). Dr. Patel's work status and causation opinions did not change from his previous evaluation. (Px 6, p. 17, 35).

Illinois Bone and Joint Institute – Dr. Andrew Ehmke

Petitioner presented to orthopaedic total joint surgeon, Dr. Andrew Ehmke, at Illinois Bone and Joint Institute on June 6, 2022. (Px 7, p. 5). Petitioner reported he felt a pop and pain in his right knee while emptying a garbage bin at work. (Px 7, p. 5). He also denied any previous injury to the right knee. (Px 7, p. 6). Petitioner reported a 7-8/10 pain level as well as sharp, dull, and aching pain around the medial aspect of the knee. (Px 7, p. 6). His pain is exacerbated by stairs, walking, and squatting. (Px 7, p. 6). During physical examination of the right knee, Petitioner had mild effusion and medial joint line tenderness. (Px 7, p. 6). Dr. Ehmke diagnosed Petitioner with a unilateral primary osteoarthritis of the right knee and recommended a total right knee replacement. (Px 7, p. 6). Petitioner was to remain off work. (Px 7, p. 14).

Petitioner's Narrative Report – Dr. Andrew Ehmke

Dr. Ehmke did not detect any symptom magnification during his examination of Petitioner. (Px 9, p. 4). Moreover, Dr. Ehmke opined Petitioner's right knee pain and stiffness are consistent with his diagnosis of severe right knee osteoarthritis. (Px 9, p. 4). Furthermore, Dr. Ehmke opined Petitioner's work injury aggravated his pre-existing knee arthritis which causes significant pain, stiffness, and Petitioner's inability to return to work. (Px 9, p. 4). Lastly, Dr. Ehmke opined a total [right] knee replacement is reasonable and Petitioner is unable to return to full duty work until he undergoes said knee replacement. (Px 9, p. 4-5).

Unrelated Left Lower Extremity:

Petitioner never reported any symptoms or pain involving his left knee throughout the duration of his medical treatment following his work injury on November 24, 2021. Specifically, Dr. Forman noted Petitioner's left knee did not have any tenderness, deformity, or injury, and the range of motion was unremarkable with normal strength and tone. (Px 3, p. 13). Dr. Forsythe also noted Petitioner's left knee was nontender along with a 0 to 120 degrees range of motion, negative straight leg raise, negative McMurray's exam. (Rx 3, p. 118, 121).

Throughout physical therapy treatment, Petitioner's active range of motion (AROM) in the left knee was 90 degrees, compared to 40-46 degrees in the right knee. (Px 5, p. 18, 35, 51). His passive range of motion (PROM) in the left knee was 100 degrees, compared to 60 degrees in the right knee. (Px 5, p. 18, 22, 26, 30, 35, 38, 42, 46, 51).

Evidence Deposition of Dr. Brian Forsythe

The evidence deposition of Dr. Brian Forsythe took place on November 3, 2022. (Rx 3). The deposition was bifurcated and was completed on February 9, 2023. (Rx 4). He testified he performs approximately 400 independent medical examinations per year with the majority being at the request of Respondents. (Rx 3, p. 26). He charges $1,200.00 per examination. (Rx 3, p. 27).

a. Physical Examination Findings

Dr. Forsythe testified Petitioner demonstrated an exaggerated gait and limp as well as having difficulty standing from a seated position. (Rx 3, p. 13, 22). He also testified Petitioner could only squat 30 degrees with difficulty and displayed limited movement of the knee cap because of the arthritis. (Rx 3, p. 18). Petitioner was guarded during the McMurray exam and also demonstrated wincing and groaning. (Rx 3, p. 14, 23).

b. Petitioner's Pain Levels and Range of Motion Testing

Dr. Forsythe testified Petitioner reported 7.5/10 pain levels during both of his examinations. (Rx 3, p. 28). He acknowledged Petitioner's pain levels were consistent throughout his treatment. (Rx 3, p. 29, 39-40). Additionally, Dr. Forsythe testified it was possible Petitioner had an 8/10 pain level. (Rx 3, p. 28). However, Dr. Forsythe later testified it was not possible for Petitioner's pain to be real. (Rx 3, 43).

Dr. Forsythe confirmed Petitioner's right knee range of motion during his first examination was 3 to 40 degrees whereas it was 4 to 20 degrees during his second examination. (Rx 3, p. 30). He also acknowledged Petitioner's flexion measurements decreased from 90 degrees to 30-70 degrees in between his two examinations. (Rx 3, p. 32-33). When asked on cross examination whether Petitioner's right knee range of motion either improved or worsened in between his two evaluations, Dr. Forsythe stated, "…neither because none of them are real…they're not real numbers." (Rx 3, p. 32).

c. Subjective Complaints vs Objective Findings

Dr. Forsythe testified Petitioner's x-ray revealed a credible finding of a painful condition involving bone-on-bone arthritis. (Rx 3, p. 46). However, Dr. Forsythe stated Petitioner's subjective complaints were not supportive by the objective findings simply because Petitioner's range of motion measurements were not credible. (Rx 3, p. 46).

d. Symptom Magnification of the Injured Right Knee

Dr. Forsythe testified it was quite obvious there was severe symptom magnification by any metric, and Petitioner logically chose when to magnify his symptoms. (Rx 3, p. 15, 37). Specifically, he stated Petitioner's symptom magnification worsened because (1) his leg raise went from a 3-6 degree lag to an 8-degree lag in between his two examinations, and (2) his squatting decreased from 30 degrees to 20-30 degrees in between his two examinations. (Rx 3, p. 34).

Additionally, Dr. Forsythe testified Petitioner was manifesting "very severe" symptom magnification because of exaggerated limping while walking. (Rx 3, p. 23). However, on cross examination, Dr. Forsythe stated having difficulty walking, bending, climbing, and squatting are all consistent with his diagnosis. (Rx 3, p. 37).

Dr. Forsythe testified stiffness, tenderness, and lack of range of motion are all consistent with arthritis. (Rx 3, p. 38). He also stated it is a painful condition. (Rx 3, p. 42). Furthermore, he opined an individual with an arthritic knee would experience pain in the following situations: (1) climbing stairs, (2) standing from a sitting position, and (3) walking. (Rx 3, p. 38-39). Moreover, when asked whether an individual with an arthritic knee can experience pain while sitting from a standing position, Dr. Forsythe did not disagree. (Rx 3, p. 38-39).

Dr. Forsythe stated Petitioner was guarded during his provocative McMurray exam. (Rx 3, p. 23). However, on cross examination, Dr. Forsythe acknowledged patients are sometimes guarded during physical examinations in order to avoid pain. (Rx 3, p. 44).

e. Symptoms Magnification of the Non-Injured Left Knee

Dr. Forsythe testified Petitioner displayed a normal 120-degree range of motion measurement with his uninjured left knee. (Rx 3, p. 42; Rx 4, p. 71). However, Dr. Forsythe then stated Petitioner displayed symptom magnification for his uninjured left knee as well even though he was unable to point to this information within either of his reports. (Rx 3, p. 35-36). Then, Dr. Forsythe testified he was unsure whether Petitioner magnified his symptoms when Petitioner failed to demonstrate a lag with his straight left leg raise. (Rx 3, p. 36).

f. Aggravation or Exacerbation of a Pre-Existing Condition

Dr. Forsythe testified Petitioner was not symptomatic prior to his work accident, but he confirmed he never reviewed any medical records nor was aware of any other traumatic accident relating to Petitioner's right knee that pre-date November 24, 2021. (Rx 3, p. 50-51). The only evidence Dr. Forsythe had to support his symptomatic opinion was his "dozen years practicing as a very busy clinical orthopedic surgeon…" (Rx 3, p. 51).

Dr. Forsyth defined aggravation as a "permanent worsening." (Rx 4, p. 75). He testified there is "no evidence" to suggest Petitioner's arthritis was neither aggravated, accelerated, nor materially worsened as a result of his injury. (Rx 3, p. 20, 56-57). He testified it is "impossible" to answer whether a specific injury can move an individual's arthritis from a manageable state to an unmanageable state. (Rx 3, p. 56). However, Dr. Forsythe indicated Petitioner suffered an exacerbation as a result of a strenuous activity such as heavy lifting. (Rx 4, p. 70). He also stated squatting and lunging could exacerbate a person's arthritis. (Rx 4 p. 70).

g. Total Knee Replacement is Reasonable

Dr. Forsythe testified he used to perform total knee replacements on individuals with bone-on-bone arthritis. (Rx 4, p. 74). He also testified a total knee replacement would be reasonable because of Petitioner's pre-existing arthritis. (Rx 4, p. 74). Specifically, Dr. Forsythe stated, "Mr. Brantley meets the criteria for a knee replacement based on his pre-existing severe bone-on-bone arthritis." (Rx 4, p. 74).

Evidence Deposition of Dr. Andrew Ehmke

The evidence deposition of orthopaedic surgeon Dr. Andrew Ehmke took place on October 13, 2022. (Px 10, p. 1). All of his opinions were made with a reasonable degree of medical and surgical certainty. (Px 10, p. 26). He specializes in hip and knee replacements. (Px 10, p. 7). Moreover, Dr. Ehmke performs about 190 knee replacement procedures per year. (Px 10, p. 7-8).

a. Petitioner's Credibility, Physical Examination, and Diagnosis

Dr. Ehmke testified he found Petitioner to be credible during his evaluation. (Px 10, p. 12). Petitioner did not show any signs of malingering. (Px 10, p. 11-12).

Although Petitioner's physical examination was somewhat limited due to his severe pain, Dr. Ehmke testified patients will typically be guarded during exams to help avoid those feelings of pain. (Px 10, p. 11-14). Dr. Ehmke stated Petitioner displayed a pretty significant limp, but that would be consistent with the level of Petitioner's arthritis. (Px 10, p. 12). Furthermore, Dr. Ehmke testified Petitioner's right knee range of motion (0 – 80 degrees) was consistent with his medical condition and injury. (Px 10, p. 14). He stated patients are sometimes unable to bend their knee beyond 90 degrees as a result of their severe arthritis and knee stiffness. (Px 10, p. 14). Presenting with severe pain and stiffness is common for individuals with this condition. (Px 10, p. 15).

Dr. Ehmke diagnosed Petitioner with right knee severe bone-on-bone pre-existing arthritis which was consistent with Petitioner's diagnostic images, physical examination findings, and reported symptoms. (Px 10, p. 15, 17).

b. Aggravation of a Pre-Existing Condition

Dr. Ehmke testified Petitioner was *asymptomatic prior to November 24, 2021*. (Px 10, p. 18-19). He explicitly disagreed with Dr. Forsythe's opinion on whether Petitioner's pre-existing arthritis was either aggravated, accelerated, or materially worsened as a result of the work injury. (Px 10, p. 25). Dr. Ehmke defined an aggravation as "a condition that was pre-existing and made significantly worse by a traumatic event." (Px 10, p. 20). He testified a specific injury can move an individual's arthritis from a manageable state to an unmanageable state. (Px 10, p. 19). Specifically, an example of an aggravated injury would include an individual with pre-existing arthritis being able to work full duty, but then not being able to work full duty following a specific injury or traumatic event. (Px 10, p. 19). Thus, Dr. Ehmke testified *Petitioner aggravated his pre-existing arthritis* which caused him to experience the severe pain and stiffness. (Px 10, p. 20).

c. Medical Causation and Mechanism of Injury

Dr. Ehmke testified Petitioner's ongoing *symptoms are directly related to the work injury* he suffered which aggravated a pre-existing condition that was previously asymptomatic. (Px 10, p. 20-21). Additionally, Dr. Ehmke described how Petitioner lifting the heavy garbage hopper could have impacted and aggravated his bone-on-bone arthritis in a multitude of ways: (1) Petitioner may have overloaded his right knee, (2) he may have slipped a little bit while lifting the garbage bin, (3) his weight may have shifted from one side of his body to the other, (4) or putting all of his weight through his right knee while lifting the garbage bin. (Px 10, p. 25).

Dr. Ehmke testified one must look for a scenario that puts an added stressor on the individual's arthritic knee. (Px 10, p. 25). When asked on cross examination if any activity of ordinary living could have aggravated Petitioner's bone-on-bone arthritis and make it symptomatic, Dr. Ehmke stated the following:

> "I don't know if I would say walking would aggravate it in the sense of - - in the same way that a very specific injury like we're talking about would where there's a moment where an abnormal stress is placed across the knee…" (Px 10, p. 30).

d. Total Knee Replacement is Reasonable

Dr. Ehmke testified a total knee replacement is both reasonable and necessary based on Petitioner's current condition as well as being related to his work accident. (Px 10, p. 16, 22). He recommended the total knee replacement for a multitude of reasons: (1) Petitioner failed conservative treatment, (2) Petitioner continued to experience severe pain and stiffness in his knee, (3) Petitioner continued to have difficulty walking and moving his knee, (4) Petitioner walked with a significant limp, (5) Petitioner had abnormal right knee range of motion findings of 80-90 degrees, (6) Petitioner was physically tender right over the area of his arthritis, and (7) Petitioner's x-ray findings indicated severe bone-on-bone arthritis. (Px 10, p. 14-15, 21, 32).

Dr. Ehmke testified Petitioner is at risk of his conditioning becoming materially worse if he does not undergo the total knee replacement. (Px 10, p. 24). Furthermore, based on his experience with total knee replacement candidates, Dr. Ehmke stated it is possible Petitioner begins to develop left leg symptoms due to compensation if he does not have the surgical procedure. (Px 10, p. 24).

Following the total knee replacement procedure, Petitioner will likely need to participate in physical therapy and then potentially both work conditioning and a functional capacity evaluation to assess possible permanent restrictions. (Px 10, p. 23).

e. Work Status

Dr. Ehmke kept Petitioner "off work" following his evaluation. (Px 10, p. 16-17, 24-25). Thus far, Petitioner's work restrictions have been reasonable, necessary, and related to his work injury. (Px 10, p. 25). Following the total knee replacement, Petitioner should remain "off work" for approximately 4-5 months especially if the job requires heavy lifting between 50-100 pounds multiple times per day. (Px 10, p. 23).

Petitioner's Current Condition

Petitioner testified his life has drastically changed since his right knee injury on November 24, 2021. (Tx p. 26). He no longer feels like himself and is maybe 25% of what he used to be. (Tx p. 28). Petitioner testified he currently has a 7.5/10 pain level. (Tx p. 24). He can no longer work because the injury has become too much for him and he feels hurt all the time. (Tx p. 32-33). Additionally, every day is a challenge because of the excruciating throbbing pain, spasms, shifting, clicking, and burning sensation he feels in his leg. (Tx p. 24, 25, 27). Moreover, he experiences pain while walking, bending, squatting, using stairs, getting out of bed, and using the shower. (Tx p. 25-26). His day-to-day routine has also changed because he can no longer do simple tasks such as walking his dog(s) or putting on his shoes without experiencing pain. (Tx p. 27). In the morning, his knee is stiff, sore, and achy. (Tx p. 28). At night, his knee is swollen with an accompanying burning sensation. (Tx p. 28).

Petitioner testified he continues to wear both his knee immobilizer and unloader brace on a daily basis to help keep his knee steady. (Tx p. 25, 33). He utilizes a walking cane when he develops blisters from the braces. (Tx p.

25, 34). Petitioner testified he still wants the total knee replacement recommended by both Dr. Patel and Dr. Ehmke because he wants his life back. (Tx p. 29-30).

ANALYSIS

With respect to issue "C," whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

After hearing testimony of Petitioner, reviewing the exhibits submitted, and the supporting case law, the Arbitrator finds Petitioner's accident arose out of and in the course of his employer with Respondent on November 24, 2021.

To be compensable under the Act, an injury must "arise out of" and "in the course of" the claimant's employment. *820 ILCS 305/2* (2002). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). Injuries sustained at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment. *Id*.

An injury is said to "arise out of" one's employment if its origin is in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accident injury. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848[1]. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Id*. at 36. To determine whether a claimant's injury arose out of his or her employment, we must first categorize the risk to which the employee was exposed. *Id*. Illinois courts recognize three categories of risk: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks. *Id*. at 38.

Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. *Id*. at 40. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of one's employment and are compensable under the Act. *Id*.

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* at 46.

Petitioner's knee injury arose out of an employment-related risk because the evidence established his injury was caused by a risk distinctly associated with his employment as a Lead Steward. Specifically, the act that caused Petitioner's knee injury (squatting down to lift and empty garbage from a hopper) was a risk incident to his employment because this was an act his employer could reasonably expect him to perform in fulfilling his job duties as a Lead Steward. (Tx p. 10-13)

Petitioner gave consistent and unrebutted testimony that he was emptying two large garbage hoppers when he was injured. (Tx p. 13). Specifically, He was squatting down to lift and dump the heaviest hopper when he heard a pop in his right knee, followed by immediate excruciating pain. (Tx p. 15, 47-50). He gave unrebutted testimony

[1] In *McAllister*, Petitioner worked as a sous chef for a restaurant. He knelt down on both knees to search for food that may have fallen and rolled under a cooler. While attempting to stand up, Petitioner's right knee popped. The Illinois Supreme Court ruled Petitioner's knee injury was employment related because it was caused by kneeling and standing while assisting a coworker's search for carrots in a walk-in cooler–--acts that were incident to and causally connected to claimant's job duties as an arranger of the walk-in cooler.

that his position as a Lead Steward required him to lift and carry heavy items on a daily basis. (Tx p. 11-12). Moreover, Petitioner gave unrebutted testimony that taking out garbage was a common duty he performed as a Lead Steward. (Tx p. 13).

Based on the evidence presented at hearing, it is clear Petitioner's act of squatting down to lift and dump the hopper filled with garbage was an act his employer might reasonably expect him to perform in fulfilling his job duties. Following the Illinois Supreme Court's ruling in *McAllister*, Petitioner's injury was employment related because Petitioner's act of squatting down to lift and dump the hopper filled with garbage was incident to and causally connected to his job duties. Thus, the Arbitrator finds Petitioner has met his burden proving an accident occurred that arose out of and in the course of his employment with Respondent.

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

After hearing the testimony of Petitioner and reviewing the exhibits submitted, the Arbitrator finds Petitioner's current condition of ill-being is causally related to the injuries sustained on November 24, 2021.

Causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994); *see also Darling v. Industrial Comm'n*, 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135 (1988).

a. Petitioner was in good health and asymptomatic prior to November 24, 2021

Petitioner has worked for Respondent since December 1997. (Tx p. 9). He was pain free, working full duty, had full usage and mobility of his right knee, and was neither under medical care nor taking medication specifically related to his right knee prior to his injury. (Tx p. 13, 30-31, 34).

b. Petitioner's pre-existing underlying arthritis was either exacerbated or aggravated from squatting and lifting a heavy garbage hopper on November 24, 2021

Petitioner's clear and credible testimony as well as all medical evidence submitted, support a workplace injury on November 24, 2021, in which he sustained a serious injury to his right knee while squatting down to lift and dump a heavy garbage hopper. (Tx p. 15, 47-50).

Dr. Forsythe diagnosed Petitioner with a right knee strain and severe pre-existing right knee arthritis. (Rx 3, p. 119, 122). He opined Petitioner's accident neither aggravated, accelerated, nor materially worsened his pre-existing arthritic condition. (Rx 3, p. 56-57). However, on cross examination, Dr. Forsythe testified an individual engaged in in squatting and heavy lifting could exacerbate an individual's pre-existing arthritis. (Rx 4, p. 70).

Orthopaedic surgeon Dr. Forman diagnosed Petitioner with internal derangement and early degenerative joint disease of the right knee. (Px 3, p. 14). He indicated this injury was causally related to work. (Px 3, p. 20).

Orthopaedic surgeon Dr. Patel diagnosed Petitioner with unilateral primary osteoarthritis of the right knee. (Px 6, p. 9-10). He also indicated this injury was causally related to work as a likely exacerbation. (Px 6, p. 10).

Orthopaedic surgeon Dr. Ehmke diagnosed Petitioner with unilateral primary osteoarthritis of the right knee. (Px 7, p. 6). He also indicated this injury was causally related to work as an aggravation of a pre-existing condition. (Px 9, p. 4; Px 10, p. 20-21). Specifically, Dr. Ehmke described how Petitioner's mechanism of lifting the heavy garbage hopper could have impacted and aggravated his bone-on-bone arthritis in a multitude of ways: (1) Petitioner may have overloaded his right knee, (2) he may have slipped a little bit while lifting the garbage bin, (3) his weight may have shifted from one side of his body to the other, (4) or putting all of his weight through his right knee while lifting the garbage bin. (Px 10, p. 25).

Dr. Ehmke testified one must look for a scenario that puts an added stressor on the individual's arthritic knee. (Px 10, p. 25). When asked on cross examination if any activity of ordinary living could have aggravated Petitioner's bone-on-bone arthritis and make it symptomatic, Dr. Ehmke stated the following:

> "I don't know if I would say walking would aggravate it in the sense of - - in the same way that a very specific injury like we're talking about would where there's a moment where an abnormal stress is placed across the knee…" (Px 10, p. 30).

Here, the added stressor involved Petitioner squatting down and lifting up a heavy hopper in order to empty the garbage. When doing so, Petitioner felt his right knee pop which caused his pre-existing underlying arthritis to move from asymptomatic to symptomatic.

Unlike the opinion of Dr. Forsythe, Dr. Ehmke testified a specific injury can move an individual's arthritis from a manageable state to an unmanageable state. (Px 10, p. 19). An example of an aggravated injury would include an individual with pre-existing arthritis being able to work full duty, but is then unable to work full duty after a specific injury or traumatic event. (Px 10, p. 19).

c. Petitioner has had credible and consistent physical complaints since November 24, 2021

Petitioner testified he felt excruciating pain immediately following his injury. (Tx p. 15). He currently has a 7.5/10 pain level and feels he is maybe 25% of what he used to be and that he feels hurt all the time. (Tx p. 24, 28, 32-33). Furthermore, every day is a challenge because of the excruciating throbbing pain, spasms, shifting, clicking, and burning sensation he feels in his right leg. (Tx p. 24-25, 27). Moreover, he experiences pain while walking, bending, squatting, using stairs, getting out of bed, and using the shower. (Tx p. 25-26). His day-to-day routine also changed because he can no longer do simple tasks such as walking his dog(s) or putting on his shoes without experiencing pain. (Tx p. 27). In the morning, his knee is stiff, sore, and achy. (Tx p. 28). At night, his knee is swollen with an accompanying burning sensation. (Tx p. 28). To help keep his knee steady, Petitioner utilizes a knee immobilizer, an unloader brace, and a walking cane. (Tx p. 25, 33-34). He never had to utilize these assistive devices prior to November 24, 2021. (Tx p. 33-34).

d. Petitioner was neither malingering nor magnifying his right knee symptoms

Dr. Forsythe would have this court believe Petitioner's condition did not deteriorate, but rather his symptom magnification had worsened. However, the credible testimony of both Petitioner and Dr. Ehmke, the myriad of inconsistent testimony provided by Dr. Forsythe, and the multitude of examples substantiating Petitioner's complaints being supported by the objective findings are a clear indication Petitioner is neither malingering nor magnifying his symptoms.

Dr. Ehmke found Petitioner to be credible and not to be exhibiting any signs of malingering. (Px 10, p. 11-12). Additionally, neither Dr. Forman nor Dr. Patel found Petitioner to be malingering. However, Dr. Forsythe opined Petitioner's current condition of ill-being is not causally related to his work injury because it was quite obvious there was severe symptom magnification by any metric, and Petitioner logically chose on when to magnify his symptoms. (Rx 3, p. 15, 37).

Specifically, Dr. Forsythe stated Petitioner was magnifying his symptoms for the following reasons: (1) Petitioner was walking with an exaggerated gait and limp, (2) he squatted with exaggerated difficulty, (3) he had exaggerated difficulty standing from a seated position, (4) he displayed active wincing and guarding, (5) there were no reproducible areas of tenderness, (6) and he had inconsistent range of motion metrics. (Rx 3, p. 13-14, 18, 22-23).

However, on cross examination, Dr. Forsythe stated arthritis is a painful condition. (Rx 3, p. 42). He acknowledged individuals are sometimes guarded during physical examinations in order to avoid pain. (Rx 3, p. 44). He opined an individual having difficulty walking, bending, climbing, and squatting are all consistent with his diagnosis. (Rx 3, p. 37). He also testified stiffness, tenderness, and lack of range of motion are all consistent with arthritis. (Rx 3, p. 38). Moreover, Dr. Forsythe confirmed an individual with an arthritic knee would experience pain in the following situations: (1) climbing stairs, (2) standing from a sitting position, and (3) walking. (Rx 3, p. 38-39). Furthermore, when asked whether an individual with an arthritic knee can experience pain while sitting from a standing position, Dr. Forsythe did not disagree. (Rx 3, p. 38-39).

Dr. Ehmke also opined individuals will typically be guarded during physical examinations to help avoid feelings of pain. (Px 10, p. 11-14). When asked whether Petitioner showed any signs of exaggeration, Dr. Ehmke stated Petitioner displayed a pretty significant limp, but that would be consistent with the level of Petitioner's arthritis. (Px 10, p. 12). He also testified presenting with severe pain and stiffness is common for individuals with this condition. (Px 10, p. 15).

Dr. Forsythe is adamant Petitioner was magnifying his symptoms because of the gross inconsistencies with Petitioner's range of motion testing. (Rx 3, p. 14, 23). However, he acknowledged Petitioner's right knee flexion measurements from his first exam to his second exam were different (90 degrees to 30-70 degrees). (Rx 3, p. 32-33). Moreover, Dr. Ehmke testified these measurements are consistent with Petitioner's medical condition and injury because sometimes individuals are so stiff, they are incapable of bending their knee beyond 90 degrees. (Px 10, p. 14).

Dr. Forsythe confirmed Petitioner's x-ray revealed a credible finding of a painful condition involving bone-on-bone arthritis. (Rx 3, p. 46). He acknowledged Petitioner reported 7.5/10 pain levels during both of his examinations and had consistent reported pain levels throughout his treatment. (Rx 3, p. 28-29, 39-40). Dr. Forsythe also testified it was possible Petitioner could even have a reported 8/10 pain level. (Rx 3, p. 28).

In conclusion, based on the chain of events analysis, Petitioner's credibility and ongoing complaints, and the credibility of the doctors, the Arbitrator finds Petitioner met his burned of proof by a preponderance of the evidence that his condition of ill-being relating to his right knee is causally related to his November 24, 2021, work accident.

With respect to issue "G," regarding Petitioner's earnings, the Arbitrator finds as follows:

Petitioner has claimed an average weekly wage (AWW) of $1,337.54. However, Respondent has claimed an AWW of $949.34. The dispute arises because Petitioner, was on a layoff for a large part of 2021 due to the Covid-19 emergency. (Tx p. 38-40).

Petitioner maintained his income in the 52 weeks prior to the accident should be divided by 17.8. This was calculated by counting the number of days worked in that period, then dividing by 5 to arrive at 17.8 work weeks. (Px 11). Respondent argued Petitioner's income should be divided by 26, which appears to be the number of weeks Petitioner earned *some* wages. (Rx 2).

After reviewing the facts and the applicable case law, the Arbitrator adopts Petitioner's method of calculation as mandated by our Supreme Court in *Sylvester v. Industrial Comm'n*, 197 Ill.2d 225 (2001). As the *Sylvester* court explained, Section 10 provides several ways to calculate AWW. In general, AWW is defined as the claimant's earnings in the 52 weeks prior to the accident, divided by 52. However, if a claimant has lost more than five calendar days of work, *"whether or not in the same week,"* their earnings should be divided by the total number of "weeks and parts thereof" remaining *"after the time so lost has been deducted." Sylvester,* 197 Ill.2d at 230, 233 (emphasis added).

Similar to the Petitioner in this case, the claimant in *Sylvester* had been laid off in the year prior to his accident. While on layoff, the claimant had periodically been called in for a few hours' work. His employer argued "the weeks in which the employee worked at least one day should be counted the same as a full week of work." *Id*. at 231. Noting the claimant drew a paycheck of some sort in 48 of the 52 weeks, the Respondent divided his total earnings by 48, for an AWW of $368.43. *Id*. at 229.

The Court rejected this method as contrary to the plain language of Section 10, which called for deduction of all days lost whether or not in the same week. While the employer argued "time is only deducted when it is lost in whole-workweek increments, the Court ruled, "the clear meaning of the statute is to the contrary." *Id*. at 233. The number of "weeks and parts thereof" used should equal the 131 days claimant had actually worked in the previous 52 weeks, divided by the number of days in a work week. The result was 26.2 weeks, yielding an AWW of $674.98. *Id*. at 234.

In our case, Respondent, by advocating a 26-week calculation, attempts to use the very method rejected by the Supreme Court in *Sylvester*. Petitioner testified he had not worked at all prior to May 3, 2021, "because of covid … no one was working. We weren't called back until May 17." (Tx p. 39). His hours were limited after he first returned from this Covid-19 layoff because "the event business was coming back, the business, the bookings." (Tx p. 40). Petitioner earned just $98.00 in the two-week pay period beginning May 3, 2021, for a four-hour orientation meeting. (Tx p. 43). His pay records show his wages remained sporadic until weeks 40-41, when bookings returned to their normal levels. (Px 11, p. 1).

Diluting Petitioner's AWW by including the entirety of those initial pay periods, rather than just the days actually worked defeats the purpose of the Workers' Compensation Act: "providing financial protection for interruption or termination of a worker's earning power." *Sylvester, Id*. at 232. Thus, the Arbitrator finds Petitioner's AWW to be $1,337.54, as calculated by Petitioner.[2]

With respect to issue "J," whether the medical services 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:

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[2] The Arbitrator notes that both parties included overtime earnings in their calculations. Given Petitioner's unrebutted testimony that such hours were mandatory for him as a lead steward (Tr. 55), this is appropriate. See *D.J. Masonry, Inc. v. Industrial Comm'n*, 295 Ill. App. 924 (1st Dist. 1998); *Airborne Express v. IWCC*, 372 Ill. App. 3d 549 (1st Dist. 2007). Petitioner's Exhibit 11 properly calculates his overtime earnings at straight-time rates in accordance with *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 667 (1st District 1990).

Petitioner treated with the following providers after his work accident: (1) AMITA Health St. Francis Hospital, (2) Erie Family Health, (3) Chitown Orthopaedics & Sports Medicine, (4) Edgebrook Radiology, (5) Doctors of Physical Therapy, (6) Illinois Bone & Joint Institute, and (7) EQMD. At the time of hearing, Petitioner had the following related outstanding medical bills:

AMITA Health St. Francis Hospital	$1,478.04 (Px 1, p. 13)
Edgebrook Radiology	$1,950.00 (Px 4, p. 2-3)
Illinois Bone & Joint Institute (Dr. Patel)	$3,015.00 (Px 6, p. 43-46)
Illinois Bone & Joint Institute (Dr. Ehmke)	$285.00 (Px 7, p. 20)
EQMD	$416.68 (Px 8, p. 2-4)
Total Outstanding Balance	$7,144.72

Additionally, some of Petitioner's medical care was put through his BlueCross BlueShield group health plan. (Px 3, p. 5-11).

The Arbitrator finds Petitioner's medical care was reasonable and necessary due to the Arbitrator's findings above regarding accident and causation. Thus, the Arbitrator finds Respondent liable for all of Petitioner's medical care and expenses as set forth above. Respondent shall pay all unpaid and related medical expenses according to the fee schedule, and provide Petitioner documentation of said fee schedule payment calculations. The Arbitrator awards the outstanding medical bills outlined above to be paid directly to Petitioner pursuant to the Illinois medical fee schedule.

With respect to issue "K," whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

Having found a causal connection between Petitioner's workplace accident and his ongoing pain and symptoms. Therefore Arbitrator finds the recommended total knee replacement surgery to be both reasonable and medically necessary.

a. <u>The recommended total right knee replacement is both reasonable and necessary:</u>

Petitioner underwent Dr. Forsythe's recommended physical therapy and injection, but neither treatment option helped. (Tx p. 22-23). Specifically, Petitioner's therapist reported the following:

> "The patient has not shown significant improvement with regards to R knee mobility, ROM, force generating capacity or tolerance to functional activities since beginning PT…Patient has likely reached maximum potential improvement from PT services at this time." (Px 5, p. 51).

Both Dr. Patel and Dr. Ehmke recommended a right total knee replacement. (Px 6, p. 16-17). Dr. Ehmke testified the total knee replacement is both reasonable and necessary based on Petitioner's current condition as well as being related to his work accident. (Px 10, p. 16, 22). He also recommended the total knee replacement for a multitude of reasons: (1) Petitioner failed conservative treatment, (2) Petitioner continued to experience severe pain and stiffness in his knee, (3) Petitioner continued to have difficulty walking and moving his knee, (4) Petitioner walked with a significant limp, (5) Petitioner had abnormal right knee range of motion findings of 80-90 degrees, (6) Petitioner was physically tender right over the area of his arthritis, and (7) Petitioner's x-ray

findings indicated severe bone-on-bone arthritis. (Px 10, p. 14-15, 21, 32). Failure to have the total knee replacement puts Petitioner at risk of his condition becoming materially worse. (Px 10, p. 24).

Dr. Forsythe also testified a total knee replacement would be reasonable. (Rx 4, p. 74). Specifically, Dr. Forsythe explicitly stated, "Mr. Brantley meets the criteria for a knee replacement based on his pre-existing severe bone-on-bone arthritis." (Rx 4, p. 74).

b. The Arbitrator finds the opinions of Dr. Forsythe to be inconsistent and not credible:

Material Worsening: Dr. Forysthe testified there is "no evidence" to suggest Petitioner's arthritis was materially worsened as a result of his injury. (Rx 3, p. 20, 56-57). However, Petitioner now experiences excruciating throbbing pain, spasms, shifting, clicking, and burning sensation in his right leg when he attempts to walk, bend, squat, utilize stairs, get out of bed, and use the shower on a daily basis. (Tx p. 24-27). His right knee is stiff, sore, and achy in the morning as well as swollen in the evening. (Tx p. 28). He did not have these issues prior to his work injury. Prior to his injury, he did not need to utilize braces and a cane to walk. (Tx p. 25, 33-34). Now, he does. (Tx p. 34). Prior to this injury, he was able to work full duty. (Tx p. 34). Now, Dr. Ehmke has him medically restricted him from returning to work until he has the total knee replacement. (Px 9, p. 4-5). Prior to his injury, he was not treating for his right knee. Now, Dr. Patel, Dr. Ehmke, and Dr. Forsythe all agree he needs a total knee replacement. The evidence overwhelming indicates Petitioner's arthritis was materially worsened as a result of his injury on November 24, 2021.

Pain Levels: Dr. Forsythe confirmed Petitioner had reported 7.5/10 pain levels during his examinations while acknowledging its possible he can have 8/10 pain levels. (Rx 3, p. 28). However, Dr. Forsythe then testified he has reason to doubt Petitioner's reported pain levels with Dr. Patel and Dr. Ehmke without ever reviewing their reports. (Rx 3, p. 29). Shortly thereafter, Dr. Forsythe insinuated he knew the pain Petitioner was feeling, but he was incapable of rating the pain on a scale of 0-10. (Rx 3, p. 40). Dr. Forsythe then stated a typical person would have a 3/10 pain level which contradicted his previous testimony of the possibility of Petitioner having an 8/10 pain level. Finally, Dr. Forsythe egregiously opined it is *not possible* Mr. Brantley's pain was real. (Rx 3, p. 43).

Asymptomatic vs Symptomatic: Dr. Forsythe acknowledged he never reviewed any medical records supporting medical treatment nor knew of any other traumatic accident involving the right knee prior to November 24, 2021. (Rx 3, p. 50). Nevertheless, Dr. Forsythe testified Petitioner was not asymptomatic prior to November 24, 2021. (Rx 3, p. 51). The only evidence he presented to support this opinion was his "dozen years practicing as a very busy clinical orthopedic surgeon." (Rx 3, p. 51). When asked whether he was 100% certain Petitioner was symptomatic with right knee symptoms prior to November 24, 2021, Dr. Forsythe was very vague and refused to provide a direct answer. (Rx 3, p. 51-52).

Malingering: In addition to Petitioner's aforementioned arguments under subsection (d) with respect to issue "F," Dr. Forsythe opined Petitioner magnified his uninjured left knee symptoms. Petitioner's left knee range of motion was 0-120 degrees. (Rx 3, p. 42; Rx 4, p. 71). Dr. Forsythe initially classified this measurement as a normal good effort measurement, but he then quickly changed his opinion and stated Petitioner magnified these symptoms as well. (Rx 3, p. 35-36).

Dr. Forsythe does not mention any left knee malingering within his IME reports. When asked to point to where he mentions left knee malingering within his reports, Dr. Forsythe immediately reverts back to Petitioner's lack of credibility and speculates Petitioner had the predisposition prior to his appointments of wanting to magnify his symptoms. It is disconcerting knowing Dr. Forsythe claims Petitioner magnified his symptoms on an otherwise

uninjured body party with normal range of motion measurements coupled with the absence of any subjective complaints or objective findings.

c. The Arbitrator finds Petitioner's credible testimony and ongoing symptoms warrants the need for surgical intervention with a total right knee replacement:

Petitioner currently has a 7.5/10 pain level. (Tx p. 24). Every day is a challenge because of the excruciating throbbing pain, spasms, shifting, clicking, and burning sensation he feels in his right leg when he attempts to walk, bend, squat, utilize stairs, get out of bed, and use the shower. (Tx p. 24-27). He can no longer walk his dog(s) or put his shoes on without experiencing pain. (Tx p. 27). In the morning, his knee is stiff, sore, and achy. (Tx p. 28). At night, his knee is swollen with an accompanying burning sensation. (Tx p. 28). He has been confined to using a knee immobilizer, an unloader brace, and a walking cane as a result of his work injury. (Tx p. 25, 33-34). Petitioner even underwent the physical therapy and injection recommended by Dr. Forsythe, but that treatment did not help. (Tx p. 22-23).

It is also important to note all doctors involved in Petitioner's case have acknowledged his pain complaints and need for medical treatment, specifically the total knee replacement. Neither Dr. Forman, Dr. Patel, nor Dr. Ehmke found Petitioner to be either non-credible or a malingerer. Most importantly, Petitioner testified he still wants to proceed with the total knee replacement because he wants his life back. (Tx p. 29-30).

d. The Arbitrator finds the following Commission decision applicable to the facts herein:

In assessing the reasonableness and necessity of Petitioner's need to undergo the recommended surgery, the Arbitrator finds the Commission decision of *Macedo Santos v. Menards*, 22 IWCC 0125 applicable to the facts herein. In *Macedo Santos v. Menards*, the Commission adopted the Arbitrator's order for prospective medical care by finding Petitioner's expert more persuasive than Respondent's expert. Additionally, the Commission found Petitioner truly exhausted conservative care, but was still limited physically. The Commission also reasoned Petitioner had a long time to think about the proposed surgery and accepts the surgery is not without risks.

Similarly, in our case, the Arbitrator finds Dr. Ehmke to be more credible than Dr. Forsythe based on the inconsistencies in Dr. Forsythe's testimony. Additionally, Petitioner has exhausted all conservative care, but he continues to exhibit excruciating throbbing pain, spasms, stiffness, clicking, and burning sensations in his right knee. (Tx p. 24-25, 27). He also experiences pain while walking, bending, squatting, using stairs, getting out of bed, and using the shower. (Tx p. 25-26). Lastly, Petitioner has had approximately one year to think about the surgery and fully understands the surgery is not without risks. Thus, pursuant to the Commission's decision, the Arbitrator finds recommended total knee replacement to be both reasonable and necessary.

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

Petitioner alleges 71.857 weeks of temporary total disability ("TTD") from 11/25/21 – 4/11/23, which is the date of trial for this claim. The medical records show Petitioner was taken off work by Erie Family Health on November 29, 2021. (Px 2, p. 62). Petitioner was then taken off work by Dr. Forman from December 2, 2021, through January 4, 2022. (Px 3, 14, 16, 26, 28, 30). Dr. Forsythe opined Petitioner was capable of desk duty on January 13, 2022. (Rx 3, p. 119). Dr. Forman provided Petitioner with the following light duty restrictions on February 1, 2022: (1) seated work only, (2) no squatting, kneeling, or twisting, (3) no climbing stairs or ladders,

and (4) no twisting, pushing, or pulling. (Px 3, p. 32). Dr. Forsythe opined Petitioner was capable of full duty work on April 5, 2022. (Rx 3, p. 122). Petitioner was then taken off work by Dr. Patel on both May 5, 2022, and May 19, 2022. (Px 6, p. 10, 18, 33, 35). Dr. Ehmke continued to keep Petitioner off work during his evaluation on June 6, 2022. (Px 7, p. 14). Dr. Ehmke then testified Petitioner is unable to return to full duty work until he undergoes the total right knee replacement. (Px 9, p. 4-5). Petitioner is currently not receiving any TTD benefits. (Tx p. 41).

Petitioner testified he would be willing to report to work in some modified capacity if the position were suitable to his current medical condition because he currently does not have a way to financially support himself. (Tx p. 55). Respondent claims to have offered Petitioner a light duty job position. (Rx 2). Petitioner testified Respondent never offered him a light duty job position. (Tx p. 53-54). There was no evidence presented to contradict the testimony of the Petitioner,

Based on the medical records and work status reports, and the preponderance of the evidence, the Arbitrator finds Petitioner was temporarily totally disabled from 11/25/21 – 4/11/23, for a period of 71.857 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC029838
Case Name	Elizabeth J. Knight v. Christian Horizons PEO, LLC
Consolidated Cases	
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	24IWCC0218
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	James Ruppert
Respondent Attorney	Timothy Furman

DATE FILED: 5/16/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELIZABETH KNIGHT,

Petitioner,

vs. NO: 22 WC 29838

CHRISTIAN HORIZONS PEO, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits and any and all issues raised at arbitration, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission 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 to state that Respondent is entitled to a credit under Section 8(j) of the Act as agreed to by and between the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 25, 2023 is hereby modified as stated and otherwise affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

MAY 16, 2024

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

CAH/pm
O: 5/9/24
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC029838
Case Name	Elizabeth J. Knight v. Christian Horizons PEO, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	James Ruppert
Respondent Attorney	Timothy Furman

DATE FILED: 7/25/2023

/s/Edward Lee, Arbitrator

Signature

INTEREST RATE THE WEEK OF JULY 25, 2023 5.27%

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
PETITIONER'S PROPOSED 19(b)
ARBITRATION DECISION

Elizabeth J. Knight
Employee/Petitioner

v.

Christian Horizons PEO, LLC
Employer/Respondent

Case # **22 WC 029838**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **June 29, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 10, 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 $**45,825.00**; the average weekly wage was $**940.00**.

On the date of accident, Petitioner was **35** years of age, respectively, ***single*** with **2** dependent child.

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

Respondent shall be given a credit of $**14,055.32** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**14,055.32**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule totaling $7,862.32, equating to $620.00 due and owing to Ferrell Carmi Family Medicine RHC; $2,726.00 due and owing to Ferrell Hospital; $121.00 due and owing to Specialists in Medical Imaging; $129.51 due and owing to Dr. George Paletta; $396.40 due and owing to MFG Spine, LLC; $2,238.41 due and owing to Orthopedic Surgery Center of Creve Coeur; and $1,631.00 due and owing to United Physician Group, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall pay directly to Petitioner $148.30 so Petitioner may satisfy the subrogation interest held by Aetna.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Gornet, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $626.67/week for 34-3/7ths weeks, for the date of 10/30/22 and for the period of 11/2/22 through 6/29/23, as provided in Section 8(b) of the Act.

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

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

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

Edward Lee _____ **JULY 25, 2023**

Signature of Arbitrator, Date

STATE OF ILLINOIS)
) **SS**
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ELIZABETH J. KNIGHT,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case. No. 22 WC 029838
	)	
CHRISTIAN HORIZONS PEO, LLC,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACTS

The stipulations and record reflect that on 10/10/22, Petitioner was employed by Respondent when she injured her cervical spine while caring for a patient. This claim came before Arbitrator Edward Lee for trial in Collinsville on 6/29/23. The issues in dispute are causal connection, medical expenses, prospective medical care and temporary total disability benefits. All other issues and credits have been stipulated.

TESTIMONY AND MEDICAL RECORDS

Petitioner testified that she worked at Respondent's long-term care nursing home facility on 10/10/22 as a CNA and restorative nursing assistant. Her job duties were to take care of residents' everyday living/care needs and assist them with therapy. Petitioner testified that on 10/10/22 she was changing a 300 lbs patient's bed sheet and the patient let go of the bed railing and landed on the sheet that Petitioner was holding which pulled on her entire right side. Petitioner stated that immediately after the incident occurred, she had pain in her right shoulder and in between her shoulder blades. Petitioner stated that about 1.5 to 2 weeks after the incident, she began to have pain in her neck. Petitioner stated that pain initially radiated from her right shoulder to her neck and then it began to radiate down her arm, causing her middle and ring fingers to be numb and tingling.

Petitioner stated that after her injury she presented to her primary care provider, Mr. Wes Henson, NP. He ordered she undergo some therapy at Wabash Christian Therapy and an MRI of her right shoulder at Ferrell Hospital. Petitioner stated Mr. Henson referred her to an orthopedic doctor, Dr. George Paletta, and Dr. Paletta felt her neck might be causing her symptoms so he ordered a cervical spine MRI. After reviewing the cervical spine MRI, Dr. Paletta referred Petitioner to an orthopedic doctor, Dr. Matthew Gornet. Petitioner stated Dr. Gornet had her undergo an injection in her neck and recommended that she have surgery on her cervical spine.

Petitioner was shown page 46 of Petitioner's Exhibit 2 and stated that Mr. Henson imposed those restrictions on 11/2/22. Petitioner stated that Respondent was not willing to accommodate

the restrictions imposed on 11/2/22 and that she last worked for Respondent on 11/1/22. Petitioner stated she currently has quite a bit of pain in her neck that radiates pain down her right arm and her fingers would still go numb. Petitioner also stated she would get headaches intermittently. Petitioner stated that she tries to lessen her symptoms by not using her right arm, by taking Tylenol and by using IcyHot. Petitioner stated that prior to 10/10/22 she never had neck pain for more than 24 hours and had not seen any medical provider for her neck prior to 10/10/22. Similarly, Petitioner stated that prior to 10/10/22 she never had right shoulder or right upper extremity symptoms for more than 24 hours and had not seen any medical provider for her right shoulder or right upper extremity prior to 10/10/22.

On cross-examination Petitioner stated that she had not had any second or subsequent accidents after 10/10/22. Petitioner stated that she continued to work after the accident in a light duty capacity until approximately 11/1/22. Petitioner stated she was truthful and honest with all of her physicians. Petitioner agreed that Respondent sent her to an IME with Dr. Jesse Butler in March, 2023, and she was honest and truthful with Dr. Butler.

The medical records admitted into evidence indicate that Petitioner initially saw Mr. Henson on 10/11/22 and was complaining of right shoulder and upper back pain following a work related injury on 10/10/22 while turning a patient in bed when the patient let go of the rail. Mr. Henson's physical exam showed decreased range of motion (ROM), tenderness in her right shoulder and a positive empty can sign. Mr. Henson diagnosed a right shoulder injury and ordered x-rays of her right shoulder. Mr. Henson also prescribed Flexeril, Tylenol and formal physical therapy. X-rays of her right shoulder taken on 10/11/22 at Ferrell Hospital were unremarkable.

Petitioner returned to Mr. Henson on 10/18/22, and he noted ongoing right shoulder discomfort and that Petitioner had not started physical therapy yet. Mr. Henson's physical exam that date showed reduced ROM in her right shoulder and a positive, but improved, empty can sign on the right. Mr. Henson's diagnosis and care recommendations were unchanged.

Petitioner followed up with Mr. Henson on 10/25/22, and he charted continued right shoulder pain with pain into the right side of her neck and that her head would lean to the left by the end of the day. Mr. Henson noted that the pain was radiating into her neck and that her right arm had numbness and tingling sensations. Mr. Henson's physical exam showed reduced ROM in her right shoulder and a positive empty can sign on the right. Mr. Henson ordered a MRI of her right shoulder and referred her for orthopedic care.

Mr. Henson's 10/29/22 note reflects that our client had some increase in her right shoulder and neck pain following her work shift that date. Mr. Henson recorded that her symptoms were constant. Mr. Henson's physical exam showed reduced ROM in her right shoulder and tenderness about her cervical spine and trapezius muscle. Mr. Henson continued to recommended the MRI and orthopedic consult and took Petitioner off of work on 10/30/22.

Mr. Henson reevaluated Petitioner on 11/2/22 and noted ongoing right shoulder and neck discomfort. He noted her symptoms now included headaches and tingling/numbness in her fingertips. Dr. Henson documented she had not improved and that therapy had worsened her symptoms. He continued to recommend a MRI and an orthopedic appointment. Mr. Henson imposed light duty restrictions on 11/2/22 that stated Petitioner was not to have weight bearing movement with her upper extremities until she underwent an MRI and saw an orthopedic doctor.

The 11/9/22 right shoulder MRI completed at Ferrell Hospital was normal. From 10/19/22 through 11/16/22, Petitioner completed therapy at Wabash Christian Therapy. On 1/4/23 Petitioner was seen by Dr. George A. Paletta, Jr. at the Orthopedic Center of St. Louis. Dr. Paletta noted a consistent history of present illness and symptoms consisting of neck pain, right shoulder pain, pain in her right arm and numbness/tingling down her right arm and into her middle and ring fingers. Dr. Paletta's physical exam showed reduced ROM of the cervical spine, significant pain with cervical spine extension, a positive Spurling's sign with axial neck pain and right arm pain and an unremarkable exam of our client's right shoulder. Dr. Paletta obtained x-rays and reviewed the prior imaging of Petitioner's right shoulder and opined they were unremarkable. Dr. Paletta diagnosed cervicalgia with right upper extremity symptoms and no evidence of primary shoulder pathology. Dr. Paletta opined that based on her complaints and physical exam findings, the origin of her pain was likely cervical in nature. Dr. Paletta recommended a MRI of her cervical spine and prescribed a Prednisone taper. Dr. Paletta commented that if the cervical spine MRI showed pathology he would refer her to an orthopedic spine specialist. Dr. Paletta ordered Petitioner off of work at that time.

The cervical spine MRI was completed on 1/11/23 at MRI Partners of Chesterfield. The reading radiologist, Dr. Matthew S. Ruyle, opined that it showed midline protrusions at C4-5 and C5-6 with bilateral foraminal protrusions at C5-6 that were larger on the right than the left as well as right greater than left foraminal stenosis at C5-6 and ventral dural displacement at both C4-5 and C5-6. Dr. Paletta reviewed the cervical spine MRI on 1/16/23 and stated that there are disc protrusions at C4-5 and C5-6. Dr. Paletta stated that these MRI findings may correlate well with Petitioner's symptoms. Dr. Paletta recommended a cervical spine consultation with Dr. Chris Reeves or Dr. Matthew Gornet.

Petitioner presented to Dr. Matthew Gornet on 2/16/23 with a chief complaint of neck pain with daily headaches, pain in her right trapezius, right shoulder pain and tingling down her right arm into her fingertips. Dr. Gornet recorded a consistent history of present illness and recounted her care to date. Dr. Gornet's physical exam showed pain in her right trapezius, right shoulder and right upper arm, decreased strength in her right biceps, deltoid and wrist dorsiflexion and decreased sensation in her right fingertip distribution. Dr. Gornet reviewed her cervical spine MRI and opined that it showed central disc protrusions at C4-5 and C5-6 and to a lesser degree at C3-4. Dr. Gornet diagnosed a disc injury at C4-5 and C5-6 and potentially even at C3-4. Dr. Gornet recommended an epidural steroid injection at C5-6 on the right and prescribed Meloxicam and Cyclobenzaprine. Dr. Gornet also kept Petitioner off work and opined that Petitioner's "current symptoms and requirement for treatment are causally connected to her work injury of 10/10/22."

Dr. Helen Blake performed the interlaminar epidural steroid injection on the right at C5-6 at the Orthopedic Surgery Center of Creve Coeur on 3/14/23. Petitioner returned to Dr. Gornet on 4/10/23. Dr. Gornet's physical exam that date continued to show decreased strength in her right biceps, deltoid and wrist dorsiflexion. Dr. Gornet noted the injection did not provided relief. Dr. Gornet opined that there were injuries to C3-4, C4-5 and C5-6. Dr. Gornet opined these disc injuries were not causing significant nerve compression but were causing axial neck pain. Dr. Gornet stated that he did not think Petitioner needed care at C3-4 at this time because it was a smaller injury. Dr. Gornet stated he would likely only treat C4-5 and C5-6 and recommended disc replacement surgery at those levels. Dr. Gornet also kept Petitioner off work.

On 3/21/23 Petitioner presented to Dr. Jesse Butler for a Section 12 examination. Dr. Butler recorded a consistent history of present illness and was able to review medical records including through the end of care by Dr. Paletta. At the time of the initial IME, Dr. Butler was not able to review the actual imaging from the MRI of Petitioner's cervical spine. Dr. Butler's physical exam showed tenderness to Petitioner's right paraspinal musculatrure. Dr. Butler's diagnosed cervical radiculopathy. Dr. Butler stated there "appears to be a causal connection between the current condition and the October 10, 2022 accident." Dr. Butler stated Petitioner did not exhibit signs or evidence of symptom magnification. Dr. Butler stated Petitioner's care to date was reasonable, necessary and causally related to the 10/10/22 accident. Dr. Butler commented that Petitioner did not appear to be able to work light duty but would comment further on her capacity to work after reviewing the cervical spine MRI study. Dr. Butler stated he could not determine if Petitioner was at maximum medical improvement or assess an impairment rating at that time in light of the fact he was without the MRI films.

On 3/30/23 Dr. Butler issued an addendum to his initial 3/21/23IME report and stated that he had reviewed the cervical spine MRI imaging. Dr. Butler opined the MRI showed no significant disc pathology, no foraminal stenosis, no disc herniation or spinal cord compression and only slight desiccation of the C5-6 disc. Following his review of the MRI imaging, Dr. Butler diagnosed cervical strain and stated there is no objective basis for Petitioner to have cervical radiculopathy. Dr. Butler stated there was no objective basis for Petitioner to have cervical radiculopathy but also opined there was a causal connection between the patient's initial symptoms and the work event on 10/10/22. Dr. Butler opined Petitioner did not require any additional treatment. Dr. Butler stated that Petitioner did not require restrictions on her ability to work. Dr. Butler opined Petitioner had reached maximum medical improvement. Dr. Butler stated he would provide an impairment rating under separate cover.

On 5/17/23 Dr. Babak Lami authored a record review report. In his report, he opined that Petitioner's cervical spine MRI findings were minimal and age appropriate. Dr. Lami opined Petitioner's records were consistent with shoulder strain and that there was no objective evidence to support continued symptoms at this time to be related to the 10/10/22 injury. Dr. Lami opined Petitioner's subjective complaints were not corroborated by her objective findings. Dr. Lami opined that all care except for the epidural steroid injection was reasonable, necessary and causally related to the work accident. Dr. Lami did not recommend additional care and "absolutely disagree[d]" with the care recommended by Dr. Gornet as there was no basis for such surgery. Dr. Lami stated that bulges that were noted on MRI were normal for her age and not neuro-compressive. Dr. Lami lastly opined that Petitioner was at maximum medical improvement and was able to work full duty.

Testimony by Dr. Matthew Gornet

Dr. Gornet testified via evidence deposition for Petitioner on 5/15/23. Dr. Gornet testified that he has been a board-certified orthopedic surgeon devoted solely to spine surgery for 30 years and that he sees 100-120 patents a week and performs five to ten surgeries each week. Dr. Gornet testified and his curriculum vitae reflects that he has authored some of the largest publications concerning cervical disc replacement specifically in the field of injured workers and long-term comparison to fusion procedures. Dr. Gornet testified that he has been performing cervical disc replacement for 17 years. Dr. Gornet testified that he had reviewed Petitioner's medical records

from Carmi Family Practice, Ferrell Hospital, Dr. Paletta, MRI Partners of Chesterfield and Dr. Blake as well as the IME reports by Dr. Butler.

Dr. Gornet testified it is extremely common for him to see a provider initially work up a patient for a shoulder problem when the problem is related to the cervical spine. Dr. Gornet testified that a patient like Ms. Knight that suffers a disc injury will often complain of headaches and trapezial pain. Dr. Gornet testified that a Spruling's test is a test that looks for nerve irritation in the cervical spine. Dr. Gornet testified consistent with his medical records as to Petitioner's history of present illness, subjective complaints and objective examination findings when he saw Petitioner for the first time on 2/16/23. Dr. Gornet testified that Petitioner's mechanism of injury is one that could easily cause a disc injury especially when her arm is pulled by hundreds of pounds. Dr. Gornet also noted that Petitioner did not have any significant prior neck symptoms before the 10/10/22 work injury.

Dr. Gornet stated his physical exam on 2/16/23 was indicative of nerve irritation at C5 and C6 which correlated to nerves at the C4-5 and C5-6 levels. Dr. Gornet stated that her MRI showed small central protrusions at C4-5 and C5-6 and to a lesser extent at C3-4. Dr. Gornet testified that the herniations that Ms. Knight has as shown on MRI cause nerve irritation by way of inflammation which explained her right upper extremity symptoms. Dr. Gornet testified there were also annular tears present at C4-5 and C5-6 (i.e., a a tear of the annulus which is the tough ring that is the main anchoring body of the disc itself). Dr. Gornet ultimately stated that the MRI findings correlated with Petitioner's subjective complaints and his physical exam findings.

Dr. Gornet stated that he is recommending surgery at C4-5 and C5-6 because her subjective complaints correlate well with her objective findings, she had no objective sign of shoulder pathology and she had not prior problems of significance in her neck before her work injury, all of which "line[d] up fairly well with saying that these disc are injured and these need to be treated." Dr. Gornet opined the proposed surgery was reasonable, necessary and causally related to the 10/10/22 accident. Dr. Gornet opined that Petitioner had exhausted conservative care measures and that his similar patient have done very well with this type of surgical treatment. Dr. Gornet also based his causation opinion on Petitioner's mechanism of injury. Dr. Gornet opined that Petitioner's current neck and upper extremity symptoms were related to the 10/10/22 accident. Dr. Gornet also opined that Petitioner's care to date was reasonable, necessary and causally related to the 10/10/22 accident. Dr. Gornet testified that he and Dr. Butler simply disagreed as to their interpretation of the MRI, but Dr. Butler had initially opined Petitioner's subjective complaints were consistent with her objective exam and supported a diagnosis of cervical radiculopathy. Dr. Gornet found Petitioner to be credible and stated she did not display any signs of malingering or symptom magnification.

On cross-exam, Dr. Gornet agreed that Petitioner's herniations were small herniations. Dr. Gornet stated that Petitioner's symptoms are from both the structural disc injuries and the inflammation caused by the disc injuries. Dr. Gornet opined that the Petitioner's objective MRI findings and lack of relief from conservative care were a foundation for Petitioner to have surgery. Dr. Gornet stated the herniation at C4-5 is smaller than the one at C5-6. Dr. Gornet stated that Dr. Butler's diagnosis of strain was a "nebulous" diagnosis and that clinically Dr. Butler felt Petitioner had cervical radiculopathy. Dr. Gornet stated he and the radiologist did not think the cervical spine MRI was normal while Dr. Butler did think it was normal. Dr. Gornet agreed that Petitioner's MRI did not show neurologic compression. Dr. Gornet did not agree that Petitioner's cervical spine

MRI showed age appropriate changes because the other levels of her spine were "fairly pristine." Dr. Gornet stated he took Petitioner off of work the last time he saw her because Petitioner was fairly miserable at that time. Dr. Gornet testified that Petitioner's best treatment option was the two level disc replacement surgery. Dr. Gornet expected to release Petitioner to full duty about 4.5 months after surgery.

Testimony by Dr. Jesse Butler

Dr. Butler testified via evidence deposition for Respondent on 6/16/23. Dr. Butler stated he is a board certified orthopedic spine surgeon that has worked for Spine Consultants since 2010. Dr. Butler testified he performs spine surgery two days each week and about 25-30% of his practice is devoted to treating cervical/neck related conditions. Dr. Butler testified he examined Petitioner for an IME on 3/21/23 and recited the history of present illness Petitioner provided consistent with his 3/21/23 IME report. Dr. Butler also stated he reviewed Petitioner's medical records as found in his 3/21/23 IME report and his supplemental 3/30/23 report including Petitioner's imaging studies. Dr. Butler stated his physical exam of Petitioner was normal except for some tenderness on the right side of her neck.

Dr. Butler stated that based on his initial exam and review of records, he diagnosed cervical radiculopathy and opined it was causally connected to the 10/10/22 work accident. Dr. Butler stated it was hard to initially make a definitive diagnosis without her MRI study to review and based his cervical radiculopathy diagnosis on her subjective complaints and his physical exam findings. Dr. Butler stated it is important to review the MRI as it should provide correlation with the subjective complaints and a basis for the necessity of treatment. Dr. Butler stated that he reviewed Petitioner's 1/11/23 cervical spine MRI after issuing the initial IME report and found the MRI to be normal with only a "slight desiccation of the C5-6 disc" which he felt was normal for this woman's age. Dr. Butler stated desiccation is a change in color of the disc which is caused by dehydration of the disc which is a consequence of her age. Dr. Butler stated he did not see an annular fissure or tear when he reviewed the MRI. Dr. Butler stated that after reviewing the MRI he felt Petitioner had subjective complaints of cervical radiculopathy but his actual diagnosis was cervical strain as there was no objective basis for Petitioner to have cervical radiculopathy. Dr. Butler opined Petitioner did not require further care as her symptoms had lessened and she only required time and symptom management with over-the-counter medication to treat her condition. Dr. Butler also opined Petitioner was able to return to work without restrictions and at maximum medical improvement following his review of the MRI. Dr. Butler stated Petitioner did not display signs of symptom magnification.

Dr. Butler when asked why Petitioner continued to report symptoms in spite of her normal MRI stated that it is not atypical for his own patients to have such complaints and he educates them that they have an excellent prognosis and that their symptoms shoulder resolve in time. Dr. Butler stated that surgery was "completely inappropriate" for Petitioner as there was no objective pathology, and he could not "imagine anyone recommending surgery for this." Dr. Butler opined that he still felt Petitioner initial symptoms related to the 10/10/22 incident but also felt the persistence of her symptoms have no objective basis. The Arbitrator notes that Dr. Butler completed an impairment rating with respect to Petitioner, but Petitioner raised a Ghere objection as the impairment rating report had not been provided to Petitioner in advance of Dr. Butler's deposition. As there was no evidence to support that Respondent provided the impairment rating

report to Petitioner in advance of the deposition, Petitioner objection was sustained. The admissibility of the impairment report is also moot in light of the Arbitrator's conclusions below.

On cross-examination, Dr. Butler agreed that some patients that suffer cervical spine injuries initially only present with shoulder complaints. Dr. Butler acknowledged that patients sometimes are worked up for a shoulder problem only to later realize it is a cervical spine problem and vice versa because there is overlap. Dr. Butler agreed that Petitioner injured her cervical spine on 10/10/22 and opined she suffered a strain. Dr. Butler stated that strains generally resolve during a period of 4 weeks to 6 months. Dr. Butler agreed that he treats patients that have annular tears/fissures. Dr. Butler agreed that Petitioner consistently complained of right upper extremity symptoms since her 10/10/22 accident. Dr. Butler opined all care he had reviewed was reasonable and necessary. Dr. Butler agreed that being jerked by a 300 lbs patient could injure the cervical spine. Dr. Butler stated his working diagnosis was cervical radiculopathy based on his clinical exam of Petitioner. Dr. Butler stated that as of 3/21/23 his opinion was her current condition of illbeing was related to the 10/10/22 accident and she was unable to work at that time. Dr. Butler stated that he generally found Petitioner to be credible and did not know of Petitioner having any other injuries to her cervical spine prior to the work accident. Dr. Butler stated that he had treated axial neck pain with surgery in his career but it was not typical.

Testimony by Dr. Babak Lami

Dr. Lami testified via evidence deposition for Respondent on 6/12/23. Dr. Lami stated he is a board certified orthopedic spine surgeon that works at Illinois Spine Institute. Dr. Lami testified that he almost exclusively treats the spine and performs surgery on the spine each week, including fusion procedures and disc replacement operations in the cervical spine. Dr. Lami stated he completed a records review concerning Petitioner, including reviewing her cervical MRI films, but did not physically examine the Petitioner. Dr. Lami stated that he had reviewed the MRI and felt it only showed minimal, insignificant bulges at C4-5 and C5-6 with no nerve root compression, which overall was consistent for a woman in her 30's. Dr. Lami stated that he could have just as easily opined it was a normal MRI but did not want to disagree with the reading radiologist. Dr. Lami diagnosed cervicalgia based on her subjective complaints and explained that the diagnosis just meant neck pain. Dr. Lami opined the MRI did not show any annular tears or fissures. Dr. Lami opined there was no causal connection between Petitioner's current neck symptoms and the work accident because of the lack of physical exam findings and objective findings. Dr. Lami testified that he absolutely disagrees with Petitioner undergoing any surgery on her cervical spine because there is no basis for surgery as Petitioner's MRI is normal. Dr. Lami opined that Petitioner would not benefit from disc replacement because disc replacement is for radicular symptoms and Petitioner had no radicular symptoms to be resolved. Dr. Lami opined Petitioner was at MMI and could return to work full duty.

On cross-examination Dr. Lami stated there was no reason he failed to include Petitioner's complaints about neck pain when he summarized care records dated 10/25/22 and 10/29/22. Dr. Lami stated Petitioner sustained a sprain of her neck/shoulder area from the work accident. Dr. Lami agreed that it is possible for people to suffer neck injuries and initially only have shoulder complaints. Dr. Lami stated that strains would resolve in days or weeks. Dr. Lami agreed that Petitioner has complained of right upper extremity symptoms to all of her providers since her work injury. Dr. Lami stated that all of Petitioner's care to date, except for the injection, was reasonable and necessary care. Dr. Lami stated it is possible to injure the cervical spine when one's arm is

jerked and he did not know the weight of the patient that jerked Petitioner's arm. Dr. Lami stated that he sees his own patients before surgery to examine them, develop a doctor-patient relationship and to obtain inform consent. When asked about the physical exam findings observed by Dr. Butler and Dr. Paletta's opinion that the MRI showed pathology at C4-5 and C5-6, Dr. Lami stated that those doctors' records speak for themselves. Dr. Lami stated he would not disagree with the physical exam findings shown in Dr. Gornet's records but also stated that no one had opined the MRI shows compression of her nerves in the cervical spine. Dr. Lami stated he did not see any evidence of malingering or symptom magnification in his review of her care records, nor did he see that Petitioner had suffered any injuries to her cervical spine prior to 10/10/22. Dr. Lami stated he has not written or performed any research in the field of spinal care for 20 years as his career is limited to a clinical practice.

CONCLUSIONS OF LAW

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

The Arbitrator finds Petitioner's current condition of ill being is causally related to the accident that occurred on 10/10/22. The record supports Petitioner's cervical spine being asymptomatic prior to 10/10/22. There is no evidence to suggest Petitioner was actively treating a neck or upper extremity issue leading up to her work injury. Immediately after her injury, Petitioner began to complain of right shoulder, neck and right upper extremity symptoms and treated her symptoms consistently thereafter. While Petitioner did not immediately complain of neck pain following 10/10/22, Dr. Gornet, Dr. Butler and Dr. Lami all agreed that cervical spine injuries can and often do present initially with only shoulder symptoms.

Dr. Gornet, Dr. Butler and Dr. Lami agreed Petitioner sustained an injury at work on 10/10/22 but disagreed as to the extent of this injury. Dr. Gornet, Dr. Butler and Dr. Lami all also agreed Petitioner's subjective complaints were credible. The Arbitrator finds Dr. Gornet's testimony to be more persuasive than the testimony of Dr. Butler and Dr. Lami. Dr. Butler and Dr. Lami diagnosed a cervical strain and acknowledged that such strains would resolve in four weeks or up to six months from the date of injury. Since Petitioner's symptoms have lasted more than six months since the date of injury, it makes the diagnosis of strain inconsistent with Petitioner's credible history. The MRI shows pathology as identified by Dr. Paletta, Dr. Gornet and the reading radiologist of the MRI, Dr. Ruyle. This pathology would explain why Petitioner's symptoms have persisted longer than what would be expected for a strain. Dr. Gornet, Dr. Butler and Dr. Lami all also opined that there was no nerve root compression that would cause Petitioner's ongoing upper extremity symptoms. Yet, the explanation from Dr. Gornet that Petitioner has inflammation at C4-5 and C5-6 from disc injuries at those levels that is irritating that C5 and C6 nerve roots is the most compelling explanation as to why Petitioner has ongoing symptoms in her upper extremity. Facts that undermine Dr. Butler's ultimate opinions are that he stated that as of 3/21/23 his opinion was Petitioner's current condition of illbeing was related to the 10/10/22 accident and she was unable to work at that time based on his initial physical exam, review of records and conversation with Petitioner. Nine days later Dr. Butler, upon review of her MRI, reversed his opinion and felt Petitioner could work full duty and could not explain why Petitioner was having the symptoms she was having. Undermining Dr. Lami's opinions is the fact that he never examined Petitioner.

Further supporting causal connection here is Dr. Gornet's opinion that Petitioner's symptoms correlate well with the pathology shown on MRI at L5-S1. The Arbitrator also

concludes that the Petitioner's mechanism of injury (i.e., having her arm jerked by the body weight of a 300+ lbs patient) would be significant enough to cause a disc injury, which was the opinions of Dr. Gornet, Dr. Butler and Dr. Lami. The Arbitrator was also persuaded by the fact that Petitioner has had no injuries to her neck or right upper extremity following 10/10/22. The only reasonable explanation is that Petitioner's cervical spine pathology and symptoms were caused by the 10/10/22 incident. There is no evidence to suggest the annular tear or disc injury in the cervical spine were symptomatic or present prior to 10/10/22.

The Arbitrator finds Petitioner has met her burden of proof and finds Petitioner's current condition of ill-being in her cervical spine is causally related to the work accident of 10/10/22.

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

The Arbitrator concludes that Petitioner's medical services to date have been reasonable, necessary and causally connected to the 10/10/22 accident. This conclusion is based on opinions by Dr. Gornet, Dr. Butler and Dr. Lami finding such care was reasonable, necessary and casually related. The Arbitrator notes that Dr. Lami opined Petitioner's injection was not reasonable or necessary care, but the Arbitrator is persuaded more by the opinions of Dr. Gornet and Dr. Butler in this regard as they examined Petitioner. Based on the above findings as to causal connection, the Arbitrator finds the Petitioner is entitled to payments of past medical benefits.

Based on the foregoing and Petitioner's Exhibit 9, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule totaling $7,862.32, equating to $620.00 due and owing to Ferrell Carmi Family Medicine RHC, $2,726.00 due and owing to Ferrell Hospital, $121.00 due and owing to Specialists in Medical Imaging; $129.51 due and owing to Dr. George Paletta; $396.40 due and owing to MFG Spine, LLC; $2,238.41 due and owing to Orthopedic Surgery Center of Creve Coeur; and $1,631.00 due and owing to United Physician Group, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall further pay directly to Petitioner $148.30 so Petitioner can satisfy the subrogation interest held by Aetna.

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

In light of the Arbitrator's finding that Dr. Gornet's has the more well based diagnosis and a diagnosis that is consistent with the Petitioner's MRI findings, objective examinations and subjective complaints, Respondent shall pay all medical benefits necessary to bring Petitioner to maximum medical improvement concerning her cervical spine, including the two level disc replacement surgery recommended by Dr. Gornet.

ISSUE (L): What temporary benefits are in dispute.

As temporary total disability benefits were solely denied based on Respondent disputing causation and in light of the Arbitrator's conclusion regarding causation, Respondent shall pay Petitioner temporary total disability benefits of $626.67/week for 34-3/7ths weeks, for the date of 10/30/22 and for the period of 11/2/22 through 6/29/23, as provided in Section 8(b) of the Act. The record includes medical records and testimony that Petitioner was either completely off of

work or under restrictions that Respondent was unable to accommodate during said 34-3/7ths weeks.

Pursuant to stipulation, Respondent shall receive a credit for $14,055.32 for temporary total disability benefits that have been paid prior to trial.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC011982
Case Name	Jeffrey Clark v. Black Lane Auto Parts/Tripple J Transport
Consolidated Cases	
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	24IWCC0219
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Carol Cesaretti

DATE FILED: 5/16/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY CLARK,

Petitioner,

vs. NO: 22 WC 11982

BLACK LANE AUTO PARTS/
TRIPLE J TRANSPORT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability benefits, the reasonableness and necessity of the medical treatment and charges, prospective medical treatment, and evidentiary 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. 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, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 1, 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 $39,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 16, 2024 \
O: 5-9-24
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	22WC011982
Case Name	Jeffrey Clark v. Tripple J Transport- Black Lane Autoparts
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Carol Cesaretti

DATE FILED: 9/1/2023

THE INTEREST RATE FOR THE WEEK OF AUGUST 29, 2023 5.35%

/s/Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeffrey Clark
Employee/Petitioner

v.

Tripple J Transport-Black Lane Autoparts
Employer/Respondent

Case # **22** WC **011982**

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 **7/31/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/21/22**, 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 $**52,131.56**; the average weekly wage was $**1,002.53**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,729.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,729.15**.

Respondent is entitled to a credit of $**TBD and any and all amounts paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

Respondent shall pay the medical expenses outlined in Petitioner's Group Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule. Pursuant to the stipulation of the parties, Respondent shall receive credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act.

Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a total shoulder arthroplasty or a reverse total shoulder arthroplasty if the rotator cuff is found to be abnormal or torn intraoperatively, as recommended by Dr. Bradley, and all reasonable and necessary attendant care.

Respondent shall pay Petitioner temporary total disability benefits of $**668.35**/week for **74** weeks, commencing **3/1/22** through **7/31/23**, pursuant to Section 8(b) of the Act.

Based on the Arbitrator's finds that Respondent rebutted the presumption of unreasonable delay and had a good-faith basis to withhold benefits, attorney's fees and penalties pursuant to Sections 16, 19(k), and 19(l) are denied.

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

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

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

SEPTEMBER 1, 2023

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JEFFREY CLARK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 22-WC-011982
	)	
TRIPPLE J TRANSPORT-BLACK LANE AUTOPARTS,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 31, 2023 pursuant to Section 19(b) of the Act. The parties stipulated that on January 21, 2022 Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, prospective medical care, and penalties/attorney's fees under Sections 19(k), 19(l), and 16 of the Act.

The parties stipulated that Respondent shall receive credit for any and all medical expenses paid through its group medical plan, under Section 8(j) of the Act. The parties further stipulated that Respondent shall receive a credit of $11,729.15 in TTD benefits paid.

TESTIMONY

Petitioner was 61 years old, married, with no dependent children at the time of accident. Petitioner was employed by Respondent for approximately five years as a semi driver. He hauled shipping containers and transported machinery. His job duties required him to load and unload the trucks and tie down loads. Petitioner testified that on 1/21/22 he loaded a shipping container on his truck and began throwing straps over the container to tie it down. The top of the container was 16 feet off the ground once loaded. The straps he threw over the top of the container were nylon and three inches wide. They had a metal hook on the end that helped get them over the load when thrown. An unrolled strap weighed approximately 5 to 7 pounds. Petitioner made 7 or 8 attempts to throw a strap over the container, but the wind was working against him. He turned around and threw the strap over his head backwards and felt immediate pain in his right shoulder. He used his dominant right arm each time he threw the strap. He found a long stick and used it with his left arm to maneuver the strap into place.

Petitioner testified that he reported the accident to his boss John McDaniel and proceeded to deliver the container. He iced his shoulder that evening and was scheduled off work the next day as it was a Saturday. Petitioner testified he has not worked since the accident. He testified he was ill for approximately one week after the accident. He testified he spoke to Mr. McDaniel several times in January or February to get treatment for his shoulder. Petitioner has never had a worker's compensation claim and was not aware of the process. He testified that from the date of his accident until 3/1/22 his right arm was unusable, and he could barely move it, just as he is now.

Petitioner testified he finally went to urgent care at WellNow on 3/1/22 because worker's comp was taking too long. Respondent referred him to Dr. Hobbs who administered an injection and recommended physical therapy which Petitioner did not receive as it was not approved. Dr. Hobbs recommended an MRI and light duty restrictions. Petitioner was not offered light duty work and he began receiving TTD benefits around 4/27/22.

Petitioner was examined by Dr. Farley on 6/14/22 at Respondent's request. Dr. Farley maneuvered his arm until Petitioner could not take it and stopped the examination. The visit lasted approximately 15 minutes. Petitioner denied telling Dr. Farley that he worked full duty from the date of accident until March. Petitioner identified wage records (RX4) and agreed he received sick pay and two weeks of vacation between January and March because he had no income.

Petitioner testified he was examined by Dr. Bradley on 6/30/22 who recommends a shoulder replacement and light duty restrictions. Petitioner wore an arm sling at arbitration and testified he wears the sling when he is moving around to take the weight off his shoulder. He can lift his arm just off his stomach but no higher. Petitioner testified he had no issues with his shoulder prior to 1/21/22 and he was able to perform his full job duties, which included throwing straps and chains and raising his arms above his head to tighten loads.

On cross-examination, Petitioner testified there were no witnesses to his accident. He is not taking any prescription medications for his shoulder. He testified that his primary care physician at the time of his accident was Dr. Sophia. He agreed that on 5/10/19 he presented to Dr. Sophia with multiple joint problems and chronic pain that interfered with his sleep. He does not recall speaking to Dr. Sophia about right shoulder complaints or having any shoulder issues at that time. Petitioner testified he fell onto his right arm in a motorcycle accident around 1982 and underwent right elbow surgery. He did not injure his shoulder in that accident.

MEDICAL HISTORY

One medical visit that pre-dated Petitioner's work accident was admitted into evidence. (RX5) On 5/10/19, Petitioner presented to his primary care physician Dr. Sophia Rostovtseva for a one month follow up for hypertension. Petitioner admitted feeling worn, with multiple joint problems and chronic pain that contributed to poor sleep. Petitioner had a history of GI bleed with a colonoscopy and endoscopy that revealed small bowel AVM. He presented with a dry non-productive cough, unable to sleep, and very tired. He recently received two units of packet red blood cells and felt much better. He was positive for cough and right shoulder arthritic

manifestation, and negative for joint pain. He was assessed with iron deficiency, hypertension, history of arteriovenous malformation, insomnia, cough, and B12 deficiency.

On 3/1/22, Petitioner presented to urgent care at WellNow and gave a history of injuring his right shoulder at work on 1/21/22 when he threw a strap over his truck load bed. (PX1) He felt an immediate pull in his shoulder. No history of previous shoulder injury was noted. Examination of the shoulder revealed decreased range of motion and abnormal flexion, extension, and abduction. Tenderness was noted anteriorly, posteriorly, and laterally. X-rays showed no acute abnormality or significant degenerative disease. Petitioner was referred for an orthopedic evaluation and restricted to limited use of his right arm. He was prescribed Medrol Dosepak and Methocarbamol.

On 3/10/22, Petitioner was examined by orthopedist Dr. Micah Hobbs. (PX2) He reported a consistent history of injury with immediate right shoulder pain on 1/21/22. He had limited range of motion and weakness in his shoulder. He reported he went to urgent care after several weeks of decreased range of motion and persistent pain. He denied a history of previous injury, surgery, or treatment to his right shoulder. Petitioner stated he had not been able to work since the accident as his injuries prevent him from using the manual transmission on his truck. Examination revealed weakness with resisted external rotation, passive external rotation at 20, passive anterior elevation at 90 limited by pain and guarding, and weakness with isolation of the supraspinatus. Dr. Hobbs reviewed the x-rays and his impression was severe degenerative joint disease of the shoulder that pre-existed the work accident. He opined that Petitioner exacerbated a pre-existing condition and the work accident contributed to Petitioner's current symptoms of pain and significant limitations in range of motion. Dr. Hobbs diagnosed right shoulder pain and osteoarthritis of the glenohumeral joint. He ordered an MRI and placed Petitioner on restrictions of no commercial driving, no overhead work, and no lifting more than 5 pounds.

The right shoulder MRI was performed on 3/25/22 and revealed degenerative changes of the acromioclavicular joint, degenerative changes of the shoulder joint with moderate effusion and loose bodies in the capsule, adhesive capsulitis, a bone bruise, a Type II SLAP tear of the labrum, and tendonitis of the supraspinatus tendon. (PX3)

On 4/19/22, Dr. Hobbs reviewed the MRI that showed severe glenohumeral osteoarthritis with loose bodies and subchondral cystic changes, evidence of rotator cuff tendinitis involving the anterior supraspinatus tendon without evidence of tear, and moderate acromioclavicular osteoarthritis. He noted clinical crepitus and decreased range of motion consistent with objective findings. Dr. Hobbs administered a subacromial space injection, ordered physical therapy, and continued Petitioner's light duty restrictions. Petitioner was evaluated for physical therapy at St. Louis Orthopedics and Sports Medicine on 4/19/22. (PX2) No additional physical therapy records were admitted into evidence.

On 6/14/22, Petitioner was examined by Dr. Timothy Farley pursuant to Section 12 of the Act. (RX1, Ex. 2) Petitioner reported a consistent history of injury on 1/21/22. Petitioner denied any injury or problems with his shoulder prior to the work accident. He rated his pain 8-10/10 that was constant, sharp, stabbing, grinding, and throbbing. He complained of extreme lack of motion and his wife had to help him get dressed. Dr. Farley noted Petitioner continued to work

full duty without restrictions until he saw Dr. Hobbs on 3/10/22. Dr. Farley reviewed Petitioner's medical records and performed a physical examination. He noted Petitioner had severe shoulder pain. Petitioner denied any shoulder injuries or treatment prior to 1/21/22. Petitioner was unable to participate in an axillary view while x-rays were being performed. Dr. Farley felt Petitioner's symptoms were "way out of proportion and dramatically magnified for an arthritic condition". He opined that due to Petitioner's symptom magnification, he felt that Petitioner offered significant credibility issues in his oral history, so he clearly did not believe the work injury caused the issue or an aggravation of his pre-existing condition. He opined that Petitioner's subjective and objective findings were inconsistent because Petitioner claimed to be totally disabled from performing his job duties but worked full duty until he saw Dr. Hobbs on 3/10/22. He opined that all of Petitioner's treatment was reasonable and necessary but not related to his work accident.

On 6/30/22, Petitioner was examined by Dr. Matthew Bradley. (PX4) Dr. Bradley noted a consistent history of injury and Petitioner received short-term relief from the injection. His referral to physical therapy was denied. Petitioner denied any pain, dysfunction, or treatment to his shoulder prior to 1/21/22. Dr. Bradley reviewed the MRI and x-rays and performed a physical examination. X-rays performed that day revealed bone-on-bone degenerative disease, sclerosis, and inferior osteophytes. Dr. Bradley noted no symptom magnification and Petitioner was not able to lift his hand off his abdomen without severe pain. He noted the MRI showed significant degenerative disease and loose bodies, but also a very large SLAP tear and some tendonisis of the supraspinatus tendon. He opined that Petitioner was a candidate for a standard total shoulder arthroplasty. However, if the rotator cuff was found to be abnormal or torn intraoperatively, consideration would be given for a reverse total shoulder. He placed Petitioner on light duty restrictions of desk work only and no use of his right arm.

On 5/1/23, Dr. Bradley noted Petitioner reported significantly worsening pain and dysfunction. Petitioner kept his hand at his belly at all times and could no longer dress himself or perform activities of daily living. Dr. Bradley continued to recommend a reverse total shoulder arthroplasty. He prescribed anti-inflammatories and instructed Petitioner to perform home exercises to maintain as much strength and motion as possible pending surgery. Dr. Bradley opined that Petitioner's work accident aggravated his underlying degenerative condition as he was able to perform his heavy duty truck driving duties and had no history of injury or treatment to his shoulder prior to 1/21/22. The recommendation for surgery was secondary to the pain Petitioner experienced as a direct result of the work accident.

Dr. Timothy Farley testified by way of deposition on 10/25/22. (RX1) Dr. Farley is a board-certified orthopedic surgeon. He testified that Petitioner reported he continued to work his regular job duties until he saw Dr. Hobbs in March 2022. Dr. Farley reviewed Dr. Hobbs' medical records, x-rays, and the MRI report. He noted Dr. Hobbs diagnosed significant osteoarthritis with an intact rotator cuff. Dr. Farley agreed with the diagnosis and opined that the mechanism of injury may cause a pre-existing osteoarthritis to become temporarily symptomatic for about 30 seconds and not cause any long-term aggravation of arthritis. Dr. Farley testified that Petitioner would have reached MMI as it pertained to the work accident after his first visit with Dr. Hobbs. He testified that Petitioner's treatment with Dr. Hobbs and the MRI and x-rays were reasonable and related to his work accident.

On cross-examination, Dr. Farley agreed he had no evidence that Petitioner had any issues with his right shoulder prior to 1/21/22 and he was able to work full duty without restrictions in a heavy duty job. He testified he would have expected Petitioner to seek treatment and have been unable to work from 1/21/22 through 3/10/22 given his extreme pain. He felt there was a credibility issue with Petitioner based on his presentation and examination on 6/14/22 and Petitioner's ability to continue working until 3/10/22.

Dr. Farley testified he has seen asymptomatic osteoarthritis become symptomatic with other forms of injuries, but not the mechanism of injury Petitioner performed on 1/21/22 of throwing a strap over his head. He testified that appropriate treatment for osteoarthritis is conservative care, including ice, anti-inflammatories, and injections. If the patient improves with cortisone injections for a period of months, then injections can be repeated. He testified that a patient is a candidate for an arthroplasty when the injections stop helping or provide only short-term relief. Dr. Farley testified that a reverse total shoulder arthroplasty is not appropriate because Petitioner does not have a rotator cuff tear and would not be standard of care. He agreed that if Petitioner "was doing a little bit of throwing he may develop some tendinitis over the top".

An Employee Earnings Record was admitted into evidence for pay periods 12/3/21 through 3/18/22. (RX4) Between pay periods 1/28/22 through 2/25/22 Petitioner was paid for 51.75 hours of work at $20 per hour, $2,487.50 in "other wages", and 16 hours of sick pay. Pay period dated 3/18/22 shows Petitioner was paid 40 hours vacation pay.

CONCLUSIONS OF LAW

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

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

A claim is not denied simply because a claimant suffers from a preexisting condition. The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000). Employers are to take their employees as they find them. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

The parties stipulated that Petitioner sustained accidental injuries on 1/21/22 that arose out of and in the course of his employment with Respondent. Petitioner was working full duty without restrictions at the time of accident. He testified his job duties required him to load and unload machines and shipping containers on a truck and tie down loads. This involved throwing 5 to 7 pounds nylon straps over loads approximately 16 feet off the ground, throwing chains, and working with his arms stretched high above his head. He always used his right dominant arm to throw the straps. There was no evidence that Petitioner had any injuries, symptoms, or treatment for his right shoulder prior to 1/21/22.

Petitioner credibly testified he experienced immediate pain in his right shoulder when he threw the strap on 1/21/22. He made several attempts to throw the strap before he turned around and threw it backwards over his head. Petitioner reported the accident to his boss John McDaniel and proceeded to deliver the container.

Petitioner testified he had never had a worker's compensation claim prior to 1/21/22 and he was not aware of the process. He testified that he spoke to Mr. McDaniel several times in January or February 2022 about getting his shoulder addressed but nothing happened. Mr. McDaniel did not testify at arbitration. Petitioner testified he finally went to urgent care at WellNow on 3/1/22 because worker's comp was taking too long. Petitioner gave a consistent history of injury to all of his treating physicians. On 3/1/22, Petitioner was placed on light duty restrictions of no use of his right arm and was referred for an orthopedic evaluation.

Respondent referred Petitioner to Dr. Hobbs whom he saw on 3/10/22. Dr. Hobbs noted Petitioner had significant limited range of motion and weakness in his shoulder. Petitioner reported he went to urgent care after several weeks of decreased range of motion and persistent pain. Petitioner reported he had not worked since the date of accident and his injuries prevented him from using the manual transmission on his truck. Dr. Hobbs placed Petitioner on restrictions and ordered an MRI. Dr. Hobbs opined that Petitioner's work accident exacerbated a pre-existing condition and contributed to Petitioner's current symptoms of pain and decreased range of motion. Dr. Hobbs administered an injection and ordered physical therapy that was denied by Respondent.

Petitioner presented to Dr. Bradley on 6/30/22 who also noted Petitioner had no pain, dysfunction, or treatment to his shoulder prior to 1/21/22. Dr. Bradley noted Petitioner initially thought he merely pulled or strained his shoulder and he attempted to treat this nonoperatively on his own. Dr. Bradley noted Petitioner was not able to lift his hand off his abdomen without severe pain and noted no symptom magnification. He noted the MRI showed significant degenerative disease and loose bodies, but also a very large SLAP tear and some tendonisis of the supraspinatus tendon. He opined that Petitioner was a good candidate for a standard total shoulder arthroplasty. However, if the rotator cuff was found to be abnormal or torn intraoperatively, consideration would be given for a reverse total shoulder. He placed Petitioner on light duty restrictions of desk work only and no use of his right arm.

On 5/1/23, Dr. Bradley noted Petitioner's pain and dysfunction had significantly worsened. Petitioner kept his hand at his belly at all times and could no longer dress himself or

perform activities of daily living. Dr. Bradley continued to recommend a total shoulder arthroplasty. Dr. Bradley opined that Petitioner's work accident aggravated his underlying degenerative condition as he was able to perform his heavy duty truck driving duties, which included loading and unloading, and he had no history of injury or treatment to his shoulder prior to 1/21/22. He opined that the recommendation for surgery was secondary to the pain Petitioner experienced as a direct result of the work accident.

The Arbitrator finds the opinions of Dr. Hobbs and Dr. Bradley more persuasive than those of Dr. Farley. Dr. Farley found Petitioner to be uncredible because Petitioner reported he worked full duty without restrictions following his accident until he treated with Dr. Hobbs on 3/10/22, which he would not have been able to do with the severe pain and dysfunction he presented with on 6/14/22. He believed that Petitioner's symptoms were "way out of proportion and dramatically magnified for an arthritic condition", which made him question Petitioner's credibility as to his history of injury. Dr. Farley opined that Petitioner's mechanism of injury may cause pre-existing osteoarthritis to become temporarily symptomatic for about 30 seconds with no long-term aggravation. The Arbitrator finds this opinion uncredible and unsupported by the evidence. Dr. Farley testified he has seen asymptomatic osteoarthritis become symptomatic with other forms of injuries, but not the mechanism of injury Petitioner performed on 1/21/22 of throwing a strap backwards over his head. Dr. Farley agreed that if Petitioner "was doing a little bit of throwing he may develop some tendinitis over the top".

Dr. Farley testified that appropriate treatment for osteoarthritis is conservative care, including ice, anti-inflammatories, and injections. He testified that a patient is a candidate for an arthroplasty when the injections stop helping or provide only short-term relief. The evidence supports that Petitioner received short-term relief from the subacromial space injection performed by Dr. Hobbs on 4/19/22. Respondent denied the recommended physical therapy. Petitioner has attempted icing and medications without improvement. On 5/1/23, Dr. Bradley continued to prescribe anti-inflammatories and instructed Petitioner to perform home exercises to maintain as much strength and motion as possible pending surgery.

Based on the evidence as a whole, the Arbitrator finds that Petitioner's current condition of ill-being in his right shoulder is causally connected to the work accident that occurred on 1/21/22.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based on the finding as to causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits related to his undisputed work injury. Dr. Farley testified that Petitioner's treatment with Dr. Hobbs and the x-rays and MRI were reasonable, necessary, and related to his work accident. Respondent shall therefore pay the medical expenses outlined in Petitioner's Group Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the medical fee schedule. Pursuant to the stipulation of the parties, Respondent shall receive credit for any and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act.

The Arbitrator further finds Petitioner is entitled to receive the additional care recommended by Dr. Bradley. Despite conservative care, Petitioner has persistent symptoms that prevent him from returning to full duty work. Therefore, Respondent shall provide and pay for prospective medical treatment, including, but not limited to, a total shoulder arthroplasty or a reverse total shoulder arthroplasty if the rotator cuff is found to be abnormal or torn intraoperatively, as recommended by Dr. Bradley, and all reasonable and necessary attendant care.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Indus. Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984).

Petitioner claims entitlement to temporary total disability benefits from 1/22/22 through 7/31/23. Petitioner paid TTD benefits from 3/10/22 through 7/6/22.

Although Petitioner testified that he did not work following the accident, he did not receive treatment or work restrictions until 3/1/22. He was referred for an orthopedic evaluation and restricted to limited use of his right arm. On 3/10/22, Dr. Hobbs placed Petitioner on restrictions of no commercial driving, no overhead work, and no lifting more than 5 pounds. On 4/19/22, Dr. Hobbs continued Petitioner's light duty restrictions and ordered physical therapy.

On 6/14/22, Dr. Farley opined that Petitioner's current condition of ill-being was not causally related to his work accident and he did not require work restrictions or surgery as a result of the accident. On 6/30/22, Dr. Bradley opined that Petitioner was a candidate for a standard total shoulder arthroplasty, and possibly a reverse total shoulder if the rotator cuff was found to be abnormal or torn intraoperatively. He recommended light duty restrictions of desk work only and no use of Petitioner's right arm which continued through arbitration.

Based upon the findings as to causal connection, the Arbitrator awards Petitioner temporary total disability benefits from 3/1/22 through 7/31/23, representing 74 weeks.

Respondent shall receive credit for temporary total disability benefits paid in the amount of $11,729.15, pursuant to the stipulation of the parties.

Issue (M): Should penalties or fees be imposed upon Respondent?

Petitioner filed a Petition for Penalties and Attorney's Fees pursuant to Sections 16, 19(k), and 19(l) of the Act for Respondent's nonpayment of TTD benefits and refusal to authorize physical therapy recommended by Dr. Hobbs.

The intent of Sections 16, 19(k), and 19(l) is to implement the Act's purpose to expedite the compensation of industrial workers and to penalize employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301 (1980). Awards under section 16 and 19(k) are proper only if the employer's delay in making payment is unreasonable or vexatious. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 504-05 (1998). That is, the refusal to pay must result from bad faith or improper purpose.

An award under section 19(l) is more in the nature of a late fee, so an award under that section is appropriate if an employer neglects to make payment without good and just cause. *McMahan*, 183 Ill. 2d at 515; *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶15. The employer has the burden of showing that it had a reasonable belief that the delay was justified. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill. App. 3d 576, 579 (1995). In regard to Section 19(l), the statute states: "If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay . . . . [i]n case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Arbitrator finds that Respondent rebutted the presumption of unreasonable delay and had a good-faith basis to withhold benefits. Petitioner did not seek medical treatment until 3/1/22 at which time he was placed on light duty restrictions and referred for an orthopedic evaluation. Dr. Hobbs placed Petitioner on light duty restrictions and ordered physical therapy on 3/10/22. Respondent issued a check for temporary total disability benefits on 5/2/22 for the period 3/10/22 through 4/27/22 and continued to pay TTD benefits through 7/6/22, approximately three weeks after Dr. Farley's Section 12 examination.

No written demands for payment of benefits or communications regarding same were admitted into evidence. On 3/10/22, Dr. Hobbs recommended treatment in the form of physical therapy and ordered a right shoulder MRI. On 4/19/22, Dr. Hobbs reviewed the MRI, administered a subacromial space injections, ordered physical therapy, and continued Petitioner's light duty restrictions. Respondent did not authorize physical therapy but instead chose to exercise its rights under Section 12 of the Act by obtaining an independent medical examination

with Dr. Farley on 6/14/22. Based on Dr. Farley's causation opinion, Respondent denied further benefits.

The Arbitrator finds that Respondent's conduct in light of the underlying facts was not unreasonable or vexatious and denies attorney's fees and penalties under Sections 16, 19(k), and 19(l).

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	22WC007908
Case Name	Daniel L. Marx v. City of Springfield - CWLP
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0220
Number of Pages of Decision	11
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	James W. Ackerman
Respondent Attorney	Kenneth Bima

DATE FILED: 5/16/2024

/s/Christopher Harris, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL MARX,

Petitioner,

vs. NO: 22 WC 7908

CITY OF SPRINGFIELD – CWLP,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 27, 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.

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.

MAY 16, 2024
d: 5-9-24
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	22WC007908
Case Name	Daniel L. Marx v. City of Springfield - CWLP
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	James W. Ackerman
Respondent Attorney	Kenneth Bima

DATE FILED: 12/27/2023

THE INTEREST RATE FOR THE WEEK OF DECEMBER 27, 2023 5.08%

/s/ Jeanne AuBuchon, 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
NATURE AND EXTENT ONLY

Daniel L. Marx
Employee/Petitioner

v.

City of Springfield - CWLP
Employer/Respondent

Case # **22** WC **7908**

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 **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Springfield, Illinois**, on **November 28, 2023**. By stipulation, the parties agree:

On the date of accident, **October 13, 2020**, 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 $**85,598.24**, and the average weekly wage was $**1,646.12**.

At the time of injury, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been **or will be** provided by Respondent.

Respondent shall be given a credit of $**ALL TTD PAID** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**ALL TTD PAID**.

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 $**871.73**/week for a further period of **45** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the 9% loss of use of the person as a whole as to Petitioner's right shoulder.

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.

Jeanne L. AuBuchon **DECEMBER 27, 2023**

Signature of Arbitrator

PROCEDURAL HISTORY

This matter proceeded to trial on November 28, 2023, on all disputed issues. The sole issue in dispute is the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 55 years old and employed by the Respondent as a locator foreman for the Respondent's Water Department when, on October 13, 2020, he was opening a frozen meter pit when he injured his right shoulder. (AX1, T. 10, 16-17)

On that day, the Petitioner sought medical treatment from his primary care physician, Dr. Bryan Albracht at Springfield Clinic, on October 13, 2020. (PX3, RX1) Dr. Albracht diagnosed the Petitioner with a right shoulder strain and placed him on a 15-pound work restriction. (Id.) At a follow-up appointment on October 27, 2020, Petitioner continued to have pain, and Dr. Albracht referred him for an orthopedic consult and placed him on restrictions of no lifting greater than 20 pounds. (Id.)

On October 29, 2020, Petitioner saw Dr. Rishi Sharma, a sports medicine specialist at Springfield Clinic. (Id.) Dr. Sharma restricted the Petitioner to no lifting greater than 15 pounds and ordered an MRI that showed mild glenohumeral and acromioclavicular joint osteoarthritis and mild rotator cuff tendinopathy. (Id.) During a follow-up appointment on December 10, 2020, Dr. Sharma diagnosed rotator cuff tendinitis and prescribed physical therapy. (Id.)

The Petitioner attended physical therapy at Memorial's Rehabilitation Services from January 4, 2021, through February 25, 2021, for a total of 12 visits. (PX4) The discharge evaluation noted that the Petitioner rated his improvement as 60% since starting physical therapy.

(Id.) He met six out of seven goals and was discharged due to being independent with his home exercise program and managing well. (Id.)

On March 9, 2021, Petitioner followed up with Dr. Sharma and reported that he was 70 percent better. (PX3, RX1) Dr. Sharma recommended additional physical therapy. (Id.) The Petitioner followed up with Dr. Sharma on May 4, 2021, and reported that his right shoulder pain was more of a dull achiness which he rated as a 1/10. (Id.) Dr. Sharma diagnosed the Petitioner with right shoulder impingement syndrome and administered a steroid injection. (Id.) When the Petitioner followed up with Dr. Sharma on June 10, 2021, he reported that the injection gave him improvement, but he was still experiencing intermittent pain and discomfort. (Id.) Dr. Sharma referred Petitioner to Dr. Allison Mayfield, an orthopedic surgeon at Springfield Clinic, for a surgical consult. (Id.)

Petitioner saw Dr. Mayfield on August 5, 2021. (Id.) Dr. Mayfield reviewed the MRI and noted that the Petitioner had no full thickness tearing of the rotator cuff. (Id.) She felt the Petitioner had subacromial impingement and a significant component of adhesive capsulitis. (Id.) Dr. Mayfield noted that adhesive capsulitis can take up to 12-18 months to resolve. (Id.) She administered another steroid injection and recommended the Petitioner continue his home exercises. (Id.) The Petitioner returned to Dr. Mayfield on November 18, 2021, and she administered another steroid injection and discussed treatment options, including surgery. The Petitioner elected to undergo additional physical therapy. (Id.) The Petitioner underwent physical therapy at Springfield Clinic from December 1, 2021, through February 18, 2022. (Id.)

The Petitioner next saw Dr. Mayfield on February 24, 2022, and reported that his shoulder continued to improve – rating his pain as 1/10. (Id.) Dr. Mayfield recommended additional physical therapy, which the Petitioner underwent from February 25, 2022, through March 12,

2022. (Id.) The physical therapy discharge summary from May 12, 2022, noted that the Petitioner demonstrated excellent progression in his objective measures, was independent with his home exercise program and met all of his physical therapy goals. (Id.)

The Petitioner was next seen by Dr. Mayfield on July 22, 2022, and reported doing very well, having 80 percent improvement since his last visit and 99 percent better overall with a pain level of 0.5/10 occasionally when he did too much movement or overworked his shoulder. (Id.) He felt that he regained almost all of his motion and certainly all of his strength. (Id.) Dr. Mayfield placed Petitioner at maximum medical improvement and advised him to follow-up as needed (Id.)

The Petitioner did see Dr. Mayfield for the last time on August 25, 2023, and reported exacerbation of his shoulder injury with driving for long periods of time and reaching across his body or overhead. (Id.) He said he was having difficulty sleeping. (Id.) But on that day, his shoulder had calmed down and had gone down to baseline. The Petitioner declined another steroid injection, and Dr. Mayfield again released him from her care to follow up as needed. (Id.)

The Petitioner testified that he discussed surgery with Dr. Mayfield, but the idea of surgery made him very nervous. (T. 17) He did not recall telling Dr. Mayfield that his shoulder was 99 percent better nor that his pain was .5/10. (T. 35-36)

The Petitioner testified that he retired in December 2020 and never returned to work full duty. (T. 18-19) He did not believe he could return to his old job because he was right-hand dominant and lost a lot of strength, mobility and motion in his right arm. (T. 19) He said he planned to take another job – like delivering automobile parts – but he would not be able to lift and carry parts into a shop. (T. 20-22) The Petitioner said he mostly uses his left hand for such things as lifting over his head. (T. 26) He said he has difficulty driving for more than an hour. (T. 27) He drives auto cross, but his wife has to help him unload the car, and he takes breaks. (Id.)

He said he has had to modify how he changes tires. (T. 30-31) He said he also takes breaks when cutting grass. (T. 28-29) He said he uses frozen gel packs every couple of days and does stretching in the mornings. (T. 29-30)

CONCLUSION

Issue 10: What is the nature and extent of the Petitioner's injury?

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. 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.** Neither party submitted an AMA rating. Therefore, the Arbitrator uses the remaining factors to evaluate the Petitioner's permanent partial disability.

(ii) **Occupation.** The Petitioner retired from his employment with the Respondent, but testified that he wanted to work as an automotive parts deliverer but felt he could not because of limitations with lifting and carrying. The Arbitrator places some weight on this factor.

(iii) **Age.** The Petitioner was 55 years old at the time of the injury. If he chose to work again, he would have several work years left during which time he will need to deal with the effects of his injury. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner's testimony and reports to his medical providers as to issues with his shoulder were contradictory. He testified that he mostly uses his left hand for such things as lifting over his head, has difficulty driving for more than an hour and has had to modify how he performs activities, such as his auto cross hobby, changing tires and cutting grass. He said he uses frozen gel packs every couple of days and does stretching in the mornings. However, in his latest reports to his medical providers, he reported he was 99 percent better overall with a pain level of 0.5/10 occasionally when he did too much movement or overworked his shoulder. He reported that he felt he regained almost all of his motion and certainly all of his strength. The Arbitrator relies more on the Petitioner's reports to his doctors than his testimony, although it is reasonable to find that he would suffer flare-ups in the future. The Arbitrator puts some weight on this factor.

Based on the foregoing evidence and factors, the Arbitrator finds that the Petitioner sustained serious and permanent injuries that resulted in the 9 percent loss of the person as a whole as to his right shoulder.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031388
Case Name	Danielle Stone v. Meyer Oil Company-Mach 1
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0221
Number of Pages of Decision	11
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Jacob Jackson
Respondent Attorney	Robert Doherty

DATE FILED: 5/16/2024

/s/Amylee Simonovich, 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

DANIELLE STONE,

Petitioner,

vs. NO: 21 WC 31388

MEYER OIL CO-MACH 1,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, permanent disability, evidentiary rulings, and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 28, 2023 is hereby affirmed and adopted.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2).* Based upon the denial of compensation herein, no bond is set by the Commission.

MAY 16, 2024
o050724
AHS/ldm
051

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC031388
Case Name	Danielle Stone v. Meyer Oil Company-Mach 1
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Jacob Jackson
Respondent Attorney	Robert Doherty

DATE FILED: 2/28/2023

/s/ William Gallagher, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF FEBRURAY 28, 2023 4.94%

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

Danielle Stone
Employee/Petitioner

v.

Meyer Oil Company - Mach 1
Employer/Respondent

Case # 21 WC 31388

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 Champaign, on January 6, 2023. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On June 19, 2021, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $14,728.00; the average weekly wage was $526.00.

On the date of accident, Petitioner was 39 years of age, single with 1 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $2,808.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,808.00.

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

ORDER

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

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

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

William R. Gallagher, Arbitrator
ICArbDec p. 2

February 28, 2023

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on June 19, 2021. According to the Application, Petitioner "twisted knee stepping down from step ladder" and sustained an injury to her "right knee and leg" (Arbitrator's Exhibit 2). Petitioner claimed she was entitled to payment of medical bills, temporary total disability benefits and permanent partial disability benefits. Petitioner also filed a Petition for Section 19(k) Penalties, Section 19(l) Penalties, and Section 16 Attorneys' Fees. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent, a gas station/convenience store, as the assistant manager. She described her job duties as being "everything" which included bookkeeping, cleaning and stocking merchandise. Petitioner testified on June 19, 2021, she was in the cooler stocking merchandise on the top shelf. Petitioner was standing on a step ladder and, when she stepped down, she twisted her right knee. Petitioner stated that, at that time, she experienced an immediate onset of pain/swelling in her right knee.

Petitioner testified she did not report the accident to Respondent on the day it occurred because the store manager, Steve White, was not present. On cross-examination, Petitioner was shown a copy of a portion of the Employee Handbook and she acknowledged the page where she signed. Petitioner agreed that Employee Handbook had a statement that any accident, no matter how small, had to be immediately reported to the person in charge of the store (Respondent's Exhibit 10).

Petitioner testified that, because the store manager, Steve White, was not present, she was the individual in charge. On cross-examination, Petitioner was questioned about there being a phone tree that was supposed to be used if there was no manager on duty. Petitioner denied having any knowledge of a phone tree.

Allen Meyer, Respondent's CEO, testified at trial. Meyer's responsibilities included managing/investigating workers' compensation claims. Meyer testified he reviewed the Respondent's employment records and Steve White worked on June 21, June 22 and June 23.

Petitioner reported the accident to Steve White on June 23, 2021. At that time, Petitioner completed an incident report which was received into evidence at trial. It noted Petitioner sustained an injury to her right knee when she came off a step ladder and twisted her right knee. The date of accident was indicated as June 23, 2021 (Respondent's Exhibit 2). At trial, Petitioner explained that this was a "discrepancy" as to when the accident occurred.

On July 22, 2021, Petitioner gave a statement to the adjuster handling the case. Both the recording and transcription of the statement were received into evidence at trial. The Arbitrator listened to the recording and read the transcribed statement. On two separate occasions in the statement, Petitioner identified June 23 as being the date she sustained the accident (Respondent's Exhibits 10 and 11).

Attached to Petitioner's Motion for Penalties and Attorneys' Fees, was a document entitled Workers' Compensation Employee Questionnaire which Petitioner completed and signed on July 28, 2021. The date of accident indicated in this document was June 19, 2021 (Petitioner's Exhibit 8).

Meyer testified there are 62 cameras located at Respondent's facility. He stated that when an accident as reported, all of the video regarding the incident is pulled. All of the daily videos are kept on a hard drive which has a limited amount of space. As the hard drive gets filled, it records over old material so there is a limited window of time to obtain video of any specific day. Based upon Petitioner's statement the accident occurred on June 23, 2021, Meyer directed that all video of Petitioner working in the cooler on June 23, 2021, be pulled.

Respondent tendered into evidence video clips of the job duties performed by Petitioner on June 23, 2021. On that day, Petitioner worked for almost 11 hours so there were over 3,000 clips of her performing various job duties (Respondent's Exhibit 5).

Respondent also tendered into evidence a summary video of Petitioner's work activities of June 23, 2021, which was approximately two hours 28 minutes in length. Petitioner was initially observed arriving for work and walking across the parking lot without an altered gait or observable limp. A significant portion of the video showed Petitioner working in the cooler stocking various beverages on the shelves. The Arbitrator observed Petitioner lifting cases of soft drinks, and bending and squatting while stocking the shelves. The Arbitrator also observed Petitioner on several occasions climbing up/down the step ladder while stocking the shelves and did not observe Petitioner experiencing any difficulties doing so. During a portion of the time Petitioner was not in the cooler, Petitioner was observed standing behind the counter waiting on customers, again without any observable difficulties.

Meyer testified it was his understanding Petitioner was claiming the date of accident to be June 23, 2021, until he received the Application for Adjustment of Claim, which alleged it to be June 19, 2021. However, the Application was not filed until November 12, 2021 (Arbitrator's Exhibit 2).

On June 25, 2021, Petitioner contacted the office of Dr. Paul Plattner, an orthopedic surgeon, by telephone, and spoke to Susan Brown, a Registered Nurse. According to the record of that date, Petitioner had chronic right knee pain. The record contained no reference to Petitioner having sustained a work-related accident (Petitioner's Exhibit 1).

Dr. Plattner evaluated Petitioner on July 2, 2021. He noted Petitioner had chronic right knee issues which she described as being a "horrible knee." Dr. Plattner noted Petitioner had previously undergone right knee surgery in 2018 which consisted of repair of a torn ACL with a cadaveric tendon graft. Petitioner informed Dr. Plattner she was a store manager and had to be on her feet constantly; however, there was no reference of Petitioner having informed Dr. Plattner that she had sustained a work-related accident (Petitioner's Exhibit 2).

Petitioner was subsequently seen by Casey Shroyer, a Physician Assistant associated with Dr. Plattner, on July 14, 2021. Petitioner complained of right knee pain and provided a history of twisting her knee in June, which resulted in increased pain. Petitioner did not provide a specific date in June

and, again, there was no reference in the medical record of Petitioner reporting that she had sustained a work-related accident (Petitioner's Exhibit 2).

Dr. Plattner ordered an MRI scan of Petitioner's right knee which was performed on July 19, 2021. According to the radiologist, the MRI revealed a complex tear of the medial and lateral menisci as well as the post-surgical changes of the ACL reconstruction. The report also noted Petitioner had sustained a "twisting injury" one month ago (Petitioner's Exhibit 2).

Petitioner was subsequently seen by Dr. Robert Bane, an orthopedic surgeon, who evaluated Petitioner on August 12, 2021. At that time, Petitioner informed Dr. Bane she had sustained an injury to her right knee when she twisted it while stepping off a step ladder. She also informed Dr. Bane of the prior ACL surgery. Dr. Bane opined Petitioner had a "very complex problem" with her knee. He opined the ACL repair did not appear to be "competent" and recommended Petitioner undergo arthroscopic surgery consisting of a partial medial and lateral meniscectomy. He suggested an ACL reconstruction procedure might also be necessary sometime in the future. At that time, Dr. Bane did not provide an opinion as to causality (Petitioner's Exhibit 2).

Dr. Bane performed surgery on October 12, 2021. The surgery consisted of removal of approximately 25% of the medial meniscus as well as bone grafting of the femur and tibia (Petitioner’s Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Lawrence Li, an orthopedic surgeon, on May 5, 2022. In connection with his examination of Petitioner, Dr. Li reviewed medical records and the two and one-half hour video of Petitioner of June 23, 2021, which were provided to him by Respondent. When seen by Dr. Li, Petitioner advised the accident occurred on June 19, 2021, and there was no injury on June 23, 2021. Based on the medical records and the video, Dr. Li opined Petitioner did not sustain an injury to her right knee on June 19, 2021. This was based on his observation of the Petitioner working in a completely normal manner on June 23, 2021, the fact Petitioner had a significant prior right knee condition which was described as a "horrible knee" prior to the accident, and that the meniscal tears were degenerative and secondary to the incompetent ACL (Respondent's Exhibit 9; Deposition Exhibit 2).

At the request of Petitioner's counsel, Dr. Bane prepared a medical report dated June 23, 2022, wherein he addressed the issue of causality. Dr. Bane opined the twisting injury could have aggravated the pre-existing meniscal pathology and may have worsened it, but that the bone deficit was not related to the twisting injury (Petitioner's Exhibit 6).

Dr. Bane was deposed on August 22, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bane's testimony was consistent with his medical records and report of June 23, 2022, and he reaffirmed the opinions contained therein. Specifically, Dr. Bane testified the mechanism of injury could have either caused or aggravated the injury to the meniscus (Petitioner's Exhibit 7; pp 15-16).

On cross-examination, Dr. Bane agreed that a degenerative meniscus could tear as a result of very minor trauma to where any kind of trauma could cause such a tear. He conceded such a tear could happen at work, at home, getting out of a car or anything like that (Petitioner's Exhibit 7; p 18).

Dr. Li was deposed on October 3, 2022, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Li's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Li testified there was no causation, acceleration or exacerbation of Petitioner's right knee condition as a result of the accident of June 19, 2021 (Respondent's Exhibit 9; p 23).

Petitioner testified she no longer works for Respondent. At trial, she stated she had secured employment as a dispatcher and the job is much more sedentary than the one she had when employed by Respondent. Further, she is making more income now than she was when she worked for Respondent. Petitioner complains of constant right knee pain, that her right knee gives out on her and that she can only stand for maximum of two hours.

Conclusion of Law

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

The Arbitrator concludes Petitioner did not sustain an accidental injury arising out of and in the course of her employment by Respondent on June 19, 2021, and her current condition of ill-being is not related to her work activities.

In support of this conclusion the Arbitrator notes the following:

When Petitioner initially reported the accident, she completed an incident report on June 23, 2021 and indicated that the date of accident was also June 23, 2021.

When Petitioner gave a statement to the adjuster handling the case on July 22, 2021, she stated that the date of accident was June 23, 2021.

Petitioner testified she did not report the accident to the store manager, Steve White, on the day it occurred, June 19, 2021, because he was not present. However, Allen Meyer testified Steve White worked on June 21, June 22 and June 23, 2021. There was no explanation as to why Petitioner did not report the accident to Steve White when he was present on June 21, 2021.

Petitioner acknowledged that the company requires all accidents, no matter how small, to be reported immediately, but denied any knowledge of the phone tree to be used when a manager is not present.

Petitioner alleged she sustained a severely disabling injury to her right knee on June 19, 2021; however, in the video of her performing work duties on June 23, 2021, Petitioner was observed walking without an altered gait or limp, lifting cases of soft drinks, and bending and squatting. Further, Petitioner was observed climbing up/down the step ladder on several occasions without any observable difficulties. Petitioner being able to perform all of the aforementioned duties approximately four days after sustaining a severely disabling injury to her right knee is highly questionable.

There was no doubt Petitioner had a significant prior right knee condition which required ACL surgery.

When Petitioner first contacted Dr. Plattner's office by telephone on June 25, 2021, the office record indicated Petitioner had a chronic knee problem but there was no reference to Petitioner having sustained a work-related injury.

When Petitioner was seen by Dr. Plattner on July 2, 2021, Petitioner's right knee condition was described as being chronic and Petitioner having a "horrible knee." Again, the medical record contained no reference to Petitioner having sustained a work-related injury.

When Petitioner was seen by PA Shroyer on July 14, 2021, she did provide a history of sustaining a twisting injury in June, but did not provide a specific date. Once again, the medical record contained no reference to Petitioner having sustained a work-related injury.

When the MRI was performed on July 19, 2021, there was a history of Petitioner having sustained a "twisting injury" one month prior, but no further information regarding same.

The first time Petitioner gave a history of the accident of June 19, 2021, to a medical provider was when she was seen by Dr. Bane on August 12, 2021, almost two months post-accident.

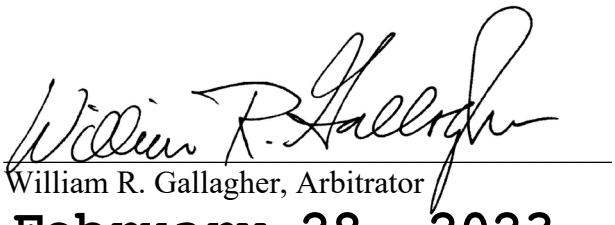
Given the preceding, the Arbitrator finds Petitioner's credibility to be questionable.

Dr. Bane opined Petitioner's torn meniscus was related to the accident; however, this opinion was based solely on the information Petitioner provided to him. He did not watch the video of Petitioner's activities of June 23, 2021.

Respondent's Section 12 examiner, Dr. Li, reviewed Petitioner's medical records and also watched the video of Petitioner's work activities of June 23, 2021. Dr. Li's observation of Petitioner's activities observed during the video of June 23, 2021, was consistent with that of the Arbitrator and he opined Petitioner's right knee condition was not work-related.

Based on the preceding, the Arbitrator finds the opinions of Dr. Li to be more persuasive than that of Dr. Bane in regard to causality.

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



William R. Gallagher, Arbitrator

February 28, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034803
Case Name	Brian Caver v. State of Illinois - Graham Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0222
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 5/16/2024

/s/Carolyn Doherty, Commissioner

Signature

21 WC 34803
Page 1

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

BRIAN CAVER,
Petitioner,

vs. NO: 21 WC 34803

STATE OF ILLINOIS –
GRAHAM CORRECTIONAL CENTER,
Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 6, 2023 is hereby affirmed and adopted.

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

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

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

MAY 16, 2024
O: 05/09/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034803
Case Name	Brian Caver v. SOI/Graham C. C.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Thomas Bowman

DATE FILED: 10/6/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 3, 2023 5.34%

/s/ Jeanne AuBuchon, Arbitrator
Signature

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

October 6, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN CAVER
Employee/Petitioner

v.

SOI/GRAHAM C.C.
Employer/Respondent

Case # **21** WC **034803**

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 **Springfield**, on **August 24, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 6, 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 $**114,115.90**; the average weekly wage was $**2,194.54**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent child(ren).

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services listed in Petitioner's Exhibit 1, as provided in § 8(a) of the Act. Respondent shall be given credit for medical benefits that have been paid through its group carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,463.03/week for 9 weeks, representing Petitioner's periods of incapacity from December 30, 2021, through March 3, 2022, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**937.11**/week for **79.74** weeks, because the injuries sustained caused the **9% loss of the right and left hands (34.2 weeks), and the 9% loss of the right and left arms (45.54 weeks)**, as provided in § 8(e) of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

OCTOBER 6, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on August 24, 2023, on all disputed issues. The issues in dispute are: 1) whether the Petitioner sustained accidental injuries that arose out of and in the course of his employment; 2) the causal connection between the accident and the Petitioner's bilateral carpal and cubital tunnel syndromes; 3) liability for medical bills incurred; 4) liability for temporary total disability (TTD) benefits from December 30, 2021, through March 3, 2022; and 5) the nature and extent of the Petitioner's injuries. In addition, at trial the Arbitrator reserved ruling on the Respondent's objection to admission of Petitioner's Exhibit 8 – a copy of the Section 12 examiner's deposition with documents attached.

FINDINGS OF FACT

The Petitioner was employed with the Illinois Department of Corrections for 30 years. (T. 14) He began in 1993 as a corrections officer at Western Illinois Correctional Center medium/maximum facility, where he keyed locks, lifted property boxes and secured inmates with handcuffs and leg irons. (T. 14-15) After five years, he went to Graham Correctional Center, where he worked every job in the prison – supervising inmates and performing checks of doors and locks. (T. 15-16) He turned regular and Folger Adams keys – more Folger Adams keys at Western than at Graham. (T. 16-17) He loaded and unloaded trucks and searched property boxes. (T. 17) In 2014, he was promoted to correctional lieutenant and continued performing the duties of correctional officer plus writing reports. (T. 17-18) In 2017, he was promoted to shift supervisor, and his duties included handwriting reports. (T. 38-39) He said that as shift supervisor, 10 percent of his day involved keying. (T. 41) During COVID, he worked a lot of double shifts. (T. 41) He said he unlocked doors, padlocks and food hatches. (T. 42) He said the prison was short-staffed, so instead of two supervisors, he was the only one. (T. 43)

On a Work History Timeline form, the Petitioner wrote that as a correctional officer from June 1993 through 2014, he: turned regular and Folger Adams keys; performed bar rapping; opened and closed heavy steel doors/bars; lifted property boxes, loaded and unloaded trucks with said property; keyed, opened and closed pass-through doors; raised and lowered gun/case by rope; and wrote reports. (PX6) As a correctional lieutenant from 2014 through 2017, he: turned keys; occasionally lifted property boxes; keyed, opened and closed food pass-through doors; wrote reports daily; signed forms; and closed and opened heavy steel doors/bars. (Id.) As shift supervisor from 2017 through present, he: turned keys; opened and closed food pass trays; wrote reports; signed forms; and closed and opened heavy steel doors/bars. (Id.)

The Respondent submitted a position description for shift supervisor that listed administrative and supervisory duties for a majority of work time. (RX4)

The Petitioner testified that he did not have gout, hypothyroidism, rheumatoid arthritis or hypertension. (T. 18) He said he was 5-foot-10 and weighed 200 pounds. (Id.) He said he had not sustained any prior injury to his elbows or hands. (T. 19, 45) He said he used to ride motorcycles but sold his about eight years ago, and he hunted and fished occasionally. (Id.)

The Petitioner said that during the course of his employment, he noticed that his elbows and wrist were becoming sore, his hands would get numb and go to sleep, it was hard for him to sleep at night, he would wake up with numbness in his elbows, he had difficulty writing, and he experienced pain. (Id.) He said the symptoms began between 2016 and 2019 in his right hand first, then in his left. (T. 31) He said he dealt with the symptoms for a while, then heard from co-workers who had talked with Petitioner's counsel. (T, 20) The Petitioner then contacted counsel, who sent him to Dr. Matthew Bradley, an orthopedic surgeon at Metro-East Orthopedics. (Id.)

On December 6, 2021, the Petitioner saw Dr. Bradley and complained of bilateral elbow, wrist, and hand pain with associated numbness, tingling, and burning that he had been suffering from for about two years, with the right side worse than the left. (PX3) The Petitioner reported that the symptoms were initially intermittent, they became constant due to the increasing locking and unlocking of cells during COVID lockdown. (Id.) After a physical examination, Dr. Bradley diagnosed bilateral carpal and cubital tunnel, referred the Petitioner for electromyography and nerve conduction studies (EMG/NCS) and advised the Petitioner to take over-the-counter anti-inflammatories, use lace-up splints at night and engage in a home exercise program. (Id.) Dr. Bradley allowed the Petitioner to continue working full duty. (Id.) He opined that chronic repetitive microtrauma and use of bilateral elbows and hands while working as a correctional office contributed to the development of bilateral carpal and cubital tunnel syndromes. (Id.)

The studies were performed that day and showed severe left side carpal tunnel syndrome, moderate to severe right side carpal tunnel, cubital tunnel syndrome on the left side, mild cubital tunnel syndrome on the right side and moderate Guyon's canal syndrome (neuropathy due to injury to the ulnar nerve where it passes through the wrist) bilaterally. (PX 4)

The Petitioner testified that the bracing and exercises did not help. (T. 22) During a phone call with Dr. Bradley on December 20, 2021, the Petitioner denied any change in his symptoms, and the two agreed to surgical intervention. (PX3)

January 12, 2022, the Petitioner underwent left carpal cubital tunnel release and left cubital tunnel decompression and release, followed by a right carpal tunnel release and right cubital tunnel release on February 16, 2022. (PX3, PX5) The Petitioner reported much improvement post-operatively and was released at maximum medical improvement on March 3, 2022. (PX3)

On March 18, 2022, the Petitioner underwent a Section 12 examination by Dr. Patrick Stewart, a hand surgeon at Sarah Bush Lincoln Medical Center. (RX5) He told Dr. Stewart that at that time, he was opening approximately 10-15 doors on a given day and had not done bar rapping since 2014 when he was a correctional officer. (Id.) He did not recall telling Dr. Bradley that his symptoms had worsened because of increased locking and unlocking doors during lockdown. (Id.) The Petitioner felt his symptoms worsened because of administrative duties. (Id.)

Dr. Stewart found no causal connection between the Petitioner's work duties and the compression neuropathies for which he was treated. (Id.) In support of this conclusion, Dr Stewart noted that on specific questioning, the Petitioner changed what he felt was the causal factor or activities for his symptoms as being administrative duties of writing and typing. (Id.) Dr. Stewart said there is not an established relationship or increased risk profile with handwriting and the development of compression neuropathies. (Id.) Regarding cubital tunnel syndrome, Dr. Stewart stated that none of the activities the Petitioner described met the criteria for a risk pattern, which would include repetitive flexion and extension and maintained hyperflexion of the elbow. (Id.)

As to the medical treatment the Petitioner received, Dr. Stewart did not see a direct indication for the X-rays obtained because there was no related joint pain, joint injuries or swelling. (Id.) He said conservative treatment was very limited. (Id.) Dr. Stewart believed no additional medical treatment was necessary and the Petitioner would reach maximum medical improvement within the next 60 days if he was returned to regular work activities and was doing well. (Id.)

Dr. Bradley testified consistently with his records at a deposition on July 6, 2022. (PX7) He said he reviewed the history, timeline and job description prepared by the Petitioner and the report of Dr. Stewart. (Id.) He said that in his practice, he had treated multiple correctional officers and was familiar with the jobs of correctional officer and lieutenant. (Id.)

Dr. Bradley opined that the Petitioner's work for the Respondent for the past 30 years had at least contributed to his carpal and cubital tunnel syndromes. (Id.) He said that in his treatment of corrections officers, he learned that inmates jam locks, which are old, and the doors are heavy. (Id.) He said keys have to be wiggled and pushed around. (Id.) He said that when COVID hit in early 2020 and the lockdown happened, corrections officers were working longer hours and had to do more keying, such that symptoms that were intermittent before became more severe and more chronic. (Id.) In the Petitioner's case, Dr. Bradley believed that working as a correctional officer from 1993 to 2014 started the process of his conditions. (Id.) He said that in switching to a lieutenant and supervisor, the Petitioner may not have been turning keys as much, but he was still doing repetitive activities with both hands, which continued to get worse to the point that his symptoms moved from bothersome and intermittent to very painful to the point where he wanted to do something about it. (Id.) He said the Petitioner had symptoms for multiple years, but he focused on the last two years because that's when the symptoms really came to the Petitioner's attention and really started bothering him. (Id.) He acknowledged that the Petitioner's later work was less physically demanding but explained that he already had an inflammatory process going on with nerve compression, and it did not require much force to make it worse. (Id.) Dr. Bradley analogized the Petitioner's conditions to an existing bruise, stating that subsequent tapping on the bruise causes it to become more inflamed and to worsen. (Id.)

Regarding his decision to perform surgery after two weeks of conservative treatment, Dr. Bradley testified that because of the severity of the Petitioner's nerve compression, the chance for success with nonoperative treatment became pretty limited and he believed surgery was the best treatment to prevent permanent nerve damage. (Id.) He stated that during the surgeries, he found a lot of inflammatory scar tissue encasing the nerve in the cubital tunnel, and the nerve was

flattened in the carpal tunnel where it had been pushed on for so long. (Id.) He did not believe the Petitioner's conditions would have improved without surgery. (Id.) As to Dr. Stewart's criticism of the number of X-rays taken, Dr. Bradley said the standard of care for treating any painful joint is to take X-rays above and below the joint to see if there are any potential sources of pain other than nerve compression. (Id.)

On cross-examination, Dr. Bradley was asked about whether he had ever pulled on a cell door or performed key turning at a prison. (Id.) He said he had not but had asked to do so and was told he could not. (Id.) He did not know the frequency with which the Petitioner performed various tasks that he said contributed to his condition. (Id.)

Dr. Stewart testified consistently with his report at a deposition on December 6, 2022. (RX6) He testified that he toured the prison and physically manipulated locks to see what his done by the differing positions there. (Id.) Petitioner's counsel objected to this testimony. (Id.)

On cross-examination, Dr. Stewart testified that the Petitioner's work as a correctional officer prior to being a supervisor was not relevant because the Petitioner did not have symptoms during that time. (Id.) He said the Petitioner did not indicate that there was any difference between his administrative functions before or during COVID. (Id.) Also during cross-examination, Petitioner's counsel questioned Dr. Stewart about several exhibits to which Respondent's counsel objected under Illinois Supreme Court Rule (ISCR) 206(h)(2) and on relevance. (Id.) In addressing the objection, Petitioner's counsel pointed out that the Respondent had these documents "for some time" and that some of the documents were the Respondent's own documents. (Id.)

Petitioner's Deposition Exhibit 1 contained in Petitioner's Exhibit 8 consists of letters to other corrections employees who were examined by Dr. Stewart at the request of the Respondent. Exhibits 2 and 3 are Section 12 reports from Dr. James Emanuel at Parkcrest Orthopedics and Dr.

Ryan Calfee at Washington University School of Medicine, respectively, regarding corrections employees whose carpal and cubital tunnel syndromes were found to be causally related to their work. Exhibit 4 is a Section 12 report from Dr. Stewart regarding an employee who fell. Exhibits 5 and 6 are Arbitrator decisions in which where the Arbitrator did not give weight to Dr. Stewart's opinions. Exhibit 7 is a Commission decision affirming and adopting an Arbitrator's decision in a case regarding a correctional officer at Graham.

The Petitioner testified that before the surgery, it was miserable and hard to work because in his job he did a lot of form writing and had to stop writing because of the pain. (T. 23) He said the surgeries helped, and his condition improved 90 percent after the surgeries. (T. 23-24, 36)

At the time of arbitration, the Petitioner was retired. (T. 12) He said he was still experiencing numbness, but he could tolerate it. (T. 26) He said he takes over-the-counter anti-inflammatories about three times a week. (Id.)

Trevor Wright, current shift supervisor for Graham, attended the arbitration hearing as the Respondent's representative and testified that he served as a lieutenant under the Petitioner. (T 48) He heard the Petitioner's testimony and said that nothing the Petitioner said was untrue. (Id.) He said that while working together, the Petitioner complained about his hands being numb. (T. 50) He said the Petitioner's written job description was accurate. (T. 51-52) Mr. Wright testified that the Folger Adams keys used at Graham were smaller and not as heavy as the Folger Adams keys used at maximum-security facilities. (T. 52) He said those keys were used on the housing unit wing doors. (T. 52-53)

CONCLUSIONS OF LAW

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

As a preliminary matter, the Arbitrator reserved ruling on Respondent's objection to admission of Petitioner's Exhibit 8 – a copy of Dr. Stewart's deposition with exhibits attached. The Respondent objected to the admission of these exhibits based on ISCR 206(h)(2) and relevancy. ISCR 206 is within Part E of the rules, which addresses discovery, and specifically pertains to taking depositions. Paragraph (h) provides the procedures for taking depositions by remote electronic means. Most of Rule 206 relates to discovery depositions, but parts thereof refer to evidence depositions. Paragraph (h) does not make a distinction between discovery and evidence depositions.

Subparagraph (2) provides: "Any exhibits or other demonstrative evidence to be presented to the deponent by any party at the deposition shall be provided to the officer administering the oath and all other parties within a reasonable period of time prior to the deposition." (ISCR 206(h)(2))

The fact that there is no discovery under the Workers' Compensation Act, makes this analysis different than in cases in civil court. The only disclosure rule under the Act is the 48-hour rule for expert opinions under *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 663 N.E.2d (4th Dist. 1996). There is no penalty for failure to disclose any other evidence under the Act. If Dr. Stewart were testifying live at an arbitration hearing, there would be no basis for an objection under ISCR 206(h)(2).

In addition, review of ISCR 206(h) and the comments thereto make it apparent that the Rule is a logistical or procedural one rather than substantive, with the Supreme Court setting ground rules to allow for the technological advancements in the ways depositions are taken.

The comments from 1999 state:

"The committee is of the opinion that telephonic and other remote electronic

> means depositions should be allowed by a specific paragraph of Rule 206. It is meant to reduce unnecessary discovery costs. The committee recommends that all other demonstrative evidence to be presented to the deponent be premarked before being provided to the officer administering the oath and the other parties. The parties may agree pursuant to Rule 201(i) to amend or waive any conditions of paragraph (h). (ISCR 206 Comments)

It is apparent that the purpose of this rule is to ensure that the court reporter, witness and counsel all have the same exhibits while a deposition is being taken remotely. The remedy for violation of this rule would be to adjourn the deposition to make sure that everyone remotely present had the exhibits at hand. The Respondent simply objected and did not ask for adjournment to be able to see the exhibits about which the witness was testifying. The Respondent also did not reply to the Petitioner's argument in opposition to the objection. Therefore, the objection on the basis of ISCR 206 is overruled.

Regarding relevancy, this Arbitrator does not commonly sustain relevancy objections but gives the exhibits or testimony the weight she believes the evidence deserves. However, Petitioner's Deposition Exhibits 5, 6 and 7 are Arbitrator and Commission decisions. They have precedential value but no evidentiary value and are more appropriate for inclusion as citations in a proposed decision rather than as evidence. Therefore, the relevance objection is sustained as to Petitioner's Deposition Exhibits 5, 6 and 7.

The Arbitrator sees that Petitioner's Deposition Exhibit 1 could be relevant in the Petitioner's attempt to show bias by Dr. Stewart because he performed multiple Section 12 examinations on correctional employees for the Respondent. However, the Arbitrator finds these letters to be of little to no evidentiary significance as there is no indication that Dr. Stewart opinion in this case was affected by the fact that the Respondent chose him to examine numerous correctional employees.

Petitioner's Deposition Exhibits 2, 3 and 4 appear to be an attempt to compare this case

with similar cases in which causation was found. However, this relevancy is limited in that each case is different, and this evidence has little bearing, if any, on the facts of the instant case.

Therefore, Petitioner Deposition Exhibits 1-4 are admitted over the objection of the Respondent, but the Arbitrator gives them little weight as explained above.

The Arbitrator also notes objections by the Petitioner to testimony elicited from Dr. Stewart in his deposition about conclusions he drew after visiting the prison. This was not contained in his report, and there was no proof that this information or the conclusions Dr. Stewart drew therefrom was disclosed at least 48 hours before testimony began. The Arbitrator finds this is a violation of the rulings in *Ghere*, and the testimony is hereby stricken.

Last is the preliminary issue of the Petitioner's credibility. Although there were things the Petitioner could not recall – especially dates – this did not mean that he was not credible. In his interview with Dr. Stewart, he did not recall telling Dr. Bradley that repeated keying during the COVID lockdown increased his symptoms. However, there is no indication that Dr. Bradley incorrectly recorded this. In addition, the Petitioner's testimony about the tasks he performed during his career was confirmed by Mr. Wright, who did not disagree with the Petitioner's representations that he also performed corrections officer duties in his supervisory positions or that he worked double shifts during COVID, during which time he unlocked and locked doors, padlocks and food hatches. Therefore, the Arbitrator finds the Petitioner's testimony and his reports to Dr. Bradley to be credible.

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the accident?

The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of

employment, and that involves as an element a causal connection between the accident and the condition of claimant. *Cassens Transp. Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 199 Ill. Dec. 353 (2nd Dist. 1994) An injury is considered "accidental" even though it develops gradually over a period of time as a result of repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Id*. Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor. *Laclede Steel Co. v. Indus. Comm'n.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (Ill. 1955)

Further, a Petitioner's job duties need not be repetitive in the sense that the same task is done over and over again as on an assembly line to result in a compensable injury. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009). There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. *Edward Hines Precision Components v. Indus. Comm'n*, 365 Ill.App.3d 186, 192, 825 N.E.2d 773, 292 Ill.Dec. 185 (2nd Dist. 2005) See also *Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135, 1142 (1st Dist. 1988). Proof of effort required or exertion needed may carry great weight only where the work duty complained of is a common movement made by the general public. *Darling*, 176 Ill.App3d. at 1142. As to whether the Petitioner's work duties complained of were common movements made by the general public, the Arbitrator finds that his duties were not common movements made by the general public. Therefore, proof of effort or exertion is not required.

In the instant case, Drs. Bradley and Stewart disagreed as to whether the Petitioner's repetitive trauma were due to his work. There are several reasons why the Arbitrator gives Dr. Bradley's opinions more weight.

First, the Arbitrator notes that Dr. Stewart's opinions were based more on the Petitioner's feelings about his condition at the time of the examination than those expressed prior thereto. The Petitioner's accounts to Dr. Bradley are more pertinent as they occurred when the Petitioner was actively suffering the symptoms of his condition. In addition, Dr. Stewart said in his conclusions that the Petitioner denied telling Dr. Bradley that his symptoms were related to increased locking and unlocking of doors. However, earlier in his report, Dr. Stewart said the Petitioner did not recall making that statement. Dr. Stewart's characterization of a failure to recall as a denial is inaccurate, and, therefore, leads the Arbitrator to give his opinions less weight. Also, Dr. Stewart's reliance on the Petitioner's causation opinions stated during his examination by Dr. Stewart is misplaced. The Petitioner is not an expert, and his opinions should not be relied upon.

Also, Dr. Stewart did not give consideration to the 30 years during which the Petitioner performed duties that would contribute to carpal and cubital tunnel syndromes – locking and unlocking doors. Nor did Dr. Stewart consider the increase in the Petitioner's duties during COVID lockdown while the prison was short-staffed.

The Appellate Court has held that work history extending years before a claimant's alleged manifestation date is relevant because a repetitive-trauma injury is one which has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction. *PPG Indus. v. Illinois Workers' Comp. Comm'n*, 2014 IL App (4th) 130698WC, ¶ 19, 22 N.E.3d 48.

On the other hand, Dr. Bradley did take the Petitioner's work history over the past 30 years and the increase in his duties during the COVID lockdown into consideration in forming his causation opinion. The Arbitrator finds the opinions of Dr. Bradley that years of keying led up to the Petitioner's condition that worsened during the COVID lockdown to make more sense than to

simply say that because the Petitioner primarily administrative duties during the past two years meant that his conditions were not work-related. A persuasive description of the development of the Petitioner's conditions is Dr. Bradley's bruise analogy, wherein the Petitioner's carpal and cubital tunnel conditions existed before he became a supervisor, but the intermittent "tapping" on the "bruise" – i.e. continuing to perform duties of a correctional officer, especially during the COVID lockdown – caused the conditions to worsen to the point where the Petitioner could no longer tolerate the symptoms.

Dr. Bradley's opinions also deserve greater weight because he was the Petitioner's treating physician and had more opportunities to become familiar with the Petitioner and his condition – especially prior to having surgery.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his bilateral carpal and cubital tunnel syndromes arose out of and in the course of his employment and were causally related to his work duties.

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

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

Although Dr. Stewart was critical of the number of X-rays taken and what he considered to be a short period of conservative care, Dr. Bradley thoroughly explained the rationale for his course of treatment. Based on this and the findings above, the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary and orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 1. The Respondent shall have credit

for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

According to the Request for Hearing (AX1), the parties dispute TTD benefits for the period of December 30, 2021, through March 3, 2022.

An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

The Respondent disputed liability for TTD on the basis of liability only. Based on the findings above regarding accident and causation, the Arbitrator finds that the Petitioner was entitled to TTD benefits from December 30, 2021, through March 3, 2022.

Issue (L): What is the nature and extent of the Petitioner's injury?

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." *Id.*

(i) **Level of Impairment.** There was no AMA impairment rating produced. Therefore, the Arbitrator gives this factor no weight.

(ii) **Occupation.** The Petitioner is retired and no longer is subject to the same physical challenges as during his work for the Respondent. The Arbitrator places little weight on this factor.

(iii) **Age.** The Petitioner was 48 years old at the time of the injury. Although he is retired, he could still pursue gainful employment and would have many work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner's achieved a good result from his surgeries and was returned to work full duty. However, he testified that he still experiences numbness. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's permanent partial disability to be 9 percent of the left arm, 9 percent of the left hand, 9 percent of the right arm and 9 percent of the right hand.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036881
Case Name	William Miles v. The American Coal Company
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0223
Number of Pages of Decision	24
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 5/16/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM MILES,

Petitioner,

vs. NO: 18 WC 36881

THE AMERICAN COAL COMPANY

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 occupational disease, disablement, causal connection, permanent partial disability, legal and evidentiary error, and the application of Sections 1(d) through 1(f) of the Occupational Disease Act, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof

The Commission writes additionally on the issue of occupational disease. The Arbitrator found that Petitioner failed to meet his burden of proving he developed coal workers' pneumoconiosis (CWP) or chronic bronchitis as a result of any exposure while working for Respondent, or that his current condition of ill-being is causally connected to such exposure. The Commission affirms and adopts these findings, and further adds that Petitioner also failed to meet his burden of proving he developed emphysema or chronic obstructive pulmonary disease (COPD) as a result of any exposure while working for Respondent.

I. Emphysema

Petitioner testified that he began experiencing breathing difficulties two to three years prior to being laid off by Respondent on October 4, 2017, but emphysema is not mentioned in Petitioner's treatment records until January 9, 2020, after Petitioner's evaluation for black lung. Unspecified emphysema appears in the problems list of his records thereafter. Dr. Suhail Istanbouly did not diagnose Petitioner with emphysema in his written evaluation, though he

testified that his finding of hyperinflated lungs was consistent with emphysema. It is not clear from this record that the X-rays which Dr. Istanbouly claimed to show hyperinflated lungs were films of *Petitioner's* lungs. There is no evidence that Dr. Istanbouly reviewed Petitioner's November 7, 2018 and April 16, 2021 chest X-rays. He testified that Petitioner did not bring any X-rays or reports to the evaluation. Dr. Istanbouly testified that he accessed the medical records of Harrisburg Medical Center and reviewed chest X-rays performed on March 29, 2019 and in 2017. He testified that if the date of birth for the individual that had chest X-rays performed on March 29, 2019 and in 2017 was October 19, 1956, either the identity of the patient or the dating of the record was wrong. The Arbitrator correctly sustained Respondent's objection to the portion of Dr. Istanbouly's report regarding these X-rays for lack of foundation showing that they were films of Petitioner.

Dr. Christopher Meyer testified that generally, X-rays could show signs consistent with emphysema. Dr. David Rosenberg testified that he did not see evidence of emphysema on Petitioner's films. Dr. Rosenberg also testified that none of the B-readers who interpreted Petitioner's chest X-rays saw emphysema because the notation was not marked off on Section 4(b) of the B-reading form, nor was there any description in the comment sections. Dr. Rosenberg stated that neither he nor Dr. Henry Smith recorded hyperinflated lungs, which would need to be recorded in Section 4(c) of the B-reader form. Dr. Meyer's B-reading forms also lack any notation of hyperinflation or emphysema. Dr. Rosenberg further testified that emphysema could cause restriction or obstruction, and generally tends to cause obstruction. Petitioner was found to have a mild restriction, not an obstruction. Given this record, the Commission prefers the opinion of Dr. Rosenberg over that of Dr. Istanbouly and concludes that Petitioner failed to prove he contracted emphysema from coal dust exposure.

II. COPD

Dr. Istanbouly also diagnosed Petitioner with COPD/chronic bronchitis, GOLD stage one per PFT criteria related to both coal dust inhalation and smoking. He testified that the finding of hyperinflated lungs was consistent with COPD. Dr. Meyer testified that generally, X-rays could show signs consistent with COPD and that hyperinflation could be a finding consistent with COPD. Dr. Rosenberg agreed that hyperinflated lungs could be a sign of COPD. As noted above, none of the B-readers recorded hyperinflated lungs, and it is not clear from this record that the X-rays which Dr. Istanbouly claimed to show hyperinflated lungs were films of Petitioner's lungs. Furthermore, Dr. Istanbouly acknowledged that smoking is the leading cause of COPD and chronic bronchitis, but did not consider Petitioner's smoking history of 10 to 15 cigarettes per day for 10 years to be significant, despite including it as a factor in his diagnosis. Petitioner's treatment records suggest that he smoked from 1977 to 2011, and was noted to be a smoker in the period from 2020 to 2022. Given this record, the Commission prefers the opinion of Dr. Rosenberg over that of Dr. Istanbouly and concludes that Petitioner failed to prove he contracted COPD from coal dust exposure.

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 October 18, 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 failed to meet his burden of proving he developed CWP, chronic bronchitis, emphysema, or COPD as a result of any exposure while working for Respondent, or that his current condition of ill-being is causally connected to such exposure.

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.

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.

MAY 16, 2024
o: 5/09/24
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	18WC036881
Case Name	William Miles v. The American Coal Company
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 10/18/2023

/s/Linda Cantrell, Arbitrator
Signature

THE INTEREST RATE FOR THE WEEK OF OCTOBER 17, 2023 5.335%

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 DECISION5

WILLIAM MILES
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **18** WC **036881**

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 **9/5/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **October 4, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's earnings were $**53,862.64** and the average weekly wage was $**1,035.82**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

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

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

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

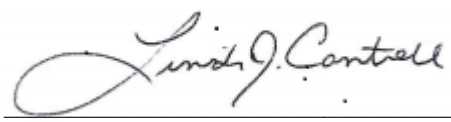
Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Based on the Arbitrator's finding that Petitioner failed to meet his burden of proving he developed CWP or chronic bronchitis as a result of any exposure while working for Respondent, or that his current condition of ill-being is causally connected to such accident/exposure, all claims for permanent partial disability benefits are denied.

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

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



Arbitrator Linda J. Cantrell

October 18, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM MILES,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-036881
	)	
THE AMERICAN COAL COMPANY,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on September 5, 2023 on all issues. On 12/14/18, Petitioner filed an Application for Adjustment of Claim alleging he sustained an occupational disease of his lungs, heart, pulmonary system, and respiratory tracts as the result of inhaling coal mine dust, including, but not limited to, coal dust, rock dust, fumes, and vapors for a period in excess of 23 years. (AX2) The issues in dispute are disease, causal connection, the nature and extent of Petitioner's injuries, and Sections 1(d)-(f) of the Occupational Diseases Act. All other issues have been stipulated.

TESTIMONY

Petitioner lives in Rosiclare, Illinois. His date of birth is 3/31/61 and he was 62 years old and unmarried at the time of arbitration. Petitioner graduated from high school. His post high school education included some new car training through a Ford dealership. He estimated that he worked close to 30 years in coal mining and did not work underground. Petitioner testified that in addition to coal dust, he was regularly exposed to and breathed silica dust and smoke from coal fires. Petitioner's last day of work was on 10/4/17 at Respondent's Galatia mine. Petitioner testified that he was 56 years old on his last day of coal mine employment. His job classification when he left was equipment operator that involved pushing coal in feeders and away from stacks. Petitioner testified that he was exposed to coal dust on his last day of work, and he did not have any post mining employment.

Petitioner testified that he started working in the mines on 6/6/88. He first worked for Dravo which was a rock quarry. They were bought out by Martin Marietta Materials. Petitioner testified that he did repairs in the shop and loaded trucks as well as anything that needed to be done. Petitioner testified that he ran loaders, dozers, power hose on trucks, and cranes. He testified that most of that involved moving stuff around. He

testified that sometimes the work created quite a bit of dust which was silica dust. He testified that he was exposed to diesel exhaust while working in the shop. He worked there for 13½ years. He next worked as an equipment operator for Illinois Fuel which was a strip mine. He loaded coal on trucks and broke up the coal. He testified that the trucks ran over the coal stirring up dust and he was exposed to diesel exhaust fumes. Petitioner worked at Illinois Fuel for 12 or 13 years. After that job he went to work for Respondent. He could not recall what year he started at Respondent, but he stayed there until he left the mining industry. At Respondent, Petitioner was an equipment operator and did repairs. He testified that Respondent was a deep mine, but he worked on the surface. He testified that when the coal came out from underground it was taken on a belt all the way up to a breaker. The rock was taken out and then it went across the belt to a concrete stack that had windows in it where the coal could fall out and either went to a feeder and he pushed it in or pushed it away. He testified that there were times there was a lot of dust because there was no water on the coal. Petitioner testified that he also repaired the screen and would do cleanup, shovel the coal, and repair belts. He also loaded coal for the trains.

Petitioner testified that he first noticed breathing problems at work about two or three years before he quit. He testified that he coughed constantly. He testified that sometimes he wore a mask and sometimes he did not. He testified that sometimes the equipment had air conditioning and other times it did not, so he was covered in dust. Petitioner testified that when he was working, his breathing did not vary much. He testified that since leaving coal mining and getting older, his breathing is getting worse. Petitioner testified that he could walk 50 to 100 feet on level ground at a normal pace before having shortness of breath. He testified that he has two sets of stairs in his house and he can tell a difference in his breathing when he goes up them. He was not taking any breathing medication as of arbitration. He testified that because of his breathing difficulties he just cannot do things, including mowing his lawn. He testified that he used to work on old cars, but it is hard to do that. He testified that if he picks up 50 pounds to walk somewhere he gets worn out and his breathing is erratic. Petitioner testified that he had a swimming pool, but he does not swim in it anymore because it is too much effort. Petitioner testified that he cleans his house half a room at a time.

Petitioner testified that he sees Dr. Chatto and sometimes Dr. Haste at Hardin County Clinic. He testified that he has never really talked too much to them about his breathing. He testified that he was not sure whether they knew he worked in the dust. Petitioner testified that he was not currently a smoker, but he has smoked in the past. He testified that he smoked maybe 2 or 3 years and then quit for 5 or 6 years before restarting. He testified that the last time he smoked was probably five years prior to arbitration. He smoked about a pack a day. He estimated that he smoked about seven years in his life. Petitioner testified that he suffered a stroke and had five bypasses, a massive heart attack, back surgery, and is diabetic. He had a foot and a half of his colon removed. Petitioner testified that he takes a blood thinner, Hydrocodone for pain, and medication for blood pressure. He does not take medication for his heart.

On cross examination, Petitioner testified that he was laid off from the mine on 10/4/17. He testified that the mine was closing as of his layoff. Petitioner testified that he

collected unemployment benefits for six months. Petitioner was awarded social security disability in October 2018 for a back injury he sustained while employed at Rich Motor Company from 1978 to 1986. He underwent back surgery and settled that claim. Petitioner had a stroke in April 2021 and COVID in December 2022. Petitioner had a high blood pressure event in March 2023. Petitioner testified that he had the heart attack about five days before he had the five-vessel bypass surgery. Petitioner has been diabetic for 15 years. He testified that he had to have part of his colon removed because one of his polyps caught a seed or something and abscessed. Petitioner testified that he has treated with Dr. Chatto and Dr. Haste's group since March 2011.

Petitioner testified that at Respondent he was pushing coal with a bulldozer. He agreed that he was hired by Respondent around 8/20/09. Petitioner testified that after he saw Dr. Istanbouly for an exam as part of this claim, he saw Dr. Chatto. He testified that he might have shared with Dr. Chatto that he had been diagnosed with black lung. Petitioner agreed that he had testing regarding this claim scheduled in Indiana, but he did not attend same. He testified that he has always been honest with his physicians as to any problems he had or did not have. He testified that he has also been honest about what he can remember regarding his smoking history. He testified that he has smoked and quit so many times "it ain't been funny." Petitioner testified that if Dr. Chatto charted in 12/20/22 that he was a current every day smoker, he was not at that time. He testified that he might have said that he smoked, but he did not say that it was every day. He testified that it had been a long time since he smoked. He testified that it could have been more recent than five years ago because he is not good on the dates. As of arbitration, Petitioner was on Social Security and Medicare.

Petitioner testified that he did not know if Respondent had miners undergo chest x-ray screening for black lung. He testified that they did not come in with a trailer for x-rays. He testified that he never saw a notice that the miners could go to Harrisburg Medical Center or Ferrell Hospital to have a chest x-ray performed. Petitioner was taking Hydrocodone for his back, hip, and knee. He testified that they are wore out and they ache. He testified that he does not have trouble going up stairs or walking as a result of his knee, hip, or back. Petitioner testified that he has trouble bending down and getting down on his knee. He has been going to pain management at Carbondale for hip pain. He testified that he has gotten a shot in his knee and had some fluid drained off of it one time. He testified that the doctor has discussed surgery for his hip, but they told him to go as long as he could before they do the surgery.

MEDICAL HISTORY

Dr. Suhail Istanbouly testified by way of deposition on 2/21/23. (PX1) Dr. Istanbouly specializes in pulmonary, critical care, and sleep medicine. He currently works at Hines VA in the Chicago area, but he has a satellite clinic in Southern Illinois. Dr. Istanbouly worked in Southern Illinois from April 2003 until April 2019. He worked a number of years at the Black Lung Clinic in Southern Illinois. Dr. Istanbouly testified that between inpatient and outpatient he was taking care of coal miners on a daily basis, so they made up roughly 10 to 20% of his practice. Dr. Istanbouly testified that he performed pulmonary function tests and interprets same. He also interprets chest x-rays

in the care and treatment of his patients. Dr. Istanbouly testified that some of his patients at Hines VA have occupational diseases of various sorts, particularly veterans who were exposed to smoke. He testified that those patients do not exceed 5% of his practice.

Dr. Istanbouly testified that he saw Petitioner one time on 6/17/19 at the request of his counsel for a workup on his state black lung claim. Dr. Istanbouly testified that in the past for a number of years he performed 5 to 7 examinations a month and always at the request of Petitioners' attorneys. Dr. Istanbouly testified that he travels on average once a month to Southern Illinois where he continues to perform such examinations.

Dr. Istanbouly testified that Petitioner was a coal miner for 15 years with all of his coal mine work being above ground. The last month of his coal mine employment was in October 2017. In the last year of his employment, Petitioner was a bulldozer operator and repairman. Dr. Istanbouly testified that Petitioner retired after he left the coal mine and he left the coal mine because it closed. Prior to his coal mining career, Petitioner worked in rock quarries for 13.5 years where there was significant dust exposure including silica. Petitioner was smoking 10 to 15 cigarettes per day at the time of Dr. Istanbouly's examination, but according to Petitioner he had been a smoker for a total of 10 years. Petitioner reported that he had been coughing on a daily basis for years and lately the cough had been getting worse, sometimes moderate to severe in intensity. Petitioner noticed that the cough was aggravated by strenuous activities and irritating smells. His cough was mostly dry with no significant sputum production. Petitioner complained of exertional dyspnea and becoming short of breath by walking half a block or less. Petitioner's physical capacity seemed to be declining in the last six months. Petitioner had a history of having undergone a five-vessel CABG surgery a few years prior. He also complained of mild intermittent runny nose.

Spirometry performed on the date of examination revealed nonspecific ventilatory limitation with FEV1 2.75L, 80% of predicted; FVC of 3.58L, 79% of predicted; and FEV1/FVC of 77%. Dr. Istanbouly testified that he reviewed two chest x-rays from Harrisburg Medical Center. The x-rays were dated 3/29/19 and 2017. Both chest x-rays revealed hyperinflated lungs with mild interstitial changes bilaterally, more prominent in the lower lobes. Examination of Petitioner's lungs revealed good air entry bilaterally with no wheezing or rales. Dr. Istanbouly's assessment was simple coal workers' pneumoconiosis (CWP) in its early stages which was related to a long history of coal dust exposure. Dr. Istanbouly also diagnosed chronic obstructive pulmonary disease/chronic bronchitis, GOLD stage one per PFT criteria related to both coal dust inhalation and smoking. Dr. Istanbouly testified that it was advisable for Petitioner to avoid further coal dust inhalation and to quit smoking to prevent the progression of his underlying pulmonary disease. Dr. Istanbouly testified that Petitioner had simple CWP and that he met the criteria for chronic bronchitis. He testified that Petitioner suffers from significant lung damage related to CWP. He testified that Petitioner suffers impairment in the function of his pulmonary system as a result of his chronic bronchitis. Dr. Istanbouly testified that Petitioner's FVC of 79% would place him in Class 1 disablement under the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*. He testified that a miner can have radiographic abnormalities of CWP on his chest x-ray but just not

enough to be positive for CWP. He testified that a negative chest x-ray is not enough to rule out CWP.

Petitioner related to Dr. Istanbouly no past history of respiratory disease. Dr. Istanbouly did not consider Petitioner's smoking history of 10 to 15 cigarettes per day for 10 years to be significant. He testified that a significant smoking history would be 20 pack years per the medical literature. Dr. Istanbouly testified that smoking is associated with cough, sputum production, and dyspnea on exertion. Dr. Istanbouly testified that smoking is the leading cause of COPD and chronic bronchitis. He testified that Petitioner was smoking at the time he examined him. Dr. Istanbouly testified that he would expect an increase in Petitioner's symptoms and a decline in his pulmonary function over time if he continued to smoke. Dr. Istanbouly testified that Petitioner had a significant history of silica exposure prior to his coal mine employment. He testified that such a history alone could cause interstitial changes on a chest x-ray. Dr. Istanbouly testified that Petitioner told him that he left the mine because of closure of the mine and not because of an inability to perform his job duties or due to respiratory disease. He testified that Petitioner related to him dyspnea on exertion. Dr. Istanbouly testified that there are causes for that other than respiratory disease, including heart disease and deconditioning. Dr. Istanbouly was not sure what Petitioner had done since his retirement to stay physically fit. Dr. Istanbouly testified that Petitioner's FEV1/FVC ratio was 77% and his predicted FEV1/FVC ratio was 76% which meant that Petitioner's FEV1/FVC was 101% of predicted. Dr. Istanbouly testified that there was no evidence of obstruction in Petitioner. He testified that the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, employ the ATS/ERS Guidelines for interruptive strategy for pulmonary function rather than the so-called GOLD standard.

Dr. Istanbouly testified that typically when he meets with an individual for a black lung exam, the patient brings a chest x-ray and an interpretation of same for him to review. Dr. Istanbouly testified that Petitioner did not have a chest x-ray or a report at the time he examined him. Dr. Istanbouly accessed the medical records of Harrisburg Medical Center to find out if there were any films on record for Petitioner. He testified that the date of birth for the individual that had a chest x-ray performed on 3/29/19 and in 2017 was 10/19/56 which was not Petitioner. Dr. Istanbouly did not review any treatment records regarding Petitioner. Dr. Istanbouly testified that one must be a susceptible host to develop CWP. He testified that not all coal miners develop CWP.

Dr. Istanbouly provided an addendum to his report which stated he reviewed the B-reader report on Petitioner's chest x-ray taken on 11/7/18, which confirmed mild interstitial fibrosis in the mid and lower zones with a profusion of 1/0 per the B-reader, Dr. Henry Smith. (PX1, Ex. 2). Dr. Istanbouly is not an A or B-reader. He testified that he relies upon the B-readings in the examinations he performs. Dr. Istanbouly does not provide profusion ratings on the films he interprets for black lung. When he interprets a film for black lung, he determines whether it is positive or negative for same, and if it is positive, he characterizes what he sees as mild or early, moderate, or severe pneumoconiosis.

Dr. Henry K. Smith interpreted Petitioner's chest x-ray of 11/7/18 as positive for pneumoconiosis of profusion 1/0 with P/P opacities in the mid and lower lung zones bilaterally. Dr. Smith is a board-certified radiologist and NIOSH B-reader. (PX2)

Dr. Cristopher Meyer testified by way of deposition on 5/18/20 and 5/10/23. (RX1, 2) Dr. Meyer has been board-certified in radiology since 1992. He reviewed the chest x-ray of Petitioner dated 11/7/18 and noted the film was quality 1. He testified that there were no small or large opacities. Petitioner had a prior median sternotomy, and the examination was otherwise unremarkable. Dr. Meyer testified that there were no radiographic findings of CWP. He interpreted a chest x-ray of 4/16/21 performed at Hardin County Hospital. The 2021 chest x-ray was of diagnostic quality but was quality 2 due to scapula overlap, meaning the shoulder blades projected over the lungs. Dr. Meyer testified that there were no small or large opacities or findings of CWP on the 2021 chest x-ray and no changes compared to the 2018 x-ray. He testified that comparison studies are helpful to detect subtle changes and to determine whether a disease process is acute or chronic. Dr. Meyer testified that CWP affects the lung parenchyma and there was no change in Petitioner's lung parenchyma when comparing the films.

Dr. Meyer testified that he was asked to take the B-reading exam by Dr. Jerome Wiot who was part of the original committee that designed the teaching course which is called the B-reader program. He testified that there are several ways to study for the B-reader examination. He testified that there is a course module that contains a whole series of films that NIOSH will send, or the American College of Radiology runs a B-reading course. Dr. Meyer has participated in the course previously in studying for the examination and was recently asked to have a more active academic role in creating the new syllabus and designing the new B-reader exam. Dr. Meyer is currently co-director of the ACR B-reader course. He testified that as a member of the ACR Pneumoconiosis Task Force, he helped complete a new syllabus for the course as well as the test that was delivered to NIOSH in 2017.

Dr. Meyer testified that the B-reading training course is a weekend training course in which there are a series of lectures describing the B-reading classification system. The course participants review a series of practice examples with mentors overseeing the practice examples. Dr. Meyer testified that the faculty for the course is typically experienced senior level B-readers who have been involved in the process for quite some time. He testified that typically one takes the exam after taking the B-reading course, which is a six-hour exam where 120 chest x-rays are categorized. The pass rate for the examination ran roughly 60%. The current exam is 24 multiple choice questions and 72 cases in five hours. Dr. Meyer testified that generally radiologists have about 10% higher pass rate than other specialties. In Dr. Meyer's opinion, radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reading training and examination is making the distinction between a film with profusion of 0/1 which is a normal examination from 1/0 which is an almost normal but slightly abnormal examination. Dr. Meyer testified that making that distinction is a critical component of the B-reader examination and is a point of emphasis in the B-reading course as well.

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities and based on the size and appearance of the small opacities they are given a letter score. Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. CWP is characteristically described as small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, are described as small linear opacities. The distribution of the opacities is also described because different pneumoconioses are seen in different regions of the lung. CWP is typically an upper lung zone predominant process. Idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of the interpretation is the extent of the lung involvement or so-called profusion. Dr. Meyer testified that very rarely will opacities be found in the mild and lower lung zones and not the upper lung zones. Dr. Meyer testified that profusion is basically trying to describe the density of the small opacities in the lung.

Dr. Meyer testified that the gold standard for determining the existence of lung disease is pathologic review of the tissue itself rather than radiology. He testified that when he does B-readings, he looks at the film and answers a simple question: Is there anything on there that is consistent with the abnormalities of CWP. He testified that his assumption when he is asked to do a B-reading is that the worker has an appropriate exposure history to warrant having the chest x-ray. Dr. Meyer testified that one of the issues with interpreting a chest x-ray for pneumoconiosis is making sure the individual who is interpreting the study has ample experience reading them to be able to sort out what the background variation is for normal. Dr. Meyer testified that part of trying to figure out whether or not there is an abnormality in the lung is recognizing the large spectrum of normal which is why he spends his entire career as a chest radiologist devoted to looking at chest radiographs to establish that spectrum of normal. Dr. Meyer testified that on average he performs 150 to 250 B-readings per month. Depending on the month, he reads between 10 and 20 CT scans for the purpose of determining the presence, absence, or severity of an occupational lung disease.

Dr. Meyer testified that there are studies that show that at autopsy, 50% or more of long-term coal miners have coal macules that can be diagnosed by pathology that have not reached the degree of severity to be seen on chest x-ray. Dr. Meyer testified that if he reads an x-ray as positive and the worker had a sufficient history to cause CWP, that would warrant a finding of CWP. He testified that if he finds a chest x-ray negative, that would not necessarily rule out that the miner may have pneumoconiosis pathologically. Dr. Meyer testified that it would be fair to say that all long-term coal miners are going to come out with some dust deposit trapped in their lungs; however, the majority of those will not have changes in their lungs that qualify for CWP. Dr. Meyer testified that it is not possible to have CWP without having a tissue reaction to the coal dust. In category 1 pneumoconiosis there would be some change in the function of the lung at the very site of the tissue reaction which probably could not be measured. Dr. Meyer testified that simple CWP typically will not progress once exposure ceases.

Dr. David Rosenberg conducted a review of medical records and a chest x-ray regarding Petitioner at the request of Respondent's counsel. (RX3) Dr. Rosenberg has been board-certified in internal medicine since 1977. After graduating from medical school, he did a pulmonary fellowship at the National Institute of Health in Bethesda,

Maryland. Dr. Rosenberg received his board certification in pulmonary disease in 1980 and received his board certification in occupational medicine in 1995. Dr. Rosenberg has been a B-reader since July 2000. He is a member of the American Thoracic Society and American College of Chest Physician. Dr. Rosenberg has lectured by invitation on a number of subjects through the years, including interstitial lung disease, chronic obstructive lung disease, pulmonary stress testing, pulmonary function testing, exercise testing, and occupational lung disease. Dr. Rosenberg has patients in his clinical practice who have black lung.

Dr. Rosenberg reviewed chest x-rays of Petitioner dated 11/7/18 and 4/16/21. He testified that the chest x-ray from 2018 had profusion 0/0 and there were no findings of pneumoconiosis. There was evidence of previous bypass surgery. The film dated 2021 was quality 3, being light and underexposed with scapular overlay. No change was noted from the 2018 film. Dr. Rosenberg also considered the 2021 film to be 0/0 profusion. He testified that for a proper reading of a chest x-ray for pneumoconiosis, the reader first assesses the quality of the film. Next, the reader classifies whether there are parenchymal changes present and outlines whether there are small opacities. If there are small opacities, he outlines what the configuration is and identifies the lung zones where they are located. He also notes whether there are large opacities and pleural abnormalities. In Section 4 the reader notes other abnormalities. Dr. Rosenberg testified that the B-reader indicates whether the small opacities are round or linear. He testified that the interpretation of the target film or films is done side by side with the standard ILO films. Dr. Rosenberg testified that he performed this side by side reading with Petitioner's films. He testified that profusion is the intensity of the findings of opacities in the lung should they be present. Dr. Rosenberg testified that the distinction between a category 1 pneumoconiosis and a film that is 0/1 is a fine one. He testified that a film with a 1/0 profusion is considered positive for pneumoconiosis while a film with a profusion of 0/1 is considered negative for pneumoconiosis. Dr. Rosenberg testified that the use of profusion ratings is done in part to avoid imprecise descriptive terms of what is seen on the films such as early or mild pneumoconiosis. He testified that what early or mild means to one person may be different than what it means to another. He testified that any A or B-reader knows what it is meant by profusion of 1/0.

Dr. Rosenberg testified that he did not see evidence of emphysema on Petitioner's films. He testified that none of the B-readers who interpreted Petitioner's chest x-rays saw emphysema because the notation was not marked off on Section 4(b) of the B-reading form nor was there any description in the comment sections. Dr. Rosenberg testified that making the distinction between a film that is minimally positive for pneumoconiosis versus negative is a point of emphasis in the B-reading syllabus, course, and exam.

Dr. Rosenberg testified that it is unlikely for simple CWP to progress once the exposure ceases. He agreed with the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in the mine at currently permissible dust levels until he reaches retirement age. Dr. Rosenberg testified that there is not any clinically significant impairment related to subradiographic pneumoconiosis. He testified that cough is not considered an objective determinant of pulmonary

impairment. If one wants to know whether an individual suffers from an impairment in respiratory function, he would look to valid pulmonary function test results to determine same. Dr. Rosenberg is familiar with the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, Chapter 5, The Pulmonary System. He testified that chest imaging under the *Guides* is not a factor, let alone a key factor, in the assessment of pulmonary impairment. Dr. Rosenberg agrees with the *Guides* that the correlation of chest x-ray interpretations and physiologic measures of impairment is poor.

Dr. Rosenberg testified that he is familiar with the definition of chronic bronchitis, with comes from the World Health Organization and is the same one that the American Medical Association has adopted. He testified that the history obtained from Petitioner by Dr. Istanbouly of daily cough with no significant sputum production was not sufficient to satisfy that definition of chronic bronchitis. The treatment records Dr. Rosenberg reviewed did not contain the diagnosis of chronic bronchitis. Dr. Rosenberg testified that chronic bronchitis is defined as cough and sputum production for three months out of two consecutive years.

Dr. Rosenberg testified that an individual needs to be a susceptible host to develop CWP and not all coal miners develop the disease. He testified that only a minority of coal miners develop CWP. NIOSH compiled statistics on the prevalence of CWP in the Work-Related Lung Disease Surveillance Report which was based upon interpretations from the Coal Workers' X-ray Surveillance Program. Dr. Rosenberg testified that based on that study the prevalence rate for pneumoconiosis in the United States is in the low single digits overall and the rate in the last timeframe from the study, 2005-2006, was 3.3%. Dr. Rosenberg testified that if an individual miner is not a susceptible host for pneumoconiosis, it does not matter how many years he was exposed or the intensity of his exposure.

Dr. Rosenberg testified that Petitioner's spirometry suggested the presence of a restriction. He was able to rule out Petitioner's workplace exposure as being a contributing factor to that restriction. He testified that restriction means small lungs which can come about because of two factors. One is extrinsic restriction where the structures around the lungs are impaired or not as functional as they should be. If there is a problem with the structures around the lungs, that can impinge on the expansion on the lungs, and they do not expand well enough. Dr. Rosenberg testified that when coal dust causes restriction it is called intrinsic restriction because the lungs become stiff from advanced lung disease from coal dust. When the lungs become stiff, they get smaller in nature. Dr. Rosenberg testified that to have extrinsic restriction he would have expected advanced profusion changes of 3/3 or higher with complicated pneumoconiosis. Dr. Rosenberg attributes the suggestion of restriction in Petitioner to extrinsic factors. Petitioner had previous bypass surgery which probably disrupted the musculoskeletal structure around the lungs and the sternum which can cause the decreased expansion of the lungs. He testified that from a respiratory standpoint, based upon his review of the medical and the results of Petitioner's objective testing, Petitioner was capable of heavy manual labor from a respiratory standpoint.

Dr. Rosenberg testified that Petitioner worked in the coal mines for around 15 years, and he has a long smoking history. The medical records outlined that he stopped smoking in 2012 surrounding his myocardial infarction and coronary artery bypass surgery, but Dr. Istanbouly's 2019 evaluation indicated he continued to be an active smoker. Dr. Rosenberg testified that while Dr. Istanbouly reported exertional dyspnea, the treatment records do not outline the presence of such. There was no documentation in the records of chronic cough and sputum production. Dr. Rosenberg testified that Petitioner's pulmonary function revealed mild restriction without obstruction. He testified that Petitioner had not been described as having cough and sputum production occurring on a regular basis for three months out of two consecutive years. Petitioner's restriction on his pulmonary function tests did not relate to past coal mine dust exposure. Dr. Rosenberg testified that it likely related to his body habitus coupled with his previous coronary artery bypass surgery. Dr. Rosenberg testified that Petitioner's FEV1, FEV1/FVC ratio and FEF 25-75 values were considered class 0 impairment based on the *AMA Guides, Sixth Edition*. Reduction in his FVC to 79.2% predicted, which represents Class 1 impairment, relates to his extrinsic restriction. He opined that Petitioner does not have any respiratory condition or respiratory disability related to his coal mine employment. He testified that there are many factors outside the pulmonary system that cause coughing, including sinus problems, ear problems, and throat problems, and medications. He testified that Petitioner was on Lisinopril which is a blood pressure medication that commonly causes a dry cough.

Dr. Rosenberg testified that for determining CWP between radiographic study and pathologic review, pathology is the gold standard. He testified that an individual could have CWP pathologically with a negative chest x-ray. He disagreed with Dr. Istanbouly's opinion that it would be very unusual for a miner who worked 30 to 40 years in a coal mine not to have a single opacity of CWP. Dr. Rosenberg testified that the prevalence of CWP in the coal mine surveys of around 3% overall, which means 97% of the coal miners have negative x-rays.

Medical records of BHMG Heart Group were admitted into evidence. On 4/17/12, Petitioner underwent a chest x-ray that was interpreted as revealing no abnormalities. (RX4, p. 21) On the same date, Petitioner underwent a transthoracic echocardiogram which was interpreted as revealing mild concentric left ventricular hypertrophy. No pulmonary hypertension was noted. (RX4, p. 19-20) An EKG was performed on 4/19/12 which revealed an inferior infarct. (RX4, p. 16) An EKG performed on 5/30/12 revealed possible left atrial enlargement, inferior and anterior infarct age undetermined. (RX4, p. 15). Petitioner was seen on 5/20/12 for follow up status post bypass surgery. He had no decreased exercise tolerance, dyspnea, fatigue, or shortness of breath. Past medical history included tobacco use. Petitioner was noted to be a current every day smoker, smoking a pack of cigarettes a day and had done so for 15 years. Past surgical history was significant for left heart catheterization on 4/17/12, and coronary artery bypass graft on 4/18/12. Review of systems respiratory was negative for difficulty breathing at rest or exertion and dyspnea. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX4, p. 11-13) Petitioner was seen for follow up on his coronary artery disease on 10/2/12. He had no shortness of breath. Review of systems respiratory was negative for difficulty breathing at rest or with exertion and dyspnea.

Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. He was cleared to return to work in the mine as a dozer operator. (RX4, p. 7-9) Petitioner was seen on 11/12/13 for evaluation of his coronary artery disease. It was noted that he quit smoking tobacco the year prior. Review of systems respiratory was negative for cough or difficulty breathing at rest or with exertion and dyspnea. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. Petitioner was doing fairly well overall with no chest pain or exercise shortness of breath. (RX4, p. 3-5)

Medical records of HMC Clinic were admitted into evidence. Petitioner completed a new patient registration form on 11/20/14 and reported he had a heart attack two years prior and was diabetic. (RX5, p. 108) On a registration form completed on 12/1/14, it was recorded that Petitioner was a former smoker having smoked from 1980 to 2011. (RX5, p. 103) Petitioner was seen to establish patient care. On review of systems pulmonary he had no dyspnea, cough, or wheezing. On examination of his lungs, he had normal breath sounds/voice sounds. (RX5, p. 88-92) Petitioner was seen on 2/19/15 to discuss kidney issue and diabetes. His history of present illness included dyspnea. On review of systems pulmonary he had no dyspnea and no cough. On examination of his lungs, he had normal breath sounds with no wheezing, rhonchi, or rales. (RX5, p. 82-86) Petitioner was seen on 5/6/15 for a chief complaint of cough and fever. He related dyspnea, cough with sputum, wheezing, nasal discharge, malaise, itching eyes, and sneezing. His symptoms started six days prior. Under social history, it was noted that Petitioner was a former smoker having quit in 2012. Examination of the chest revealed wheezing. Assessment was acute sinusitis and bronchitis with community acquired pneumonia in the left lower lobe. (RX5, p. 78-81) Petitioner was seen on 6/1/15 for a wound on his left upper back that would not heal. Review of systems pulmonary revealed no dyspnea. (RX5, p. 74-76) Petitioner was seen on 10/14/15 for medication checkup. Review of systems respiratory was negative for dyspnea, cough, or wheeze. Examination of the chest revealed normal breath sounds with no adventitious sounds. (RX5, p. 51-55)

Petitioner was seen on 9/13/16. On that date he completed a Registration Form where he indicated that he was a former smoker having smoked from 1977 to 2011. (RX5, p. 46) Petitioner's review of systems respiratory was negative for dyspnea, cough, or wheeze. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX5, p. 40-44) Petitioner was seen on 4/6/17 for recheck of blood pressure, diabetes, and back pain. Review of systems respiratory was negative for dyspnea, cough, or wheeze. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX5, p. 35-39) Petitioner was seen on 5/26/17 for stomach pain. Review of systems respiratory revealed no dyspnea or wheeze. Examination of the chest revealed the lungs clear to auscultation. (RX5, p. 28-32)

Petitioner was seen on 2/16/18 for recheck of diabetes and an annual wellness physical. It was noted he had applied for disability for his heart condition. Petitioner was still running his restaurant. Review of systems respiratory was negative for dyspnea, cough, and wheeze. Examination of the chest revealed lungs clear to auscultation with no adventitious sounds. Under plan it was charted that Petitioner was either going back to work or going on disability. (RX5, p. 14-19) Petitioner was seen on 11/19/18 for recheck

of diabetes, blood pressure, and coronary artery disease. It was noted that Petitioner was approved for disability. Examination of the chest revealed no dyspnea, cough, or wheeze. On examination of the chest his lungs were clear to auscultation with no adventitious sounds. It was noted that Petitioner was a current every day smoker. (RX5, p. 3-8)

Medical records of Dr. Eladio Chatto were admitted into evidence. Petitioner was seen on 3/10/11 to establish patient care. Petitioner related hypertension and diabetes. He suffered from tobacco dependence of one pack of cigarettes per day. Examination of the chest revealed normal lung sounds with no adventitious sounds. (RX6, p. 106-107) Petitioner was seen on 5/26/11 to discuss medications. Examination of the chest revealed lungs to be clear to auscultation. (RX6, p. 100-101) Petitioner was seen on 8/8/11 at which time he related riding a motorcycle a few days prior when his nose was struck with a rock. Examination of the chest revealed the lungs to be clear. (RX6, p. 98-99) Petitioner was seen on 9/9/11 in follow up for diabetes. He denied shortness of breath and related he felt good. Examination of the chest revealed the lungs to be clear. (RX6, p. 94-95)

Petitioner was seen on 4/16/12 for chest discomfort and cough. The discomfort radiated into his neck and the left side of his mouth. He related some discomfort that was not associated with exercise. It could be associated with shortness of breath. He was noted to be a smoker of one pack per day. Examination of the chest revealed the lungs to be clear with no adventitious sounds. Petitioner had an abnormal EKG. The assessment was unstable angina, and he was admitted to the hospital.

Petitioner was seen on 6/10/13 for routine checkup. It was noted that Petitioner underwent a five-vessel CABG in April 2012. Examination of the chest revealed the lungs clear to auscultation was no adventitious sounds. (RX6, p. 87-88) Petitioner was seen on 12/23/13 for right leg pain. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX6, p. 85-86)

Petitioner was seen on 7/18/14 for complaints of sinus congestion for two weeks. He reported a lot of sinus pressure and drainage which was mostly clear. He related that he worked around a lot of dust and thought that was contributing. Petitioner had a dry cough. He denied shortness of breath. Petitioner had a positive smoking history. On examination lungs were clear to auscultation bilaterally with no wheezes, rales, or rhonchi. Assessment was acute sinusitis and allergic rhinitis. (RX6, p. 82-83)

Petitioner was seen on 1/9/20 for checkup regarding his right knee. He was noted to be a current every day smoker. Past medical history was positive for black lung. Examination of the chest revealed no adventitious sounds. Assessment included black lung and possible COPD. His problem list included CWP, acute bronchitis, and emphysema. (RX6, p. 79-81) Petitioner was seen on 3/13/20 for follow up regarding his right knee. Examination of the chest revealed no adventitious sounds. (RX6, p. 75-77) On 4/15/21, Petitioner underwent a CT scan of the head/brain for possible stroke. Interpretation was no evidence of acute intracranial process. (RX6, p. 70) Petitioner was seen on 5/12/21 for worsening right knee pain. Examination of the chest revealed no adventitious sounds. (RX6, p. 57-59) Petitioner was seen on 8/4/21. It was noted he was a former smoker. Examination of the chest revealed no adventitious sounds. (RX6, p. 54-

56) Petitioner was seen on 2/28/22 in follow up to a colonoscopy. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX6, p. 40-42) Petitioner was seen on 7/11/22 for a right knee injection. Petitioner was noted to be a current every day smoker. Examination of the chest revealed the lungs clear to auscultation with no adventitious sounds. (RX6, p. 33-35) Petitioner was seen on 12/8/22 for fever with chills and body aches. There was no cough or shortness of breath. Examination of the chest revealed no adventitious sounds. Petitioner was noted to be a current every day smoker. Petitioner tested positive for COVID. (RX6, p. 27-30) Petitioner underwent a CT scan of the chest on 12/11/22. Peripheral hazy ground glass opacities were present in the lungs compatible with atypical viral pneumonia such as COVID-19 pneumonia. (RX6, p. 15-16) Petitioner was seen on 1/20/23 for right knee pain. Review of systems respiratory was negative for cough and shortness of breath. Past medical history included bronchitis, CWP, and emphysema. Petitioner was noted to be a former smoker. Examination of the chest revealed normal breath sounds. Assessment included pulmonary emphysema unspecified. (RX6, p. 10-14) Petitioner was seen on 3/27/23 for follow up on hypertension. He was noted to be a former cigarette smoker. On pulmonary examination he had normal effort and normal breath sounds. (RX6, p. 3-9)

Petitioner's Disability Determination Transmittal correspondence from Social Security Administration was admitted into evidence. Petitioner was determined to be disabled with the primary diagnosis being disorders of back and secondary diagnosis being chronic ischemic heart disease with or without angina. The disability onset date was 10/15/17. (RX7)

CONCLUSIONS OF LAW

Issue (C): Did an occupational disease occur that arose out of and in the course of Petitioner's employment with Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to his occupational exposure?

Petitioner, a 62-year old coal miner, alleges he developed occupational diseases including pneumoconiosis and chronic bronchitis as a result of working in coal mining for various employers for approximately 30 years. Petitioner testified that all of his coal mining work was above ground. He lost no time from work for his alleged conditions and worked for Respondent the final eight years of his career until he was laid off on 10/4/17. He was 56 years old on his last day of coal mine employment. Petitioner testified that he collected unemployment benefits for six months and was awarded social security disability in October 2018 for a prior work-related back injury and chronic ischemic heart disease.

Petitioner testified that he began experiencing breathing difficulties two to three years prior to being laid off by Respondent on 10/4/17. He testified that he coughed constantly, and his breathing did not vary much while he was still working. Petitioner testified that he treats with Dr. Chatto and Dr. Haste at Hardin County Clinic and he "never really talked too much to them" about his breathing. He testified that he was not sure whether his doctors knew he worked in the dust. He testified that since leaving coal

mining and getting older, his breathing is getting worse. He was not taking any breathing medication as of arbitration.

There is mention of dyspnea and cough in Petitioner's medical records, along with a multitude of medical conditions that Dr. Istanbouly and Dr. Rosenberg opined could cause respiratory issues, including heart disease, coronary artery bypass surgery, smoking, body habitus, sinus issues, and taking Lisinopril for high blood pressure which can commonly cause dry cough.

Petitioner underwent a five-vessel coronary artery bypass graft on 4/18/12. At a follow up visit on 5/20/12, Petitioner reported he was a current every day smoker, smoking a pack of cigarettes a day for 15 years. He was released to return to work as a dozer operator on 10/2/12 with no dyspnea or difficulty breathing at rest or with exertion. Petitioner was examined twice in 2013 and his lungs were clear to auscultation with no adventitious sounds. He was negative for dyspnea and had no difficulty breathing at rest or with exertion. On 11/12/13, Petitioner reported he quit smoking the year prior.

In 2014, Petitioner reported a history of diabetes and that he was a former smoker from 1980 to 2011. The Arbitrator notes this is a 30-year smoking history which contradicts the history Petitioner provided to his treating physicians and his testimony at arbitration of a 7-year history. His examination in early 2014 was negative for dyspnea, cough, or wheezing. On 7/18/14, Petitioner reported sinus congestion, pressure, and clear drainage for two weeks. He reported that he worked around a lot of dust and thought that was contributing. Petitioner had a dry cough and denied shortness of breath. Examination revealed his lungs were clear to auscultation bilaterally with no wheezing, rales, or rhonchi. He was diagnosed with acute sinusitis and allergic rhinitis.

In February 2015, Petitioner reported kidney issues, diabetes, and dyspnea. His examination was negative for dyspnea and cough, and he had normal breath sounds with no wheezing, rhonchi, or rales. On 5/6/15, Petitioner reported cough with sputum, fever, dyspnea, wheezing, nasal discharge, malaise, itching eyes, and sneezing that started six days ago. He was diagnosed with acute sinusitis and bronchitis with community acquired pneumonia in the left lower lobe. He followed up in June and October 2015 and was negative for dyspnea, cough, or wheezing and had normal breath sounds.

On 9/13/16, Petitioner reported he was a former smoker having smoked from 1977 to 2011, a 34-year history. Examination was negative for dyspnea, cough, or wheezing, and his lungs were clear to auscultation with no adventitious sounds. He was examined on 4/6/17 for recheck of blood pressure, diabetes, and back pain, and again on 5/26/17 for stomach pain, and was negative for dyspnea, cough, or wheezing and his lungs were clear.

On 2/16/18, four months after Petitioner was laid off from the coal mines, Petitioner presented for a diabetes check and an annual wellness physical. He reported he applied for disability for his heart condition but was still running his restaurant. Examination was negative for dyspnea, cough, and wheezing and his lungs were clear to auscultation with no adventitious sounds. He was examined again on 11/19/18 with

negative breathing and chest symptoms and Petitioner reported he was a current every day smoker.

Petitioner presented the opinions of two retained medical experts. Dr. Smith, a certified B-reader, interpreted Petitioner's chest x-ray dated 11/7/18 as positive for pneumoconiosis of profusion 1/0 with P/P opacities in the mid and lower lung zones bilaterally. He found no opacities in Petitioner's upper lung zones. Dr. Smith was not presented for a deposition.

Dr. Istanbouly, a board-certified pulmonologist, examined Petitioner on 6/17/19. Dr. Istanbouly is not a B-reader. Petitioner did not bring any chest x-rays or medical records with him for Dr. Istanbouly to review at the time of examination. Dr. Istanbouly testified that he had access to Harrisburg Medical Center's system and reviewed chest x-rays dated 2/5/17 and 3/29/19 for a William Miles with a date of birth of 10/19/56. Petitioner's date of birth is 3/31/61. There is no evidence that Dr. Istanbouly reviewed Petitioner's chest x-ray dated 11/7/18. He indicated in his addendum report that he reviewed the B-reader report of Dr. Smith for the 11/7/18 x-ray which confirmed mild interstitial fibrosis in the mid and lower lung zones. According to Dr. Istanbouly's addendum, Dr. Smith's B-reading confirmed the findings on chest x-rays that were not of Petitioner. The Arbitrator gives no weight to Dr. Istanbouly's opinion that Petitioner had radiographic findings consistent with CWP.

Respondent presented the opinions of two retained certified B-readers, Dr. Meyer, a board-certified radiologist, and Dr. Rosenberg, a board-certified pulmonologist. Both read Petitioner's chest x-rays dated 11/7/18 and 4/16/21 and opined they did not show CWP. Dr. Rosenberg also reviewed Petitioner's medical records and opined they did not reveal the presence of chronic bronchitis. Dr. Rosenberg opined that Petitioner was not disabled from a pulmonary perspective and he was capable of heavy manual labor.

The Arbitrator is more persuaded by the opinions of Respondent's experts. A diagnosis of CWP is usually made upon the reading of a chest x-ray by a B-reader. The opinions of B-readers are usually considered more reliable that those of non-B-readers. Dr. Istanbouly is not a B-reader, did not review any of Petitioner's medical records, and relied upon Dr. Smith's interpretation of the chest x-ray. Drs. Meyer and Rosenberg interpreted the same chest x-ray as negative for pneumoconiosis. Dr. Meyer testified that CWP is typically an upper lung zone predominant process and very rarely is CWP found in the mid and lower lung zones and not in the upper lung zones. Dr. Smith's interpretation was not consistent with the general presentation and progression of CWP. Drs. Meyer and Rosenberg interpreted the chest x-ray dated 4/16/21 as negative for pneumoconiosis. Dr. Meyer testified that it is of value to have serial films for comparison to detect any subtle changes that might be less obvious if one did not have a prior film for comparison. Dr. Meyer testified that in Petitioner's case, the lungs were clear so there was not much additional information from getting a follow up other than confirming that nothing had developed since the 2018 exam.

The Arbitrator finds Dr. Smith to be less credible than Dr. Meyer. Dr. Meyer is not only a certified B-reader, he also served on the ACR Pneumoconiosis Task Force

which completed a new syllabus for the B-reading course as well as the test that was delivered to NIOSH in 2017 to be used for certification as a B-reader. Dr. Meyer is a co-director of the ACR B-reader course. Based on the B-readings by Drs. Meyer and Rosenberg, the Arbitrator finds that Petitioner does not suffer from CWP.

The Arbitrator also finds more persuasive Dr. Rosenberg's opinions that Petitioner did not develop work-related chronic bronchitis. Dr. Rosenberg has been board-certified in pulmonary disease since 1980 and holds additional board certifications in internal medicine and occupational medicine. He has taught pulmonary physiology, pulmonary medicine, respiratory physiology, and pulmonary disease. Although Dr. Rosenberg did not examine Petitioner, he did review his medical records, something Dr. Istanbouly did not do. Dr. Rosenberg did not believe that the history Petitioner provided to Dr. Istanbouly met the definition of chronic bronchitis, which is defined by the World Health Organization and adopted by the American Medical Association as cough and sputum production for three months of the year for two consecutive years. Dr. Rosenberg testified that Petitioner's history of daily cough with no significant sputum production was not sufficient to satisfy that definition.

Dr. Istanbouly testified that Petitioner's spirometry revealed non-specific ventilatory limitation and suggested the presence of a restriction. He testified that one would expect to see an advanced profusion of 3/3 or higher with complicated disease. Dr. Rosenberg testified that Petitioner did not have changes on his chest x-ray sufficient to cause a restriction. He opined that Petitioner's restriction was likely due to extrinsic restrictions where the structures around the lungs are impaired. He testified that Petitioner's previous bypass surgery had probably disrupted the musculoskeletal structure around the lungs and the sternum causing the decreased expansion of the lungs due to the abnormality of those structures.

Considering the record as a whole, the Arbitrator finds that Petitioner failed to meet his burden of proving he developed CWP or chronic bronchitis as a result of any exposure while working for Respondent, or that his current condition of ill-being is causally connected to such accident/exposure.

Issue (O): Whether Petitioner proved timely disablement pursuant to Sections 1(e) and (f) of the Occupational Diseases Act?

The Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that he suffered a timely disablement as described in Sections 1(e) and (f) of the Occupational Diseases Act.

Petitioner testified that he was laid off on 10/4/17 and the mine closed after his layoff. Petitioner collected unemployment benefits for six months and began receiving social security disability benefits in October 2018 related to his back condition and chronic ischemic heart disease. The disability onset date was 10/15/17. Petitioner related to Dr. Istanbouly no past history of respiratory disease. He told Dr. Istanbouly that he left the mine because of closure and not because of an inability to perform his job duties or respiratory difficulties. There was no evidence that any physician ever restricted

Petitioner from work as a result of an occupational lung disease. Dr. Rosenberg testified that from a respiratory standpoint, Petitioner was capable of heavy manual labor.

Issue (L): What is the nature and extent of the injury?

Given the Arbitrator's findings on disease and causation, the Arbitrator denies permanent partial disability benefits herein.

Arbitrator Linda J. Cantrell

October 18, 2023
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023947
Case Name	Lovell Smith v. Peoria Public School District 150
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0224
Number of Pages of Decision	9
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Hania Sohail
Respondent Attorney	Michael Brandow

DATE FILED: 5/17/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOVELL SMITH,

Petitioner,

vs. NO: 19 WC 23947

PEORIA PUBLIC SCHOOL DISTRICT 150,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove he sustained a compensable accident that arose out of and in the course of his employment on March 11, 2019.

I. Findings of Fact

Petitioner, a bus operator, testified that on March 11, 2019, he hit several potholes and speed bumps while driving children to school in a bus that had a wobbly seat and no air shocks. Petitioner testified that he felt immediate tightness in his bilateral low back, but he did not begin to experience back pain until later that same day after he had gotten off the bus. Petitioner went home after completing his route and called his dispatcher to inform her that he was not able to come back due to his back symptoms.

Petitioner acknowledged that shortly preceding this work accident, he had suffered another non-work-related back injury at his home in February of 2019. In this incident, Petitioner was unable to get up from a seated position on his bed after sitting down to put on his boots and get ready for work. Petitioner then lowered himself to his knees, crawled to his bathroom, and called his dispatcher to inform her of what had happened. Petitioner testified that when he rolled to his side and pushed himself up during the ordeal, he felt a sharp pain in the middle of his low back. Petitioner thereafter treated with Dr. Omomengbe Oni of UnityPoint Health on two occasions, during which time he was taken off work and prescribed NSAIDs and a muscle relaxer. Dr. Oni released Petitioner to return to full duty work on March 8, 2019, at which time Petitioner testified

that he no longer had any low back problems or complaints until the work accident occurred three days later. It was a Friday when Petitioner was released to work on March 8, 2019. He was then off work the following Saturday and Sunday before presenting back to work on Monday, March 11, 2019, the date of the work accident.

Following the accident, Petitioner sought medical attention at IWIRC with Dr. Ziad Musaitif on March 18, 2019, at the request of his dispatcher. The treatment record shows Petitioner reported that he was getting better after hurting his low back at home tying his shoes on February 19 when he reinjured his low back pulling himself into the bus on March 11, 2019. Dr. Musaitif diagnosed Petitioner with a low back strain and implemented sedentary restrictions of lifting ten pounds occasionally, mostly sitting, and no commercial driving. To manage the pain, Dr. Musaitif prescribed Tylenol, cyclobenzaprine, and analgesic ointment.

When Petitioner followed up on March 25, 2019, Dr. Musaitif added a diagnosis of sciatica, continued the medication and sedentary work restrictions, and ordered a lumbar MRI. The MRI was obtained on April 10, 2019 and revealed epidural lipomatosis, degenerative changes, and a L5-S1 broad-based disc protrusion posteriorly and to the right of the midline. The MRI technician noted that Petitioner had nontraumatic low back pain, worsening since February 2019, with radiating pain into the right buttock and tingling. Dr. Musaitif reviewed the MRI on April 18, 2019, and diagnosed Petitioner with a L5-S1 disc protrusion that was not work-related. Dr. Musaitif referred Petitioner to physical therapy and instructed him to continue using Tylenol and analgesic ointment. Dr. Musaitif also increased Petitioner's work restrictions to light duty with lifting 20 pounds occasionally and ten pounds frequently, as well as no commercial driving.

Petitioner began physical therapy at IWIRC on May 17, 2019. Petitioner told the physical therapist that his original onset of back pain occurred three months prior while attempting to rise from sitting at home in between his driving shifts. Petitioner reported that two to three weeks before that, he also had a similar incident while trying to rise from bed one morning. Petitioner thereafter attended regular follow-up appointments at IWIRC through August 1, 2019, during which time Petitioner's ongoing low back pain was treated with physical therapy, Tylenol, topical ointment, and light duty work restrictions. Respondent was able to accommodate Petitioner's work restrictions for the entire time he remained treating at IWIRC.

Petitioner was released from IWIRC's care by PA Chelsea Hart on August 1, 2019. At this visit, Petitioner reported two pre-accident low back injuries. First, Petitioner disclosed that in 2007, he sustained a disc protrusion in a prior work injury. Petitioner indicated that he had treated with his primary care provider, underwent imaging, and participated in physical therapy for this injury. Petitioner reported that then, in February 2019, he woke up one morning with pain in the same right low back area and could not move. Petitioner explained that after his primary care physician gave him medication for this injury, it eventually improved. Petitioner further stated that thereafter on May 11, 2019, he was just in his bus and felt pain in the same area again. PA Hart diagnosed Petitioner with a low back strain, sciatica related to Petitioner's non-work-related L5-S1 disc protrusion, and non-work-related degenerative disc disease. She opined that Petitioner's acute flare up had resolved and he was now dealing with ongoing low back issues from his chronic underlying degenerative disc disease. PA Hart released Petitioner from IWIRC's care for his work injury but indicated that he needed to be evaluated by his primary care physician

for his chronic non-work-related issues. Petitioner had been working under his light duty restrictions up until this point, but on August 9, 2019, Respondent informed Petitioner that he had to stop working until he obtained a release with no restrictions from his primary care physician.

On August 13, 2019, Petitioner presented to Prairie Spine and Pain Institute complaining of predominantly axial low back pain with intermittent radicular symptoms in his right leg that traveled down his right buttock, lateral thigh, and into the top of his right foot. Petitioner reported that his back problems had been present since March 2019 when he was working as a school bus driver and hit several potholes and speed bumps on a particular day. Petitioner also disclosed his prior injury from bending over to tie his shoes in February 2019. He noted that the pain from the February 2019 injury had resolved after a short course of treatment with anti-inflammatories. At this visit, lumbar X-rays were obtained and revealed a L5-S1 wedge-type disc with loss of height and potential narrowing of the neural foramen as well as mild Grade 1 L4-L5 retrolisthesis. PA Andrew Kitterman recommended bilateral sacroiliac joint injections and a lumbar motion analysis scan to look for any instability between the lumbar vertebrae that could have been sustained in the injury. He then took Petitioner off work for his lumbago and sacroiliac joint pain.

The lumbar motion X-ray analysis occurred on August 21, 2019, and found no radiographic evidence of listhesis, instability, or other motion abnormalities. A few days later, on August 26, 2019, Petitioner underwent right and left sacroiliac joint injections and arthrograms. Following the procedures, Petitioner returned to Prairie Spine and Pain Institute and was seen by Dr. Richard Kube on September 10, 2019. Dr. Kube noted that Petitioner was a prior patient of his for a lumbar spine issue ten years ago in 2009, for which Petitioner underwent an MRI and was discharged in 2010 with a light to medium lifting capacity level. Dr. Kube indicated that he had not seen Petitioner since August of 2010. Dr. Kube found that Petitioner's present area of concern was now more so on the right sacroiliac joint rather than the lumbar spine. Dr. Kube recommended a month of physical therapy, and depending on how Petitioner responded, a right sacroiliac joint injection. In the interim, Dr. Kube provided light duty restrictions, which Respondent did not accommodate.

Petitioner began another round of physical therapy on September 19, 2019, at which time he reported that his low back pain had gradually increased when he was injured on March 19 while driving a school bus and hitting several potholes. The physical therapist believed that Petitioner's symptoms were associated with bilateral sacroiliac joint dysfunction and further noted some evidence of radiculopathy related to possible L5-S1 stenosis.

Thereafter, on September 25, 2019, Petitioner treated with Dr. Serafino Sauro of UnityPoint Health for issues unrelated to the present back claim, including lung issues, prediabetes, chronic kidney disease, mixed hyperlipidemia, and chest pain. Nevertheless, of note, Petitioner reported to Dr. Sauro that he had chronic back pain since March 11, 2011, when he was hit by another bus as a bus driver. The following day, on September 26, 2019, Petitioner returned to PA Kitterman and reported that physical therapy was starting to bother him and set him back. PA Kitterman administered bilateral lumbar trigger point injections and recommended a second right joint injection, which Petitioner subsequently underwent on October 14, 2019.

On October 29, 2019, Petitioner reported an 80% improvement in his pain since the last

injection. Dr. Kube believed Petitioner's response confirmed that his injury involved the sacroiliac joint, which was different from the diagnosis that Dr. Kube had treated Petitioner for a decade prior. Dr. Kube found that Petitioner was a candidate for either activity modification and continued medication management or surgical intervention in the form of a minimally invasive right-sided sacroiliac joint fusion. Petitioner was apprehensive of the surgery and wanted to research it further. In the interim, Dr. Kube continued Petitioner's physical therapy and light duty restrictions.

On November 1, 2019, Petitioner filed an Amended Application for Adjustment of Claim alleging that he had sustained an injury to his back on or around March 11, 2019 while driving his bus and hitting a speed bump coming out of Wandering Springs. Through this time, Petitioner had continued to participate in physical therapy; however, on November 19, 2019, his physical therapist noted that Petitioner was not progressing as expected due to his ongoing pain and deferred to Dr. Kube to determine the plan moving forward. There are no further physical therapy visits documented in the record after this date. When Petitioner returned to Dr. Kube on November 26, 2019, Dr. Kube ordered another CT to consider surgical planning, prescribed Celebrex and cyclobenzaprine, and maintained Petitioner's light duty restrictions.

Petitioner thereafter underwent a §12 examination performed by Dr. Edward Goldberg of Midwest Orthopaedics at Rush on February 10, 2020. Petitioner informed Dr. Goldberg that in February of 2019, he developed right-sided low back pain after bending over to tie his shoe at home. Petitioner reported that he had seen his primary care provider for this injury and was off work for three weeks, after which his pain had somewhat improved and he returned to work on March 8, 2019. However, Petitioner indicated that shortly thereafter, on March 11, 2019, he was driving a bus for a school district with poor streets, puddles, and speed bumps when his back pain increased and became aggravated. Dr. Goldberg diagnosed Petitioner with right sacroiliac joint dysfunction and found that this condition was not causally related to the work accident. Instead, Dr. Goldberg attributed Petitioner's current condition to the February 2019 incident that predated the accident. Putting causation aside, Dr. Goldberg recommended that Petitioner be maintained on Tylenol or an anti-inflammatory. He did not believe Petitioner required any type of surgery and found no reason that Petitioner could not return to work as a bus driver, since he was neurologically intact.

After the §12 examination, on February 11, 2020, Respondent wrote Petitioner a letter informing him that the Peoria Board of Education had approved the dismissal of his employment effective as of February 3, 2020. Petitioner testified that Respondent had terminated him due to the exhaustion of his FMLA. Petitioner further testified that he had not been back to work anywhere since August 18, 2019 and remained on light duty restrictions per Dr. Kube. After he was let go by Respondent, Petitioner did not look for any other work because he believed it was too difficult for him to stand and sit for long periods of time.

Petitioner's light duty restrictions were maintained by Dr. Kube at his next visit on March 10, 2020. Upon Dr. Kube's order, he subsequently underwent a CT of his pelvis on April 17, 2020. The CT revealed mild degenerative changes of the sacroiliac joints without erosions, an old healed inferior sacral fracture deformity, moderate to severe degenerative changes with osteitis and fragmentation pubic symphysis, and mild bilateral hip degenerative joint disease with findings that may contribute to pincer femoral acetabular impingement. After reviewing the CT scan, on

April 21, 2020, Dr. Kube recommended a minimally invasive sacroiliac joint fusion on the right side. Petitioner was apprehensive about the operation and wanted to think it over for the next couple weeks. When he returned on May 12, 2020, Petitioner advised Dr. Kube that he wished to proceed with the recommended surgical intervention.

Petitioner next presented to Dr. Kube on August 11, 2020, at which time they were still waiting on surgical authorization. Again, at his return visit on November 10, 2020, Dr. Kube indicated that they remained in a holding pattern until the recommended surgery was authorized. Dr. Kube prescribed cyclobenzaprine and Mobic for medication management and kept Petitioner under light duty restrictions. Petitioner thereafter presented for monthly follow up appointments with either Dr. Kube or PA Kitterman through April 13, 2021. At each of these visits, Petitioner's medications were refilled and his light duty restrictions were continued as they remained waiting on surgical authorization. Ultimately, Petitioner never underwent the recommended surgery, as it was not approved by workers' compensation.

Several months after his last regular monthly visit, on October 5, 2021, Petitioner returned to Dr. Kube complaining of significant sacroiliac joint pain with no real change in his situation. Dr. Kube adjusted Petitioner's medication but otherwise indicated that Petitioner's options were limited given that they could not get him surgically fixed. Petitioner last treated with PA Kitterman on November 9, 2021. At that time, PA Kitterman recommended that Petitioner continue to follow up on a monthly basis for medication management and ongoing light duty restrictions.

At the time of the hearing, Petitioner testified that he continued to suffer from back pain shooting mainly down his right leg, although it sometimes went from one leg to the other. He testified that the pain sometimes made it difficult for him to walk. Petitioner further testified that on an average day, he did pretty much nothing and spent his time being occupied by social media, trying to clean and cook when he could, and watching television. Otherwise, Petitioner sometimes went to visit relatives or his fiancé. Nevertheless, he was still able to drive and go to the grocery store by himself.

II. Conclusions of Law

Following a careful review of the entire record, the Commission finds that Petitioner failed to prove he sustained an accident arising out of and in the course of his employment on March 11, 2019. In so finding, the Commission hereby reverses the Decision of the Arbitrator and denies all benefits under the Illinois Workers' Compensation Act (hereinafter, the "Act") accordingly.

To obtain compensation under the 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. 820 ILCS 305/1(d). In the present matter, the Commission finds that Petitioner failed to meet his burden due to the substantial number of inconsistencies amongst the accident histories that he testified to at the hearing and provided to his various treatment providers.

Petitioner's testimony at the hearing was that on March 11, 2019, he developed low back pain after hitting a bunch of potholes and speed bumps while driving a school bus that had a wobbly

seat and no air shocks. Petitioner further testified to a prior incidence of non-work-related back pain in February of 2019 shortly before the work accident when he was putting on his boots at home. He testified that after he was released to return to work by his primary care provider on March 8, 2019 for this prior injury, he did not have any other low back problems or complaints until the March 11, 2019 work accident.

When Petitioner first presented for treatment at IWIRC on March 18, 2019 following the accident, he told Dr. Musaitif that he was getting better after hurting his low back at home tying his shoes in February 2019 when he reinjured his low back pulling himself into the bus on March 11, 2019. In this version of the accident, Petitioner did not discuss any potholes or speed bumps with Dr. Musaitif and instead identified pulling himself into the bus as his mechanism of injury.

When Petitioner then presented for his lumbar MRI on April 10, 2019, the history provided to the technician was that Petitioner had nontraumatic low back pain, worsening since February 2019, with radiating pain into the right buttocks and tingling. There was no mention of potholes or speed bumps, nor of the March 2019 work accident in general, in this version of the accident.

Petitioner thereafter began physical therapy on May 17, 2019 and told the physical therapist that his original onset of back pain was three months prior due to attempting to rise from sitting at his home in between his driving shifts. Petitioner further reported that two to three weeks before that, he had a similar incident while attempting to rise from bed one morning. In this accident history, there is again no mention of potholes or speed bumps as the source of Petitioner's pain.

On August 1, 2019, Petitioner then told PA Hart of IWIRC that he had woken up one morning in February 2019 with right low back pain and could not move. Petitioner indicated that this eventually improved with medication from his primary care provider; however, subsequently on May 11, 2019, he was just in his bus and felt pain in the same area again. Petitioner failed to mention any potholes or speed bumps when offering this accident history.

The first instance in which Petitioner provided an accident history that was entirely consistent with his trial testimony was to PA Kitterman of Prairie Spine and Pain Institute on August 13, 2019. At this visit, Petitioner reported that his back problems had been present since March 2019 when he was working as a school bus driver and hit several potholes and speed bumps on a particular day. Petitioner also disclosed his prior February 2019 injury from bending over to tie his shoe but indicated that his pain from this incident had resolved after a short course of treatment with anti-inflammatories. Although the accident history that Petitioner told PA Kitterman aligns consistently with his testimony regarding the accident, it comes roughly five months after the accident date. Petitioner also provided a consistent accident history, specifically that he was injured while driving a school bus after hitting several potholes, at his physical therapy evaluation on September 19, 2019. Nevertheless, this consistent accident history occurred over six months post-accident and is bookended by various other inconsistent accident histories.

Shortly thereafter, on September 25, 2019, Petitioner treated with Dr. Sauro at UnityPoint Health for conditions unrelated to his present back claim, but he notably mentioned that he had chronic back pain since March 11, 2011 when he was hit by another bus as a bus driver. This treatment note inconsistently references there being some sort of bus collision in 2011.

Another inconsistent accident history was provided by Petitioner in the Amended Application for Adjustment of Claim that he filed on November 1, 2019. In this filing, Petitioner stated that the accident had occurred on March 11, 2019 while he was driving the bus and hit a speed bump coming out of Wandering Springs. This version of the accident suggests that one singular and specific speed bump was involved in the injury, whereas Petitioner's testimony implicated numerous speed bumps and potholes.

In consideration of the above, the Commission is persuaded by the numerous inconsistencies riddled throughout the accident histories that Petitioner provided at the trial and to his treating medical providers. Several of the accident histories that Petitioner provided, including those given shortly after the accident, do not mention any potholes or speed bumps. Moreover, some of the accident histories present wholly different versions of the mechanism of injury, such as Petitioner pulling himself onto the bus. The majority of the accident histories in the treatment records are inconsistent with Petitioner's testimony at trial that his accident occurred after hitting numerous potholes and speedbumps, whereas the few accident histories that do consistently align with Petitioner's trial testimony were first given over five and six months post-accident. Even the Amended Application for Adjustment of Claim provides an inconsistent version of the accident, alleging that the accident occurred from hitting a singular speed bump coming out of Wandering Springs as opposed to the numerous speed bumps and potholes Petitioner testified to hitting over the course of his ride.

These numerous inconsistencies render it impossible for the Commission to determine that the accident occurred in the particular manner that Petitioner testified to at the hearing. It would be speculative for the Commission to guess which of the many versions of the accident is the correct manner in which it actually occurred. For this reason, the Commission finds that Petitioner failed to meet his burden of credibly proving that he sustained a compensable accident arising out of and in the course of his employment on March 11, 2019. All compensation benefits under the Act are therefore denied. The Decision of the Arbitrator is reversed accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 17, 2023, is hereby reversed as stated herein.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment on March 11, 2019.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is denied any and all benefits under the Act related to the March 11, 2019 alleged accident.

The party commencing proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

/s/*Deborah L. Simpson*

MAY 17, 2024

Deborah L. Simpson

/s/*Stephen J. Mathis*

Stephen J. Mathis

DLS/mek
O: 3/20/24
46

/s/*Raychel A. Wesley*

Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC030552
Case Name	Jessica Dominick v. Prairie Farms Dairy dba Ice Cream Specialties
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0225
Number of Pages of Decision	21
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	David Galanti
Respondent Attorney	Matthew Terry

DATE FILED: 5/17/2024

/s/ Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JESSICA DOMINICK,

Petitioner,

vs. NO: 21 WC 030552

PRAIRIE FARMS DAIRY d/b/a
ICE CREAM SPECIALTIES,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 5, 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 $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.

MAY 17, 2024
O050724
KAD/bsd
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC030552
Case Name	Jessica Dominick v. Prairie Farms Dairy d/b/a Ice Cream Specialties
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	David Galanti
Respondent Attorney	Matthew Terry

DATE FILED: 4/5/2023

THE INTEREST RATE FOR THE WEEK OF APRIL 4, 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
19(b)

Jessica Dominick
Employee/Petitioner

v.

Prairie Farms Dairy d/b/a Ice Cream Specialties
Employer/Respondent

Case # **21** WC **030552**

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 **1/31/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **9/27/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**7,569.38**; the average weekly wage was $**574.33**.

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 $**12,144.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**24,383.09** in medical expenses paid, for a total credit of $**36,527.24**.

Respondent is entitled to a credit of $**TBD and any and all paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 8, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the stipulation of the parties, Respondent shall receive a credit for any and all medical expenses paid through its group medical plan under Section 8(j) of the Act, and a credit of $24,383.09 in medical expenses paid.

Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, an anterior cervical disc replacement at C3-4 and C5-6, and pre- and post-operative care until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**382.89** for **68-4/7th** weeks commencing **9/28/21 through 10/18/21, 10/27/21 through 10/28/21, and 11/1/21 through 1/31/23**, as provided in Section 8(b) of the Act. Pursuant to the stipulation of the parties, Respondent shall receive a credit for temporary total disability benefits paid in the amount of $12,144.15.

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

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

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

APRIL 5, 2023

Arbitrator Linda J. Cantrell

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JESSICA DOMINICK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 21-WC-030552
	)	
PRAIRIE FARMS DAIRY D/B/A	)	
ICE CREAM SPECIALTIES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACTS

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 31, 2023, pursuant to 19(b) of the Act. On 11/3/21, Petitioner filed an Application for Adjustment of Claim alleging she sustained accidental injuries to her right wrist and right shoulder on 9/27/21 as a result of slipping in a freezer. (AX2) The parties stipulated that Respondent is entitled to a credit for any and all medical expenses paid by its group medical plan. The parties further stipulated that Respondent is entitled to a credit of $12,144.15 in temporary total disability benefits and $24,383.09 in medical expenses paid.

The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 36 years old, single, with no dependent children at the time of the alleged accident. Petitioner testified she was employed by Respondent as a merchandiser for three months prior to her accident on 9/27/21. She denied having any problems with her neck or back when she was hired by Respondent and passed a pre-employment physical.

Petitioner testified that on 9/27/21 she was in a walk-in freezer pushing a flat cart full of ice cream. She testified that the cart became stuck on a chunk of ice and as she pushed the cart she fell. She stated the product on the cart was stacked two to three feet high and weighed a couple of hundred pounds. She fell to the ground and landed on her right wrist with an outstretched arm. She struck her right hip and her shoulder jammed into her neck and head. She described feeling instant pain and then numbness in her hip, wrist, shoulder, and neck all on the

right side. She testified she did not have any pain on her left side immediately following her fall. Petitioner called out for help, but nobody came to assist her. Petitioner called her supervisor, Derek Rhodes, and reported her injury. Petitioner finished stocking the merchandise at that store and did not complete her route to other stores. Petitioner stated she was losing dexterity in her hand and went to BarnesCare at the direction of Respondent. Petitioner testified she began her shift at 8:00 a.m. on 9/27/21 and the accident occurred around 11:00 a.m.

Petitioner treated at BarnesCare through 10/22/21. The mobility in her hand/wrist and shoulder improved and her hip pain resolved, but the pain in her shoulder and neck were excruciatingly painful. Petitioner testified she previously treated at iCAN Clinic on 9/9/21 for a rib injury. She testified that her dog leash got wrapped around her leg causing her to fall backward and one of her ribs "popped out". She had pain in her lower left ribs in the back. Petitioner stated the rib was popped back in and she returned to work the next day. No additional treatment was recommended.

Petitioner testified she treated at iCAN Clinic from 6/1/20 through 9/9/21 for left ear issues that caused her neck and shoulder to lock up. She stated that if she had neck or back problems she would always go to that clinic and no other provider. She testified that her symptoms were always on the left side and never caused her to miss work. Petitioner testified that in 2015 she tripped up uneven concrete stairs while carrying a laundry basket. Her primary care physician, Dr. Bird, ordered a cervical MRI and two weeks of physical therapy. She was not referred to a surgeon or receive injections related to that incident. Petitioner switched primary care providers to Dr. Yablonsky whom she treated with from April 2016 through August 2017.

Petitioner testified that following her work accident she treated with MultiCare Specialists who referred her to Dr. Gornet. She underwent cervical injections on 12/7/21 and 12/21/21 by Dr. Blake with temporary relief from the first injection and no relief from the second. She last saw Dr. Gornet on 12/1/22 who recommends surgery. Petitioner testified she has constant pain in her neck and shoulder area that radiates to her right hand. She has pain across her chest and down her shoulder blade on the right side. She testified that her hand and hip injuries have resolved. She is right hand dominant and her right hand is now weaker than her left. She does not feel she could perform her job duties at this time due to difficulty lifting from the ground to waist level and she cannot lift above waist level. She testified she is 5'5" tall and the milk cartons are stacked 6 feet tall requiring her to reach overhead.

On cross-examination, Petitioner identified the pain diagram she completed at her pre-employment physical. She testified she had muscle problems in her back from tension in her shoulders and not neck issues. She marked the area of her trapezius where she was experiencing current symptoms and did not indicate her neck. She testified she routinely had tightness in the trapezius area for which she treated at iCAN Clinic. Petitioner testified that when she treated for her rib injury on 9/9/21 her entire spine hurt, and she indicated neck, back, and left shoulder pain. She stated her pain was midline down the center. She denied right-sided pain.

Petitioner testified she has not worked anywhere since her accident. She testified that she contacted HomeGoods in September 2021 before her work accident about working for them again on days she did not work for Respondent. She also applied for a security position at Stifel

Theater/Enterprises Center in September 2021. Petitioner testified she has always had two or three jobs since she moved back to Collinsville in 2019. Petitioner stated she does not work at Schnucks, but her father used to, and her wife was just hired there.

Petitioner testified that she struck her right hip and wrist equally when she fell on 9/27/21. She testified that after treating at BarnesCare on the day of the accident she went home and rested. She denied going bowling that night. She testified she was on a bowling league and had to quit due to her accident and restrictions. She stated she went to the bowling alley the night of her accident and sat and watched her team play. She denied any prior issues with her right upper extremity and stated she had a lot of previous injuries on her left side that caused radiating pain down her left arm. She agreed that sometimes it went down both arms, but it was mostly on the left side. She testified she only had left-sided neck pain prior to the accident that was caused by leaning on her desk at her drafting job. She stated her prior left-sided neck issues resolved after a period of time. She testified that her neck symptoms improved a little with physical therapy after her work accident.

Petitioner identified two pain diagrams she completed on 10/11/21 and 10/14/21. Petitioner testified she was placed on restrictions by Dr. Cantrell and her supervisor, Derek Rhodes, and boss, Derrick Dilworth, told her they might be able to accommodate her. She stated she refused the light duty work offered her because she knew her limitations and Dr. Cantrell did not perform any strength testing to know what she was capable of doing. She testified she no longer has any hobbies and watches television and reads since her work accident.

Derek Rhodes testified on behalf of Respondent. Mr. Rhodes has been Respondent's merchandising supervisor and sales representative since 2014. He worked as a merchandiser from 2004 through 2014. He testified that Petitioner did merchandising for Wal-Mart stores. He was aware of Petitioner's restrictions given by Dr. Cantrell on 10/27/21. He testified he sent Petitioner a screenshot of a text on 10/28/21 offering her work within her restrictions. Mr. Rhodes testified that Petitioner could have performed any job, except milk, as they were all under 20 pounds.

On cross-examination, Mr. Rhodes testified he was not aware that a doctor was holding Petitioner off work beginning 11/1/21. He stated Petitioner was not offered light duty work from the date of accident through 10/28/21 because they were waiting on her restrictions. He agreed that Petitioner called him after the accident and that she gave an accurate description of her job duties.

MEDICAL HISTORY

Petitioner's pre-accident medical records were admitted into evidence. On 11/12/13, Petitioner underwent an EMG/NCS at the referral of her primary care physician, Dr. Bird. (RX2) The study reports a longstanding history of neck pain with recent sharp pain radiating along the left arm to her hand. The study was normal with no evidence of left cervical radiculopathy.

On 12/9/15, Petitioner presented to Dr. Bird with pain down her spine from her neck to her tailbone. (RX3, p. 1-3) She reported a history of tripping up stairs carrying laundry two

weeks ago. She had pain, burning, and numbness down her left greater than right shoulder and arm. Dr. Bird noted limited range of motion of Petitioner's neck with rotation and left hip pain that radiated to her ankle. He noted Petitioner worked at a computer doing drafting 12 hours per day, 5 days per week, with a 2-hour break through the day. Dr. Bird assessed cervical radiculopathy, leg paresthesia, acute low back pain, and neck pain. He referred her to physical therapy, prescribed Voltaren and Hydrocodone, and ordered a cervical MRI.

Petitioner began physical therapy on 12/10/15 for neck pain that extended down into her left arm and hand. (RX4) She reported tripping up stairs on 12/1/15 and had pain in her neck, hand, and leg. The therapist noted the CT scans were inconclusive for any abnormalities.

The cervical MRI was performed on 12/16/15 at Anderson Hospital. (RX5, p. 2) The radiologist noted minimal spondylosis without stenosis. Petitioner returned to Dr. Bird on 12/23/15 with complaints of pain along her right shoulder blade to her neck and upper lumbar spine. (RX3, p. 6) Petitioner had completed three therapy sessions and her pain was improving. She had been working and taking pain medication at night. The paresthesia in her hands has disappeared. Dr. Bird noted good range of motion of the cervical spine and ordered her to complete physical therapy. On 1/22/16, Dr. Bird noted Petitioner had a long-standing history of shoulder pain which improved with therapy. (RX3, p. 8) Petitioner reported she was going to be very active in the next few weeks and wanted to continue therapy to help her neck and shoulder pain. Her diagnosis remained unchanged, and she was ordered to continue physical therapy. Examination of Petitioner's cervical spine was normal.

Petitioner's last physical therapy note was dated 1/27/16 at which time she was working without pain and having little complaints or difficulty with activity. (RX4, p. 43) Petitioner reported she was no longer having pain in her shoulder, neck, or back.

On 1/17/17, Petitioner presented to Anderson Hospital with right shoulder pain that radiated to the right thoracic region and lateral ribs. (RX5, p. 7) She reported an onset of symptoms two days after a lot of lifting and moving furniture. X-rays of the right shoulder were normal. She was diagnosed with strains of her right shoulder, thoracic spine, and chest wall muscle.

Petitioner periodically treated at iCAN Clinic from 6/1/20 through 9/9/21. (RX6) A pain diagram completed on 6/1/20 indicated constant, moderate pain throughout her spine and radiating to the left shoulder. She described her symptoms as: "neck, left shoulder and lower back pain, numbness in arm/hands, legs feet, spine pain", that started years ago of unspecified origin. (RX6, p. 2) Petitioner complained of constant, centralized, sharp/stabbing pain, restriction in the cervical spine that began on 3/1/2010. Her pain radiated to the back of her head which she rated 7/10. Petitioner also reported constant, bilateral, sharp/stabbing pain, dull pain, numbness, weakness, restriction in the lumbar spine that began on 3/1/2010. She had radiating pain in both legs and rated her pain 4/10. She reported that her neck and low back symptoms were not the result of a motor vehicle or work accident and neither caused her to miss work. (RX6, p. 5) She reported she has to lay down for 15 to 20 minutes when she wakes up due to her spine and legs hurting the last couple of years. She reported that both of her arms go numb and her left hand flutters. She reported playing a lot of sports in the past, including swimming, baseball, soccer,

and tennis. A cervical x-ray revealed bilateral hypoplastic C7 ribs and mild intervertebral disc space narrowing at C3-4. Physical examination showed edema, muscle atrophy, and joint flexions at C2, C6, and throughout her thoracic and lumbar spine. It was recommended she undergo chiropractic treatment three times per week for five weeks.

Petitioner underwent 11 chiropractic adjustments through 6/29/20 at which time she reported pain in her right shoulder shooting down her arm into her hand. She stated the pain was causing her right hand to go numb. (RX6, p. 26) Chiropractic adjustments were performed at C1, C5 and various levels of the thoracic and lumbar spine. Petitioner underwent another three chiropractic visits and filled out a progress report on 7/9/20. With respect to her cervical spine, Petitioner reported constant, sharp, burning, tingling, and numbness and rated her pain 4/10. She stated that overall she was getting better and still needed improvement. (RX6, p. 31) She continued to receive 12 chiropractic treatments from 7/13/20 through 9/2/20 at which time she reported upper back and neck pain over the last week with work.

On 11/14/20, Petitioner presented to Gateway Regional Medical Center with complaints of right shoulder pain that radiated to her neck and numbness in her right arm. (RX7, p. 2) She stated she had pain intermittently for a month but woke up that morning with an increase in pain and was unable to turn her neck. She rated her pain 9/10. Triage assessment was sharp, shooting, stabbing pain in the bilateral trapezius, right shoulder area, and the pain radiated to the base of the skull. She denied any previous similar problems. A cervical spine x-ray revealed mild nonspecific reversal of the lordosis, mild degenerative disc, and hypertrophic changes at C3-4 and C4-5. She was diagnosed with spasmodic torticollis. (RX7, p. 9)

Petitioner returned to iCAN Clinic on 1/4/21 with neck and low back pain. (RX6, p. 56) She reported constant, bilateral, sharp/stabbing and dull pain, and restrictions in the cervical spine that began two weeks ago. She reported radiation of pain to both arms. Chiropractic treatment was administered to her cervical spine at C1, C6, and C7, and throughout her thoracic and lumbar spine.

On 6/18/21, Petitioner underwent a pre-employment physical at BarnesCare Midtown at the direction of Respondent. (RX8) She completed a pain diagram and indicated numbness, burning, and pins and needles across her upper back between her shoulders. (RX8, p. 6) The examiner made no comment on Petitioner's symptoms and found she was capable of working without restriction.

Petitioner did not treat again until she presented to iCAN Clinic on 9/9/21. She complained of a sore and stiff neck and back. She filled out a pain diagram and indicated pain in her neck, back, and left shoulder. (RX6, p. 59) She circled her entire midline spine on the pain diagram, with no indication of radiculopathy or left shoulder symptoms. The record states Petitioner has had back pain since yesterday and she is not too sure what she did, but it felt like she fell on her back. She rated her pain 7/10 making it difficult to stand, walk, and sleep. Edema was present at T12, L1, L5, and the right sacrum. Hypertonicity and tenderness was noted in the lower thoracic and lumbar musculature, rhomboids, erector muscles, and lumbar paraspinals bilaterally. She underwent chiropractic adjustments at T12, L1, L5, and the right sacrum. No treatment was provided to her cervical spine.

On 9/27/21, Petitioner presented to BarnesCare and provided a history of falling in a freezer when she tried to push a cart full of ice cream that was stuck. She landed with an outstretched arm and landing on her right hip. (PX1, p. 79). She complained of pain in her shoulder, wrist, index and middle fingers, and hip all on the right side. Cervical spine examination revealed no signs of trauma or deformity, full active range of motion with pain in all planes except bilateral lateral flexion and rotation. X-rays of Petitioner's hand, shoulder, and wrist were normal. She was diagnosed with impingement syndrome of the right shoulder. No x-rays were performed of Petitioner's cervical spine. She was prescribed medication, work restrictions, and to follow up in two days. (PX1, p. 84)

On 9/29/21, Petitioner returned to BarnesCare with continued complaints. She was prescribed therapy, continued on restrictions, and ordered to follow up in 12 days. (PX1, p. 70-78) Petitioner underwent five physical therapy sessions at BarnesCare from 10/4/21 through 10/18/21.

On 10/18/21, Petitioner returned to BarnesCare and reported dull, achy, and intermittent pain along her right shoulder. (PX1, p. 2) APRN Cierra Jones noted Petitioner's therapist discharged her with improved range of motion and ability to lift up to 40 pounds with limited difficulty. Petitioner reported working without restrictions. Examination of her right shoulder was normal with full range of motion and no tenderness or crepitation. She was diagnosed with improved impingement syndrome of the right shoulder and improved strain of the fascia and tendon of the lower back. Petitioner was placed at MMI and released without restrictions. Petitioner completed a pain diagram and indicated weakness in the back of her right shoulder. (PX1, p. 9)

On 10/27/21, Petitioner was examined by Dr. Russell Cantrell for the purpose of evaluating and treating her work-related injuries. (PX3, p. 1) Dr. Cantrell's office note was directed to Cassie Shropshire at CCMSI. Petitioner reported she fell backward in the freezer and landed on her right arm, causing her shoulder to be jammed and her fingers were jammed against a pallet. Petitioner reported that the treatment at BarnesCare improved her mobility and dexterity in her hand, but she did not feel she had the strength to perform her job duties that required lifting and carrying up to 80 pounds. Petitioner complained of right shoulder pain with movement, particularly overhead, pain in the dorsal radial aspect of her right wrist, and diminished strength in her right arm. Physical examination revealed normal active range of motion of the cervical spine, full range of motion of the shoulder bilaterally with mild discomfort with abduction and end range of internal rotation, negative arm drop test and negative impingement signs, positive O'Brien's test for reproduced anterior shoulder pain, tenderness to palpation of the right AC joint and bicipital tendon, normal strength in the upper extremities, and positive Finkelstein's test at the right wrist. Dr. Cantrell diagnosed a right shoulder sprain and right deQuervain's tynosynovitis. He opined that Petitioner was not at MMI and prescribed work restrictions of lifting less than 30 pounds from waist to shoulder and less than 40 pounds from floor to waist. Dr. Cantrell reviewed Petitioner's job description and noted she was required to lift up to 35 pounds from floor to waist and 35 pounds from above head to floor level. He recommended work conditioning two times per week for three weeks and to return on 12/1/21.

Petitioner completed a pain diagram and indicated symptoms in her entire midline back and right arm. (PX3, p. 6)

No medical records were admitted into evidence that reflect Petitioner underwent the recommended work conditioning or returned to Dr. Cantrell for further treatment.

On 11/1/21, Petitioner reported to MultiCare Specialists. (PX4, p. 89) She provided a consistent history of injury and complained of right upper extremity pain, right-sided neck pain, with numbness and pain in her right arm with above shoulder activity. Physical examination revealed pain with flexion, right rotation, and right lateral bending of the cervical spine, positive compression and distraction test, exquisite tenderness over the right trapezius and anterior shoulder, decreased internal rotation of the right shoulder, 4/5 rotator cuff strength on the right compared to the left, weakness with grip strength on the right compared to the left, and positive Finkelstein's on the right. Impressions were cervical disc protrusion with right radiculitis and possible deQuervain's tenosynovitis. An MRI of the cervical spine, right shoulder, and right wrist was ordered. Petitioner was placed off work and referred to physical therapy.

Petitioner underwent the MRIs on 11/4/21. (PX2) The cervical spine MRI revealed bilateral foraminal protrusions at C3-4 resulting in moderate to severe foraminal stenosis, right greater than left, with ventral cord flattening and central canal stenosis; central protrusions at C5-6 and C6-7 with a centrally caudally extruded disc fragment and annular tear at C5-6 resulting in mild central canal stenosis with no foraminal stenosis. The right wrist MRI revealed reactive edema or contusion of the distal dorsal radius without fracture, and strain or contusion of the peripheral triangular fibrocartilage complex without tear. The right shoulder MRI revealed subtle supraspinatus and subscapularis tendinitis with long head biceps peritendinitis/tenosynovitis without tear, and an intact labrum and AC joint.

Petitioner returned to MultiCare Specialists on 11/4/21 with complaints of soreness into her right trapezius. The MRIs were reviewed and Petitioner was diagnosed with disc bulges at C3-4, C5-6, and C6-7, right wrist reactive edema/contusion, and right supraspinatus tendonitis. Petitioner was referred to Dr. Gornet for further evaluation of her cervical spine.

On 11/9/21, Petitioner was examined by Dr. Gornet. (PX5). Petitioner gave a consistent history of injury and complained of right trapezius pain radiating to the base of her neck, right shoulder, and right arm down to her hand and wrist. She had tingling down her right arm to her hand with a new onset of tingling in her left forearm and hand. Petitioner related her symptoms to her work accident on 9/27/21. Petitioner reported a history of left shoulder pain 8 to 10 years ago for which she underwent physical therapy, but no other treatment of significance. Dr. interpreted the cervical MRI to show a large herniation and tear on the right at C3-4, and a smaller central right-sided disc protrusion at C5-6. He opined there was spinal cord flattening at both levels. He opined the MRI findings appeared acute in nature and correlated with Petitioner's subjective complaints of right-sided pain. He opined that Petitioner's current symptoms and requirement for treatment were causally connected to her work-related fall. Dr. Gornet recommended injections at C3-4 and C5-6 on the right and placed her on light duty restrictions with a 10-pound lifting limit and no overhead work. He prescribed Meloxicam and Cyclobenzaprine and referred Petitioner to physical therapy and chiropractic care three times per

week for six weeks. He stated that if Petitioner's condition failed to improve, he would recommend a cervical disc replacement at C3-4 and C5-6.

Petitioner underwent a right C3-4 epidural steroid injection on 12/7/21 and right C5-6 epidural steroid injection on 12/21/21 by Dr. Helen Blake.

Petitioner returned to Dr. Gornet on 2/14/22. (PX5, p. 6) He noted the injections provided temporary relief. She had right-sided pain in her neck, right trapezius, right shoulder, and down the right arm, which was consistent with the MRI findings. He recommended an anterior cervical disc replacement at C3-4 and C5-6 and continued her on light duty restrictions.

On 3/15/22, Petitioner was examined by Dr. Thomas Sylvester pursuant to Section 12 of the Act. (RX1, p. 32-37) Petitioner reported a consistent history of injury. Dr. Sylvester diagnosed Petitioner with cervical spondylosis, bulging discs at C3-4 and C5-6, and intermittent right upper extremity pain and numbness. Dr. Sylvester opined that Petitioner's fall at ground level did not cause or permanently aggravate her previous neck pain or cervical radicular symptoms. He noted Petitioner had a long-standing history of cervical issues with intermittent radiation of pain into her shoulders and upper extremities. He noted Petitioner was seen for such symptoms as recently as three weeks before the alleged accident. Dr. Sylvester placed Petitioner at MMI and opined she required no further work restrictions or treatment as is related to the work accident.

Petitioner was last seen by Dr. Gornet on 12/21/22. He continued to recommend surgery. Dr. Gornet noted no light duty work was available. He opined that a new MRI and CT scan would be required prior to surgery.

Dr. Matthew Gornet testified by way of deposition on 9/29/22. (PX9) Dr. Gornet is a board-certified orthopedic surgeon. His testimony was consistent with his treating records. Dr. Gornet testified he agreed with the radiologist's findings that Petitioner had spinal cord flattening at C3-4 and C5-6 which he found to be acute in nature based on signal intensity, or fluid around the disc. He opined that the MRI findings correlated with Petitioner's subjective right-sided complaints. Dr. Gornet opined that the herniations are causally related to the work accident. He testified that in comparing the 2015 MRI to the 2021 MRI, the recent MRI shows large herniations at C3-4 and C5-6 with spinal cord flattening that was not present in 2015. He testified that these were new findings and consistent with Petitioner's radiculopathy. He testified that the 2015 MRI did not show any disc herniations of significance and mild protrusions that were age-appropriate.

Dr. Gornet acknowledged that Petitioner had a history of neck pain that necessitated a cervical MRI. She had an episode of significance six years earlier and the MRI did not show the pathology as seen on the 2021 MRI. He testified that Petitioner's current symptoms are radicular and more significant than any symptoms she experienced prior to her work accident which were not caused by a specific cervical level. He disagreed with Dr. Sylvester that a fall such as the one Petitioner sustained could not cause a permanent aggravation.

On cross-examination, Dr. Gornet testified that a sudden mechanical load of the arm can easily cause a neck injury. He understood that Petitioner fell on her outstretched arm which transferred the force into her neck. He testified it is common for a person to initially have shoulder and trapezius pain. He agreed that Petitioner did not recall any neck treatment of significance, but treated for her shoulder. She did not report the prior MRI or chiropractic care to him. He testified that visits to a doctor for episodes of pain is not significant unless treatment ensues. He testified that Petitioner did not tell him she had any neck pain prior to the accident of the severity she reported when he examined her. He agreed the MRI findings cannot be dated but testified there was evidence of acute injury based on signal intensity. He testified it is normal to have full strength and still require surgery. He testified that approximately 10% of his surgeries involve noncontiguous levels as it is more uncommon, but noncontiguous disc injuries could absolutely be caused by the same fall. He testified that Petitioner's clinical course changed after the work accident as she had constant and not intermittent treatment as she had prior to the accident. Dr. Gornet testified he reviewed Petitioner's pre-accident medical records after her 5/26/22 visit and found nothing in the records to make him change his opinion. He testified that after reviewing the 2015 MRI it supported there was a significant change in pathology.

Dr. Thomas Sylvester testified by way of deposition on 10/26/22. (RX1) Dr. Sylvester is a board-certified orthopedic surgeon. He testified that Petitioner gave him a history that on 9/27/21 she "fell backwards onto her right buttock and hip and her right arm, which was stretched behind her." She reported that her fingers struck a pallet, and she had immediate hand and finger pain, as well as immediate difficulty making a first or gripping objects. He testified that Petitioner denied any previous upper extremity radiating symptoms or previous neck injuries.

Dr. Sylvester reviewed the 12/16/15 cervical MRI that showed mild degenerative changes with mild disc protrusions at several levels. He reviewed the 11/14/20 cervical spine x-ray that showed mild degeneration at C3-4 and C4-5. He reviewed the 11/2/21 cervical MRI that showed disc protrusions at C3-4 and C5-6. Dr. Sylvester testified there is no way to tell exactly when the protrusions occurred. Dr. Sylvester diagnosed Petitioner with disc protrusions at C3-4 and C5-6 with intermittent cervical radicular symptoms. He opined that the work accident was not a cause of and did not permanently aggravate her diagnoses based on the mechanism of injury, specifically the history Petitioner gave him that she landed onto her buttocks and then her right arm or hand struck the floor. Dr. Sylvester explained that it did not seem to him that the force from her fall traveled through her upper extremity to her neck and the brunt of the force of the fall was taken through her buttocks and lower extremities. He testified that the imaging prior to her accident showed mild disc protrusions at C3-4 and C5-6 and she had symptoms into her neck and shoulders before the accident, which suggested to him Petitioner had a progression of a previous degenerative disease independent of any fall on 9/27/21.

Dr. Sylvester testified it is atypical to have C3-4 and C5-6 injuries due to a fall from ground height, or to have noncontiguous cervical levels require surgery due to a fall from ground height. Dr. Sylvester testified that activities of daily living can cause an asymptomatic herniated disc to become symptomatic. He testified that a person can have radiating pain from the neck that comes and goes, and radiculopathy down the arms that switches sides.

On cross examination, Dr. Sylvester admitted that the 2015 MRI films demonstrate mild cervical protrusions that were consistent with her age and that the 2021 film revealed more significant pathology at C3-4 and C5-6. Dr. Sylvester testified he does not perform disc replacements. He testified that Petitioner would be a candidate for some type of cervical surgery. He admitted that one could have intermittent cervical radiculopathy which becomes persistent secondary to trauma. He opined that Petitioner's complaints of neck and posterior shoulder pain with pain, tingling, and numbness radiating down her arm were consistent with her radiographic studies. He did not feel that Petitioner was exaggerating her symptoms.

CONCLUSIONS OF LAW

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

It is unrebutted that Petitioner fell in a walk-in freezer while attempting to push a stuck cart. It is undisputed that Petitioner immediately reported the accident and sought medical treatment the same day. Petitioner provided a consistent history of injury to all of her medical providers. Based on the overwhelming evidence, the Arbitrator finds that Petitioner's injuries arose out of and in the course of her employment with Respondent.

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

The law holds that an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." Fierke v. Industrial Commission, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000).

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).

It is undisputed that Petitioner has a long-standing history of neck pain and radicular symptoms dating back to 2013. In 2013, Petitioner underwent an EMG/NCS for neck pain with recent sharp pain radiating into her left arm to hand. The study was normal with no evidence of left cervical radiculopathy. She treated again in 2015 with Dr. Bird who noted pain down her spine from her neck to her tailbone. Her symptoms were related to a specific incident of tripping up stairs. She had pain, burning, and numbness down her left greater than right shoulder and arm. Dr. Bird assessed cervical radiculopathy, leg paresthesia, acute low back pain, and neck pain. He recommended a cervical MRI and physical therapy which Petitioner underwent. It was noted that CT scans were inconclusive for any abnormalities.

Petitioner underwent a cervical MRI on 12/16/15 and the radiologist interpreted minimal spondylosis without stenosis. Petitioner completed physical therapy on 1/27/16 at which time she was working without pain and having little complaints or difficulty with activity. Petitioner reported she was no longer having pain in her shoulder, neck, or back.

On 1/17/17, Petitioner presented to Anderson Hospital with right shoulder pain that radiated to her right thoracic region and lateral ribs after moving furniture two days prior. She was diagnosed with strains of her right shoulder, thoracic spine, and chest wall muscle.

Petitioner periodically received chiropractic treatment at iCAN Clinic from 6/1/20 through 9/9/21. A pain diagram completed on 6/1/20 indicated constant, moderate pain throughout her spine and radiating to her left shoulder. She described her symptoms as: "neck, left shoulder and lower back pain, numbness in arm/hands, legs feet, spine pain", that started years ago of unspecified origin. It was noted Petitioner presented with complaints of constant, centralized, sharp/stabbing pain, restriction in the cervical spine that began on 3/1/2010. She reported that both of her arms go numb and her left hand flutters. A cervical x-ray revealed bilateral hypoplastic C7 ribs and mild intervertebral disc space narrowing at C3-4. Petitioner underwent 11 chiropractic adjustments through 6/29/20 at which time she reported pain in her right shoulder shooting down her arm into her hand, with numbness in her hand. Chiropractic adjustments were performed at C1, C5 and various levels of her thoracic and lumbar spine through 9/2/20, at which time Petitioner reported upper back and neck pain over the last week with work.

On 11/14/20, Petitioner presented to Gateway Regional Medical Center with complaints of right shoulder pain that radiated to her neck and numbness in her right arm. She stated she had pain intermittently for a month but woke up that morning with an increase in pain and was unable to turn her neck. Triage assessment was sharp, shooting, stabbing pain in the bilateral trapezius, right shoulder area, and the pain radiated to the base of her skull. A cervical spine x-ray revealed mild nonspecific reversal of the lordosis, mild degenerative disc, and hypertrophic changes noted at C3-4 and C4-5. She was diagnosed with spasmodic torticollis.

Petitioner began chiropractic treatment again on 1/4/21 for neck and low back pain. She reported constant, bilateral, sharp/stabbing and dull pain, and restrictions in the cervical spine that began two weeks ago. She reported radiation of pain to both arms. Chiropractic treatment was administered to her cervical spine at C1, C6, and C7, and throughout her thoracic and lumbar spine.

On 6/18/21, Petitioner underwent a pre-employment physical for Respondent. She completed a pain diagram and indicated numbness, burning, and pins and needles across her upper back between her shoulders. The examiner made no comment on Petitioner's symptoms and found she was capable of working without restriction.

Petitioner returned to iCAN Clinic on 9/9/21 with a sore and stiff neck and back. She filled out a pain diagram and indicated pain in her neck, back, and left shoulder. (RX6, p. 59) She circled her entire midline spine on the pain diagram, with no indication of radiculopathy. No accident was reported. Petitioner had pain with standing, walking, and sleeping. Treatment was

focused on Petitioner's thoracic and lumbar spine and no treatment was provided to her cervical spine.

The Arbitrator is more persuaded by the opinions of Dr. Gornet than those of Dr. Sylvester. Dr. Sylvester agrees that Petitioner would benefit from a cervical surgery; however, he does not believe that Petitioner's accident permanently aggravated her pre-existing condition. Dr. Sylvester testified that it did not seem to him that the force from her fall traveled through her upper extremity to her neck and the brunt of the force of the fall was taken through her buttocks and lower extremities. This is contrary to the medical evidence and testimony that reflect injuries to Petitioner's right upper extremity. Dr. Gornet testified that a sudden mechanical load of the arm can easily cause a neck injury. He understood that Petitioner fell on her outstretched arm which transferred the force into her neck. He testified it is common for a person to initially have shoulder and trapezius pain which is consistent with Petitioner's medical records following the work accident.

Dr. Gornet reviewed Petitioner's pre-accident medical records and did not find any evidence of significant pathology or symptoms that rose to the level of severity she experienced following the work accident. Dr. Gornet agreed with the radiologist's findings of large herniations at C3-4 and C5-6 with spinal cord flattening that was not present on the 2015 MRI. He testified that these were new findings and consistent with Petitioner's radiculopathy. He testified that the 2015 MRI did not show any disc herniations of significance and mild protrusions that were age-appropriate, which Dr. Sylvester admitted.

Despite Petitioner's periodic cervical symptoms and treatment dating back to 2013, there is no evidence she was referred to a spine specialist or was recommended for surgery, injections, or other conservative treatment other than chiropractic care. Petitioner underwent several diagnostic studies on her cervical spine prior to 9/27/21, including a CT scan, EMG/NCS, x-rays, and an MRI, all of which were normal or showed minimal to mild degenerative changes that were age-appropriate as both Dr. Gornet and Dr. Sylvester opined.

Petitioner was working full duty without restrictions at the time of the accident. She passed a pre-employment physical on 6/18/21 and the examiner reported she was capable of working without restriction. Dr. Cantrell reviewed her job duty description that required her to lift up to 35 pounds from floor to waist and 35 pounds from above head to floor level. Respondent indicates the position of merchandiser required lifting up to 40 pounds. (RX12) Petitioner has not been able to return to work within her light duty restrictions of no lifting greater than 10 pounds and no overhead work. The evidence supports that Petitioner's cervical spine has not returned to "baseline" and she requires further treatment as recommended by Dr. Gornet.

Based on the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work accident of 9/27/21.

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

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

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). 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).

Respondent disputes liability for medical expenses based on causal connection. (AX1). Based on the Arbitrator's findings as to accident and causal connection, the Arbitrator hereby awards Petitioner medical benefits.

Therefore, Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Group Exhibit 8, pursuant to the Illinois medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Pursuant to the stipulation of the parties, Respondent shall be given a credit for any and all medical expenses paid through its group medical plan under Section 8(j) of the Act, and a credit of $24,383.09 in medical expenses paid.

The Arbitrator further finds that Petitioner is entitled to receive the additional care recommended by Dr. Gornet. Therefore, Respondent shall authorize and pay for prospective medical treatment, including, but not limited to, an anterior cervical disc replacement at C3-4 and C5-6, and pre- and post-operative care until Petitioner reaches maximum medical improvement.

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

Petitioner claims entitlement to temporary total disability benefits from 9/28/21 through 1/31/23, representing 70-1/7 weeks. Respondent disputes liability for TTD benefits based on causal connection. (AX1)

Petitioner was placed on light duty restrictions when she reported to the emergency room on the date of accident. Her work restrictions were continued until she was released at MMI without restrictions by BarnesCare on 10/18/21. On 10/27/21, Dr. Cantrell placed Petitioner on light duty restrictions pending treatment. Petitioner reported to MultiCare Specialists on 11/1/21 and was placed off work. On 11/9/21, Dr. Gornet placed Petitioner on light duty restrictions which have continued through the date of arbitration.

Petitioner's supervisor, Derek Rhodes, testified he was aware of Dr. Cantrell's work restrictions dated 10/27/21 of no lifting greater than 35 pounds from floor to waist and 35 pounds from above head to floor level. On 10/28/21, Mr. Rhodes emailed screenshots of texts previously sent to Petitioner's cell phone that requested Petitioner to contact him to discuss her work

restrictions. (RX12, p. 3-4) Approximately five hours later Mr. Rhodes sent Petitioner a text stating Respondent has reviewed her work restrictions and came up with a plan that would allow her to work within her restrictions starting tomorrow, 10/29/21. Petitioner was instructed to report to the Belleville Walmart at 8:30 a.m. on 10/29/21 and work alongside Mr. Rhodes as he showed her how to work within her restrictions. On 11/1/21, Mr. Rhodes sent Petitioner an email again expressing they had a plan to return her to work within her restrictions prescribed by Dr. Cantrell. He stated she had been a no call/no show for the past three days. Mr. Rhodes requested Petitioner to contact him to discuss moving forward with her restrictions. (RX12, p. 1)

Mr. Rhodes testified that Petitioner could have performed any job, except milk, as they were all under 20 pounds. He testified he was not aware that a doctor was holding Petitioner off work beginning 11/1/21, which was the date of his email to Petitioner. He agreed that Petitioner was not offered light duty work from the date of accident through 10/28/21 because they were waiting on her restrictions. Petitioner testified she refused the light duty work offered by Respondent because she knew her limitations and Dr. Cantrell did not perform any strength testing to know what she was capable of doing.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from 9/28/21 through 10/18/21, 10/27/21 through 10/28/21, and 11/1/21 through 1/31/23, representing 68-4/7th weeks. Pursuant to the stipulation of the parties, Respondent shall receive a credit for temporary total disability benefits paid in the amount of $12,144.15.

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

Arbitrator Linda J. Cantrell Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011924
Case Name	Francelia Uriostegui v. El Meson Restaurant
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0226
Number of Pages of Decision	15
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Brian McManus Jr
Respondent Attorney	John Sturgeon

DATE FILED: 5/17/2024

/s/Amylee Simonovich, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Franciela Uriostegui,

Petitioner,

vs. NO: 19 WC 011924

El Meson Restaurant,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits, prospective medical treatment, and penalties/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, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission modifies the Arbitrator's decision on prospective medical treatment and finds Petitioner is entitled to the recommended treatment, including a custom AFO brace or a posterior tibial tendon reconstruction with ligament repair and TMT fusion as prescribed by Dr. Lin. The Commission further modifies the Arbitrator's finding of temporary total disability benefits and finds Petitioner is entitled to temporary benefits from May 18, 2022 through July 6, 2023 (the date of trial).

In so finding for Petitioner on the issue of prospective medical, the Commission relies on the opinions of Dr. Lin over the opinions of Respondent's expert, Dr. Toolan. Both Dr. Lin and Dr. Toolan are board certified orthopedic surgeons with subspecialties in foot and ankles. Both surgeons had accurate medical and accident histories from Petitioner. Both surgeons diagnosed Petitioner with dysfunction of the posterior tibial tendon with valgus deformity. Dr. Toolan opined all Petitioner's diagnoses were degenerative, not traumatic, in nature and did not recommend

additional treatment. Dr. Toolan agreed Petitioner had no known pre-existing or subsequent injuries that may cause or contribute to Petitioner's condition. Dr. Toolan could not provide an opinion on whether the work incident caused or contributed to Petitioner's condition, mainly because of Petitioner's treatment gaps.

Dr. Lin began treating Petitioner on June 25, 2019, and continued treatment for the next six months. Dr. Lin prescribed physical therapy, braces, and medication. Despite conservative measures, Petitioner continued to have pain and dysfunction. Following an MRI, Dr. Lin recommended Petitioner get fitted for a custom AFO brace or possibly undergo a posterior tibial tendon reconstruction with ligament repair and TMT fusion. Dr. Lin opined Petitioner's condition and need for treatment were related to the work incident. He considered it significant that Petitioner had no pre-existing injuries or treatment to her left ankle and Petitioner had a mechanism of injury that may cause or contribute to her ankle condition.

The Commission finds Dr. Lin more persuasive than Dr. Toolan. Dr. Lin treated Petitioner over the course of several months and his treatment began closer in time to the accident when compared with Dr. Toolan's evaluation in August 2020. Dr Toolan testified by the time he examined Petitioner several years after the incident, there was no evidence of an acute injury, and her diagnoses were degenerative in nature.

Given the above, the Commission agrees with Dr. Lin's opinion on future treatment. The Commission acknowledges it was a lengthy period between Dr. Lin's last evaluation with Petitioner and the date of Arbitration, however, Petitioner was off work and simultaneously treating for her right shoulder condition for a large part of that time period. Petitioner testified her left ankle pain was manageable while taking prescription pain medication for her right shoulder. She assumed her left ankle treatment would resume once her right shoulder treatment concluded, however, her ankle treatment was denied at that point.

During his deposition in September 2022, Dr. Lin opined Petitioner's tibial tendon dysfunction with probable medial malleolar avulsion fracture was caused by the work incident. Dr. Lin's treatment recommendation was surgery or a custom AFO brace. Dr. Lin testified Petitioner's need for surgery was causally related to the work incident and he felt the surgery was necessary to improve Petitioner's pain. During his deposition, Dr. Lin was asked "as you sit here today, do you believe that the surgery that you recommended would be one of my client's best treatment options," to which he responded, "correct." (PX5 at 242).

Accordingly, the Commission finds it reasonable Petitioner would forego treatment to her left ankle while undergoing major treatment to her right shoulder. Dr. Lin continued to recommend surgery in September 2022, but Petitioner's treatment was denied at that point. Dr. Toolan had no treatment recommendations to alleviate Petitioner's ankle pain and dysfunction, even if said treatment was for an unrelated degenerative condition. Petitioner continued to be symptomatic and desired the recommended surgery to correct her ankle condition. The Commission finds Dr. Lin's treatment plan reasonable and necessary to alleviate Petitioner's pain.

Based on the above, the Commission finds Petitioner was entitled to temporary disability through the date of trial. The period of temporary total disability ends when the employee's

condition stabilizes and he or she is able to return to regular work. *Archer Daniels Midland Co. v. Industrial Com.*, 138 Ill. 2d 107, 561 N.E.2d 623 (1990). Factors to be considered when determining if temporary total disability benefits should end are: 1) whether the employee has been released to regular work by a physician; 2) the medical testimony about the injury; 3) the extent of the injury; 4) whether the injury has stabilized; and 5) whether the employee has achieved maximum medical improvement. *Land & Lakes Co. v. Industrial Comm'n (Dawson)*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2d Dist. 2005); *Mech. Devices v. Industrial Comm'n (Johnson)*, 344 Ill. App. 3d 752, 279 Ill. Dec. 531, 800 N.E.2d 819 (2003)

Petitioner was given sedentary work restrictions by Dr. Lin and Dr. Jasonowicz. In Dr. Jasonowicz's final note dated June 6, 2022, he specified the sedentary restrictions were not permanent or long term but recommended them until Petitioner followed up with him or her original physician. Dr. Jasonowicz did not specify an end date for the restriction. Petitioner did not return to Dr. Jasonowicz. At the time of Petitioner's evaluation with Dr. Jasonowicz, her treatment had been denied per the Section 12 Examination with Dr. Toolan.

Petitioner chose to pursue the recommended surgery with Dr. Lin. Petitioner has not worked since November 2017. Petitioner testified she continues to be symptomatic. To date, none of Petitioner's treating physicians have placed her at MMI or have determined that her condition had stabilized . Dr. Lin continues to recommend surgery for Petitioner based on her symptoms and radiographic findings. Accordingly, the Commission finds Petitioner's condition has not stabilized and Petitioner is entitled to TTD through the date of trial.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 2023, is modified. The Commission finds Petitioner has proven she is entitled to the prospective treatment recommended by Dr. Lin including a custom AFO brace and/or a posterior tibial tendon reconstruction with ligament repair and TMT fusion and temporary total disability benefits from May 18, 2022- July 6, 2023. All remaining issues are affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay Petitioner the sum of $578.80 per week for 59 2/7 weeks, commencing May 18, 2022-July 6, 2023, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for the prospective surgery recommended by Dr. Lin and all attendant care pursuant to Sections 8 and 8.2 of the Act.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 17, 2024

AS: ns
o 3/21/24
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC011924
Case Name	Francelia Uriostegui v. El Meson Restaurant
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	Brian McManus Jr
Respondent Attorney	John Sturgeon

DATE FILED: 9/11/2023

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 6, 2023 5.30%

/s/ Rachael Sinnen, Arbitrator

Signature

STATE OF ILLINOIS)

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)

Francelia Uriostegui
Employee/Petitioner

v.

El Meson Restaurant
Employer/Respondent

Case # **19** WC **11924**

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 **7.6.23 and 8.1.23**. 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, **6.15.17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**45,188.84**; the average weekly wage was $**868.17**.

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 $**129,067.94** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**129,067.94**.

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

ORDER

The Arbitrator finds that Petitioner has failed to meet her burden that she is entitled to surgery as prescribed by Dr. Lin.

Respondent shall pay Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act: IBJI ($163.67).

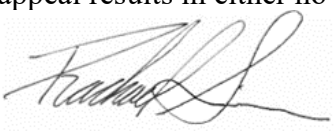
Respondent shall pay Petitioner temporary total disability benefits of $578.78/week for 10 6/7 weeks, commencing 5.18.22 through 8.1.22 as provided in Section 8(b) of the Act.

The Arbitrator declines to impose penalties or fees upon Respondent.

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 11, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Francelia Uriostegui	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC11924
El Meson Restaurant	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on July 6, 2023 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing pursuant to Section 19b/8a of the Illinois Workers' Compensation Act "Act". The parties reopened proofs on August 1, 2023 to amend the request for hearing form. Issues in dispute include causal connection, unpaid medical bills, temporary total disability "TTD," future medical care and penalties and fees under Sections 19(l), 19(k) and 16 of the Act. Arbitrator's Exhibit "Ax" 1, 4.

Petitioner's Accident on June 15, 2017

Petitioner testified that she was hired in 2000 or 2001 by El Meson Restaurant. She worked in the capacity as a waitress. Petitioner stated that she had no prior foot injuries to June 15, 2017.

Petitioner testified that on June 15, 2017 it was busy and there were cracks in the patio. Petitioner's left foot got stuck in the cracks and her left ankle twisted. Petitioner testified that her ankle got swollen shortly after the incident. She talked to her supervisor right after the accident and took a week off of work before returning. (T. 8-9).

Petitioner sustained another work accident with Respondent on September 25, 2017 which resulted in a separate, unconsolidated claim involving the right shoulder. Petitioner pulled a booth and felt pain in her right shoulder on September 25, 2017, sought care two days later and eventually underwent multiple surgeries for the right shoulder.

Petitioner's Medical Treatment

Although Petitioner was under the medical care of Dr. Patel as early as September 2017, Petitioner did not seek treatment for her left foot until February 28, 2018. Petitioner stated she waited so

long to treat for the foot because she was in a lot of pain and was also under care for the right shoulder.

Treatment notes from Petitioner's February 28, 2018 visit with Dr. Patel show that Petitioner reported a work accident on June 15, 2017 when she was working as a server when she rolled her ankle at the restaurant outdoor patio. Petitioner advised that at the time of the injury, she had swelling and bruising about the ankle; however, took Ibuprofen and iced her ankle. Petitioner claimed that she then hurt her right shoulder at work on September 27, 2017 and underwent right shoulder surgery in November 2017, and had been off of work since that time. Petitioner claimed that as a result of her right shoulder injury, her shoulder pain was greater than her ankle pain. She also claimed that the pain medications that she was taking for the right shoulder also addressed her right ankle pain. Now that she was recovering from the shoulder surgery, she was no longer taking pain medication, and her ankle pain was returning. Diagnosis was posttraumatic bone spur distal medial tibia, left with possible saphenous neuritis. Dr. Patel recommended over the counter medication (lidocaine patches), a return visit in two weeks, and discussed the possibility of surgery. He did not provide any work restrictions. Petitioner returned March 12, 2018 but did not want to pursue surgical options. (PX 1).

Treatment with Dr. Lin

Petitioner received no left foot treatment until June 25, 2019 when she presented to Dr. Johnny Lin of Midwest Orthopedics at Rush. (T. 21). Dr. Lin noted that physical examination of the left ankle revealed a bony prominence along the medial portion of the ankle along the medial malleus, which had swelling and tenderness along with area. Petitioner was maximally tender along her posterior tibial tendon, posterior to the medial malleus, extending into her foot. Petitioner had pain with active range of motion. Petitioner could dorsiflex to neutral and plantarflex to 30 degrees. Petitioner was neurologically intact to light touch in all nerve distributions. Petitioner again complained of pain with standing; however, did not have a significant increase in her pain with double limb heel raise.

X-rays revealed a medial malleolar avulsion fracture but Dr. Lin noted the fracture was old. He also noted Petitioner had an ankle mortis that was intact, along with widening of the syndesmosis. He noted there were no new acute fractures or dislocations. Petitioner was ultimately diagnosed with tibialis posterior tendinitis. He noted that Petitioner likely had left posterior tibial tendon dysfunction with a probable medial malleolar avulsion injury that occurred while at work. Dr. Lin recommended a brace to help Petitioner offload her tendon and improve her symptoms. Petitioner was instructed to return in approximately four weeks for reevaluation. In the event her symptoms did not improve, Dr. Lin noted they may proceed with an MRI. Alternatively, if Petitioner's symptoms did improve, she would proceed with a course of physical therapy. She was placed on sedentary duties.

Petitioner returned to Dr. Lin on August 1, 2019, September 16, 2019, and October 21, 2019, for the left ankle condition. Dr. Lin had recommended continued use of the brace, physical therapy, and sedentary duties. He ultimately ordered an MRI of the left foot and ankle which Petitioner underwent at Midwest Orthopedics at Rush on November 1, 2019. According to the reviewing

radiologist, the MRI revealed mild tibialis posterior tendinosis distally, as well as mild Achilles tendinosis. Further, the radiologist identified a mild ligament sprain.

Following completion of the MRI, Petitioner returned to see Dr. Lin on December 30, 2019. Petitioner noted she continued to utilize the brace which alleviated some symptoms. However, she continued to experience pain in the anterior medial ankle joint, posterior medial ankle as well as pain in the joint itself. Petitioner also noted some swelling. Petitioner claimed she was not presently attending physical therapy. Petitioner was utilizing Tylenol as needed for discomfort.

Physical examination revealed a valgus deformity of the left lower extremity more so along the ankle rather than foot itself. She was maximally tender along her anterior medial ankle joint along the deltoid, as well as in the anterior joint itself with additional pain along the posterior medial ankle. Range of motion remained unchanged. She had no pain directly on the medial malleolus on this date. She remained neurologically intact to light touch in all nerve distributions.

Dr. Lin reviewed the MRI. He noted the MRI revealed evidence of posterior tibial tendinosis, a mild ligament sprain, as well as a slight gap and medially at the deltoid ligament. Accordingly, he diagnosed dysfunction of the posterior tibial tendon with valgus deformity and deltoid ligament insufficiency as a result of an injury at work. Based upon review of the MRI, Dr. Lin noted Petitioner could continue a course of conservative treatment which would include a custom brace. However, he also noted Petitioner could proceed with surgical intervention which would likely include a posterior tibial tendon reconstruction with deltoid repair, and a first tarsal metatarsal fusion. Petitioner reportedly wished to first try the brace. Accordingly, Dr. Lin provided an order for the brace. Petitioner was instructed to return for reevaluation in approximately 6 to 8 weeks. Petitioner was kept on sedentary work restrictions.

Petitioner testified that she had not returned to Dr. Lin since December 30, 2019. (T., P. 21-22). At his evidence deposition on September 22, 2022, Dr. Lin testified consistent with his medical records. Dr. Lin testified that he is unaware of Petitioner's current condition.

Petitioner's Treatment with Illinois Bone and Joint Institute

She had two visits at Illinois Bone and Joint Institute (IBJI) on May 18, 2022 and June 6, 2022 at the direction of her attorney. (T., p. 18). At these visits, the doctors ultimately requested copies of older records and released Petitioner with sedentary work restrictions. No opinions on causal connection were provided.

Petitioner's Current Condition

Petitioner testified that she wants to undergo surgery. She performs very minimal activities with the left foot currently. She was present at trial wearing a pharmacy bought brace with over-the-counter compression socks. Petitioner testified the pain medication she was on for her shoulder helped with her foot.

She confirmed she was on SSDI and was making approximately $2,000.00 a month. Petitioner has not returned back to work in any capacity since September 27, 2017.

Petitioner testified that she can walk without assistive devices. She was driven to trial by a friend. Petitioner testified that no doctor ever placed Petitioner off work completely for her left foot.

Respondent's Section 12 Examiner, Dr. Brian Toolan

Petitioner underwent an independent medical examination with Dr. Brian Toolan on August 4, 2020 to address her ongoing left ankle condition. Dr. Toolan was deposed on April 18, 2023.

She reported a consistent history of the injury and a consistent history of her medical treatment including her treatment with Dr. Lin. Petitioner reported medial ankle pain which she rated a level of 6/10 in intensity. Petitioner identified the source of her pain as the posterior tibial tendon from the level of the posterior aspect of the medial malleolus to the insertion point on the navicular bone. Petitioner alleged her pain increased to a 9/10 when standing for over two hours. Petitioner admitted that typically her pain was at the level of 3/10 with daily activities. Upon further questioning, Petitioner alleged that her pain persisted even upon awakening in the morning. Petitioner admitted she did not wear the air lift brace any longer because it had not provided her any further benefit. Petitioner alleged that she had not yet secured the custom-made brace prescribed by Dr. Lin. She further alleged that her pain limited her from performing many activities.

On physical examination Petitioner was able to ambulate within the office space without an apparent limp and was able to step up and down from the platform to obtain her weight-bearing x-rays. X-rays revealed a foot deformity with uncovering of the talonavicular joint with an angle of approximately 25 to 30°. There was mild flattening of the medial longitudinal arch, however no accessory navicular. There was no evidence of post-traumatic arthritis. There was mild evidence of arthritis across the mid-foot joint.

Dr. Toolan diagnosed Stage II posterior tibial tendon dysfunction with a flexible pes plano valgus left foot deformity that was completely correctable. He also diagnosed anterior medial ankle gutter impingement. He noted these diagnoses were based on the review of the medical records, physical examination, as well as the x-rays. Dr. Toolan could not provide an opinion regarding causal connection. He specifically stated he did not hold an opinion whether or not the current diagnoses based on the evaluation, were causally related to the work injury. He noted it was possible that other causes for these conditions pre-existed the injury. However, he also noted it was possible that the diagnosis of posterior tibial tendonitis and dysfunction as well as a flexible pes plano valgus foot deformity occurred sometime between the claimant's evaluations with Dr. Patel and her initiation of care with Dr. Lin. He noted there was evidence that it supported a possible pre-existing condition involving the posterior tibial tendon following the November 1, 2019 MRI, which revealed evidence of mild tendonitis of the tibial tendon. Regardless of causal connection, Dr. Toolan noted Petitioner had reached maximum medical improvement. Further, he did not believe Petitioner had any permanent partial disability as a result of her left ankle injury.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

Here, Petitioner has demonstrated a previous condition of good health based on her testimony of lack of symptoms, lack of medical treatment, and ability to work unrestricted prior to the work accident. Petitioner has also demonstrated an accident based on her testimony (and Respondent does not dispute accident). However, Petitioner did not seek treatment for over three months and continued to work (minus 1 week). Even when she did begin to see a doctor for an unrelated work injury, she did not seek treatment for her foot/ankle until February 2018. As such, Petitioner has not demonstrated a subsequent injury sufficient to prevail on a chain of events theory. Instead, the Arbitrator looks to the medical opinions offered in this case.

Both Petitioner's treater, Dr. Lin, and Respondent's Section 12 examiner, Dr. Toolan, diagnosis Petitioner with dysfunction of the posterior tibial tendon with valgus deformity and deltoid ligament insufficiency. Dr. Toolan further states Petitioner has anterior medial ankle gutter impingement. Dr. Lin opined that Petitioner's diagnosis was as a result of her work injury while Dr. Toolan stated that he could not opine whether or not his diagnosis was casually related to the work accident. The Arbitrator acknowledges that there are significant gaps in Petitioner's treatment only some of which can be reasonably explained by Petitioner's shoulder treatment. In evaluating the credibility of the doctors' opinions, the Arbitrator notes that both doctors' had adequate histories of the work accident that were consistent with Petitioner's trial testimony. While Dr. Toolan opines to other causes for Petitioner's conditions that *could have* pre-existed the injury, the Arbitrator finds that Dr. Lin's causation opinion is sufficient to meet Petitioner's burden in showing that her work-related injury was *a* causative factor in her current condition of ill-being.

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:

Having found for Petitioner on causation and relying on the medical opinions of Petitioner's treating physicians as well as Petitioner's testimony, the Arbitrator finds Petitioner's treatment to

be reasonable and necessary. Relying on Petitioner's Exhibit 4, the Arbitrator finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay Petitioner directly the outstanding medical services at IBJI ($163.67) as shown on Px 3 and 4, pursuant to Sections 8(a) and 8.2 of the Act and Perez v. Illinois Workers' Compensation Comm'n, 2018 IL App (2d) 170086WC, ¶ 17, 96 N.E.3d 524.

Issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

At the time of trial, Dr. Lin's surgical recommendation was over three and a half years old. Dr. Lin had not evaluated Petitioner since December 30, 2019. When Dr. Lin was deposed in September 2022, he specifically stated that he was unaware of her current condition. Petitioner was seen by IBJI on May 18, 2022 but Dr. Anderson deferred to Dr. Jasonowicz who saw her on June 6, 2022. Dr. Jasonowicz requested additional prior medical records. Petitioner never returned.

Based on the above, the Arbitrator finds that Petitioner has failed to meet her burden that she is entitled to surgery as prescribed by Dr. Lin.

Issue L, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

The parties agree that Petitioner has received TTD benefits from September 27, 2017 through January 4, 2022 under a concurrent claim. At issue are TTD benefits from January 5, 2022 through the date of hearing (July 6, 2023). See Ax 1.

It is Petitioner's burden to prove whether her condition has stabilized and whether she is capable of a return to the workforce. See Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d 132, 148 (2010). Petitioner testified that she had not returned to Dr. Lin since December 30, 2019 even though she was instructed to return for reevaluation in approximately 6 to 8 weeks. At his evidence deposition in September of 2022, Dr. Lin testified that he is unaware of Petitioner's current condition and specifically stated that he was unaware of her current work status. See Px 5, pp. 14-15.

Petitioner was seen by IBJI on May 18, 2022 but Dr. Anderson placed her off work and deferred her to Dr. Jasonowicz who saw her on June 6, 2022. Dr. Jasonowicz wrote, "it is difficult for me to provide her with permanent or long-term restrictions. From my standpoint she was able to ambulate into the office and clearly can walk. I would recommend sitting accommodations until we can further understand what her pathology is." (Px 3). Even though Petitioner was instructed to return as needed or to follow up with her primary doctor, it is clear that Dr. Jasonowicz's sedentary restrictions were not intended to be long term. As Petitioner did not return to IBJI (or any provider), the Arbitrator will not extend Petitioner's TTD benefits beyond eight weeks after seeing Dr. Jasonowicz.

Based on the above, the Arbitrator finds Respondent liable for 10 6/7 weeks of TTD benefits (5.18.22 to 8.1.22) at a weekly rate of $578.78 which corresponds to $6,283.90 to be paid directly to Petitioner.

Issue M, whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator declines to impose penalties or fees upon Respondent given the substantial gaps in treatment and reasonable reliance on the medical opinions of Dr. Toolan.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC016844
Case Name	Sylvia Jones (Widow of Antoine Jones Deceased) v. Cook County Sheriff's Dept.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0227
Number of Pages of Decision	4
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Frank Sommario
Respondent Attorney	Jynnifer Cotharn

DATE FILED: 5/20/2024

/s/ Raychel Wesley, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SYLVIA JONES, widow of Antoine Jones (deceased),

Petitioner,

vs. NO: 20 WC 16844

COOK COUNTY SHERIFF'S DEPARTMENT,

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Respondent's Petition for Review of the May 16, 2023 Decision of the Arbitrator[1]. Therein, the Arbitrator found Petitioner proved she is the surviving spouse of Decedent Antoine Jones. The Arbitrator awarded death benefits under §7, commencing May 11, 2020, and imposed §19(l) penalties of $10,000, §19(k) penalties of $64,170.47, and §16 attorney's fees of $14,834.09. On its timely filed Petition for Review, Respondent identified the following issues: Decedent's marital status, Decedent's dependents, permanent disability, penalties under §19(l) and §19(k), and attorney's fees under §16.

On September 19, 2023, while the matter was pending on Review, Petitioner filed a further petition for §19(k) penalties and §16 attorney's fees. Therein, Petitioner noted Respondent's Statement of Exceptions did not advance any argument on the underlying award of death benefits, yet no death benefits had been issued to Petitioner; Petitioner alleged Respondent's refusal to institute payment of the continually accruing death benefits "despite the fact that Respondent has not sought review of the Award of the death benefits" merited the imposition of additional penalties and attorney's fees.

[1] The Commission observes the matter was brought to trial pursuant to a Petition for Immediate Hearing Under §19(b). As the claim is for death benefits relating to a fatal injury, the Commission corrects the scrivener's error to reflect the proper classification is Petition for Immediate Hearing for Death Benefits. Given the nature of the case, there is no need to remand the matter to the Arbitrator.

On December 14, 2023, a hearing on Petitioner's post-Decision penalties petition was held before Commissioner Deborah Simpson, with Counsel for both parties providing argument as well as supporting documentary evidence. The petition was taken under advisement, with the Commission's ruling to issue with the underlying Decision and Opinion on Review.

Notice having been 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, and, additionally, denies Petitioner's September 19, 2023 petition under §19(k) and §16. The Commission first emphasizes Respondent did in fact seek review of the underlying death benefits on its Petition for Review; Respondent's subsequent failure to argue the issue in its Statement of Exceptions does not remove the issue from consideration on Review. The Commission further observes that during the December 14, 2023 hearing, Respondent's Counsel made multiple affirmative statements on the record that Respondent had commenced paying death benefits:

> Ms. Bates-Cotharn: Respondent also wishes to add that despite its position, which we firmly believe in, we have agreed to in good faith pay the award. For whatever reason, it's been delayed through the comptroller, but the lump sum payment of the award is pending. And we have begun payment of the weekly benefits to opposing counsel. (December 14, 2023 Transcript, p. 8);
>
> Ms. Bates-Cotharn: …benefits have begun for Petitioner. He has received the first installment of the death benefits, and I can attest that the other payment is forthcoming. There has been a delay, but I have indicated to opposing counsel as he has stated that the lump sum payment is pending. (December 14, 2023 Transcript, p. 24).

Counsel is an officer of the court and the Commission accepts her attestations regarding Respondent's issuance of death benefits as truthful. The Commission notes all practicing attorneys are bound by the Rules of Professional Conduct, including the rule requiring candor toward the tribunal: Rule 3.3 of the Illinois Rules of Professional Conduct provides, "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Ill. R. Prof. Cond. 3.3(a)(1) (eff. Jan. 1, 2010)*.

While the Commission agrees with the Arbitrator and finds Respondent failed to prove its conduct prior to the arbitration hearing was reasonable under the circumstances and therefore warranted the imposition of penalties and attorney's fees, we do not find Respondent's conduct while the matter pended on Review was unreasonable or vexatious. As such, we decline to impose an additional award of §19(k) penalties and §16 attorney's fees. The September 19, 2023 penalties petition is hereby denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 16, 2023, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner death benefits of $961.87 per week commencing on May 11, 2020 and continuing until $500,000 or 25 years of benefits have been paid, whichever is greater, as provided in §7 of the Act. If Petitioner remarries, Respondent shall pay her a lump sum equal to two years of compensation benefits; all further rights of Petitioner shall be extinguished. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(l) penalties in the amount of $10,000.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(k) penalties in the amount of $64,170.47.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §16 attorney's fees in the amount of $14,834.09.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's September 19, 2023 penalties petition is denied.

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

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

Under §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.

MAY 20, 2024

/s/ *Raychel A. Wesley*

RAW/mck

O: 4/10/24

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC020053
Case Name	Sterling Davis v. SC2
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0228
Number of Pages of Decision	29
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Todd Strong
Respondent Attorney	Michael Baggot

DATE FILED: 5/20/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STERLING DAVIS,

Petitioner,

vs. NO: 20 WC 20053

SC2,

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, causation, temporary total disability ("TTD"), permanent partial disability (PPD"), and injurious practices under §19(d), and being advised of the facts and law, modifies the Decision of the Arbitrator as specified below, and otherwise affirms and adopts the Decision of the Arbitrator which is attached to and incorporated into this decision.

Findings of Fact – Testimony

Petitioner testified his highest level of education was the 11th grade/GED. Previously, he worked as chipper/grinder for HB Enterprises. In that job he used pneumatic tools such as "cup grinders, pencil grinders, chisels to chip off pieces of whatever you could mold for these parts for Caterpillar." He worked on pieces of engine blocks. Petitioner explained that he used an air hammer and chisels to "chip all of this stuff off." Thereafter, he would use a pencil grinder and "like six processes with six different tools." "Each tool for a different piece of the block" before he sands it out. He had a Workers' Compensation claim from that job, which was settled in March of 2010. After an EMG, Petitioner had bilateral carpal tunnel syndrome ("CTS") release surgery and was released to work in late 2009/early 2010 with permanent restrictions of no use of vibratory tools.

Petitioner agreed that he did not seek medical care for about 11 years, and then he was "incarcerated for a long period of time" where he received no medical treatment. Upon his release on parole, he sought employment with Respondent to comply with the terms of his parole. Initially, he worked there through a staffing company and then Respondent offered him a full-time job as general laborer.

Petitioner was shown PX3, a description of Petitioner's job activities as laborer for Respondent. It was his understanding that the work he was going to perform for Respondent would not expose him to vibration, which would have been in violation of the permanent restrictions imposed by Dr. Rhode. He began working for Respondent on September 23, 2019, and in the Fall of 2019 he was reassigned from a general laborer as grinder/chipper to be a "blaster." He was a general laborer for only a short period of time. In the job as blaster, Petitioner sand blasted rust off parts with a tool "like a fireman's hose that sprays out." He was able to perform his job as laborer without difficulty with his hands/arms. Similarly, initially he had no problems with his hands/arms working as blaster.

In early 2020 he was transferred to perform other job duties. Respondent entered into a large contract with Caterpillar which caused a "need for chippers and grinders to do chipping and grinding work." Petitioner felt compelled to perform the job duties to which Respondent assigned him or his job would be jeopardized. He was told he was transferred to do perform chipping/grinding because he had experience. He noticed that they were using tools that he never used before. He tried to tell them they were the wrong type of grinders. They were not meant for long hours of use and he "burned up like three of them." Respondent "took them back" and got "more grinders." Respondent did not provide him with anti-vibration gloves. He has seen chippers/grinders routinely supplied with anti-vibration gloves. He informed Respondent and requested the gloves.

Around August of 2020 he noticed tingling in in his fingertips bilaterally. He was shown PX2, which was his job to which he was assigned by Respondent. It was different from PX3, the job description of the job he was hired to perform. It was the duties in PX2 which Petitioner associated with the numbness/tingling in his fingers.

Petitioner testified he worked 40 hours a week, plus overtime sometimes on Saturday. He worked consistently in that job from January of 2020 until his report of accident/injury. After his notice, Respondent wanted him to take a drug test. His employment was terminated for "failure to submit to a drug test." He told Respondent that he was refusing because while he openly admitted smoking Marijuana, he had not used the substance for a period before the accident and "that didn't cause [his] injury." He was alleging a repetitive trauma accident/injury and he was not intoxicated at the time of the accident. Petitioner testified his supervisor, Tyler, told him that he was being assigned to chip and grind. Petitioner "wanted to stay in blast," but felt that he "had no choice." He thought that if he lost his job he would have been reincarcerated.

In performing his job from January of 2020 through August of 2020 Petitioner began to experience tightening/tingling in both his hands and arms; he couldn't "feel certain sensations" and he had weak grip in both hands. He had similar symptoms in 2008 and 2009. Petitioner did not talk to anyone at Respondent about getting medical attention, instead he saw a lawyer and filed a Workers' Compensation claim. After the application was filed, Respondent refused to authorize any treatment.

Petitioner returned to Dr. Rhode who ordered an EMG. Thereafter, Dr. Rhode performed bilateral CTS/CUTS surgeries on November 10, 2020 and February 9, 2021, respectively. Previously, in 2008, 2009, Petitioner had right CTS surgery, but not left CTS surgery. He also had left cubital tunnel syndrome ("CUTS") surgery in 2009 but did not have prior right CUTS surgery before the instant accident. Petitioner testified Dr. Rhode took him off work from August 5, 2020 through June 23, 2021 and he had not received any TTD benefits. Dr. Rhode released him to work at full duty, but then on August 4, 2021 he reinstated permanent restrictions of no repetitive gripping/grasping/using vibratory tools. He found "temporary partial employment" around November 5, 2021.

Petitioner testified that currently in "certain temperatures," his "fingers will still turn white and cold. Still get numb in the mornings." He had similar complaints in 2008 and 2009. He was now a maintenance person at a Marriot and earned $13.50 an hour. That was "fairly compatible" with what he was earning from Respondent.

On cross examination, Petitioner testified he was incarcerated for attempt armed robbery and sentenced to 13 years. He agreed that he worked as a chipper/grinder at another company for about seven months before working for Respondent. He was laid off from that job and found one with Respondent. He was not reincarcerated after being laid off from the previous employer.

Petitioner identified RX1 as part of paperwork he filled out when employed by Respondent. In the paperwork, he did not mention the permanent work restrictions imposed by Dr. Rhode. Petitioner agreed that his previous Workers' Compensation settlement included bilateral CTS, CUTS, and a shoulder condition. That claim was settled for over $174,000.00, which included loss of 45% (actually 40%) of the MAW. He was provided safety guidelines when he began working for Respondent. Petitioner was shown RX2, and Petitioner agreed that he was hired as a grinder as well as a laborer. He had told Tyler" about his prior issues with CTS/CUTS. Petitioner was also shown RX3 which outlined job duties he was to perform. Petitioner apparently signed the document attesting that he was physically able to perform the job duties. He did not discuss any vibratory tools/lifting restrictions imposed by Dr. Rhode.

Petitioner agreed he started doing blasting in January 2021. In April he was moved to blasting the "fab" job. He denied that Respondent asked for volunteers to work grinding. No vibration gloves were available when he was grinding. Petitioner reiterated that he was terminated because he refused a requested drug test.

On redirect examination, Petitioner there were two days between the time he left the blaster job and started the grinder job. He was not in trouble with parole for that move. RX1 was the "hire sheet" which indicted he was hired as a general laborer. That description does not indicate any use of vibratory tools.

On examination by the Arbitrator, Petitioner testified the handwritten portion of RX2 adds grinding and guidelines. He did not insert the handwritten portion, but he did sign it. He thought the handwritten portion was there when he signed it, but he wasn't certain. He did not recognize the handwriting.

On re-re-cross examination, Petitioner agreed that he signed part of the safety guidelines for grinding.

Hernando Mata was called by Respondent for which he worked as hiring manager. He was familiar with the "fab jobs" in April of 2020. They had received a new project that involved the "fab" jobs. They reached out to the employees for volunteers to perform these jobs. He "could not see" any employee being fired for not going to the fab job.

On cross examination, Mr. Mata testified he had no documentation of Petitioner volunteering. Petitioner's description of the use of vibratory tools was accurate.

Findings of Fact – Documentary/Medical evidence

On March 22, 2010, the Commission approved a settlement in 09 WC 101764 for alleged injuries of bilateral CTS/CUTS and shoulder impingement from repetitive trauma due to chipping and grinding. The settlement is in the amount of $174,149.44, with deduction of $34,500.00 in attorney fees, $44,522.39 in medical bills, and net proceeds to Petitioner of $94,622.39. The settlement specifies that it represents 40% loss of the person-as-a-whole.

In the job of chipper, Petitioner used grinder disk and baby cam grinders. He worked 40-56 hour a week. He had to flip parts over by hand, buff them out, and had his hand wrapped around the grinders. Basically, he grinded all day with a 15-minue break and ½ hour lunch. He was never given any written description of his job by the employer. He believed the vibration and repetitive use of grinders without providing "proper gloves with padding" caused or contributed to his condition.

Respondent identified the physical requirements of the job included lifting up to 75 lbs for men. Equipment to be used included Banding equipment, utility knives, hand jacks, heat sealing devises. "Some areas involve the use of hoists, hammers, pry bars, sanders, nail guns, or other vibratory tools." Petitioner checked "yes" that he was able to perform the tasks indicated. The area of necessary accommodations is blank.

On September 23, 2019, Petitioner signed the new employee data record indicating that he reviewed the job descriptions of general laborer, heavy lift general laborer, and fork lift operator. He acknowledged that he could physically perform those duties. The duties included constant hand/wrist motion. There is a checklist of training Petitioner received. Handwritten is the notation "Added griding guidelines, grinders are used in the mezz area."

In the job safety guidelines for grinding, Petitioner acknowledged that he must "ALWAYS wear PPE – leather or anti vibration gloves, dust mask, safety glasses, face shield, and hearing protection" (emphasis in original). As of April 12, 2020 Petitioner was internally transferred from the job of blaster to the job of material handler in Fabrication for "new business opportunity."

On August 5, 2020, Petitioner presented to Dr. Rhode for evaluation of work-related bilateral shoulder, elbow, and wrist pain for about a month. He worked as a chipper/grinder for 18 months, which required him to use pneumatic/vibratory tools. Petitioner described his job as "highly forceful and repetitious and significant exposure to vibration." He had right CUTS surgery and right CTS release in 2009 for conditions secondary to his work as chipper/grinder. He was released to full duty after those surgeries and was doing well until the recent onset of symptoms. Dr. Rhode diagnosed bilateral CTS/CUTS secondary to his exposure as chipper/grinder for 18 months. He ordered an EMG and took Petitioner off work. The EMG showed bilateral CTS, moderately severe on the left and mild and neuropathic on the right, bilateral CUTS, moderately severe on the right, mild on the left, and no evidence of proximal, distal, entrapment, cervical, or brachial neuropathies.

On September 16, 2020, Petitioner returned to Dr. Rhode after an EMG, which was positive for bilateral CTS, left greater than right, and bilateral CUTS, right worse than left. Dr. Rhode decided to administer an injection in the left wrist and provided bilateral wrist splints.

Two weeks later, Dr. Rhode noted that Petitioner reported 4/10 pain and that the injection provided only temporary relief. Petitioner indicated he no longer wanted to live with the left-sided symptomology and wanted to proceed with left CUTS/CTS surgery. Dr. Rhode took Petitioner off work pending surgery. Dr. Rhode performed left open CUTS/CTS release with submuscular transposition for left CTS/CUTS on November 10, 2020.

Three weeks post left CUTS/CTS surgery, PA Groeber noted that Petitioner was stable. He was still symptomatic on the right and wanted to proceed with right CUTS/CTS surgery. She kept Petitioner off work. Dr. Rhode performed right open CUTS/CTS release with submuscular transposition for right CTS/CUTS on February 9, 2021.

On March 31, 2021, Petitioner reported he felt good four weeks post left CUTS/CTS surgery. He had a Section 12 medical examination in which the doctor opined that Petitioner could return to work as a grinder but also that his ignoring the restrictions of no use of vibratory tools was injurious. He also opined that he was impaired from a pre-existing condition and his current symptoms were a natural progression of those prior symptoms. Dr. Rhode opined that since

Petitioner returned to work he "sustained an interval change of his bilateral [CTS/CUTS] secondary to his job exposure as a chipper and grinder. The fact that the patient potentially disregarded the prior work restrictions may have predisposed him to worsening symptomology. That being said, it [was his] opinion that the patient's job exposure was an aggravating component to his current symptomology." He kept Petitioner off work.

On June 23, 2021, Dr. Rhode noted Petitioner was stable after left CUTS/CTS surgery with 6/10 pain, worse with heavy activity. Dr. Rhode declared Petitioner at MMI, released him to full duty, and released from treatment *prn*.

Petitioner returned to Dr. Rhode on August 4, 2021, reporting he had difficulty working full duty and difficulty cleaning. He also reported pain in his right shoulder. Dr. Rhode declared again Petitioner at MMI and released him to work with permanent restrictions of "medium heavy duty (maximum 70-lbs and frequent 35-lbs lifting) with additional permanent restrictions of only occasional repetitive grasping and use of vibratory tools.

Findings of Fact – Doctor Depositions

On September 1, 2021, Dr. Rhode testified by deposition that he was board certified in orthopedic surgery and sports medicine. He first saw Petitioner on August 5th when he complained of bilateral shoulder, wrist, and elbow pain for a month. He worked as a chipper/grinder for about 18 months the duties of which required "forceful, repetitious, and vibratory, utilizing pneumatic tools and vibratory tools such as sanders and chippers." He had a similar job in the past. He had prior left CUTS/right CTS surgery secondary to the job of grinder/chipper. Dr. Rhode testified he treated patients whose jobs were grinder/chipper and was familiar with their job activities. The job involved significant number of vibratory tools. He has actually seen, observed, and held such tools. Besides the vibration, the tools also required "manipulation of the fingers and wrists and elbows in a forceful fashion." He noted that the operator of these tools have to apply a "counterforce to the tool because it's essentially acting like a gun and firing." He opined that there was "100 years of data to support" the relationship between use of such tools and CTS/CUTS. The job is "high risk" and the exposure dose was so intense that the amount of exposure does not have to be that extensive.

On examination, Petitioner exhibited signs consistent with bilateral CTS, bilateral CUTS, and mild bilateral rotator cuff tendonitis. Petitioner had no history of diabetes or thyroid dysfunction. He smoked, which can be associated with CTS/CUTS, but his BMI was below the risk level. Petitioner did not report treatment after his prior CTS/CUTS surgery from 2009 to the instant injury and this represented a new onset of symptoms. He took Petitioner off work and ordered an EMG. After a therapeutic/diagnostic injection provided temporary relief, Dr. Rhode recommended left CTS/CUTS surgery and Petitioner wanted to proceed. That surgery was performed on November 10, 2020. He continued to treat Petitioner postop and on February 9, 2021, he performed right CTS/CUTS surgery.

He released Petitioner on a trial basis and on August 4, 2021, he reported difficulty working full duty and heavy activity worsened his symptoms. Thereafter, Dr. Rhode modified work restrictions to medium/heavy duty with occasional vibration. His restrictions were all based on Department of Labor guidelines. Dr. Rhode testified all the treatment he provided Petitioner was necessary and reasonable. He believed his work activities as grinder/chipper were a causative factor in his development of bilateral CTS/CUTS.

Dr. Rhode was asked to comment on Dr. Balaram's opinion that his symptoms were merely residual symptoms from his prior CTS/CUTS conditions. Dr. Rhode opined that the lack of treatment for 10 to 11 years would suggests a new injury.

On cross examination, Dr. Rhode agreed that he first saw Petitioner in April of 2009. He did not go and inspect Petitioner's worksite or have specific knowledge of Petitioner's job or the tools he used. He agreed that on August 5, 2020 he released Petitioner to light-duty work. He also agreed that he released Petitioner to work at full duty on June 23, 2021. Later, he reimposed the permanent restrictions because Petitioner had symptomology performing full-duty work. He imposed those permanent restrictions in the hope that Petitioner would not reinjure himself. He has no future appointments scheduled with Petitioner.

Dr. Rhode agreed that when he saw Petitioner in 2009 he had similar symptoms as he did in 2021 and was diagnosed with the same conditions of bilateral CTS/CUTS. He opined that Petitioner's condition in 2009 was caused by exposure to his job as grinder/chipper, which was the same job he had in 2020. In 2009, Petitioner had worked in the job of grinder/chipper for two years prior to developing symptoms. He agreed that the EMG from 2009 found right CTS and left CUTS. Dr. Rhode agreed that after the 2009 surgeries, he placed permanent restrictions on Petitioner of medium/heavy PDL, with no use of vibratory tools, and occasional pushing/pulling/repetitive grasping. Dr. Rhode also agreed that on November 5, 2009, he noted that Petitioner was at high risk for recurrence.

On redirect examination, Dr. Rhode agreed that in his Section 12 report, Dr. Balaram indicated he agreed with the permanent restrictions Dr. Rhode imposed. He did not have access to health screening records Respondent had to assess his physical abilities to perform the duties of his job. He had no idea why Respondent hired Petitioner.

Dr. Balaram testified by deposition on October 12, 2021 that he was a board certified orthopedic surgeon with a certificate of added qualification in hand surgery. His practice was focused on the fingertips to the shoulder. He was familiar with CTS/CUTS, treated those conditions, and performed surgery for those conditions. Dr. Balaram performed a Section 12 examination on Petitioner on January 19, 2021. Petitioner reported the gradual onset of pain in the left wrist/elbow for about a year, which he associated with work activities of repetitive lifting, pushing, hammering, and grinding. He reviewed records from 2009, which showed that Petitioner's current condition was pre-existing.

Upon completion of treatment in 2009, Dr. Rhode imposed permanent restrictions of medium to heavy PDL with only occasional pushing/pulling/repetitive grasping, and no exposure to vibratory tools. In his examination, he did not note any residual pathology on Petitioner's right side or anything consistent with right hand/wrist dysfunction. He was aware that Dr. Rhode's office had recommended right CTS/CUTS surgery.

Petitioner reported working as a grinder/chipper since 2007, which appeared to be the job he had in 2009 when he was placed on permanent restrictions. He reported he had a new injury in 2020 working for Respondent using vibratory machines to burr metal. He noted that Petitioner was placed on permanent restrictions in 2009 and there was no indication of any new injury. However, he could not say if his symptoms persisted from 2009 to 2020. Dr. Balaram believed Petitioner's recent left-sided surgery was related to his prior condition and not any new injury. He noted that in 2019 he was found to have residual left-sided symptomology. The right-sided surgeries in 2020 were basically the same as that in 2009 and for the same diagnoses. He seemed unsure why Dr. Rhode would have released him to full duty in 6/21 when he had previously placed permanent work restrictions on him. Petitioner reported being a 10-pack a year smoker, which probably had a "contributory effect to the patient's condition."

On cross examination, Dr. Balaram testified he could not cite an article about the association between smoking and CTS/CUTS; it's based on his understanding of physiology and that "decreased small vascular disease smoking can lead to peripheral neuropathies." He agreed that he saw no records indicating Petitioner sought treatment from 2009 and 2020, or whether he had persistent symptoms during that period. Dr. Balaram had treated patients who used grinding/vibratory machines to buff parts and agreed that repetitive forceful grasping, use of vibratory tools, and awkward wrist positioning can foster development of peripheral neuropathies.

Nevertheless, Dr. Balaram stated these neuropathies were present in 2009. These neuropathies naturally worsen over time. Therefore, he believed Petitioner's condition was the natural progression of his pre-existing condition. He agreed that the 2020 EMG showed left CTS while the 2009 EMG did not. He noted that while there were some discrepancies between the 2009 and 202 EMG, there was also intervening surgery which could invalidate the results of a repeat NCV. Dr. Balaram would likely have imposed the same restrictions as Dr. Rhode based on his symptoms, but he was not sure he would have made them permanent.

On redirect examination, Dr. Balaram indicated that the change in EMG in 2009 and 2020 could indicate a new compressive neuropathy or simply the effects of the 2009 surgery.

On re-cross examination, Dr. Balaram agreed that in 2009 Petitioner had left CUTS and right CTS surgery. He dd not opine that Dr. Rhode should have performed right CTS surgery, he simply noted that he had symptoms at that time.

Conclusions of Law

The Arbitrator found that Petitioner sustained his burden of proving that he sustained a repetitive traumatic accident in performing his job as grinder/chipper, which caused conditions of ill-being of his upper extremities bilaterally. He also found that Petitioner's work activities did not constitute an injurious practice. The Arbitrator did not consider that action so willful and wanton, or so grossly negligent as to take Petitioner out of his employment. He awarded Petitioner 46 weeks of TTD, medical expenses submitted into evidence totaling $142,966.04, and 162.70 weeks of PPD representing loss of the use of 15% of each hand and 20% of each arm.

Respondent argues that the Arbitrator erred in finding accident/causation. It stresses Petitioner's pre-existing condition and Dr. Balaram's opinion that his current conditions were simply a natural progression of his pre-existing conditions. It then relies on the injurious practice doctrine because Petitioner took the job as grinder despite his permanent work restrictions of no use of vibratory tools.

The Commission agrees with the Arbitrator on the issues of accident, causation to Petitioner's left arm conditions of ill-being, the PPD award for Petitioner's left hand and arm, and his conclusion that Petitioner's work activities did not constitute an injurious practice under §19(d) of the Act. Therefore, the Commission affirms and adopts the Decision of the Arbitrator on the issues of accident, causation to his left-sided condition of ill-being, the award of medical expenses for treatment for his left hand/arm, the TTD award for his left-sided conditions, and the PPD award for ill-being of the left-sided conditions of CTS/CUTS.

However, the Commission reverses the Arbitrator's finding that Petitioner's right-sided CTS/CUTS was caused by the repetitive trauma accident. In this regard, the Commission finds the opinions of Dr. Balaram more persuasive than those of Dr. Rhode. We note that the right-sided pathologies Petitioner had in 2009 and 2020 were the same, as were the surgeries that were performed. It is not uncommon for the peripheral neuropathies of CTS/CUTS to recur or redevelop even absent any offending stimulus. Also, as Dr. Balaram testified these peripheral neuropathies naturally worsen over time. Finally in this instance in 2019, prior to the instant injury, Petitioner was found to have residual right-sided symptomology from his 2009 condition and surgery, suggesting ongoing problem with his right-sided CTS/CUTS before the instant accident. In addition, Dr. Rhode conceded that Petitioner was at risk for the re-development of CTS/CUTS.

Accordingly, the Commission reverses the finding of the Arbitrator that Petitioner's conditions of ill-being of right-sided CTS and CUTS were caused by the repetitive trauma accident on August 4, 2020 and vacates the Arbitrator's awards of medical expenses, TTD, and PPD, for those conditions. Regarding medical expenses and TTD, the Commission uses the date of the right-sided CTS/CUTS surgeries of February 9, 2021 as the cut-off date, because any treatment and temporary disability Petitioner experienced after that date would be based on treatment for, and disability related to, his right-sided CTS/CUTS.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated December 12, 2022 is hereby modified as specified above and otherwise affirmed and adopted, which is attached to and incorporated into this decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical bills incurred from the date of accident, August 4, 2022, prior to the date of Petitioner's right-sided CTS/CUTS surgery, February 9, 2021, pursuant to §8(a), subject to the applicable medical fee schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner $314.52 for weeks 27 weeks commencing August 5, 2020 through February 9, 2021, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner $282.93 per week for 81.35 weeks because the injuries sustained caused the 15% loss of the left hand and 20% of the left arm, pursuant to §8(e) of the Act.

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.

MAY 20, 2024

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

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

DLS/dw
O-3/20/24
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/s/*Raychel A. Wesley*
Raychel A. Wesley

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC020053
Case Name	Sterling Davis v. SC2
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	18
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Todd Strong
Respondent Attorney	Michael Baggot

DATE FILED: 12/12/2022

THE INTEREST RATE FOR THE WEEK OF DECEMBER 6, 2022 4.57%

/s/Kurt Carlson, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF **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

Sterling Davis
Employee/Petitioner
v.
SC2
Employer/Respondent

Case # **20** WC **020053**

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 **September 27, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Injurious practices under Section 19(d)**

FINDINGS

On **08-04-20**, 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 $**24,520.60**; the average weekly wage was $**471.55**

On the date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**0** 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 $314.52/week for 46 weeks commencing 08-05-20 through 06-23-21, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $142,966.04, pursuant to the medical fee schedule, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $282.93/week for 162.70 weeks, because the injuries sustained caused the 15% loss of each hand and 20% loss of each 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.

Kurt A. Carlson

Kurt A. Carlson

DECEMBER 12, 2022

In support of the Arbitrator's decision relating to:

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

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

(L) What is the nature and extent of the injury?

Accident, causal connection and nature and extent are at issue in this case.

At the time of arbitration, the petitioner was 42 years of age with an 11th grade education and GED. (TR8). His past work experience was that of a chipper and grinder. The petitioner described his use of handheld cup grindings, pencil grinders, and chisels to chip off pieces of mold on engine parts for Caterpillar. (TR9). These grinders were pneumatically driven hand tools. (TR10). Petitioner testified that he was required to use pneumatic tools of a vibratory nature to perform work to chip and grind molten slag on engine parts and to clean up engine parts to make them free of slag that was on the engine parts after they left the foundry. (TR11). The petitioner described his use of an air hammer and the process of using six different types of pneumatic tools. (TR11). The petitioner acknowledged the settlement of his prior workers' compensation claim against Haggarty Brothers and/or HB Enterprises. (TR13). In his previous workers' compensation claim, the petitioner had an EMG performed some time in 2009 with Dr. Edward Trudeau. (TR14). He was diagnosed with right carpal tunnel and left cubital tunnel which resulted in surgical intervention in his prior workers' compensation claims. (TR14). The petitioner received no medical care for 11 years from 2010. (TR14-15).

The petitioner was solicited by SC2 to apply and become a full-time employee on or about March 23, 2019. (TR17). The petitioner was hired on as a general laborer for SC2 that would not have violated his permanent work restrictions. (TR17). The petitioner testified that the general laborer position did not require exposure to vibrating tools. (TR18). The petitioner was asked and answered the following:

> Q. Was it your expectation that when you started employment at SC2 that you would not be required to work or perform any job duties that would in

any way be violative of the permanent work restrictions that you were assigned?

A. No, sir. (TR19-20).

The petitioner testified that his permanent work restriction from Dr. Rhode in early 2010 was "no exposure to vibration." (TR22). The petitioner went 11 years with no medical treatment. (TR22).

The petitioner began his employment at the respondent's facility on September 23, 2019. (TR23). The petitioner, at some point, was transferred to a blaster position by the employer. (TR24). The petitioner felt that he was able to perform the blaster position without problem. (TR25). The petitioner described that he was required by his employer to be transferred to a chipping and grinding position for the respondent. (TR28). The petitioner brought to the attention of the respondent that he felt that he was being given the wrong type of chippers, grindings, and hand tools to use and that he was not provided with anti-vibration gloves. (TR29).

The petitioner noticed that he began experiencing tingling in his hands, arms, shoulders, and neck on or about August 4, 2020. (TR31). He had tingling in his fingertips in both hands. (TR31).

The petitioner testified that he gave notice his supervisor that he was experiencing numbness and tingling in his hands while performing chipping and grinding activities. (TR34-35). He notified his supervisor, Tony C. (TR35). The petitioner testified that his hours were increased from 40 to 56 hours per week on January 25, 2020. (TR36). The petitioner testified that he was told he was going to chip and grind by Tyler, his supervisor. (TR39-40). The petitioner testified that tightening and tingling in the arms and hands continued from January to August, 2020. (TR41).

The petitioner testified that he requested authorization to be seen by a doctor. (TR43). Authorization for medical care and treatment was immediately denied. (TR44). At no point in time was medical care or treatment ever authorized or approved by the respondent. (TR44-45). The petitioner sought out medical care and treatment with Dr. Rhode. He was referred back to Dr. Edward Trudeau for a subsequent EMG/NCV study on August 17, 2020. The petitioner remained under the care of Dr. Rhode and eventually underwent surgical interventions as described below.

The petitioner testified that he was temporarily and totally disabled from August 5, 2020 through June 23, 2021. (TR48). Petitioner returned to Dr. Rhode on August 4, 2021 and the permanent work restrictions of no repetitive grip, grasp, and no vibratory tools was imposed by Dr. Rhode. This restriction is different and more intensive than the prior restriction from 2010, which only included no exposure to vibration. This current restriction removed the petitioner from his usual and customary line of employment as a chipper and grinder.

The respondent called Hernando Mata, the hiring manager for the respondent's facilities, as its witness. Mr. Mata testified that he was familiar with the Fab Shop at SC2. Mr. Mata described that they started a new project in downtown Peoria called SCS2 Fab Shop when they received a contract out of the State of Texas. This witness could not provide any documentation in writing that the petitioner did a voluntary job transfer to the chipping and grinding position. (TR69-70). Mr. Mata does not dispute the job description and actual performance of chipping and grinding with various pneumatic tools as described by the petitioner. (TR70).

The Arbitrator finds that the petitioner submitted his Application for Adjustment of Claim alleging repetitive trauma injuries from chipping and grinding activities manifesting on or about August 4, 2020. The petitioner claims injuries to his hands and arms. (PX1).

The respondent offered a prior Lump Sum Settlement Contract obtained by the petitioner as respondent's Exhibit No. 5, which demonstrated the petitioner's workers' compensation claim for alleged repetitive trauma injuries to his hands and arms due to chipping and grinding. The Arbitrator notes that the settlement was approved by then Arbitrator Mathis on March 22, 2010 and was compromised at 40% loss of use of a whole person and $80,106.82 in disputed TTD and medical benefits. (RX5).

The Arbitrator notes that there is no evidence of medical care or treatment to the petitioner's hands or arms between March 22, 2010, the date of the approval of the Lump Sum Settlement Contract and August 5, 2020, which is the date of petitioner's first medical visit with Orland Park Orthopedics. (PX5). A history was taken by Dr. Rhode at that time from petitioner as "patient presents for evaluation of a work-related bilateral shoulder, wrist, and elbow injury that developed approximately one month ago." Petitioner complained of bilateral lateral shoulder pain, bilateral wrist pain with numbness and tingling, and bilateral elbow pain. The petitioner has worked as a chipper and grinder for SC2 for approximately 18 months. This requires him to operative pneumatic and vibratory tools, including sanders and chippers. He described his job activities as highly forceful and repetitious with significant exposure to vibration. Prior to his employment as a chipper and grinder, he was working for CCR for approximately 7 months. He described his job as significantly forceful. The petitioner was previously treated at Orland Park Orthopedics for left elbow cubital tunnel syndrome and right wrist carpal tunnel syndrome sustained secondary to a prior exposure as a chipper and grinder. He underwent left and right carpal tunnel release in 2019. He ultimately returned to full duty and was doing well until his recent symptom onset. (PX5).

The petitioner was referred to Dr. Edward Trudeau to perform an EMG/NCV study on August 20, 2020. (PX7). The EMG/NCV study demonstrated positive abnormal findings for bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. (PX7).

Subsequent to the EMG/NCV study, the petitioner returned to Dr. Rhode who prescribed surgical intervention. The petitioner was referred to Koch Family Medicine for preoperative clearance. (PX6).

The petitioner underwent left carpal and left cubital tunnel surgeries on November 10, 2020 at South Chicago Surgical Solutions in Orland Park, Illinois. (PX8).

The petitioner underwent right carpal and right cubital tunnels surgeries at South Chicago Surgical Solutions on February 9, 2021. (PX9).

The petitioner reached maximum medical improvement with Dr. Blair Rhode and was assigned permanent work restrictions on August 4, 2021. (PX10).

Dr. Rhode initiated permanent work restrictions of occasional repetitive grasping, occasional exposure to vibratory tools, and assigned a medium-heavy job classification on a permanent basis. (PX10).

The petitioner introduced a copy of his personnel file. (PX4). It is clear petitioner was hired by the respondent full-time after this temporary period of employment through Sedona Staffing at the SC2 facilities. The respondent hired petitioner on full-time on September 23, 2019. (PX4). The New Employee Data Record states, “I have reviewed the selected job description(s) on page 2 and have had the opportunity to ask questions.” Petitioner was provided a job description of general laborer, heavy lift general laborer, and fork truck operator. The employer’s job description of general laborer is provided as petitioner’s Exhibit No. 3.

The general laborer job description of the respondent does not contain any suggestion of performing chipping and grinding or exposure to vibration activities. The petitioner was asked to

sign the applicant's receipt of the physical demand levels of this job on September 23, 2019, the day he was hired. The petitioner was asked the following question: "Are you capable of performing the activities listed above with or without reasonable accommodations?" The petitioner answered "yes." The physical demand load of a general laborer does not include any exposure to vibration, chipping or grinding types of activities. (PX3).

The personnel file indicates that, in 2020, the petitioner was transferred to a new position and exposed to greater grinding activities because of a new job coming into the plant. (PX4).

The personnel file furthermore reflects that "Sterling is rather new to the blast but has caught on very fast. The key to this is because he works well with others." (PX4).

The petitioner offered the deposition testimony of Dr. Blair Rhode. (PX11). Dr. Rhode was asked and answered the following:

> Q. Doctor, has the work duties that were described to you in the patient's history and that we discussed at the onset of this deposition, the index visit, do you fell that those job activities manifesting symptomatology on or about August of 2020 constituted a causative factor to the diagnosis of bilateral carpal and bilateral cubital tunnel syndrome?
>
> A. Yes. I believe they were a causative factor. (PX11, p. 25).

The respondent requested an independent medical evaluation on January 19, 2021 with Dr. Ajay Balaram. (PX12).

Dr. Balaram's deposition was taken. (PX13). Dr. Balarham was asked and answered as follows:

> Q. So, the job activities themselves, the chipping and grinding activities that the Petitioner described in his history, those job activities can be causative to the conditions that were diagnosed and treated in this case, is that a fair statement?
>
> A. That's a fair statement. (PX13, p. 38).

In a repetitive trauma case, issues of accident and causation are intertwined. ***Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,*** 99 I.LC. 0961. In order to better define "repetitive trauma" the Commission has stated:

> The term "repetitive trauma" should not be measured by the frequency and duration of a single work activity, but by the totality of work activity that requires a specific movement that is associated with the development of a condition. Thus, the variance in job duties is not as important as the specific force, flexion and vibratory movements requisite in Petitioner's job. ***Craig Briley v. Pinckneyville Corr. Ctr.,*** 13 I.W.C.C. 0519 (2013).

"[I]n no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case." ***Christopher Parker v. IDOT,*** 15 1.W.C.C. 0302 (2015).

The Appellate Court's decision in ***Edward Hines Precision Components v. Indus. Comm'n*** further highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. ***Edward Hines,*** 365 Ill.App.3d 186, 825 N .E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." ***Id.*** at N.E.2d 780. Similarly, the Commission recently noted in ***Dorhesca Randell v. St. Alexius Medical Center,*** 13 1.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding o'f repetitive trauma can be made. ***Randell*** citing ***All Steel, Inc. v. Indus. Comm 'n,*** 582 N.E.2d 240 (1991) and ***Edward Hines supra.***

The Appellate Court in ***Darling v. Indus. Comm'n*** even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive

trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. ***Darling v. Industrial Comm'n,*** 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. ***Darling,*** N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim ofrepetitive trauma." ***Id.*** at 1142. Additionally, the Court noted that such information ***"may"*** carry great weight "only where the work duty complained of is a common movement made by the general public." ***Id.*** at 1142.

In ***City of Springfield v. Illinois Workers' Comp. Comm*** **'n**, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. ***City of Springfield v. Illinois Workers' Comp. Comm'n,*** 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (Ill. App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in ***City of Springfield v. Illinois Workers' Compensation Comm 'n,*** "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." ***Id.***

The Commission has also recognized that a claimant's employment may not be the only factor in his or her development of a repetitive compressive peripheral neuropathy. The Commission awarded benefits in a correctional case where the claimant was involved in martial

arts activity outside of his employment with Respondent *(see* ***Samuel Burns v. Pinckneyville Corr. Ctr.,*** 14 I.W.C.C. 0482 (2014)), and in another correctional case where the claimant, who was a Correctional Officer promoted through the ranks to Correctional Lieutenant, was involved in weight lifting outside of his employment. *See* ***Kent Brookman v. State of Illinois/Menard Corr. Ctr.,*** 15 I.W.C.C. 0707 (2015). In the repetitive trauma case of ***Fierke,*** the Appellate Court specifically held that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being." ***Fierke v. Indus. Comm 'n,*** 309 Ill.App.3d 1037, 723 N.E.2d 846 at 849 (3rd Dist. 2000). The Court stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." ***Id.***

Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is causative factor. ***Sisbro, Inc. v. Indus. Comm 'n,*** 207 Ill.2d 193, 205, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, *"[A]* Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." ***Fierke v. Indus. Comm 'n,*** 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. ***Land & Lakes Co. v. Indus. Comm 'n,*** 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. **A.C.& S. v. Industrial Comm 'n***,* 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing ***General Electric Co. v. Industrial Comm 'n,*** 433 N.E.2d 671, 672 (1982). The Supreme Court in ***Durand v. Indus. Comm 'n*** noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. ***Durand v. Indus. Comm 'n,*** 862 N.E.2d 918, 925 (Ill. 2006).

Based upon the above, the Arbitrator finds that the petitioner sustained accidental injuries which arose out of and occurred during the scope of his employment. The Arbitrator finds that there is a causal connection between the petitioner's job duties as a chipper and grinder for the respondent and his bilateral carpal and bilateral cubital conditions for which he received reasonable and necessary medical care or treatment from Dr. Blair Rhode and other providers.

As to permanent partial disability, this Arbitrator looks to 820 ILCS 305/8.1(b). The Arbitrator notes the level of impairment as agreed to by both Dr. Balaram, the respondent's IME doctor, and Dr. Rhode. They both agree that petitioner should have permanent work restrictions as it relates to vibratory and lifting activities.

The Arbitrator reviews that the petitioner was employed by the respondent initially as a general laborer and then transferred to chipping and grinding activities. Petitioner was 41 years of age at the time of his injury. As to the future earning capacity, the petitioner has now testified that he is employable and currently working for a hotel in a maintenance/janitorial position earning a comparable wage.

The Arbitrator also reviews the evidence of disability corroborated by the treating records of Dr. Blair Rhode and the EMG study as well as the operative reports. No single enumerated factor shall be the sole determinate of disability. This Arbitrator has considered all five factors.

Based upon this Arbitrator's consideration of all five factors listed in 820 ILCS 305/8.1(b), the Arbitrator awards 10% loss of use of each hand and 20% loss of use of each arm and orders the respondent to pay to the petitioner said permanent partial disability.

In support of the Arbitrator's decision relating to:

(K) What temporary benefits are in dispute? TTD and Maintenance

The Arbitrator finds that the petitioner first saw Dr. Blair Rhode at Orland Park Orthopedics on August 5, 2020 and was taken off work. (PX5). The petitioner remained under the medical care of Dr. Blair Rhode through his dates of surgery on November 10, 2020 and February 9, 2021. The petitioner was released for full duty on June 23, 2021, but had continued complaints. He returned to Dr. Rhode on August 4, 2021 and was placed back on permanent work restrictions at a medium-heavy modified duty job classification with only occasional grasping of the hands and occasional use of vibratory tools. (PX10). The petitioner was placed at maximum medical improvement as of August 4, 2021.

Based upon the Arbitrator's findings of causal connection and accident, the Arbitrator awards to the petitioner temporary total disability benefits from August 5, 2020 through June 23, 2021. The Arbitrator orders the respondent to pay to the petitioner 46 weeks of temporary total disability benefits at a rate of $314.52 per week.

As to the petitioner's claimed period of maintenance from August 4, 2021 through November 5, 2021, the petitioner did not provide evidence of a job search. The petitioner did testify that he began looking for work and that he started work with the Springfield Marriott Hotel and Suites on or about November 6, 2021. The Arbitrator declines to award the period of maintenance claimed by the petitioner as the petitioner failed to provide evidence of his job search between August 4, 2021 and November 5, 2021.

In support of the Arbitrator's decision relating to:

(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 petitioner has submitted his medical expenses, which he has alleged to be causally related, reasonable, and necessary. The medical expenses are listed below:

NAME OF PROVIDER	ACCOUNT NUMBER	DATE OF SERVICE	TOTAL AMOUNT OF BILL
Infinite Strategic Innovations		11/9/20-2/9/21	$100.78
Koch Family Medicine	4451	11/5/20	$807.00
Memorial Medical Center Clinic	308604677	8/17/20	$2,433.00
Orland Park Orthopedics	DAVSTE0001	8/5/20-8/4/21	$70,827.61
Bob Rady, Inc.	3560	11/10/20	$1,320.00
Bob Rady, Inc.	3625	2/9/21	$990.00
RX Development		8/5/20-2/9/21	$9,894.85
South Chicago Surgical Solutions		11/10/20	$26,347.40
South Chicago Surgical Solutions		2/9/21	$26,347.40
Dr. Edward Trudeau	308604677	8/17/20	$3,898.00
	TOTAL		**$142,966.04**

Based upon the Arbitrator's findings of accident and causal connection, the Arbitrator finds the above medical expenses to be reasonable and necessary. The Arbitrator orders the respondent to pay to the petitioner $142,966.04 in reasonable, necessary, and causally related medical expenses at a rate prescribed by the Illinois Workers' Compensation Fee Schedule.

In support of the Arbitrator's decision relating to:

(M) Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that the petitioner has filed and submitted a Petition for Penalties pursuant to Sections 19(k) and 19(l) and attorney fees pursuant to Section 16. The Arbitrator finds that the respondent has made a good faith basis for denial of benefits given its unique argument concerning an alleged injurious practice pursuant to Section 19(d).

Based upon the respondent's good faith argument, the Arbitrator declines to award penalties pursuant to Sections 19(k) and 19(l) or attorney fees pursuant to Section 16.

In support of the Arbitrator's decision relating to:

(O) Were petitioner's activities injurious practices under Section 19(d)?

The Arbitrator reviews that the respondent has denied the petitioner's claim for benefits under the Illinois Workers' Compensation Act by asserting a defense listed in the Illinois Workers' Compensation Act as 820 ILCS 305/19(d), which states in relevant part:

> If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. 820 ILCS 305/19(d).

The respondent contends that the petitioner was assigned permanent work restrictions at the conclusion of his workers' compensation case in 2010. The petitioner admits that the prior claim for right carpal tunnel and left cubital tunnel condition resulted in in a remarkably large lump sum settlement (40% of MAW) because significant permanent restrictions imposed by Dr. Rhode that specifically limiting "lifting and no vibratory tools." (RX #4)

The respondent in this case cites 820 ILCS 305/19(d) as an exception (injurious practice) to the general rule that you "take your petitioner as you find them." The Arbitrator notes, however, that Section 19(d) refers to injurious practices in "his recovery." The term "his recovery" is used twice in Section 19(d), indicating to this Arbitrator that the word "recovery" was significant to The State Legislature. This Arbitrator gives "his recovery" its plain meaning when reviewing this provision of the Act.

In Petitioner's older 2009 claim, it is undisputed that he had recovered in the sense that he quit treating and was placed at maximum medical improvement ("MMI"). He had recovered to be as good as he was ever going to be, but not as good as ever. This Arbitrator understands

19(d) of the Act, to apply in cases that precede maximum medical improvement ("MMI"). The case law seems to support that the 19(g) provision be a corrective device prior to MMI. The Arbitrator does not wish to 19(g) in a new direction. In the present case, Petitioner achieved MMI long ago and then received no additional medical care for another eleven years. As such, the Arbitrator does not find 19(g) to applicable.

Perhaps a more compelling defense in the present case would be for Respondent to allege that the Davis' accident did not arise out of his employment with SC2 because Davis engaged in grossly negligent behavior by defying the 2009 permanent restrictions of "no vibratory tools." While it may be true that one of the objectives of the Workers' Compensation Act was to do away with the defenses of contributory negligence or assumed risk, Hines v. Industrial Comm'n. 191 Ill.App.3d 917, 548 NE2d 345 (1989); it is also true that that "grossly negligent" or "willful and wanton" conduct can remove an employee from the scope of employment. Seglar v. Industrial Comm'n. 406 NE2d 542, 40 Ill.Dec. 536 (1980).

In considering the above, Professor Larson has noted the following analysis:

"There must be an intentional doing of something…. whether with the knowledge that it is likely to result in serious injury, or with wanton disregard of probable consequences." (1A A. Larson Workmens' Compensation Law Sections 35.30, at 6-149 (1992).

This argument was not presented at trial, but considering the above, the Arbitrator would probably again find in favor of Petitioner because of the eleven-year absence of medical treatment. Stated more clearly, it would seem less outrageous for Petitioner to disregard his earlier permanent restrictions since he had been asymptomatic for such a long a time and while

his conduct could still be accurately described as self-destructive and negligent, it might not rise to the level of grossly negligent nor willful and wanton. Perhaps his condition had improved overtime and he willing to give his old work another chance. Reasonable people may disagree.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017168
Case Name	Jeremy Jones v. State of Illinois - Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0229
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Peter Drummond
Respondent Attorney	Joseph L. Moore

DATE FILED: 5/20/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MACOUPIN)

☐ 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

JEREMY JONES,

Petitioner,

vs. NO: 20 WC 17168

STATE OF ILLINOIS – DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of Petitioner's average weekly wage ("AWW"), benefit rate, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as specified below, and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made part hereof.

Petitioner worked for Respondent as a highway maintainer. The parties stipulated Petitioner sustained a compensable accident on January 2, 2020, in which he injured his left arm and shoulder. On September 18, 2020, Dr. Herrin performed left-shoulder arthroscopic surgery involving capsular release, labral debridement, and glenohumeral joint, subacromial decompression, and manipulation for aggravation of early degenerative arthritis, adhesive capsulitis, and subacromial impingement. Petitioner continued to experience pain in his left shoulder despite postop PT. On August 26, 2021, Dr. Herrin's diagnoses were degenerative osteoarthritis, possible adhesive capsulitis, and possible rotator cuff pathology. He administered a subacromial injection. On September 23, 2021, Petitioner reported the injection did not help and he had 6-7/10 pain. He was working with restrictions and the shoulder was "still quite limiting to him." On examination, he exhibited limited ROM, crepitus, and weakness which appeared to be pain related.

Dr. Herrin diagnosed adhesive capsulitis, chronic left-shoulder pain, impingement syndrome, and posttraumatic arthritis. Dr. Herrin advised Petitioner that the only way to address his condition was a total shoulder arthroplasty. However, he would not recommend the surgery at that time due to Petitioner's relative youth. He recommended an FCE to determine permanent restrictions. On October 27, 2022, Dr. Herrin noted x-rays showed evidence of osteophytes with narrowing of the glenohumeral joint space. Dr. Herrin released Petitioner without restrictions "as tolerated within his symptoms." However, he did not release Petitioner from his care.

On the issue of average weekly wage, Petitioner testified the TTD Respondent paid him was based on an average weekly wage of $55,680. However, his earnings were higher because he was paid in 2020 for 2019 work based on negotiations with Petitioner's union. $8,248.00 of 2019 compensation he earned in was deferred and paid in June of 2020 because of a "change in Governors." Petitioner explained that OT was mandatory, which Respondent stipulated to. There was $812.03 in mandatory OT, which was not considered in Respondent's payment of TTD. Wage statement for 2019 indicates a salary of $55,680.00 with no OT. The 2019 W-2 shows wages of $56,112.55. Finally, a salary earning statement from the week June 30, 2020 showed OT earnings of $812.03.

The Arbitrator found Petitioner's AWW to be $1,245.00. In so doing, he included the $812.00 in OT payment as well as the $8,248.00 of compensation he allegedly earned in 2019, but paid in 2020. He referred to that as an "intentional underpayment by" Respondent. He noted that the parties had stipulated on the inclusion of OT. We agree with the Arbitrator that the OT has to be included in the calculation of AWW because the parties so stipulated.

The Commission concludes that the Arbitrator should not have included the alleged deferred payment. Petitioner has the burden of proving all the elements of his claim, including AWW. Petitioner provided no corroboration of what that payment was for, the substance of any union negotiation/contract, or that that payment was specifically intended to pay for work Petitioner performed in 2019. Therefore, the Commission concludes that Petitioner did not meet his burden of proving that the $8,248.00 paid in 2020 comprised part of his "actual earnings" "during the period of 52 weeks ending with the employee's last full pay period immediately preceding the date of accident." Therefore, the Commission finds Petitioner's 2019 earnings were $56,112,55 and his AWW to be $1,079.09.

On the issue of PPD, on November 5, 2020, Dr. Herrin noted that Petitioner was finished with PT and continued his HEP. He felt like he could return to work in some capacity. Dr. Herrin released Petitioner to work with restrictions of no lifting over 25 pounds, no shoveling, and no repetitive overhead work. He also noted that Petitioner was not at MMI, but thought he may be able to work full duty in six weeks. Dr. Emmanual, Respondent's IME, recommended significant permanent work restrictions consistent with those then imposed by Dr. Herrin.

Petitioner testified he still had problems with his shoulder postop. Dr. Herrin indicated that the next step would be shoulder replacement surgery, but he did not want to perform the surgery at that time because of Petitioner's relatively young age (43). In January of 2021 he wanted to get a note establishing permanent work restrictions. Currently difficulty sleeping was his "worst" symptom. He had constant pain, dressing was an issue, his range of motion was limited, he had difficulty with overhead activities, but he could "do anything low." He also testified that he Petitioner thanked God that he was "blessed" with a work environment that Respondent is happy with his production so he can "actually operate equipment in a productive manner and they do not want to lose" him and are working with him on the work site. Respondent was accommodating his situation 100%.

The Arbitrator awarded Petitioner 110 weeks of PPD representing loss of 22% of the person-as-a-whole. In so doing, the Arbitrator gave greater weight to doctors' opinions about the extent of Petitioner's permanent partial noting that both Dr. Herrin and Dr. Emanuel, Respondent's IME, concurred in "a poor prognosis" regarding Petitioner's left shoulder. He also stressed that Dr. Herrin indicated that Petitioner would need a total shoulder arthroplasty and both Dr. Herrin and Dr. Emanuel agreed on the necessity of significant permanent work restrictions. The Arbitrator gave "no weight" to Petitioner's occupation apparently because Respondent had assigned him duties within his restrictions. The Arbitrator gave greater weight to Petitioner's age (42), noting his youth and severe restrictions. He gave lesser weight to Petitioner's future income, and finally, he gave greater weight to evidence of disability in the record, basically reiterating his previous argument about the opinions of the doctors.

The Commission has no issue with the Arbitrator's basic assignment of weight to the various statutory factors in determining PPD. However, we do note that Dr. Herrin apparently did not impose permanent restrictions, but last released him to work "as tolerated." We do take issue with the Arbitrator's reliance on Dr. Herrin's suggestion that Petitioner may need left-shoulder arthroplasty surgery sometime in the future. In our view that is too speculative to base a PPD award upon. If Petitioner's condition changes to a point where he might need additional surgery within five years, he can file a 19(h) petition. In assessing the entire records before us, the Commission finds that an award of 87.5 weeks of PPD representing loss of 17.5% of the person-as-a-whole is appropriate in this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 10, 2023 is hereby modified as specified above and otherwise affirmed and adopted, which is attached hereto and made a part hereof.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $719.39 per week for 43&4/7 weeks, commencing January 10, 2020 through November 9, 2020, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner $647.45 per week for a total of 87.5 weeks because the injuries resulted in the loss of 17.5% of the person as-a-whole pursuant to §8(d)(2) of the Act

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, including $31,002.80 in paid TTD.

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

MAY 20, 2024

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

DLS/dw
O-3/20/24
46

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017168
Case Name	Jeremy Jones v. State of Illinois – Illinois Department of Transportation
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Peter Drummond
Respondent Attorney	Chelsea Grubb

DATE FILED: 2/10/2023

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

/s/ Edward Lee, Arbitrator

Signature

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

February 10, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jeremy Jones
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **20** WC **017168**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Peoria**, on **12/28/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/2/2020**, 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 $**64,740.00**; the average weekly wage was $**1245.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**31,002.80** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**31,002.80.**

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

Edward Lee
Signature of Arbitrator

February 10, 2023

FINDINGS OF FACT

The Petitioner in this claim is an employee of the Illinois Department of Transportation, had been employed by said entity for approximately 5 years when, on or about January 2, 2020, he suffered an on-the-job injury to his left shoulder and underwent extensive treatment. The Petitioner was initially restricted to light duty for approximately 22 months but three months prior to the hearing he was released to full duty. The only issues in dispute are nature and extent of the injury and computation of his average weekly wage as it applies to the TTD benefits already paid and the claimant's PPD rate.

A. PETITIONER'S TESTIMONY

The Petitioner was born on 6/19/1969. (Hearing Transcript (hereafter T.) 6). The Petitioner has a high school education and attended some college courses. (Id.) The Petitioner currently lives in Farmersville, IL and has lived there at all times since date of injury. (T.6-7).

A trial was held in Peoria, IL on 12/28/2022 and the only witness called to testify was the Petitioner. Two issues were in dispute in this claim: (1) The average weekly wage (AWW) and (2) the nature and extent of the petitioner's injury.

On 1/2/2020, the date of the injury in this claim, the Petitioner was employed by the Illinois Department of Transportation as a highway maintainer. (T.7). As of January 2020, the Petitioner had been working in that position for approximately 60 months. (Id.) The Petitioner was hired by the Illinois Department of Transportation on approximately January 2, 2015. (Id.)

The Petitioner described his job as doing anything needed to maintain the highways including participating in construction duties, flagging duties at construction sites, and, in the winter, doing snow plowing and spreading of salt when necessary. (T.8).

The temporary total disability benefits (TTD) were based upon a wage statement from Tristar that indicated his salary was $55,680.00. (T.30; PX1). At trial, the parties stipulated this amount did not include an additional $812.03 in mandatory overtime, which would bring the earnings in the year prior to injury to be $56,492.03, and Petitioner argued for an additional $8,248.00 earned but not paid until after his injury. (T.35; PX1).

The Illinois Department of Transportation instituted a wage freeze due to the State of Illinois' financial issues that result in him failing to be paid his union negotiated raises for 4 years prior to his injury on 1/2/2020. (T.30-31). He indicated this resulted in unpaid "backpay" of $8,248.00 in unpaid wages that related to unpaid wages from the year 2019 that was supposed to be paid prior to his date of injury. (T.29-32).

The Petitioner was paid $8,248.00 in June 2020 for the unpaid "backpay." (R. 32). Petitioner testified, and it is undisputed, this $8,248.00 related to "backpay" owed to him for work he performed in the 52 weeks prior to his injury date. (R.29-32).

On 1/02/2020, the Petitioner related he arrived to work and was told to empty a truck that had been previously loaded with salt at the Illinois Department of Transportation yard in Carlinville, IL. (T.8-9). He testified that the salt being in the truck prior had caused some abrasion on the truck bed. (T.9-10). After he dumped the previously loaded salt, he was told to drive to P.H. Braughton's, an asphalt paving company, to pick up a load of asphalt and bring it back to the Illinois Department of Transportation yard in Carlinville, IL. (T.9).

Mr. Jones, upon arriving back at the Illinois Department of Transportation yard in Carlinville, IL, tried to dump the asphalt as instructed. (T.10). He testified he attempted to empty the bed by doing the normal process of backing the truck up to the location the material would be dumped, elevated the bed with a hydraulic system to tilt the bed upward, and then open the gate and back up. (Id.). He testified he attempted to do this process multiple times but the asphalt would not come out of the bed. (Id.).

The petitioner exited the vehicle and walked to the side of the truck bed after the normal process of dumping did not work. (T.10-11). He testified he then began to swing the truck bed up and down lifting the tail gate and slamming it against the truck bed in order to knock the asphalt loose so it would dump out of the truck bed and did this several times. (Id.). On the last occasion, the bed swung upwards taking his arm up and away from his body resulting in immediate pain in his shoulder. (T.11). The Petitioner testified he immediately felt pain and went to the ground in pain. (Id.).

There is no dispute that the claimant provided both oral and written notice to his employer immediately after his injury.

The Petitioner did have a history of a prior injury to the left shoulder in 2013 and underwent a left shoulder scope with repair of the capsule and labrum in 2013. (T.13).

Between 1/1/2015 and 1/2/2020 he had not taken any medications for his left shoulder, was not on any work restrictions for his left shoulder, and was able to do his job with the Respondent full duty for this time period. (T.12-13). The Petitioner did not have any problems doing his job duties between 1/1/2015 and 1/2/2020 nor did he have any diminished function regarding his right shoulder or right upper extremity. (T.13).

He was off work entirely due to his left shoulder injury from 1/2/2020 until 11/15/2020 when he returned with restrictions consistent with light duty from his orthopedic surgeon Dr. Rodney Herrin and worked under his restrictions from Dr. Herrin consistent with light work until from 11/15/2020 until 9/21/2022. (R. 24).

On 9/21/2022, Andrew Hall, the Human Resources (HR) director of the Illinois Department of Transportation notified Mr. Jones that the Attorney General's Office (AG) had requested IDOT terminate the claimant's light duty and his position. (T.24).

An e-mail from Andrew Hall on 9/21/2022 to Sean Stinnett stated:

> Per the AG's office we need to send home Jeremy Jones letting him know we can no longer accommodate his restrictions on light duty.
>
> Mr. Jones is over the limit per the Teamster's contract for days on Light Duty and he has not presented a full release from his injury by a physician. AG stated hopefully he will be moving him to the VOC program soon.
>
> His settlement trial starts next week. (PX6).

The petitioner testified that his work presented him three options moving forward: (1) proceed to vocational rehab (VOC); (2) retire medically and go on disability; or (3) obtain a full return to work release with no restrictions. (T.24-25). The Petitioner testified he chose to get a full return to work release with no restrictions because it was the only way he could keep his job with IDOT. (T.25).

Due to his desire to keep his job, on 9/23/2022, the Petitioner saw his primary care doctor and got a full release to return to work and also was referred to Dr. Herrin for further evaluation. (T.25). The Petitioner testified he later saw Dr. Herrin on 10/27/2022 who indicated he could return to work as tolerated symptoms allow but he was not released from his care.

The Petitioner has continued to have constant pain in his left shoulder causing significant limitations with his left shoulder including difficulty with range of motion, sleeping, overhead reaching, getting comfortable, lifting and carrying, and getting dressed including problems putting on a coat. (T.27-28). The Petitioner has worked at his position as a highway maintainer since 9/23/2022 and he was able to work with his current pain and symptomology because his employer is accommodating his situation and giving him assignments that do not violate his prior restrictions. (T.28).

B. MEDICAL EXHIBITS

Immediately after his injury on 1/2/2020, Mr. Jones was taken to the emergency room at Carlinville Area Hospital on 1/2/2020 due to his shoulder pain. (T.14; PX2). He also saw his family doctor on 1/2/2020 after his emergency room visit. (T.14),

After his emergency room visit, an MRI of the upper extremity was performed on 1/10/2020 due to his injury and it showed the claimant to have tendinosis of the rotator cuff, without tear, prior labral repair, diminutive long head of the biceps tendon that could be related to remote rupture or tenotomy, and mild-moderate osteoarthritis of the shoulder. (PX2).

Mr. Jones was referred to Dr. Rodney Herrin, an orthopedic specialist in Springfield. (R.15).

Dr. Herrin first saw the claimant on February 12, 2020. He described an injury to his shoulder on 1/2/2020 when the tailgate of a truck pulled his left arm and felt a pop in his arm. (PX3). He reported having a

history of prior left shoulder in 2013 and underwent a left shoulder scope with repair of the capsule and labrum in 2013. (Id.). He reported he was avoiding range of motion since his injury, had stiffness and pain, and felt a pop with any range of motion. (Id.). An examination was performed that showed limited range of motion of the left shoulder, poor strength, positive apprehension test, and pain with impingement testing. (Id.). Dr. Herrin assessed the Petitioner to have a possible rotator cuff injury without obvious tear and probable posttraumatic adhesive capsulitis and performed a subacromial space injection. (Id.).

The Petitioner was next seen by Dr. Herrin on 4/6/2020 and reported continuing pain and popping in the left shoulder. (Id.). He was noted to have gone to physical therapy but had to stop due to COVID 19. Physical exam again showed significant abnormalities in the left shoulder and Dr. Herrin performed a corticosteroid injection in subacromial space on the left shoulder. (Id.). It was noted if the injection did not work, then surgery would be discussed at the next appointment. (Id.).

Dr. Herrin saw the Petitioner again on 5/4/2020 and noted relief from the corticosteroid injection but ongoing pain rating as a 5/10 with popping in the left shoulder. (Id.). He reported pain with pulling and pushing objects. (Id.). Physical exam again showed abnormalities in the left shoulder and left shoulder scope was recommended to help with posttraumatic adhesive capsulitis/stiffness. (Id.). A shoulder athroscopic repair was recommended at this time. (Id.).

Due to delays caused by COVID 19, on 9/18/2020, Dr. Herrin then performed a left shoulder arthroscopy with arthroscopically assisted capsular release, debridement of the labrum and glenohumeral joint, and subacromial decompression and manipulation. (Id.). Surgical notes indicate it was stated that he had grade II or III chondromalacia of the humeral head and the glenoid, and degenerative changes throughout the entire labrum. (Id.). The capsule was contracted throughout, and the rotator cuff including the subscapularis and articular side of the supraspinatus and infraspinatus were fairly normal, the long head of the biceps was absent, evaluation of the subacromial space revealed evidence of some abrasion on the undersurface of the acromion with no significant pathology in the rotator cuff other than some associated abrasion, but no significant tearing. (Id.). After treatment and debridement with both the electrocautery and the shaver, the arthroscope was entered in the subacromial space, noticed the mild abrasion on the undersurface of the acromion and subacromial decompression. (Id.).

Midwest Rehab notes of 9/18/2020 indicate he had appeared at that facility post-surgery for physical therapy on 9/18/2020. (Id.). The Petitioner presented again to physical therapy on 9/22/2020 for his status post surgery and noted he has had constant pain since the nerve block wore off and was taking Norco for pain. (Id.). He was observed to have limitations with strength, range of motion, and stretch tolerance. Therapy consisted of therapeutic exercise and stretching. (PX4).

On 9/28/2020, Dr. Herrin saw the claimant at a postoperative appointment and his sutures were removed. He was advised to continue with physical therapy. (PX3).

On 11/5/2020, he followed up with Dr. Herrin for a status post surgery and noted to have completed physical therapy. (Id.) Dr. Herrin observed abnormal range of motion in the shoulder, ordered the claimant to continue with a home exercise program, and noted he was not at maximum medical improvement (MMI). (Id.). .Dr. Herrin then gave restrictions including no lifting greater than 25 pounds, no shoveling, no overhead repetitive work, and to be evaluated again in six weeks. (Id.).

The Petitioner returned to work at Respondent doing light duty work on 11/15/2020. (T.20/PX4).

On 12/23/2020, he was seen again in follow-up by Dr. Herrin, who noted he had returned to work with restrictions. (PX3). Dr. Herrin indicated the claimant was to remain on the prior restrictions given to the claimant on 11/5/2020. (Id.).

The claimant was then seen on 1/27/2021 by Dr. Herrin, noted to continuing light duty activities as tolerated, and unable to do overhead motions due to pain and stiffness in the shoulder. (Id.). It was noted that at this time, the claimant reported increasing his activities caused increased pain and that he needed a work note discussing his permanent limitations of things he can and cannot do. (Id.). In order to objectively obtain the claimant's permanent limitations, Dr. Herrin suggested a functional capacities evaluation (FCE) and the doctor stated the claimant was now at MMI. (Id.).

The recommended FCE was denied at this time by Respondent. (R. 37).

On 4/12/2021, Dr. James Emanuel saw the claimant for an independent medical exam (IME). In the IME, Dr. Emanuel agreed with Dr. Herrin's evaluation of the claimant and indicated Dr. Herrin's treatment of the claimant's left shoulder was reasonable and necessary. (PX5). Dr. Emanuel indicated he would recommend further treatment of the left shoulder including injections into the glenohumeral joint to determine if complaints are related to traumatic degenerative arthritis of the glenohumeral joint. (Id.). Dr. Emanuel stated the prognosis for complete resolution of the examinee's left shoulder pain is poor and he did not consider him to be at MMI at this time. (Id.).

Dr. Emanuel gave restrictions of no lifting greater than 25 pounds from floor to waist, 10 pounds from waist to shoulder height, and no lifting of any weight above shoulder height, no repetitive chest height or above pushing, pulling, reaching or lifting, no climbing, no use of power equipment including jackhammers and power tools, and no carrying with 25 pounds and no pushing or pulling greater than 25 pounds. (Id.).

Dr. Herrin next saw the Petitioner on 7/22/2021 to review the results of his FCE, but the FCE had not been performed due to being denied by Respondent, and Petitioner reported worsening pain in the left shoulder and extreme stiffness and weakness. (PX3). Physical exam showed pain with palpation of the lateral aspect of his left shoulder, patient is very stiff and limited with passive assisted forward flexion, abduction, and external rotation. (Id.). Dr. Herrin gave the Petitioner a cortisone injection in the intra-articular space of the left shoulder and indicated follow up in four weeks. (Id.). Dr. Herrin indicated if the symptoms were not improved by the injection, a subacromial injection would be recommended for diagnostic and symptomatic relief. (Id.).

On 8/26/2021, Dr. Herrin stated the intra-articular space injection did not help Mr. Jones at all, that his shoulder is still quite limiting, and Mr. Jones described a throbbing on the lateral aspect of the shoulder and a stabbing on the posterior aspect of the shoulder. (Id.). He was noted to was working within his previously outlined restrictions. (Id.).

Dr. Herrin then performed a subacromial space injection and Dr. Herrin noted a FCE would be recommended if the injection was not helpful. (Id.).

On 9/23/2021, Dr. Herrin again saw the Petitioner and it was reported the subacromial space injection did not help and the Petitioner continued to considerable difficulties with the left shoulder. (Id.). The claimant continued to report a throbbing on the lateral aspect of the shoulder and a stabbing on the posterior aspect of the shoulder. (Id.).

Dr. Herrin stated a total shoulder arthroplasty would be needed to address the Petitioner's problems but due to the Petitioner's young age and activity level, he would not recommend this surgery at that time. (Id.). Dr. Herrin stated the claimant was at MMI unless he would undergo a total shoulder arthroplasty which Dr. Herrin did not recommend. (Id.). Dr. Herrin recommended the claimant undergo a FCE to determine the need for permanent restrictions regarding the left upper extremity. (Id.).

The recommended FCE was denied at this time by Respondent. (R. 37).

On 10/27/2022, Dr. Herrin saw the claimant for his chronic left shoulder issues and noted he continued to reman symptomatic, is concerned about his work status, and wants to continue work but has difficulty doing so and is concerned about being on any sort of work restrictions at this time. (PX3). Physical examination showed some limitation of motion of the shoulder and some crepitus. (ID.).

Dr. Herrin noted the claimant may return to work as tolerated symptoms allow but was not releasing him from his care. (Id.). Dr. Herrin added that the Petitioner may require a total shoulder arthroplasty and ordered a new CT. (Id.).

ORDER

The findings of fact, above, are incorporated herein.

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

The findings in regard to accident, causal connection, temporary total disability, and medical, above, are incorporated herein.

Average weekly wage (AWW)

During the pendency of this case, Respondent paid all TTD at a rate of $706.00 per week based on AWW of $1070.00 based on the salary $55,680.00, which did not include the $812.03 of mandatory overtime or the earned but not paid amounts of $8248.00. TTD was paid from for 43 and 3/7 weeks, from 1/10/2020 until the claimant returned to light duty on 11/9/2020, for a total TTD paid of $31,002.80.

At the hearing, Respondent stipulated to the overtime being included which would bring the amount earned in the 52 weeks prior to the injury to $56,492.00 and an AWW of $1086.00 and if the late payments earned in the year preceding the injury were included the total would be $64,740.00.

Petitioner argues for an average weekly wage of $64,740.00, based on the fact he was paid $55,680.00 by the State of Illinois but also owed earned overtime of $812.00 and backpay of $8,248.00 for hours worked during the 52 weeks prior to his 1/2/2020 injury date. Petitioner does not dispute that this $8,248.00 was paid after 1/2/2020 but notes it related to contract wages pursuant to a contract between the State of Illinois and the International Brotherhood of Teamsters during the 52 weeks prior to his injury and related back to hours worked during the 52 weeks prior to his injury.

The Arbitrator finds the average weekly wage is $1,245.00 based on earnings in the 52 weeks prior to injury of $64,740.00 because it reflects the actual wages earned during the 52 weeks prior to the 1/2/2020 injury even though he was "paid" later due to the State of Illinois' intentional underpayment. Additionally, Petitioner feels that the W-2 wages of $812.03 for 2019 for overtime should also be included for the average weekly wages, because the overtime was mandatory.

It would be inequitable to penalize the Petitioner as the computation of to his average weekly wage simply because the Respondent had intentionally underpaid him in the 52 weeks prior to the injury, when those wages had been vested according to his union contract and the work had been performed.

Thus, Arbitrator finds the Petitioner's total earned in the 52 weeks prior to injury is $64,740.00, comprised of the $55,680.00 actually paid, the mandatory overtime of $802.00, and the $8,248.00 paid after 1/2/2020, resulting in average weekly wage of $1,245.00, TTD rate of $821.70 a week, and a PPD rate of $747.00 per week.

Respondent paid TTD based on the salary of $55,680.00, with an average weekly wage of $1,070.77, and was paid at the rate of $706.71 for 43 and 4/7 weeks for a total payment of $31,498.06. Respondent argues that no other TTD is outstanding at this time.

The Arbitrator finds the claimant was temporarily disabled from 1/10/2020 to 11/9/2020, a period of 43 and 4/7 weeks and was actually paid of $31,002.80 in TTD, and Respondent is given a credit of $31,002.80 in TTD actually paid.

Thus, the Arbitrator finds the average weekly wage to be $1,245.00 and finds the proper TTD rate to have been $821.70.

Petitioner argues that the TTD rate should be based on the salary of $64,740.00, with an average weekly wage of $1,245.00, and a TTD rate of $821.70 and should have been paid for 43 and 4/7 weeks for a total of $36,623.17.

The Average Weekly Wage is determined to be **$1,245.00,** based on earnings of **$64,740.00** earning the 52 weeks prior to the injury.

Credits

Respondent shall be given a credit of $**31,002.80** for TTD, $**0.00** for TPD, and $**0.00** for maintenance benefits, for a total credit of $**31,002.80.**

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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**821.70**/week for **43 and 4/7** weeks, commencing **1/10/2020** through **11/9/2020**, as provided in Section 8(b) of the Act for a total of $**35,801.47.**

Respondent shall be given a credit of $**31,002.80** for temporary total disability benefits that have been paid and is ordered to pay **$4,798.67**, representing the difference between the awarded temporary total disability benefits and the credited amount for temporary total disability actually paid.

Nature and Extent

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The Arbitrator notes both the Petitioner's treating physician Dr. Herrin and the independent medical examiner Dr. Emanuel indicated a poor prognosis in the Petitioner's left shoulder, Dr. Herrin's indicated a total left shoulder arthroscopy will be needed in the future but is not currently recommended due to the Petitioner's

young age, and Dr. Herrin and Respondent's examining physician Dr. Emanuel agree on virtually all points as to permanent limitations. Dr. Emanuel gave permanent restrictions of no lifting greater than 25 pounds from floor to waist, 10 pounds from waist to shoulder height, and no lifting of any weight above shoulder height, no repetitive chest height or above pushing, pulling, reaching or lifting, no climbing, no use of power equipment including jackhammers and power tools, and no carrying with 25 pounds and no pushing or pulling greater than 25 pounds for this now 45 year-old-man. Because of the agreement between the physicians regarding limitations, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a highway maintainer at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes the claimant was off work from 1/2/2020 until 11/9/2020, worked at light duty from 11/9/2020 until 9/2022, and sought out the new release to return to work in 2022 due to the Attorney General's request to terminate his light duty and his position. Additionally, the Arbitrator notes the claimant indicated he has been assigned work tasks that do not push him beyond his previously determined limitations from Dr. Herrin and the current release was issued at least 20 months after the claimant was determined to have reached maximum medical improvement by Dr. Herrin on 1/27/2021. Because of the above-referenced evidence, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Because of the claimant's young age and significant limitations, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the claimant is working at his highway maintainer position and earning more due to union negotiated raises based upon his years of service. Because of the earnings at this time are due to his union negotiated raises, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes both the Petitioner's treating physician Dr. Herrin and the independent medical examiner Dr. Emanuel indicated a poor prognosis in the Petitioner's left shoulder, Dr. Herrin's indicated a total left shoulder arthroscopy will be needed in the future but is not currently recommended due to the Petitioner's young age, and Dr. Herrin and Respondent's examining physician Dr. Emanuel agree on virtually all points as to permanent limitations including no lifting greater than 25 pounds from floor to waist, 10 pounds from waist to shoulder height, and no lifting of any weight above shoulder height, no repetitive chest height or above pushing, pulling, reaching or lifting, no climbing, no use of power equipment including jackhammers and power tools, and no carrying with 25 pounds and no pushing or pulling greater than 25 pounds for this now 45 year-old-man. Because the opinions of Dr. Herrin and Dr. Emanuel, which were nearly identical, are highly persuasive, both of which indicate severe and permanent limitations., 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 22% loss of use of a Man 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC025010
Case Name	Tina McDaniel v. Adams & Assoc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0230
Number of Pages of Decision	5
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Justin Schooley

DATE FILED: 5/20/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tina McDaniel,
Petitioner,

vs. NO: 18 WC 25010

Adams & Assoc./Joliet Job Corps,
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 denial of reinstatement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 31, 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.

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

May 20, 2024
o5/8/24
DLS/rm
046

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

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

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

STATE OF ILLINOIS)
)
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
DECISION

TINA MCDANIEL
Employee/Petitioner

v.

ADAMS & ASSOC./JOLIET JOB CORPS
Employer/Respondent

Case # **18** WC **25010**

The ***petitioner*** filed a petition or motion for **Reinstatement**

on , and properly served all parties. The matter came before me on

March 23, 2023 in the city of **Joliet** . After hearing

the parties' arguments and due deliberations, I hereby ***deny*** the petition.

A record of the hearing ***was*** made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner has failed to provide sufficient evidence to justify reinstatement of the above noted matter. Petitioner's counsel withdrew on 7/1/20. This matter was then subsequently dismissed by Arbitrator Doherty and was then reinstated on review. On 3/12/21, Arbitrator Doherty recused from the matter and it was reassigned to the current Arbitrator at that time. The Arbitrator has no specific knowledge of what led to this initial dismissal or the decision to reinstate at that time.

Since March 2021, the Arbitrator has attempted multiple times to discuss the case with the pro se Petitioner and Respondent's counsel. In April 2021, Petitioner sent an email to the Arbitrator with a "Motion" which alleged, among other things, fraud and a criminal conspiracy by multiple parties in this case, including the Commission and Arbitrators. In an initial attempt to discuss the merits of this workers' compensation claim via call-in following the pandemic changes, the Petitioner's voice was not functioning well and she advised that she had a surgery pending in June 2021. During a 9/1/22 pretrial meeting following the Respondent's filing of a Request for Hearing for 8/2/21, the Petitioner was unwilling to discuss the merits of the workers compensation case, indicating she did not believe the Arbitrator had jurisdiction to do so.

At various times the Petitioner has forwarded to the Arbitrator Motions for Summary Judgment and assorted other unusual motions. These generally were not addressed as such motions are not part of workers' compensation practice in Illinois, and as they were not properly docketed in CompFile. In December 2021 Petitioner was advised via email that the motion was denied as such summary judgment motions are not anything the Arbitrator can entertain in this administrative forum.

A planned November 2021 meeting also did not take place, as the Petitioner requested a postponement due to an asthma episode. Because the Petitioner refused to discuss the case

without a court reporter present, the matter was reset for 12/15/21 in person in Joliet for pretrial. It appeared that Petitioner continued to misunderstand that the Social Security Disability award she received is a separate matter from the workers' compensation matter that is the subject of the case at bar. The Arbitrator advised that Petitioner had been granted multiple continuances, including in May and August based on Respondent's filed requests for hearing, at her request in 2021 and that she needed to appear on 12/15/21. Respondent's counsel appeared for the 12/15/21 pretrial but Petitioner failed to do so. Given the multiple continuances and the fact that the matter was above the red line, the Arbitrator then sent an email to the parties advising that the matter would be set for hearing on 3/14/22 and that, despite this setting, the Arbitrator would still be willing to schedule a Webex pretrial prior to February 2022. The Petitioner did not take advantage of the opportunity to do so. The trial date was changed, by agreement of the parties, to 3/17/22 at the request of Respondent. Petitioner failed to appear at that time and the matter was dismissed for want of prosecution. CompFile forwarded a notice of dismissal at that time to the Petitioner via email.

Petitioner then filed a Petition to Reinstate on 5/19/22, however this motion sought both reinstatement and disqualification of the Arbitrator, alleging among other things fraud, conspiracy and civil rights violations instituted by Arbitrator Doherty, the current Arbitrator, defense counsel and her prior attorney. This Petition was never properly presented at the subsequent Joliet status call. Ultimately, a preliminary hearing was scheduled for 9/16/22 in Joliet pursuant to a Webex meeting. The Petitioner subsequently declined to attend on this date, requesting a Webex hearing in lieu of same, and was advised that the Commission requires any hearings to take place in-person, and that as the Petition was filed by Petitioner, it was her choice as to whether she wished to proceed on the properly scheduled date. It was also noted that she consistently requests the presence of a court reporter. Petitioner then sent an email to the Arbitrator on 9/13/22 indicating she would not be attending on 9/16/22, once again alleging a conspiracy against her and that she feared for her life if she attended. Respondent's counsel only appeared on 9/16/22 and a record was prepared (see Rx2).

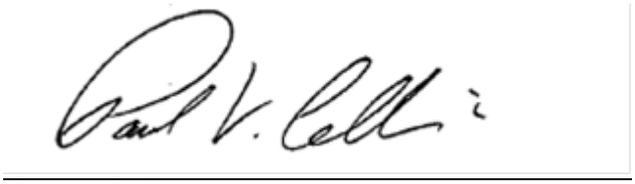
Petitioner subsequently refiled Petitions for Reinstatement for the August 2022, November 2022 and February 2023 Joliet status calls. However, these Petitions were not prosecuted until there finally was a setting on 3/23/23. The matter was heard at that time and Petitioner was given an opportunity to present evidence. She emailed the Arbitrator subsequent to the hearing indicating that she wanted an opportunity to present evidence that she did not bring with her to the hearing. This was objected to by the Respondent, and thus this request was denied. The Arbitrator notes that the Petitioner had multiple Petitions to Reinstate pending over many months and had ample time to prepare for the hearing date.

The Arbitrator has advised the Petitioner several times that counsel representing her would truly be in her best interests given the fact her motions to date indicate a lack of knowledge of the workers' compensation system, but she has indicated that no attorney would take her case. It is possible that the Petitioner has a meritorious workers' compensation claim, but there is no way for the Arbitrator to evaluate this when she has declined to discuss the merits of the case despite multiple opportunities to do so. As such, it is impossible for the Arbitrator to consider that aspect of the request for reinstatement.

Ultimately the Petitioner believes there is some sort of conspiracy being instituted against her and as a result has declined to prosecute her case over the past two years. As noted, multiple continuances were provided to Petitioner, but when she was provided opportunities to at a minimum discuss the facts of her case with the Arbitrator and opposing counsel, she has declined to do so. The Arbitrators repeated attempts to provide these opportunities have resulted in significant additional time and costs to the Respondent, and it is not fair to the Respondent to continue in this fashion. Nothing was presented at the hearing on reinstatement to indicate that Petitioner would be prosecuting this matter pursuant to the Illinois Workers' Compensation Act, Commission Rules or the Rules of Evidence moving forward.

For these reasons, the Arbitrator denies the Petitioner's motion to Reinstate.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.



Signature of arbitrator

May 26, 2023
Date

May 31, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021064
Case Name	Scott Bradley v. Penguin Trucking Inc. & Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0231
Number of Pages of Decision	19
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Ivan Rittenberg
Respondent Attorney	Carter Esterling, Dan Kallio, David M Spada

DATE FILED: 5/21/2024

/s/Kathryn Doerries, Commissioner

Signature

24IWCC0231

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT BRADLEY,

Petitioner,

vs. NO: 19 WC 021064

PENGUIN TRUCKING, INC., and
STATE TREASURER as ex-officio
Custodian of the IWBF,

Respondents.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Decision except to modify the award of temporary total disability (TTD) and to correct a scrivener's error. The Commission views the evidence regarding the Petitioner's entitlement to TTD differently than the Arbitrator. Thus the Commission strikes the third and fourth paragraphs under the section entitled "TTD" under Issue K and substitutes the following.

The Commission awards 17-3/7 weeks of TTD commencing June 6, 2019, through October 5, 2019, when Petitioner was recovering from the accident and temporarily incapacitated from working. The Commission bases this conclusion on the fact that the Emergency Room notes from the University of Louisville Hospital confirm that Petitioner was seen there following the work accident crash. (PX9) Petitioner was first treated by resident, Mickey Sherman, but the attending physician, Dr. Benns, personally saw and examined the Petitioner as well. (PX8, p. 8,

T. 146) Petitioner was sent to University Hospital for definitive care. (PX7) He was admitted for observation. Petitioner was given multimodal pain therapy for his multiple rib fractures as well as a sternal fracture. *Id.* The note states that due to Petitioner's significant traumatic injuries, he would require narcotic pain control for greater than 72 hours. *Id.* Nurse practitioner Kim Broughton-Miller authored the discharge note with Dr. Benns as attending. *Id.* Petitioner was discharged with lifting restrictions and instructions of no driving while taking pain medication. (PX8, p. 8-10, T. 18)

On June 19, 2019, Petitioner first consulted Dr. Murthaiah and reported his semitruck accident, and multiple rib fractures. He reported pain with deep breaths and moving and was unable to sleep due to pain. (PX10, p. 18, T. 440) Petitioner underwent chest and bilateral rib x-rays on June 20, 2019. (PX10, T. 458) The Radiologist Impression of the rib x-rays was:

1. Small left pleural effusion.
2. No evidence of pneumothorax.
3. Minimally displaced posterolateral left 5th rib fracture and essentially nondisplaced posterolateral left 6th and 7th rib fractures.
4. No evidence of right-sided rib fracture. *Id.*

At the office visit on June 19, 2019, Petitioner was given another prescription for Norco. (PX10, T. 441) On July 3, 2019, Dr. Murthaiah noted Petitioner had multiple left sided rib fractures. Petitioner reported pain with deep breaths and he was struggling to sleep with pain. (PX10, p. 15, T. 437) Petitioner was then prescribed Trazodone for a sleep aid due to pain keeping him up. (PX10, T. 436) On July 15, 2019, Dr. Murthaiah saw Petitioner for several issues and noted in his Assessments that Petitioner had closed fractures of multiple ribs of his left side with routine healing. Dr. Murthaiah noted that Petitioner had "wheezing, LLB, rib fracture, could be consolidation." (PX10, p. 9, T. 431) He ordered another chest x-ray. *Id.* The Commission further notes that on September 4, 2019, Dr. Murthaiah authored a Report of Disability Form and authorized Petitioner off work through October 5, 2019. (RX11, T. 450) Therefore, the Commission finds that Petitioner is entitled to TTD benefits for 17-3/7 weeks, commencing June 6, 2019, through October 5, 2019, at a weekly rate of $1,000.00.

The Commission further corrects a scrivener's error in the Arbitrator's Conclusions of Law and in the Arbitrator's Order. Therefore, the Commission strikes "4 & 4/7 weeks" from the last paragraph in the Arbitrator's Conclusions of Law, under the section entitled "Issue L" on page 10 of the Arbitrator's Decision and substitutes "25 weeks" to comport with the award of 5% loss of use of a person as a whole. The sentence now reads, "[u]nder Section 8.1b (b) (v) Based upon the above factors and the record taken as a whole, the Arbitrator orders Respondent to pay Petitioner the sum of $900.00/week for a period of 25 weeks, as provided in §8(d)(2) of the Act, because the injuries sustained caused/resulted in permanent partial disability to the extent of 5.0% loss of use of a person as a whole."

The Commission further strikes the phrase "4 & 4/7 weeks" from the permanent partial disability (PPD) Order, and substitutes "25 weeks" so the sentence now reads, "Respondent shall pay Petitioner the sum of $900.00/week for a period of 25 weeks, as provided in §8(d)(2) of the Act, because the injuries sustained caused/resulted in permanent partial disability to the extent of 5.0% loss of use of a person as a whole."

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,000.00 per week for a period of 17-3/7 weeks, commencing June 6, 2019, through October 5, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $900.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of use of a person as a whole

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Act, shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the Medical Fee Schedule and as is set forth below.

University of Louisville Hospital- $9,476.00
The Medical Center of Caverna-$201.70
VIP Imaging-$145.00
Hart County Ambulance Service-$1,649.93

Additionally, Respondent shall reimburse Indiana Medicaid to the extent allowable under Illinois Law for services provided by Indiana Health Center, Inc on the dates and in the amounts as follows:

7/15/19- $193.66
7/26/19- $193.66
8/27/19- $193.66
10/04/19-$84.00

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall pay Petitioner the compensation benefits that have accrued from June 6, 2019 through October 5, 2019, in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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 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.

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 $52,200.00. 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.

May 21, 2024
O032624
KAD/bsd
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021064
Case Name	Scott Bradley v. Penguin Trucking Inc. Injured Workers' Benefit Fund
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Crystal Caison, Arbitrator

Petitioner Attorney	Ivan Rittenberg
Respondent Attorney	Joseph Blewitt, David M Spada, Carter Esterling

DATE FILED: 6/13/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 13, 2023 5.15%

/s/Crystal Caison, 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

Scott Bradley
Employee/Petitioner

v.

Penguin Trucking Inc.
Injured Workers' Benefit Fund
Employer/Respondent

Case # **19 WC021064**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Crystal L. Caison**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **December 1, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Penguin Trucking, Inc. and IWBF, 19WC021064

FINDINGS

On the date of accident, **June 5, 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 $9,000 for the 6 weeks of employment with Respondent; the average weekly wage was $**1,500.00**.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act, pursuant to the Medical Fee Schedule and as is set forth below.

University of Louisville Hospital- $9,476.00
The Medical Center of Caverna-$201.70
VIP Imaging-$145.00
Hart County Ambulance Service-$1,649.93

Additionally, Respondent shall reimburse Indiana Medicaid to the extent allowable under Illinois Law for services provided by Indiana Health Center, Inc on the dates and in the amounts as follows:

7/15/19- $193.66
7/26/19- $193.66
8/27/19- $193.66
10/04/19-$84.00

Respondent shall pay Petitioner for 4 & 4/7 weeks of total disability benefits from September 4, 2019 through October 5, 2019 at a weekly rate of $1,000.00, which corresponds to $4,571.43 to be paid directly to Petitioner, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $900.00/week for a period of 4 & 4/7 weeks, as provided in §8 (d)(2) of the Act, because the injuries sustained caused/resulted in permanent partial disability to the extent of 5.0% loss of use of person as a whole.

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 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.

Respondent shall pay Petitioner the compensation benefits that have accrued from September 4, 2019 through October 5, 2019 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Crystal L. Caison

Signature of Arbitrator

JUNE 13, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Bradley, Petitioner, v. Penguin Trucking Inc. & Injured Workers' Benefit Fund, Respondent.	)	Case No. 19WC021064

PROCEDURAL HISTORY

This matter proceeded to hearing on December 1, 2022 in Chicago, Illinois before Arbitrator Crystal L. Caison. As this is a Fund case, all issues are in dispute except for penalties and former attorneys' fees. (AX-1) Northland Insurance was initially named as a party to the case. Petitioner and Northland Insurance joined in on an agreed motion to dismiss Northland Insurance as a party from this action. The Fund made no objections. At trial, the Arbitrator made a finding that Northland did not provide workers' compensation insurance coverage to Penguin Trucking or any known subsidiary of Penguin Trucking, Inc. Therefore, the Arbitrator entered an order dismissing Northland Insurance with prejudice from the case.

THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner Scott Bradley testified that he worked for Respondent Penguin Trucking as a truck driver. (T. 30) He started driving for Penguin in April 2019. (T. 32) He was paid 55¢ per mile, and he estimates he drove 2500-3000 miles per week, and worked 60-70 hours per week, which averages $1500 per week. *Id.* He would receive his assignment from Maggie via phone call or text message. He was paid weekly, and not issued a W2. (T. 63) Penguin owned the trucks he drove, and he estimated Penguin owned 5-6 trucks. Petitioner testified that he found the job through Craigslist and stated the business was owned by husband and wife Dan and Maggie, but that he dealt mostly with Maggie. *Id*.

On June 5, 2019, Petitioner testified that he was in a Penguin truck driving through Horse Cave, KY when he collided head-on with another truck. **(**T. 45**)** He called Maggie to inform her of the accident and called a tow truck. *Id.* The tow truck took him to The Medical Center at Caverna located in Horse Cave, KY. *Id.*

While at The Medical Center at Caverna, Petitioner underwent a chest x-ray which showed a nondisplaced lower sternal fracture with a small amount of retrosternal hematoma, multiple nondisplaced left rib fractures, and probably esophagitis with gastroesophageal reflux. **(**PX 6**)**. He also suffered a left elbow abrasion. *Id*. On June 6, 2019, the physician arranged for his transfer via ambulance to the University of Louisville Trauma Center for observation of his hematoma. **(**PX 5 & 6**)**. There he obtained a cervical CT which showed no fracture. (PX 8) He obtained a pelvis CT which showed no acute injury. Id. He obtained a lumbar CT which showed no acute injury. Id. He also obtained a thoracic CT which showed no acute injury. *Id*. He was discharged the next day and Petitioner was instructed no driving while taking pain medication. *Id*.

Petitioner, a resident of Kokomo, IN, began care at Indiana Health Centers in Kokomo. (PX10**)**. On June 19, 2019, he underwent x-rays showing routine healing of rib fractures. Id. He was prescribed pain medication. *Id*. The next day, he presented to St. Vincent Hospital also in Kokomo. PX11. He underwent rib x-rays which showed fractures of the left 5th, 6th, and 7th ribs. *Id*. On June 27, 2019, Petitioner returned with complaints of a cough, and a chest x-ray was performed. *Id*. No pneumonia was found, but he was instructed to use a spirometer to aid with breathing and discharged. *Id*. On September 4, 2019, Dr. Pradeep Murthaiah completed a Report of Disability stating Petitioner was unable to work from June 5, 2019 through October 5, 2019. (PX11).

At trial, Petitioner presented photos of the truck he was driving on the day of the accident, taken three months after the accident. (PX 14, 15, 16**)** They showed extensive front-end and passenger-side damage, as well as a Penguin Trucking name and logo. *Id*. No police report
was entered. Petitioner did not return to work for Penguin, and now works for a trucking company called Gold Star making 60¢ per mile. He did not give any medical records or bills to his employer.

A certification from the National Council on Compensation Insurance verified that Penguin Trucking did not have insurance on the date of accident. (PX3). No representative of Penguin was present at the hearing.

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).

At arbitration, Petitioner answered all questions asked of him and with no apparent attempt to evade the questions. When asked to describe his symptoms as related to his current condition, he did not appear to exaggerate his complaints.

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. Overall, Petitioner was a credible witness.

Issue A, whether Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds as follows:

The Arbitrator finds that Respondent is subject to the Act because it is engaged in the extra hazardous activity of carriage by motor vehicle, and because it employed more than two employees. Sec. 3(3).

Issue B, whether there was an employee-employer relationship, the Arbitrator finds as follows:

Petitioner is a resident of Indiana and the accident occurred in Kentucky, however according to the NCCI certificate, Penguin was located in Illinois. Petitioner testified that Maggie, on behalf of Penguin, contracted with Petitioner via phone or text for each of his assignments. Further, Penguin owned and maintained its trucks and equipment.

Therefore, the Arbitrator finds that Respondent is an employer under Section 1(a)(2) and Petitioner is an employee under 1(b)(2).

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

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

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at ¶ 36. To determine whether a claimant's injury arose out of his employment, the risks to which the claimant was exposed must be categorized. Id. The three

categories of risks are "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." Id. at ¶ 38. "A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties." Id. at ¶ 46.

Based on Petitioner's testimony and contemporaneous medical records, the Arbitrator finds that Petitioner suffered an accident that arose out of and in the course of his employment.

Issue D, the date of the accident, the Arbitrator finds as follows:

Based on the medical records and Petitioner's testimony, the Arbitrator finds that the date of accident is 6/5/2019.

Issue E, whether timely notice of the accident was given to Respondent, the Arbitrator finds as follows:

Pursuant to Section 6(c) of the Act, a claimant is required to give notice to his or her employer within 45 days of a work-related accident. 820 ILCS 305/6(c). The failure to give the statutorily required notice is a bar to recovery under the Act. Silica Sand Transport, Inc. v. Industrial Comm'n, 197 Ill. App. 3d 640, 651, 554 N.E.2d 734, 143 Ill. Dec. 799 (1990). Notice to agents of the employer (i.e. supervisors or foremen) can constitute notice to the employer. See McLean Trucking Co. v. Industrial Comm'n, 72 Ill. 2d 350, 354, 381 N.E.2d 245, 21 Ill. Dec. 167 (1978).

The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. White v. Illinois Workers' Compensation Comm'n, 374 Ill. App. 3d 907, 911, 873 N.E.2d 388, 313 Ill. Dec. 764 (2007). Giving notice of an injury is insufficient if the employer is not apprised that the injury is work related. Id. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that it has been unduly prejudiced. Eileen Farina v. State Farm Mutual Insurance, 2014 Ill. Wrk. Comp. LEXIS 205, *9-10, 14 IWCC 210;

See Gano Electric Contracting v. Industrial Comm'n (Moore), 260 Ill. App. 3d 92, 631 N.E.2d 724 (4th Dist. 1994).

Based on the testimony from Petitioner, the Arbitrator finds that timely notice was given.

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).

Based on the medical records, the Arbitrator finds that Petitioner suffered multiple nondisplaced left rib fractures, sternal fracture, and concussion as a result of this June 5, 2019 accident.

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

Based on the testimony from Petitioner, he earned 55¢ per mile and drove 2500-3000 miles per week. However, he did not provide paystubs, bank statements, or driver logs. If Petitioner fails to prove an average weekly wage, no award can be entered. It does not default to the minimum. Maslat v. Super Sales, 20 IWCC 0219, Lingenfelter v. Cloverleaf 19 IWCC 0652. However, in consideration of Penguin's failure to rebut Petitioner's assertions, the Arbitrator adopts his estimate of 2500-3000 miles per week and sets his AWW at $1,500.00.

Issue H, Petitioner's age at the time of the accident, the Arbitrator finds as follows:

The medical records show that Petitioner was 60, and the Arbitrator finds the same.

Issue I, Petitioner's marital status at the time of accident, the Arbitrator finds as follows:

Based on Petitioner's testimony, the Arbitrator finds that Petitioner was unmarried with no dependent children.

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

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

Overall, the Arbitrator finds Petitioner's treatment as it relates to the rib fractures, sternal fracture, and concussion to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay the medical bills identified below pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act:

University of Louisville Hospital- $9,476.00
The Medical Center of Caverna-$201.70
VIP Imaging-$145.00
Hart County Ambulance Service-$1,649.93

Additionally, Respondent shall reimburse Indiana Medicaid to the extent allowable under Illinois Law for services provided by Indiana Health Center, Inc on the dates and in the amounts as follows:

7/15/19- $193.66
7/26/19- $193.66
8/27/19- $193.66
10/04/19-$84.00

Issue K, whether Petitioner is entitled to temporary benefits, the Arbitrator finds as follows:

TPD/MAINTENANCE

Based on the above and taking the record as a whole, the Arbitrator finds Petitioner is not entitled to temporary partial disability or maintenance benefits.

TTD

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Westin Hotel v. Indus. Comm'n, 372 Ill.App.3d 527, 542 (1st Dist. 2007).

In determining whether a claimant remains entitled to receiving TTD benefits, the primary consideration is whether the claimant's condition has stabilized and whether she is capable of a return to the workforce. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill.2d 132, 148 (2010). Once an injured employee's physical condition stabilizes, she is no longer eligible for TTD benefits. Archer Daniels Midland Co. v. Indus. Comm'n, 138 Ill.2d 107, 118 (1990).

Petitioner seeks TTD from 6/6/2019 through 10/5/2019. However, the Arbitrator notes that Petitioner was not taken off-work until 9/4/2019 when Dr. Pradeep Murthaiah back-dated a work status note to 6/6/2019. The Arbitrator finds it significant that the same doctor was treating Petitioner since June 2019, could have taken him off-work at that time, but did not. Further, Petitioner admitted he did not provide any medical records to his employer or ask about modified duty. Therefore, the Arbitrator finds the start date of the off-work status period unreliable and awards TTD for the time period of 9/4/2019 through 10/5/2019.

Based on the above, the Arbitrator finds that Respondent has not paid TTD benefits. The Arbitrator further finds that Respondent is liable for 4 & 4/7 weeks of TTD benefits (September 4, 2019 through October 5, 2019) at a weekly rate of $1,000.00, which corresponds to $4,571.43 to be paid directly to Petitioner.

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

PPD FACTORS

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, the Arbitrator gives no weight to this factor.

Under Section 8.1b(b)(ii), the Arbitrator notes that the record reveals Petitioner was employed as a truck driver at the time of the accident and that he continues to work as a truck driver. Because Petitioner's condition of ill-being does not prevent him from returning to his prior job duties, he was able to perform prior to June 5, 2019, the Arbitrator therefore gives substantial weight to this factor.

Under Section 8.1b(b)(iii), the Arbitrator notes that Petitioner was 60 years old at the time of the accident. There is nothing in the record that indicates Petitioner's age had any impact on his condition of ill-being, the Arbitrator therefore gives little weight to this factor.

Under Section 8.1b(b)(iv), the Arbitrator notes that Petitioner now earns more than he did at the time of his injury. The Arbitrator gives some weight to this factor.

As a result of the accident, Petitioner credibly testified that he experienced bad headaches, depression, nightmares and on-going pain in his ribs and chest. The Petitioner further testified that he had not suffered from the foregoing prior to the June 5, 2019 accident. The Arbitrator notes the medical reports corroborate Petitioner's physical injuries sustained on the date of accident but

does not corroborate the claims of depression or nightmares. Moreover, the Petitioner's Discharge Plan on June 6, 2019 notes, "no driving while taking pain medication" and "no lifting greater than 10lbs." However, the Arbitrator finds it significant that the discharge notes that "most rib fractures heal on their own over time . . .unless multiple ribs are broken or the ribs have moved out of place. In this case, the Petitioner suffered multiple nondisplaced left rib fractures, sternal fracture, and concussion. There are no other notes from Petitioner's treaters that reference permanent disabilities. The Arbitrator gives greater weight to this factor.

Under Section 8.1b (b) (v)- Based upon the above factors and the record taken as a whole, the Arbitrator orders Respondent to pay Petitioner the sum of $900.00/week for a period of 4 & 4/7 weeks, as provided in §8 (d)(2) of the Act, because the injuries sustained caused/resulted in permanent partial disability to the extent of 5.0% loss of use of person as a whole.

Issue O, whether Respondent is in compliance with the Act and whether the Injured Workers' Benefit Fund is liable, the Arbitrator finds as follows:

A certification from NCCI stating that "Penguin Trucking, Inc." did not have workers' compensation insurance of June 5, 2019. (PX 3) Therefore, Arbitrator finds the same.

As such, the Arbitrator further finds the Injured Workers' Benefit Fund liable and the Treasurer, as ex-officio custodian of the Fund, is ordered to pay the Petitioner's award to the extent set by statute. The Respondent shall reimburse the Fund.

It is so ordered:

Crystal L. Caison

Arbitrator Crystal L. Caison

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC034655
Case Name	Georgia Carter v. State of Illinois - Chester Mental Health Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0232
Number of Pages of Decision	13
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Robert Nelson
Respondent Attorney	Aaron Wright

DATE FILED: 5/21/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GEORGIA CARTER,
Petitioner,

vs. NO: 21 WC 34655

STATE OF ILLINOIS—CHESTER MENTAL HEALTH CENTER,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, benefit rates, medical expenses, prospective medical care, 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, with a change and/or addition to the Decision and Order stated as follows.

The Commission observes that the Arbitrator correctly references hold harmless language in the body of the Arbitration Decision under section "Issue J." However, hold harmless language was not included in the Order section of the Arbitration Decision. Therefore, the Commission writes to add to or change the Order to state that Respondent shall hold Petitioner harmless from any claims by providers of the services for which Respondent receives a credit under Section 8(j) 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 October 13, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall hold Petitioner harmless from any claims by providers of the services for which Respondent receives a credit under Section 8(j) of the Act.

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.

May 21, 2024
o: 05/09/24
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	21WC034655
Case Name	Georgia Carter v. State of Illinois/Chester Mental Health Center
Consolidated Cases	
Proceeding Type	
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Robert Nelson
Respondent Attorney	Aaron Wright

DATE FILED: 10/13/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 11, 2023 5.32%

/s/ Edward Lee, Arbitrator

Signature

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

October 13, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Georgia Carter Case # **21** WC **34655**
Employee/Petitioner

v.

State of Illinois/Chester Mental Health Center
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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **08/02/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **and up until 10/22/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $53,651.00; the average weekly wage was $1,031.75.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services identified in Petitioner's Exhibit 23, pursuant to the medical fee schedule 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.

Respondent shall pay Petitioner permanent partial disability benefits of $619.05/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the right knee, 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.

Edward Lee
Signature of Arbitrator

OCTOBER 13, 2023

MEMORANDUM FOR THE DECISION OF ARBITRATOR

Findings of Fact

Introduction

Prior to the beginning of the hearing, the parties stipulated all TTD has been paid and there is no claim for underpayment or overpayment. Further, the parties stipulated all medical bills shown on PX 23 have or will be paid assuming the Arbitrator finds the case compensable.

Petitioner works as a security therapy aide at Chester Mental Health, a maximum-security mental health facility holding people who are unfit to stand trial or are not guilty by reason of insanity. The residents there can be dangerous. She is required to make rounds every 15 minutes to check on them to make certain all are accounted for, and no one is hurting themselves. From time to time, she must respond to incidents involving violent residents. She has worked there since November 2018. She had the same position at the time of the accident on 10/22/21.

At Chester Mental Health Center, there is a defined distinction between a "hold" and a "restraint" (PX 2, Use of Restraint and Seclusion…). The hold occurs when an aide first puts her hands on a patient to escort him to the restraint room (T 19). A hold does not restrict freedom of movement. A restraint partially or totally immobilizes an individual's limbs (T 20). A restraint occurs when the patient is strapped down on the restraint bed (T 19). A restraint occurs in a room called the restraint room. There are no cameras in the restraint room and therefore no video record of activities in the room (T 21).

On 10/22/21 Petitioner responded for a call to help other workers who were putting a violent patient in a physical hold. They then escorted the patient in a physical hold to the restraint room where he was restrained. The restraint involved strapping him down over 5 parts of his body (hands, legs, and chest) with a 5-point chest posey to a bed in the restraint room to immobilize him (T 20). Petitioner assisted with the restraint because the patient was difficult to tie down (T 20). Petitioner's injuries happened while she was involved in the restraint. While there was confusion as to where the injury occurred, Petitioner, her co-worker Mr. Robert Walter (the only witness to testify), and two other witnesses reported the injury to Petitioner's right knee occurred when Petitioner was restraining a violent patient (PX 7, PX 8, PX 9). Petitioner's other exhibits were consistent. The employee notice of injury (PX 3) states the injury happened when restraining a violent patient. Petitioner's written history provided to the Section 12 examiner (PX 4), answers the question "How did problem begin" stating, "twisted during restraint of violent patient". All recorded histories discuss the activity at the time of Petitioner's injury. Each history notes she was injured while restraining a violent patient. PX 11, PX 12, and PX 13 are medical reports completed on or within a few days of the incident. Each report documents that the right knee injury happened while restraining a violent patient. Essentially, every witness and every physician has documented the event.

In the restraint, security aides put a strap over 5 points on the violent patient's body, his chest, each arm, and each leg. Petitioner was at the end of the bed securing his ankles. The facility rules require that all beds in the restraint room must be bolted to the floor (PX 2, p. 12). When she stepped towards the middle of the bed to help with the chest posey, her toe was under the bed in front of an anchor securing the bed. Her upper body turned but her foot stayed under the anchor, and she twisted her leg (T 24). Her knee popped (T 23).

There are three videos marked as a group as RX 3 showing the events leading up to the restraint. One shows the hold from one direction, another shows the hold from another direction, a third shows the doorway to the restraint room. One video shows Petitioner running to hold the aggressive patient shortly before being injured

while restraining him. None of the videos show the inside of the restraint room where the injury happened (T 22).

While the videos do not show the restraint, one does show Petitioner propping her right leg up against the doorway to the restraint room after the injury occurred (T 22). Petitioner testified she was trying to stretch out her knee because after her knee it popped (during the restraint), it got really tight. She didn't know what was wrong with it.

Causation

Petitioner had a prior injury on the job to her right knee in 2020. She missed work for two days. She did not have serious pain following the injury and had no long-term problems. She did not file a claim for that injury. She recovered well (T 17). Before the injury complained of, Petitioner had no trouble with her right knee (T 21, T 41). She took no medicine for her knee. She had no restrictions, pain, or discomfort prior to the injury on 10/22/21. Respondent introduced the three videos showing the events leading up to the accident as RX 2. In one, the video shows Petitioner prior to the injury jogging to the patient prior to the restraint (T 30). She had no trouble jogging before the incident.

Robert Walter, the witness who completed an incident report that discussed Petitioner's right knee injury, testified that he works at Chester Mental Health with Petitioner. Up until October of 2021, he never noticed her to have any physical problem with her knee (T 55 & T 56). He worked closely with her. After the restraint "she was limping, and her knee was hurt" (T 58).

Petitioner testified credibly in a straightforward manner her right knee popped several times while restraining the patient. Immediately after, the knee was stiff and tight. She reported the injury right away and therefore was not allowed to finish out her shift or stay on the floor (T 27). The next morning the knee was extremely painful. Her husband had to put her shoes on and take her to the emergency room (T 32). She had never had pain like that in her life before. She has had pain in her right knee consistently ever since (T 32).

Dr. Corey Solman, Petitioner's treating surgeon, reported in his initial office note on 12/15/21 that, "I believe within a reasonable degree of medical and surgical certainty that the injury of 10/22/21 is the substantial causative factor in the development of her right knee pathology" (PX 17, p. 89). On 02/22/22 Dr. Solman surgically repaired Petitioner's torn medial meniscus, lateral meniscus, and anterior cruciate ligament. He released Petitioner to full duty work on 09/07/22. He confirmed his causal opinion and cited a recent April 2020 study in the Orthopedic Journal of Sports Medicine to support his opinion that the event was the primary causative event (PX 17, p. 137).

Petitioner and Respondent both offered the first report of the Section 12 examiner, Dr. Timothy Farley, dated 05/24/22 (PX 18 & RX 3). Petitioner reported to him that she was "involved in a restraint of a violent patient. She twisted her knee, had immediate discomfort". The examiner initially reported "She is well mannered. She is appropriate. She seems credible" (PX 18, p. 145). When asked if there were a causal relationship between the current objective findings and the reported accident, he reported that "I believe there is. I think the patient completed a partial tear of the ACL in October of 2021" (PX 18, p.145).

Less than three months later, on 08/15/22 he changed his mind. In the interim, he did not exam Petitioner again nor did he ask her or anyone else any questions about her condition or the accident. He only looked at the videos marked as RX 2 (RX 5, p. 8). None of the videos showed the inside of the restraint room where the injury occurred. Since none of the videos showed Petitioner twisting her knee, he changed his mind and stated there was no causal connection. He went further and reported that "patient was being dishonest, and I do not deem her a credible individual". He stated the event was "demonstrated well in the visual evidence". The

witnessed accident was not demonstrated in visual evidence because there was no visual evidence of events in the restraint room; there are no cameras allowed in the restraint room. The examiner assumed, though, that if the restraint were not on the videos he was provided, then it did not occur at all. "What I didn't see happening (in the three videos he saw) is any evidence her foot was caught underneath a table or chair mount that was not at all visualized" (RX 5, p. 12). The videos, he reported, were "Not consistent with what she told me at all" (RX 5, p. 13). He "assumed" the videos showed the event Petitioner and the witnesses (PX 7, PX 8, and PX 9), reported was a restraint (RX 5, p. 16). He never saw a person restrained in a posey (RX 5, p. 20). It was his "assumption" that the totality of the event was shown on the videos. He didn't ask anyone if the video showed the event (RX 5, p. 23). Initially, he admitted that no one confirmed to him what he assumed, that the videos showed the accident (RX 5, p. 17). Later, though he claimed instead that "I saw what *I was told* was the event" (RX 5, p. 20). Further, he assumed that video of the Petitioner walking happened after the event; no one confirmed that to him (RX 5, p. 18), again he just assumed.

Earnings

Petitioner worked substantial overtime hours. She estimated half her overtime was voluntary and half mandatory in the year before the accident. Petitioner's Exhibit 24 is a compilation of her overtime hours in the year before the injury. The overtime earnings, calculated at a straight time rate, amounted to $10.770.57. Petitioner did not keep a record throughout the year of what overtime hours were voluntary and what were mandatory. Respondent's Exhibit 6 includes an itemization of overtime earnings in the year before the accident of 10/22/21. The weekly earnings are consistent with PX 24. RX 6 lists 506 hours of overtime; 307 are listed as voluntary and 199 are classified as mandatory; 61% then are voluntary and 39% are mandatory.

RX 6 shows total regular earnings were $49,447.78 and total overtime earnings were $15,734.32. RX 6, though, does not note if the $15,734.32 in total overtime hours are at a straight time rate or not. PX 24 does calculate the overtime hours at a straight time rate. The total overtime earnings calculated at a straight time rate amount to $10,770.57. Accepting RX 6 as the accurate record of voluntary and mandatory overtime hours then, 61% of the $10,770.57 were voluntary and 39% of the $10,770.57 were mandatory. 39% of $10,770.57 equals $4,203.26.

The average yearly wage for Section 10 purposes were $49,447.78 in regular earnings and $4,203.26 in mandatory overtime calculated at a straight time rate or $53,6510. The average weekly wage is $1,031.75.

Medical

The parties stipulated the medical bills may be paid to the providers pursuant to the fee schedule.

Nature and Extent

On the date of the injury, Petitioner was a Security Therapy Aide 1 at a forensic facility for people unfit to stand trial or not guilty by reason of insanity. The patients there can be dangerous (T 10). She held the same position at the time of the hearing (T 10). The job required that she walk 50 to 75 yards from the parking lot to the building (T 18), respond to emergencies when coworkers needed help to restrain the patients, and regularly checking on patients' well-being (T 9). Shortly following her injury on 10/22/21, she had an MRI taken on 11/16/21 (PX 15, p. 73 and 74). The radiologist diagnosed a tear of the anterior cruciate ligament, a tear of the anterior horn of the lateral meniscus, a possible tear of the posterior horn of the medial meniscus, edema of the lateral femorotibial ligament related to strain and possible a partial low-grade tear, and joint effusion. Thereafter, the record documents ongoing objective findings despite conservative care. The history of injury remained consistent throughout the course of care. The treating surgeon, Dr. Solman, performed a right knee partial medial and lateral meniscectomy and anterior cruciate reconstruction using a patella tendon bone allograft and several screws. The ACL was seen torn in the notch. The medial compartment showed a small tear of the posterior horn of the medial meniscus the surgeon debrided back to a stable rim. 20% of the

meniscus was removed. The mid and anterior horn of the lateral meniscus was torn and surgically brought it back to a stable rim.

At the hearing, Petitioner testified credibly she has daily pain at varying degrees and usually at a 2 on a 1 – 10 scale (T 35). At the end of a work shift, her pain level is at a 4 (T 36). The knee still cracks and pops any time she goes downstairs or bears weight on the knee getting up from a chair (T 37). The knee is painful on the medial side and in front of the patella. The pain escalates because she works many 16-hour days. The knee swells in the same location when she works a double shift. She takes over the counter Ibuprofen once a day to control swelling (T 38). She doesn't kneel as well because she has pressure on the patella in the same spot as the pain. The swelling is particularly visible when she bends the knee (T 43). She cannot squat on that knee. If she is putting on a posey, she puts her weight on the left leg. It hurts to come off her right knee from a squatting position (T 41). Petitioner's son has taken over the gardening because she cannot get down low (T 42).

Conclusions of Law

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

Issue F: Petitioner's current condition of ill-being is causally connected to the injury on 10/22/21.
The treating surgeon, Dr. Solman, confirmed the causal relationship between the accident and the three objective injuries he saw at the time he operated on Petitioner, the torn medial meniscus, torn lateral meniscus, and torn anterior cruciate ligament (PX 17, p. 102). Respondent's examiner, Dr. Farley, contested causation but did so based solely on an assumption that since a video did not show an event, it did not happen at all. He testified he did not know if the video showed what Petitioner complained happened without making assumptions (RX 5, p. 28). He saw a patient being escorted and never thought about whether there were further efforts to restrain the patient (RX 5, p. 26). Based on his assumption, he affirmatively reported that Petitioner was "dishonest, and I do not deem her a credible individual" (RX 4). He did not report any problems with Petitioner's honesty when he initially and actually questioned and examined her (RX 5, p. 25). The Arbitrator finds that Dr. Farley's opinions were based only on assumptions that are inconsistent with the evidence and the findings herein. The Arbitrator places no reliance on his causation opinion.

Regardless of the causation opinions, in this case, the Arbitrator is mindful of the chain of events analysis and the well-established case law that establishes Petitioner's entitlement to benefits since she was in relatively good health prior to the injury on 10/22/21, there was a stipulated accident, and following it she had injuries to her right leg sufficient to require surgery. This fact pattern fits with the fact pattern in well-established caselaw cited below.

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011).

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).

In *Steak N Shake v. IWCC*, 2016 IL App (3d) 150500WC, the Appellate Court considered the case of a restaurant manager who was injured by simply wiping down tables on a busy day. She had pre-existing arthritis of her thumb. The sole doctor's opinion claimed that the activity caused "manifestation of symptoms" but that her current symptoms were not related to her movement. Despite Dr. Wysocki's ultimate opinion regarding causation, the Arbitrator, Commission, Circuit, and Appellate Court all found for Petitioner based on the sequence of events theory. The Commission noted she was asymptomatic before the event but had extensive symptoms and treatment thereafter. That sequence was sufficient to support a finding of causation. Her medical evidence showed an ongoing condition that began the day of the incident and therefore was inconsistent with

Dr. Wysocki's opinion that the incident was not causative of claimant's condition. Since she was asymptomatic before, the immediate onset of symptoms after that was sufficient to establish a causal relationship. The Court noted it as well settled that the Commission can infer causation from a sequence of lack of symptoms prior to an industrial accident with symptom manifestation immediately following. It cited *Freeman United Coal Min. Co. v. Industrial Comm'n,* 318 Ill. App.3d 170, 175, 251 Ill. Dec. 966. The employer pointed out that Dr. Wysocki's opinion was the only medical opinion about causation, but the court disagreed with his conclusion since Wysocki admitted that she was pain free before the incident and wiping tables caused *"symptom manifestation"*.

In *Taylor v. Alpha* (16 IWCC 0170), Petitioner was in good health relative to her knee for more than three years before the accident. After the accident the knee problems were consistent ongoing and undebated. Again, the Commission referred to a "chain of events analysis" pointing to the causal connection but really was just confirming Arbitrator Carlson, who decided that "To say that Petitioner may have sustained a knee strain as a result of the work accident which should have resolved three to four weeks after the accident and that Petitioner's present condition of ill-being is due solely to a pre-existing condition disregards the 'chain of events' analysis".

In *Navistar, Inc. v. IWCC*, 22 ILWCLB 117, Ill.App.2d (2014) the Commission found a causal relationship between Petitioner's knee injury and his work accident. Respondent claimed that Petitioner had serious arthritis before the injury, but he had had no symptoms. After twisting his knee, however, Petitioner had a medial meniscus tear and underwent total knee arthroscopy. The Commission found the claimant credible in stating that he had no symptoms prior to the work accident, worked full duty and never received treatment for his knee prior. Further he had immediate and consistent knee pain thereafter. Petitioner's doctor said the injury was the straw that broke the camel's back; causing the underlying arthritic conditions to be symptomatic; the defendant's experts conceded that a twisting injury could have caused the preexisting tear to worsen.

Additionally, in *Peabody Coal v. Industrial Comm'n*, 571 N.E.2d 1182, 213 Ill.App.3d 64 (Ill. App. 5 dist. 1991), the Court noted that "casual connection between work duties and condition of ill-being maybe established by chain of events including workers' compensation claimant's ability to perform job duties before date of accident and inability to perform said duties following that day".

The Arbitrator concludes Petitioner's current condition of ill-being is casually related to the accident on 10/22/21.

Issue G: What are the Petitioner's earnings?

The parties submitted exhibits essentially agreeing on the number of overtime hours Petitioner worked in the year before the accident. The Arbitrator accepts RX 6 as the accurate record of voluntary and mandatory overtime. RX 6 notes that 61% of the $10,770.57 earnings in overtime at a straight time rate were voluntary and 39% of the $10,770.57 were mandatory. 39% of $10,770.57 equals $4,203.26. RX6 further states Petitioner's earnings in her regular hours were $49,447.78. When adding the regular earnings of $49,447.78 to the $4,203.26 in mandatory overtime calculated at a straight time rate, the Arbitrator concludes Petitioner earned $53,6510 for Section 10 purposes. Therefore, the average weekly wage is $1,031.75.

The law is clear that both regular earnings and mandatory overtime earnings (calculated at a straight time rate) are components of the average weekly wage for Section 10 purposes. See, for example, *Costello v. International Truck & Engine*, 15 ILWCLB 294 (Ill. W.C. Comm. 2007), where the Commission included overtime if that overtime is either 1) required; 2) consistent – a set number of hours per week; or 3) part of the regular hours of employment.

See also *Weyker v. Imperial Claim Service, 08 I.W.C.C. 08883*, where the Arbitrator declined to include overtime in calculating the average weekly wage since the hours varied dramatically. He might work half hour

overtime in a week or up to 43 hours of overtime. The Commission overturned the Arbitrator, though, because the overtime was mandatory and included the extra hours in the average weekly wage.

Issue J: Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (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 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 upon the above findings as to causal connection, the Arbitrator finds Petitioner is entitled to reasonable and necessary medical care, including but not limited to the surgery performed by Dr. Solman. Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's Exhibit 23 for Petitioner's right knee, pursuant to the medical fee schedule or PPO agreement (whichever is less), as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and hold Petitioner harmless from any claims arising from the expenses for which it receives credit.

Issue L: What is the nature and extent of the injury?
Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are 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 treatment medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." *Id.*

1. 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.

2. With regard to Subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner's job requires her to hold and restrain violent patients and make rounds regularly both of which involves physical use of the Petitioner's legs. The Arbitrator, therefore, gives some weight to this factor.

3. With regard to Subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old on the date of the injury. She has the majority of her work life ahead of her during which time she will need to deal with the residual effects of the injury. The Arbitrator places substantial weight on this factor.

4. With regard to Subsection (iv) of §8.1b(b), the Arbitrator notes that there is no direct evidence of reduced earning capacity contained in the record; therefore, the Arbitrator places no weight on this factor.

5. With regard to Subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner's testimony is corroborated by the treating medical and surgical records. Petitioner underwent partial medial and lateral meniscectomy and anterior cruciate reconstruction using a patella tendon bone allograft and several screws as described above. The

Petitioner testified that she experiences pain following her surgical repairs on a daily basis. 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 25% loss of use of the right leg. Accordingly, the Arbitrator awards Petitioner 25% loss of use of the right leg, at 215 weeks, or 53.75 weeks of permanency.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC035220
Case Name	Tanya L Bibbs-Smith v. Proactive Community Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0233
Number of Pages of Decision	5
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Estefania Perez
Respondent Attorney	Michael Rusin

DATE FILED: 5/21/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TANYA L. BIBBS-SMITH,

Petitioner,

vs. NO: 17 WC 035220

PROACTIVE COMMUNITY SERVICES,

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 Petitioner's petition for reinstatement, 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 Order of the Arbitrator filed on October 28, 2022 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's petition for reinstatement is denied.

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 21, 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

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ORDER

Tanya Bibbs-Smith Case # **17** WC **035220**
Employee/Petitioner

v.

Proactive Community Services
Employer/Respondent

A *Motion to Reinstate* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The hearing on said motion was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 28, 2022**. Petitioner was represented by Estefania Perez and Respondent by R. Mark Cosimini. After reviewing all of the evidence presented and oral arguments on the motion, the Arbitrator hereby finds:

1. This cause was dismissed for want of prosecution on December 16, 2021 in accordance to Rule 9020.60 (2)(D)(i) as no request for continuance had been filed and neither Petitioner nor her attorney were present at the status call of that date..
2. Notice of said dismissal was emailed to Petitioner's attorney of record, Anthony Ivone, on December 16, 2021.
3. Rule 9020.90 (a) states that upon dismissal for want of prosecution the parties shall have 60 days from receipt of the dismissal order to file a Petitioner to Reinstate the cause.
4. On July 18, 2022 a Petitioner to Reinstate was filed by Petitioner, acknowledging the dismissal of December 16, 2021, 215 days after receiving notice of the dismissal from the Commission..
5. The 60 day limit for filing a petition to reinstate a case after its dismissal for want of prosecution is jurisdictional in nature. TTC, Illinois, Inc. v. Illinois Workers' Compensation Commission, 396 Ill.App.3d 344,354.
6. Petitioner did not plead or argue in facts indicating it had not received the notice, it was instead noted that the attorney who had been handling the case had left the firm and the notice went to a partner who did civil litigation, not workers' compensation litigation. That partner continues to be the attorney of record in this cause.
7. Petitioner has not really argued or proven due diligence in this matter.

The Arbitrator has considered the fairness and equity of this matter as well as the prior case law dealing with jurisdiction.

Petitioner's Petition for Reinstatement is denied.

Dated: October 28, 2022

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022798
Case Name	Matthew Miller v. State of Illinois - Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0234
Number of Pages of Decision	33
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas C Rich
Respondent Attorney	Nicole Werner

DATE FILED: 5/21/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Miller,

Petitioner,

vs. No. 21 WC 022798

State of Illinois – Shawnee 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, exposure to occupational disease, 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 Arbitrator found that Petitioner was entitled to temporary total disability (TTD) benefits for a period of 104-1/7 weeks commencing January 20, 2021 through January 18, 2023. The parties stipulated, and the Arbitrator also found, that Respondent had paid Petitioner TTD benefits for a portion of this period through October 15, 2022, and awarded Respondent a corresponding credit of $41,743.56. Consequently, the Arbitrator awarded Petitioner 13-4/7 weeks TTD benefits covering the unpaid period of TTD from October 16, 2022 through January 18, 2023.

The Commission finds that since Petitioner was found to be temporarily and totally disabled for the period of January 20, 2021 through January 18, 2023 – a period of 104-1/7 weeks, the entire period of TTD benefits should also have been awarded to Petitioner, not just for the 13-4/7 week period of October 16, 2022 through January 18, 2023.

Accordingly, the Commission modifies the TTD award and orders Respondent to pay Petitioner temporary total disability benefits of $673.26 per week for 104-1/7 weeks, for the period January 20, 2021 through January 18, 2023, as provided by §8(b) of the Act, with credit for all amounts paid. All else in the Arbitration Decision is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 10, 2023, is hereby modified as stated herein, and otherwise affirmed and adopted.

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

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

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.

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.

May 21, 2024

MP/mcp
o-05/09/24
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	21WC022798
Case Name	Matthew Miller v. State of Illinois - Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	30
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 4/10/2023

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

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

April 10, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

/s/ Linda Cantrell, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Matthew Miller
Employee/Petitioner

v.

State of Illinois/Shawnee Correctional Center
Employer/Respondent

Case # **21** WC **022798**

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 **Mt. Vernon, Illinois**, on **1/18/23**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/19/21**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,514.29**; the average weekly wage was $**1,009.89**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**41,743.56** for TTD, $**0** for TPD, $**0** for maintenance, and $**any and all medical expenses paid**, for a total credit of $**41,743.56**, plus any and all medical expenses paid pursuant to the stipulation of the parties.

Respondent is entitled to a credit of $**TBD and any and all paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period 1/20/21 through 1/18/23, of which Respondent has already paid through 10/15/22. Therefore, Respondent shall pay Petitioner additional temporary total disability benefits of $**673.26**/week, representing **13-4/7th** weeks, commencing **10/16/22 through 1/18/23**, as provided in Section 8(b) of the Act. Respondent shall receive a credit of $41,743.56 in TTD benefits paid through 10/15/22.

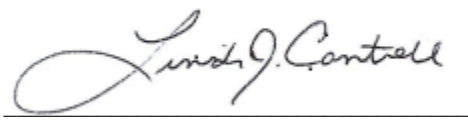
Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, pursuant to the stipulation of the parties and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any medical expenses previously paid and a credit for any and all medical expenses paid through its group medical plan, as stipulated by the parties.

Respondent shall authorize and pay for the prospective treatment relating to his long-haul COVID-19 syndrome, as recommended by Dr. Newcomb and his treating physicians.

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

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

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



Arbitrator Linda J. Cantrell

ICArbDec19(b)

April 10, 2023

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MATTHEW MILLER,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	**Case No.: 21-WC-022798**
	)	
STATE OF ILLINOIS/SHAWNEE CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on January 18, 2023, pursuant to Section 19(b) of the Act. On 8/13/21, Petitioner filed an Application for Adjustment of Claim alleging injuries to his lungs, respiratory system, and body as a whole as a result of exposure to COVID-19 on 1/19/21. The Arbitrator takes judicial notice that Petitioner's claimed exposure to the COVID-19 virus was filed under the Illinois Workers' Compensation Act and not pursuant to the Occupational Diseases Act. The Arbitrator finds that at all times relevant hereto the parties treated the claim as an exposure claim and Respondent defended the claim accordingly.

The Arbitrator further notes that the Commission may consider *sua sponte* a new theory of recovery even if that theory was never presented to the arbitrator and the claimant did not amend his Application for Adjustment of Claim to include the new theory. The Commission enjoys such discretion as long as the Commission's consideration of the new theory does not prejudice a party's substantial rights. The Commission's decision to grant benefits under a new theory of recovery does not prejudice an employer's substantial rights if the employer is aware of evidence supporting the theory before arbitration. *Caterpillar Tractor Co. v. Industrial Comm'n,* 215 Ill.App.3d 229, 240 (1991).

Based on the evidence presented in the present case, Respondent was aware Petitioner was pursuing a COVID-19 claim and Petitioner did so at arbitration. It is evident that Respondent had all the information available to research, investigate, and defend the exposure claim filed by Petitioner. In fact, Respondent's defense is founded on rebutting the COVID-19 presumption and disputing and negating Petitioner's claimed exposure to the COVID-19 virus on Respondent's premises. In workers' compensation and occupational disease cases, pleadings and procedures are informal and are designed to expedite and to achieve a right result. *Caterpillar*

Tractor Co. v. Industrial Comm'n at 239. "Thus, the Commission must decide a case on the evidence presented and on the merits of the case before it and must not be restricted to the information provided on a form." *Id.*

The Arbitrator concludes that deciding Petitioner's claim under the Occupational Disease Act does not prejudice Respondent's substantial due process rights. The Arbitrator, therefore, concludes that Petitioner's COVID-19 claim is properly adjudicated under the Occupational Disease Act rather than the Workers' Compensation Act.

The parties stipulated that Respondent is entitled to a credit for any and all medical bills previously paid and all medical expenses paid through its group medical plan, pursuant to Section 8(j) of the Act. The parties stipulated that if any medical expenses are awarded, Respondent shall pay same directly to the medical providers pursuant to the Illinois medical fee schedule, or PPO agreement, whichever is less.

Petitioner claims entitlement to additional temporary total disability benefits for the period 10/16/22 through 1/18/23. The parties stipulated that all temporary total disability benefits have been paid through 10/15/22 and that Respondent is entitled to a credit of $41,743.56 in TTD benefits paid through 10/15/22. Respondent disputes liability for TTD benefits.

The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care.

TESTIMONY

Petitioner was 41 years old, married, with three dependent children at the time of accident. Petitioner was hired by Respondent as a correctional officer in 2019. He testified he was tested for COVID-19 twice per week around the time of his exposure on 1/19/21. Petitioner worked the midnight shift from 11:00 p.m. to 7:00 a.m. and his scheduled days off were Tuesdays and Wednesdays. After Petitioner completed his shift the morning of 1/19/21 (Tuesday) he received a laboratory test for COVID-19 and was scheduled off work the next two days. Petitioner testified that an officer from the COVID command center contacted him on 1/21/21 and informed him he tested positive for COVID-19. He was required to take 14 days off work.

Petitioner testified that around the time he received his positive results, he began to experience mild symptoms. Over the following days and weeks, his symptoms progressed to fatigue, tiredness, body aches, shortness of breath, cough, loss of taste and smell, and a low-grade temperature. Petitioner testified that in the days and weeks prior to his positive COVID-19 test, none of the members of his household tested positive for COVID-19 or had come in contact with anyone who had COVID-19.

Petitioner testified that in the days and weeks prior to his positive COVID test, he came into contact with individuals at work he knew were positive for COVID-19. He testified that in the immediate weeks prior to his positive test, he worked in a cell block that housed approximately 400 inmates and had a COVID-19 isolation wing. He had physical contact with and/or was within six feet of inmates and fellow officers. He testified that he worked in the wing

every day, and that his daily duties included delivering food trays to inmates. This involved opening each cell door and handing food trays to inmates. After chow, Petitioner reopen each cell door and retrieved the food trays from inmates. He testified that the facility was on full COVID-19 lockdown in January 2021; however, prior to COVID and lockdown, the inmates would go to the chow hall for meals. He testified that delivering food to inmates from cell to cell during lockdown increased his contact with them.

Petitioner testified he wore surgical masks provided by Respondent, but they were prone to pop off during interactions with inmates. He wore a balaclava mask over his surgical mask to keep it on his face until he could adjust it. Petitioner testified that he always wore gloves during his interactions with inmates, even prior to the COVID-19 pandemic. He testified that inmates did not always wear a mask when he passed out meal trays, as he passed out trays around 4:00 a.m. and woke them up, and they were not required to wear a mask in the cell. Petitioner testified that in the weeks prior to 1/19/21 he came in contact with inmates in the isolation wing that were COVID positive.

Petitioner testified that correctional officers were required to wear masks and gloves and socially distance. He testified that he always followed the rules, but they were not always followed by his coworkers. Petitioner was not sure if any of his coworkers tested positive for COVID-19 around 1/19/21, but he testified there were coworkers who exhibited COVID-like symptoms in the days prior to his positive test.

Petitioner testified he is married with three children. In January 2021, his wife worked a hybrid schedule in an administrative role as a social worker and did not work directly with patients. He testified that her clinic was on COVID lockdown and if a patient was exhibiting COVID-symptoms or was COVID-positive, they were not seen; however, her office was located in an administrative building where patients did not come. He testified that to his knowledge, his wife had not come in contact with anyone at or outside of work that had been diagnosed or tested positive for COVID-19.

During January 2021, two of his children attended school on a hybrid schedule and went to school a few hours in the morning. He testified that they had special needs and had minimal interaction with others. Petitioner testified that his children's school would send alerts to him if there was COVID-positive staff or children, and he did not recall receiving any alerts in January 2021. His youngest child was three years old and attended an in-home daycare at some point, but he was unsure when she started or if she was in daycare in January 2021. He testified that the daycare had a policy of notifying parents if there was an outbreak of illnesses, and he was never notified of a COVID outbreak. He testified that the in-home daycare had approximately 4 or 5 other children.

Petitioner testified that prior to 1/19/21 he and his family were very strict about socially isolating and they were not interacting with other individuals. To obtain groceries, they would place an order, drive to the grocery store, and the staff would place the groceries in the trunk of their vehicle. Petitioner testified he had a customary workout regimen and the gym he attended just opened back up. He testified he did not return as he was taking his customary one-month

break to rest and recover. He testified he had not come into contact with anyone outside of work that had tested positive for COVID in the weeks prior to his positive test.

Petitioner testified he began treating with his primary care physician, Dr. Newcomb, for COVID-related symptoms. He had shortness of breath, fevers, brain fog, vertigo, fatigue, muscle aches and pains, spasms, and joint pain. He was placed on work restrictions and referred to specialists. He was ultimately diagnosed with long-haul COVID. Petitioner underwent respiratory therapy that caused horrible fatigue. He stated that the process of breathing wears his diaphragm out which results in additional fatigue, body aches, joint pain, and spasms. Petitioner underwent physical therapy that resulted in additional pain symptoms that still affect him.

Petitioner testified that Dr. Newcomb is monitoring his condition on a monthly basis. He last saw Dr. Newcomb on 12/30/22 and he is still on work restrictions. Petitioner testified that he tries to stay up-to-date in reading about new testing and treatment that could improve his condition, and that Dr. Newcomb also sends him articles on symptoms and fatigue management. Petitioner currently experiences shortness of breath, fatigue, cramps, muscle aches, brain fog, dizziness, and fevers. He testified he is not able to perform his duties as a correctional officer with his current symptoms. Petitioner takes a muscle relaxer, Tylenol, and Ibuprofen for his fevers. He uses an exercise bike and a tracker to increase his steps.

Petitioner testified that prior to contracting COVID he was very active. His job duties required extensive walking which he estimated to be five or more miles per night. Prior to his diagnosis, he had a strict workout regimen which included three 45-minute cardio sessions per week and power weightlifting four to six days per week. He testified that since contracting COVID, he has become deconditioned and has not been able to perform power or weightlifting or cardio workouts. He attempted to use resistance bands but was unsuccessful due to fatigue. He walks his daughter to the bus stop one block from his home, which results in soreness and fatigue. Petitioner is desirous of returning to work and to the gym; however, he is not able to do so in his current condition.

On cross-examination, Petitioner testified that the midnight shift officers passed the breakfast trays to the inmates. He testified he always woke the inmates to make sure they received their trays. He agreed that his wife and school-aged children came in contact with other individuals while working or going to school on a hybrid schedule. He testified that his children rode the bus to and from school on hybrid days. Petitioner testified he was diagnosed with sleep apnea and began using a C-PAP machine in November 2022. He has also been diagnosed with hypothyroidism and diabetes. He denied ever having asthma. Petitioner testified that when he graduated from the academy in August 2019, he weighed 303 pounds. When he contracted COVID in January 2021 he weighed 360 pounds. Petitioner testified that the COVID-19 vaccination was not available prior to him testing positive. He agreed that he refused to undergo some testing recommended by Section 12 examiner Dr. Jeff Selby.

Sarah Miller testified on behalf of Petitioner. Mrs. Miller has been married to Petitioner since 2008. She confirmed that she worked a hybrid schedule in January 2021 and did not have any patient contact as she was employed in an administrative role. Mrs. Miller testified she did

not come in contact with anyone at work that was COVID-positive. She testified that while at work, she wore a mask and practiced social distancing.

Mrs. Miller had no knowledge of her children coming into contact with anyone who was COVID-positive in January 2021. They went to school in the morning and were remote in the afternoon and rode the bus to and from school. They wore face masks at school. She testified that they would get calls from the school nurse or texts from teachers during the duration of the pandemic when there was an outbreak of COVID in their class, and that they received no such alerts or calls in January 2021. She testified that her youngest child attended an in-home daycare in January 2021 that had one staff member. She testified that her daughter removed her mask once she was at the daycare. She testified that the daycare provider was prudent to notify her if there was a child or family member who had COVID, and there were multiple times the daycare shut down for weeks. She did not receive any alerts or communications from the daycare that any of the children had COVID in January 2021.

Mrs. Miller testified that when they received Petitioner's COVID-positive results on 1/21/21 she was not experiencing any symptoms but took a test that day that was positive for COVID. She testified that prior to Petitioner contracting COVID, he was a very active father. They split household chores and responsibilities equally and he would help their children with homework before she returned home from work. She testified that since he contracted COVID, things have changed drastically, and Petitioner cannot help with almost any chore. She testified that Petitioner can no longer walk downstairs to do laundry without being out of breath and he is not as involved as he would like. Mrs. Miller testified that prior to Petitioner's diagnosis, he was very physically fit and had been power lifting at the gym most days each week. She testified that prior to contracting COVID, Petitioner did not have the symptoms or problems he currently has.

Major Jared Walker testified on behalf of Respondent. Major Walker was employed at Respondent's Shawnee Correctional Center facility in January 2021. He testified that he assigned Petitioner to work in Unit 1C and D wings. He stated that the COVID-19 isolation unit was 1B, and that overflow would go into restricted housing. He testified there were no COVID-positive inmates housed in Units 1C or D. Major Walker testified that the facility lockdown was lifted in late 2020 and was not on lockdown in January 2021. In order to lift a lockdown, the positivity rate outside the COVID isolation wing had to drop below a certain level for a two-week period.

Major Walker testified that staff was required to wear a surgical mask and gloves pretty much at all times. If officers were interacting in the housing unit wings, they had gowns and face shields to use. He testified that depending on the exposure risk, staff would choose to wear PPE as needed, but at a minimum they had to wear a mask and gloves. Major Walker testified that inmates had to wear masks at all times when they existed their cells. He testified that in January 2021 inmates were tested for COVID twice weekly. He testified that in January 2021 two inmates housed in units 1C and D tested positive for COVID.

Major Walker testified that midnight shift staff had the least amount of contact with inmates. He testified that officers that worked midnight shift would have contact with inmates during chow time when they opened chuckholes to pass food trays and emergency situations. Otherwise, midnight staff would walk the wings every 30 minutes without entering cells. Major

Walker testified that some staff place the food tray inside the cell without the inmate getting out of bed. He testified that inmates are counted during the midnight shift. He testified that some staff look through the window on the cell doors to account for inmates, but staff could open the cell door if they chose to.

On cross-examination, Major Walker testified he was present in the arbitration room when Petitioner testified. He testified that the only part of Petitioner's testimony he disagreed with was that Petitioner worked on the COVID isolation wing assisting with feeding trays. He testified that at that time he directed one to two officers to feed the COVID-positive inmates for safety reasons. He testified that if Petitioner assisted in feeding on the COVID isolation wing it was his choice and not a direction. He agreed that Petitioner could have volunteered to help staff on the COVID-positive wing, but he does not know if he did or not. Major Walker testified that Petitioner was assigned to work Unit 1C and D from September 2020 through March 2021. He agreed that not all inmates wore their mask when they left their cells.

MEDICAL HISTORY

Medical records from Shawnee Health Service were admitted into evidence. (PX3) On 1/22/21, Petitioner was seen via a telemedicine visit with Dr. Aaron Newcomb. His chief complaint was COVID-19 symptoms, including nasal congestion, rhinorrhea, cough, mild dyspnea, low-grade fever, oxygen saturation of 96%, and fatigue. His past medical history included dyslipidemia, degeneration of lumbar intervertebral disc, pre-diabetes, generalized anxiety disorder, severe obesity with a BMI over 40, and allergy to wasp venom. Petitioner's onset date of COVID-19 was 1/19/21. Petitioner was instructed to quarantine and prescribed an albuterol inhaler. Dr. Newcomb recommended monoclonal antibody infusions.

Petitioner had a follow-up telemedicine visit with Dr. Newcomb on 2/4/21. Dr. Newcomb noted Petitioner's symptoms were worsening. He was instructed to avoid cough suppressants, to increase fluids, and get adequate rest. He was diagnosed with post COVID-19 and secondary pneumonia and was given Prednisone and a z-pack.

Petitioner saw Dr. Newcomb on 2/9/21 via a telemedicine visit. Dr. Newcomb noted that Petitioner had received monoclonal antibodies and had persistent symptoms of a fever of 101 or 102 degrees, fatigue, dyspnea on exertion, cough, and paroxysmal symptoms. He was referred for a CT angiogram of his chest.

On 2/17/21, Petitioner saw Dr. Newcomb via a telemedicine visit. Dr. Newcomb noted Petitioner had persistent fever, fatigue, dyspnea on exertion, cough, paroxysmal symptoms, and was worn out after activities such as taking a shower. Dr. Newcomb assessed long-haul COVID. Petitioner was instructed to continue Tylenol and Ibuprofen. He noted that Petitioner's EKG, CTA, and labs performed on 2/9/21 at the emergency department were unremarkable. He was given care instructions for shortness of breath and instructed to return to the office.

On 2/22/21, Petitioner still had ongoing symptoms of fever, DOE, fatigue, cough, and paroxysmal symptoms. He was referred to a specialty clinic at Washington University for long-haul COVID.

On 3/1/21, Petitioner saw Dr. Newcomb via a telemedicine visit for persistent symptoms of fever, fatigue, paroxysmal symptoms, DOE, and cough. Dr. Newcomb assessed COVID-19, dyspnea, long-haul syndrome complication, and fever.

On 3/15/21, Petitioner had a telemedicine visit with Dr. Newcomb who noted persistent symptoms of fever and fatigue. Dr. Newcomb noted Petitioner was worn out after folding clothes recently and that his fever was better some days, but it was persistently over 100 degrees at least every other day. It was noted that Petitioner's specialist ordered an echo and pulmonary function test.

On 3/31/21, Petitioner followed up with Dr. Newcomb via a video visit to discuss long-haul syndrome and persistent symptoms. He reported he was not sweating during activity, which was unusual for him. Petitioner received the Johnson & Johnson COVID-19 vaccination on 3/25/21 and had no improvement and no worsening of symptoms. Dr. Newcomb referred Petitioner to pulmonary rehabilitation to improve his exercise tolerance and dyspnea.

On 4/14/21, Petitioner had the same persistent symptoms of fever, fatigue, DOE, cough, and proximal symptoms, and reported that activities resulted in fatigue that could last for days. Dr. Newcomb instructed him to continue treating with the specialist.

On 4/28/21, Dr. Newcomb noted Petitioner was worn out after minor activities and his symptoms persisted. He was referred to a pulmonologist and to pulmonary rehabilitation.

On 5/12/21, Dr. Newcomb noted Petitioner's chief complaint of shortness of breath. Petitioner continued to have fever, exercise intolerance, DOE symptoms, and exhaustion and fatigue that could last for days at a time. He noted that Petitioner's echo was normal, but his PFT findings were suggestive of a fixed upper airway obstruction. Petitioner was scheduled for a pulmonary evaluation and CT of his neck.

On 3/26/21, Dr. Newcomb noted Petitioner had seen a pulmonologist. His labs and imaging were normal and a repeat PFT was ordered. Petitioner had a bone lesion at T12 and mild chest wall tenderness that was aggravated by deep inhalation. He was instructed to continue treatment with the specialty clinic and pulmonologist.

On 6/9/21, Petitioner returned to Dr. Newcomb with the same persistent symptoms. Petitioner discussed that he had hypothyroidism with an onset in 2020, that he was currently taking Levothyroxine, and that his baseline hypothyroid symptoms had improved considerably.

On 7/8/21, Petitioner presented to Dr. Newcomb's office for dizziness and vertigo that followed his COVID diagnosis six months prior. He reported his head felt like it was spinning when he closed his eyes, and his daily activities were affecting. He avoided driving due to the severity of his symptoms. It was noted Petitioner had not returned to work since contracting COVID. Lab work was ordered for dizziness of unknown cause.

On 7/9/21, Dr. Newcomb noted Petitioner's persistent symptoms of fever, exercise intolerance, and DOE. He had symptoms of hypothyroidism and generalized anxiety disorder.

Dr. Newcomb noted Petitioner's intermittent vertigo spells, dyslipidemia, and pre-diabetes that had worsened due to illness and inactivity. Dr. Newcomb opined that Petitioner's vertigo was a post-COVID symptom and prescribed Meclizine.

On 8/9/21, Petitioner followed up with Dr. Newcomb for long-haul COVID-19 symptoms, vertigo, and generalized anxiety disorder. Dr. Newcomb stated that Petitioner's prognosis or treatment options were unknown. Physical activity, heat, and humidity aggravated Petitioner's symptoms and he had to quit doing yard work after less than one hour. Petitioner reported that his symptom exacerbations typically lasted three days. He had vertigo spells that were severe, intermittent, and could last for days. Meclizine helped his symptoms but caused sedation. Petitioner was experiencing generalized anxiety disorder with anxiousness and worry. Dr. Newcomb noted Petitioner was started on Escitalopram, but since he was having issues with brain fog, concentration, and sexual side effects, he started Petitioner on BuSpar for his anxiety. He prescribed Diazepam for vertigo and referred Petitioner to vestibular therapy and pulmonary rehabilitation.

On 9/8/21, Dr. Newcomb noted the Diazepam was somewhat helpful to Petitioner's vertigo but that vestibular therapy was not. Petitioner was placed off work from 1/19/21 through 10/9/21. (PX3, p. 271)

On 10/6/21, Petitioner reported continued vertigo, fatigue, fevers, aching, and cramping. He reported good and bad days, but he experienced symptoms every day. He was instructed to continue consulting with the specialist for long-COVID syndrome. Petitioner was placed off work from 1/19/21 through 11/9/21. (PX3, p. 270)

On 11/8/21, Petitioner reported he had a bad month with a lot of fatigue, and he was sleeping a lot. He reported having fevers, dizziness, extreme fatigue, and that his mental health had been adversely affected because of same. Petitioner reported that the appointment was the first time he had been out of the house in a month. He was instructed to continue Diazepam for vertigo and continue treating with the specialists for long-COVID syndrome and with his pulmonologist. Petitioner was placed off work from 1/19/21 through 12/9/21. (PX3, p. 251)

On 12/2/21, Petitioner received a Moderna COVID-19 vaccination.

On 12/8/21, Dr. Newcomb noted Petitioner continued to have the same symptoms but since he had the COVID booster he did not "feel like [he was] going to die anymore." Petitioner reported he had not felt that good in months, but he still had fatigue, pain, fever, and malaise. Petitioner was placed off work from 1/19/21 through 1/9/22. (PX3, p. 249)

On 1/27/22, Petitioner reported to Dr. Newcomb he was about the same, but the COVID-19 booster gave him some extra energy and his fatigue improved. He continued to have shortness of breath, fatigue, fevers, and vertigo. Petitioner reported that during pulmonary rehab, he spent 10 minutes on the stepper, after which he was huffing and puffing and had chest pain and cramping. Petitioner was placed off work from 1/19/21 through 2/8/22. (PX3, p. 191)

On 2/7/22, Petitioner reported that he was about the same and he recently began getting a fever from 99 to 102 degrees. He kept a journal for months and noted his symptoms were random. He still had intermittent vertigo that usually hit him hard along with fatigue and shortness of breath daily. He had been attempting therapy, but when he performed it for a day, he could not perform it again until the next week. Dr. Newcomb ordered extensive laboratory testing for Petitioner's pyrexia along with a chest x-ray. Petitioner was placed off work from 1/19/21 through 3/8/22. (PX3, p. 161)

On 3/7/22, Petitioner reported that he had a rough February, and was still experiencing vertigo, fever, fatigue, and brain fog. He reported he started taking Metformin. Dr. Newcomb assessed COVID-19, type II diabetes mellitus, and hypothyroidism. Petitioner was placed off work from 1/19/21 through 4/14/22. (PX3, p. 160)

On 4/13/22, Petitioner reported to Dr. Newcomb he had lost 26 pounds since October and was working with a dietitian and eating better. He reported that his COVID symptoms had not changed. He reported continued physical fatigue and exhaustion, shortness of breath, and fevers. He required breaks every 15 minutes with mowing the lawn. Dr. Newcomb noted that Petitioner's type two diabetes mellitus was a new problem and that he had been taking Metformin and Jardiance. He instructed Petitioner to continue his medications.

On 5/11/22, Dr. Newcomb noted Petitioner had low-grade fevers and intermittent dizziness. Petitioner reported that his pulmonologist ordered a sleep study for possible sleep apnea.

On 6/10/22, Petitioner reported that he had experienced a rough 10 days with symptoms including fatigue and shortness of breath. He had tried supplements without relief and a dehumidifier that did not help his shortness of breath.

On 6/18/22, Petitioner returned to Dr. Newcomb's office with cough, pain, chills, postnasal drip, sputum, chest wall tenderness, shortness of breath, throat clearing, and nasal discharge. He was diagnosed with an upper respiratory infection and prescribed Prednisone.

On 6/23/22, Petitioner reported continued symptoms of fever, chills, cough, wheezing, shortness of breath, and muscle aches. He was diagnosed with acute bacterial sinusitis and community acquired pneumonia. He was given Doxycycline and a chest x-ray was ordered.

On 7/13/22, Dr. Newcomb noted Petitioner's chief complaints of difficulty remembering, unrelenting fatigue, and intermittent fevers. Petitioner reported cramps in his legs and feet since his COVID diagnosis. He reported his sleep study was scheduled and he was prescribed Methocarbamol. Dr. Newcomb authored a letter/work slip to Respondent stating Petitioner had a prolonged illness following a COVID-19 diagnosis on 1/19/21 causing prominent exercise intolerance, fatigue, shortness of breath, vertigo spells, and measurable fevers basically every day since onset. She stated that Petitioner has persistent symptoms from COVID-19 and is not capable of working at this time. Petitioner has been referred to a specialty clinic in St. Louis for COVID-19 long haul syndrome on 3/3/21. He is also being managed by a pulmonologist. He has had extensive workup without alternative diagnosis. Dr. Newcomb placed Petitioner off work

from 1/19/21 through 8/14/22 due to COVID-19 and advised that Petitioner would be assessed every month to evaluate his recovery and work suitability. (PX3, p. 92)

On 8/12/22, Petitioner reported that he had walked a block to the bus stop that week and that was as far as he could go and was unable to recover from it. He reported he did not have a fever for ten days and then spike a fever of 102.4. He reported increased shortness of breath because it has been rainy and humid that week. He was still experiencing intermittent spasms and cramps that lasted a few weeks. He reported a recent bad spell of vertigo and was unable to drive. Dr. Newcomb ordered a CT of Petitioner's sinuses due to pyrexia. Dr. Newcomb authored the same letter/work slip to Respondent placing Petitioner off work from 1/19/21 through 9/14/22 due to COVID-19 and advised that Petitioner would be assessed every month to evaluate his recovery and work suitability. (PX3, p. 83) On 9/13/22, Dr. Newcomb continued Petitioner off work through 10/14/22. (PX3, p. 62)

On 9/27/22, Petitioner reported he was examined by an ENT who did not think he had any active infection in his sinuses and that if an infection had been there a long time it would not have caused high grade fevers he had been experiencing. He reported that his sleep study showed mild to moderate sleep apnea. He stated that he was not tired and sleeping the day away, but rather, was completely exhausted when he tried to do anything. He stated that nothing improved his COVID symptoms and were worsening. He had fatigue, fevers, intermittent dizziness, and shortness of breath that worsened with humidity, all of which were affecting his mental health. He reported cramps and swelling in his wrists. Dr. Newcomb noted that Petitioner's ENT concluded that his fever of unknown origin was unrelated to any sinus disease present.

On 10/27/22, Petitioner presented for left shoulder pain and spasms. He reported he had muscle spasms since his COVID diagnosis. He could not identify a context for his pain and that it was due to his long-haul COVID. Petitioner had tenderness and limited range of motion in his left trapezius and tenderness in the levator scapulae. He was prescribed Prednisone and a left shoulder x-ray was ordered.

On 10/31/22, Dr. Newcomb noted that Doxycycline and Augmentin did not improve Petitioner's sinus symptoms. Petitioner reported ongoing fatigue, severe brain fog, and pain in his trapezius that was causing problems sleeping and his blood pressure to become elevated. His vertigo and fevers were persistent. He reported that his symptoms were worsening his mental health despite medication. Dr. Newcomb noted a new diagnosis of major depressive disorder that developed in the context of chronic disease from long-haul COVID. He prescribed Bupropion and referred Petitioner to physical therapy for his left shoulder. He ordered a thoracic spine x-ray.

On 12/2/22, Petitioner reported worsening depression, panic attacks, and suicidal thoughts. He stated he had been working through the five stages of grief over his past healthy life and he was in the depression phase hoping to get to the acceptance phase. He reported using his C-PAP machine for two weeks without improvement in his extreme fatigue. He reported he attempted physical therapy for his shoulder but could not do it. He attempted an exercise bike at home for one minute per day with a goal of moving up half a minute each day but could not do

it. Dr. Newcomb instructed Petitioner to continue Bupropion for depression and prescribed Escitalopram.

On 12/30/22, Petitioner reported persistent symptoms of fever, exercise intolerance, dyspnea, fatigue, vertigo, and shortness of breath. He told Dr. Newcomb he was "pretty sick" and had not had a good day in a long time. Lexapro was helping his mental health, but he still had depression and panic attacks. He reported that he did six weeks of physical therapy and was trying to do 3,000 to 5,000 steps per day, but he still had not recovered from physical therapy. He stated it takes him months to recover when he overdoes activities. He reported that his physician in St. Louis told him that if it had been over a year, the chances of improving were unlikely. He reported he was working with a counselor on grieving his health and working on his depression.

Medical records from SIH Herrin Hospital were admitted into evidence. (PX4) On 1/25/21, Petitioner underwent monoclonal antibody therapy infusions of Casirivimab and Imdevimab.

On 2/9/21, Petitioner presented to the emergency department with shortness of breath, fever, weakness, and fatigue. An EKG showed normal sinus rhythm and a CT angiogram of the chest showed no acute infiltrate, pneumonia, or pleural fluid. Labs showed a high white blood cells, neutrophils, and monocytes. The impression was COVID-19 and Petitioner was discharged with medications.

On 4/2/21, Petitioner underwent an echocardiogram that was normal with some mildly increased wall thickness.

On 5/18/21, Petitioner presented to the emergency department for shortness of breath and stated he was a COVID long-hauler on day 119. He reported that his pulmonologist referred him to the emergency department for evaluation of a possible airway obstruction. CT scan of the soft tissue of Petitioner's neck showed no acute abnormalities. A CT angiogram showed no large central pulmonary embolism and no pneumonia. The clinical impression was that Petitioner had shortness of breath and he was discharged.

On 6/9/21, Petitioner underwent a bone scan for a T12 lesion seen on the CT performed on 5/18/21. The bone scan revealed age-related changes.

On 8/25/21, Petitioner presented for a physical therapy evaluation. The therapist noted that Petitioner had COVID in January 2021 and had experienced dizziness, fatigue, shortness of breath, brain fog, and daily fever. He had been keeping a log of his symptoms during the last few months and reported they were worsening. He had unpredictable episodes of dizziness that would last days and were without trigger. He reported his shortness of breath became worse during times of heat and humidity. He had a dizziness handicap inventory score of 58%. He was assessed with dizziness without symptom provocation. The therapist indicated that therapy could not address the episodic events and did not recommend vestibular adaptation therapy at that time.

On 1/20/22, Petitioner underwent a pulmonary stress test, and the impression was that he did not qualify for supplemental oxygen.

On 2/1/22, Petitioner reported to his physical therapist he has shortness of breath on exertion and during the following days he slept for 18 to 20 hours. He felt he had no time to recover properly with the scheduling of the program. Despite this, he wanted to continue the program and make it work.

On 3/2/22, Petitioner underwent a barium swallow and video fluoroscopy ordered by Dr. Akhtar. He reported a history of dysphagia with a tickling sensation followed by coughing after eating and drinking and a medical history of long-haul COVID-19 and fatigue. The results were normal, and it appeared that Petitioner developed a habitual cough due to a tickling sensation in the pharynx. He was instructed on breathing relaxation exercises.

On 6/23/22, Petitioner underwent a chest x-ray that was normal. On 8/31/22, Petitioner underwent a CT of his paranasal sinuses that revealed moderately severe chronic paranasal sinusitis. It was recommended that he follow up with an ENT. On 10/27/22, Petitioner underwent a left shoulder x-ray that was normal. On 10/31/22, Petitioner underwent an x-ray of his thoracic spine that was normal.

On 11/3/22, Petitioner presented for an initial therapy evaluation for his left shoulder pain. He reported he had pain due to long-haul COVID. He stated he had pain spurts that would last four to five days, with muscle spasms, cramps, and brain fog. He stated the pain began in his shoulder on 10/23/22 after five days of muscle spasms and denied any injury. Objective testing revealed tenderness to palpation at the rhomboids and posterior shoulder, tingling and numbness that radiated from the back of the shoulder to the pinky, very tight and rounded shoulders, and fatigue symptoms. He was assessed with left shoulder pain at the trap in the rhomboid region. The therapist noted that Petitioner had been suffering from side effects of COVID-19 long-haul syndrome and he had fatigue and muscle tightness in the left upper extremity quadrant. He was recommended for occupational therapy two times per week.

Petitioner participated in therapy on 11/8/22 and responded well to manual therapies; however, he still had tightness in his shoulder. Petitioner reported severe fatigue and shortness of breath for days following his attempt to use a leg bike at home for five minutes, and it was suggested that he begin with one minute and increase his time by 30 second intervals each day. He required rest breaks during therapy due to his COVID-19 long-haul syndrome.

At the 11/11/22 therapy session, Petitioner indicated he was very fatigued following his last session and he laid in bed for two days. He was advised to rest over the next few days. Petitioner indicated that his 11/15/22 therapy session was the first day in months that his fatigue was better. On 11/18/22, Petitioner reported minimal shoulder pain, but his fatigue persisted. He reported using a C-PAP machine and felt more tired. On 11/21/22, reported improvements in his left shoulder pain, but he had poor tolerance with strengthening exercises. On 11/29/22, Petitioner reported his shoulder felt better but he was more fatigued, his legs were painful, and he had a high-grade fever the night before. On 12/1/22, Petitioner reported fatigue and that he attempted to cut his hair the day before and had to sit and think about how to conserve his energy before he did so. On 12/13/22, Petitioner reported his shoulder felt fatigued, weak, and tight. He indicated that his fatigue was terrible and had not improved, that he felt more tired since

beginning to use his C-PAP machine, and that focusing deeply caused his brain fog to increase. He reported improved shoulder pain and the ability to increase activities. On 12/14/22, Petitioner reported he was not feeling well and had fatigue, but his shoulder was improved. The therapist noted Petitioner had poor tolerance with any strengthening activities and had lasting fatigue for days afterwards.

Petitioner performed four sessions of pulmonary rehabilitation at Herrin Hospital from 1/5/22 through 1/18/22. On 1/10/22, Petitioner stopped therapy after eight minutes due to feelings of vertigo. He had to sit down before resuming therapy.

Medical records from the Washington University Care and Recovery COVID Clinic were admitted into evidence. (PX5) On 3/3/21, Petitioner provided a history of an outbreak of COVID at the prison, he had "sniffles" on 1/19/21, and received his positive test results on 1/21/21. Petitioner reported having fever almost every day since, and his chief complaints were shortness of breath, fatigue, and fever. He reported he had "COVID brain" and took Tylenol three to four times daily. A pulmonary function test and transthoracic echo Doppler were ordered. Petitioner was referred to a neurologist for concerns with cognitive function.

Medical records from Heartland Regional Medical Center were admitted into evidence. (PX6) On 4/27/21, Petitioner underwent a pulmonary function test that was suggestive of a fixed upper airway obstruction. A CT verses ENT evaluation was recommended.

Medical records from SIH Pulmonary and Critical Care Medicine were admitted into evidence (PX7). On 5/18/21, Petitioner was examined by Dr. Zohaib Akhtar and reported dyspnea on exertion since being diagnosed with COVID. Dr. Akhtar noted that at baseline Petitioner was a power lifter and since his COVID diagnosis he was short of breath with daily activities. Petitioner had intermittent fevers and experienced a very slow recovery. The transthoracic echo was normal. The pulmonary function test did not show a defect but suggested questionable expiratory limb flattening. Petitioner's medical history of hypothyroidism, anxiety, depression, and hypertension were noted. He had no prior history of diabetes mellitus. Dr. Akhtar assessed dyspnea on exertion and recommended a chest CT scan to rule out post COVID pneumonia. He stated that if the CT was negative, his symptoms might be post COVID syndrome. Dr. Akhtar also recommended a cervical CT scan to evaluate Petitioner's airway. He assessed post-COVID syndrome and snoring and referred Petitioner to a sleep clinic. Dr. Akhtar recommended that Petitioner be evaluated at the emergency room for possible airway obstruction given his symptoms of shortness of breath and low oxygen saturation while in the office.

On 6/15/21, Dr. Akhtar noted Petitioner's chest and cervical CT scans were normal and did not show obstructive disease or parenchymal lung disease. He still had symptoms of fatigue and DOE and Dr. Akhtar assessed post-COVID syndrome, DOE, and post-COVID. He noted Petitioner had delayed recovery which was consistent with long-haul COVID. Petitioner was advised to use Albuterol if it improved his symptoms.

On 12/15/21, Petitioner reported to Dr. Akhtar he had 5% improvement since June and had persistent fatigue, dyspnea on exertion, and intermittent cough with eating. Dr. Akhtar referred Petitioner to pulmonary rehabilitation and ordered a six-minute walk test. He also re-

ordered the sleep clinic referral to evaluate obstructive sleep apnea and referred him to a speech language therapist for dysphagia.

Petitioner returned to Dr. Akhtar on 6/15/22 and unchanged symptoms. He attempted pulmonary rehabilitation but stopped due to post-rehab fatigue. He had been seen by a speech language pathologist and his cough had improved and his sleep study was pending. Dr. Akhtar assessed DOE, fatigue, and post COVID syndrome He recommended that Petitioner return to his office on a PRN basis and stated that as for his post-COVID DOE and fatigue, he hoped that Petitioner will recover, but it may take a long time.

Medical records of Dr. Hassan Pervaiz at SIH Center for Medical Arts were admitted into evidence. (PX8) On 5/3/22, Dr. examined Petitioner for obstructive sleep apnea. It was noted that Petitioner snored and had possible sleep apnea spells while sleeping. Petitioner had excessive daytime sleepiness during the past one and a half years that progressively worsened. A sleep study was ordered, and Petitioner was recommended to begin a nasal spray and daily sinus rinse. His review of symptoms included activity changes, fatigue, shortness of breath, dizziness, and weakness.

On 8/24/22, Petitioner presented to SIH Marion Sleep Study for a polysomnogram. (PX9) The diagnosis was obstructive sleep apnea and presenting symptoms were loud, disruptive snoring, witnessed apnea, and excessive daytime sleepiness. He was diagnosed with moderate obstructive sleep apnea, and he was recommended for a CPAP machine.

Medical records from Midwest Sinus Sleep & Allergy Associates, LLC were admitted into evidence. (PX10) On 9/20/22, Petitioner reported symptoms of chronic muscle fatigue, intermittent fevers, mild nasal congestion, and a diagnosis of sleep apnea. An endoscopy was performed that confirmed sinusitis and drainage. He was prescribed oral antibiotics and the possibility of a sinus balloon procedure was discussed.

On 10/4/22, Petitioner followed up and reported that he did not have current symptoms of nasal obstruction, sinus headache, or recurrent sinus infection since he had been using Flonase and daily saline irrigation. He was instructed to return to the office for further intervention if his symptoms were to return.

On 3/31/22, Petitioner was examined by Dr. Jeff Selby pursuant to Section 12 of the Act. (RX3) Dr. Selby took an extensive history from Petitioner, reviewed medical records, and performed a physical examination. It was noted Petitioner refused to undergo any testing or labs at the examination, except a chest x-ray, which limited Dr. Selby's ability to adequately diagnose. Dr. Selby opined that Petitioner may have contracted COVID at some point that resulted in fever, fatigue, and upper respiratory symptoms, but his ongoing symptoms were not related to COVID. He opined that Petitioner's symptoms were most likely due to recurrent sinus infections, an ongoing issue that he has had prior to the alleged injury. He noted that Petitioner has other medical issues that contribute to his current condition, including morbid obesity, deconditioning, diabetes, chronic sinusitis, hypothyroidism, uncontrolled severe sleep apnea, and preexistent asthma. Dr. Selby strongly recommended a sleep study and noted Petitioner's hypothyroid status needed to be addressed. He further recommended aerobic activity.

After reviewing extensive medical records, Dr. Selby opined there was nothing preventing Petitioner from returning to work full duty as his pulmonary functioning testing, oximetry, and echocardiogram all show normal work output capability. He opined that Petitioner's ongoing issues were not related to COVID, but rather his own pre-existing medical conditions and deconditioned state.

Dr. Selby believed that Petitioner's fevers that lasted for months following his COVID diagnosis were from another source such as sinus infection, other infection, drug fever, or even lymphoma or sarcoidosis. He stated that Petitioner had "what sounds like pre-existing asthma that may have been flared by COVID." He believed that Petitioner's fatigue was multi-factorial but indicated that for it to last as long as it had was not all likely to be from COVID. He believed that post-COVID symptoms might persist for months, but almost never that long and to that degree and believed his fatigue was caused by obesity and sleep apnea. Dr. Selby admitted that Petitioner likely had mild fatigue and foggy brain the first few weeks after having COVID, but stated that COVID had played no role in his condition for several months. He believed that medical treatment had probably been reasonable and necessary; however, he felt that Petitioner's fatigue was related to his hypothyroid, and there was no objective reason for his shortness of breath except for his BMI and inactivity. He indicated that there was no explanation as to why aerobic activity could not have been pursued much more strongly and believed that his medications could be reduced or eliminated if he would have become disciplined in losing weight and conditioning with aerobic exercise. He stated that Petitioner was not at MMI regarding his overall health, but that there was no basis to believe that COVID had influenced in him for a year.

On 12/20/22, Petitioner was examined by Dr. Anthony Shen at Suburban Chest and Sleep Specialists for an independent medical exam at the direction of Petitioner's attorney. (PX11) Dr. Shen reviewed Petitioner's medical records from Washington University COVID Clinic, Dr. Newcomb, Herrin Hospital, Dr. Akhtar, physical therapy and rehabilitation, laboratory, x-ray, and echo testing. He also reviewed an independent medical evaluation from Dr. Jeff Selby.

Dr. Shen noted that Petitioner worked as a corrections officer and was fastidious about wearing a mask covered by a balaclava, as well as glove wearing. He noted that the inmates he interacted with did not wear masks unless they were out of their cells, and that Petitioner usually saw them in their cells while they were unmasked. He noted that Petitioner was physically active prior to contracting COVID-19. He took a history of Petitioner's positive COVID test on 1/19/21 and that his condition deteriorated on approximately day 13, at which time he began to have high fevers and malaise. Petitioner reported he has not worked since his diagnosis of COVID, his symptoms have fluctuated, and he had been as low as 5% of his normal stamina and up to 40% at other times. Petitioner reported persistent symptoms of brain fog, vertigo, dizziness, shortness of breath, fatigue, joint pain and cramping, and febrile symptoms. He had a diagnosis of diabetes in 2021 and sleep apnea in 2022, and Petitioner was treating for hypothyroidism. There was no history of heart impairment, smoking, asthma, or an acute pulmonary condition.

Dr. Shen's impression was that Petitioner had long-haul COVID with significant residual impairment of brain fog, fatigue, vertigo, dizziness, stiffness in hands and feet, and lack of

stamina. Other impressions were hypothyroidism, type II diabetes, and sleep apnea, which were under management, a BMI of 48.3, and no documented pulmonary or cardiac impairment. It was Dr. Shen's opinion that Petitioner's COVID condition was related to his work, that he suffered from long-haul COVID syndrome, and that he could not return to work as a Correctional Officer due to his impairments. He noted that medications had not been identified for treatment of long-haul COVID, that Petitioner was 23 months from the date of injury, and that he was at MMI.

Dr. Anthony Shen testified by way of deposition on 1/12/23. (PX12) Dr. Shen is a pulmonary physician with board-certifications in pulmonology and internal medicine. He has been in practice since 1980. From 1986 to present, Dr. Shen has been the director of the pulmonary lab at Missouri Baptist Hospital, was the director of the pulmonary division for 35 years, and was chief of medicine for 20 of those years. He testified that he routinely sees people with COVID-19 and takes care of all the COVID patients for the St. Louis police and fire department.

Dr. Shen testified that after taking Petitioner's history, performing an examination, and reviewing medical records, he diagnosed Petitioner with long-haul COVID originating from a case on 1/19/21. He testified that Petitioner's impairments included brain fog, fatigue, vertigo, dizziness, stiffness, and lack of stamina. He testified that people with obesity such as Petitioner tend to have more complications from COVID.

Dr. Shen testified that he reviewed Dr. Selby's Section 12 report and stated physicians have "evolved quite a bit in the last nine months in our understanding of COVID and long-haul COVID." He referred to an electronic database used by physicians on a regular basis called UpToDate, and testified that a latest edition from 11/18/22 discussed the many aspects of long-haul COVID and that it occurs in people even if they have not been hospitalized, and that the understanding of same is still evolving. Dr. Shen observed that every doctor that saw Petitioner felt he had long-haul COVID. He testified that every physician's visit Petitioner had was consistent with post-COVID syndrome, and he did not see a single visit where a physician opined that Petitioner did not have long COVID.

Dr. Shen testified that the way to manage long-haul COVID is to do a thorough evaluation for any cardiac or pulmonary disease, which had been done on Petitioner. He testified there is no medication known to reverse long-haul COVID, and that it is a disease in evolution. He testified that a 12/15/22 bibliography in the American Journal of Respiratory and Critical Medicine concluded that long-haul COVID is a real impairment, that it could include a constellation of signs and symptoms, including neuromuscular, psychiatric, respiratory, cardiac, and G.I. symptoms that persist for weeks or months after COVID-19. They concluded that this was a novel passage, and it would be years before they had robust statuses on its final outcome and course. Dr. Shen recommended treating Petitioner's anxiety and depression, physical therapy, and to render supportive care and wait for the disease to heal, although he believed that the prognosis for any sudden improvement was unexpected.

Dr. Shen testified that although Petitioner wore gloves and a mask at work, he was frequently in contact with inmates, and that wearing protective equipment is not 100% effective

in preventing infection. He referred to a recent study that revealed 10% of doctors and nurses who treated COVID patients would become infected with COVID, even in hospital settings using protective equipment. He testified that Petitioner and his family were very worried about COVID and were fastidious in trying to avoid it, that he was the only one leaving the house, and as such, Dr. Shen felt it was likely that Petitioner's exposure at work was a cause of his COVID infection which resulted in long-haul impairments.

On cross-examination, Dr. Shen admitted that his causation opinion was based on information given to him by Petitioner. He did not review any data from Shawnee Correctional Center regarding Covid outbreaks at the facility. Dr. Shen testified Petitioner indicated he was about the same weight at the time he saw him as he was before he contracted Covid, approximately 266 pounds, which would make him morbidly obese. Dr. Shen testified that morbid obesity can cause fatigue, breathing problems, and shortness of breath. He further testified that sleep apnea has a significant effect on a person's heart and lungs which can cause fatigue, shortness of breath, and sleep deprivation. Sleep deprivation can cause a reduction in concentration.

Dr. Shen admitted there was no objective testing to diagnose brain fog, vertigo, or dizziness, which are diagnosed based on subjective complaints. Dr. Shen admitted that all of Petitioner's residual impairments he listed were based on Petitioner reporting them to him. He did not perform any testing for fatigue or lack of stamina. Dr. Shen testified Petitioner was in a deconditioned state, which can cause fatigue, as well as hypothyroidism.

Dr. Jeff Selby testified by way of deposition on 10/25/22. (RX4) Dr. Selby is a pulmonologist and lung specialist board-certified in internal medicine and pulmonology. He has been practicing for over 40 years. Dr. Selby testified he is very familiar with Covid and treats and manages patients with long-haul Covid symptoms. He reviewed medical records, took a history, and performed a physical examination of Petitioner. He noted Petitioner was breathing easily and his respiration was unlabored. Petitioner stated he weighed 384 pounds. Dr. Selby testified that Petitioner complained of fatigue, shortness of breath, and some vertigo. He diagnosed Petitioner with morbid obesity, uncontrolled sleep apnea, hypothyroidism, and possible asthma. He opined that Petitioner may have had post-Covid for a week or two following his diagnosis, but his current symptoms were not related to Covid.

Dr. Selby testified that Petitioner weighed approximately 350 pounds when he contracted Covid, meaning he was morbidly obese prior to the alleged sickness. He opined that morbid obesity can cause breathing problems, shortness of breath, and fatigue. The higher the BMI, the worse these conditions can be. Dr. Selby testified that Petitioner was very deconditioned which can also cause breathing problems, shortness of breath, and fatigue.

Dr. Selby testified that Petitioner does not have any current active problem related to his prior Covid diagnosis. He opined that Petitioner was at MMI for COVID and any sequelae stemming from it, and he could work full duty without restrictions from an objective standpoint.

On cross-examination, Dr. Selby testified he spent several hours reviewing Petitioner's medical records, and his chief complaint was fatigue. He did not know if Petitioner had fatigue

prior to his COVID diagnosis because he did not have any prior records to review. Dr. Selby testified he did not know where Petitioner contracted COVID and that it was useless to ask him because COVID is very commonplace and everywhere. He believed that the history of where Petitioner may have been exposed to COVID should have already been handled by the health department, as there was no way to track it back months or a year later. Dr. Selby testified there were a number of tests he wanted to perform but Petitioner refused. Dr. Selby testified that Petitioner was approaching his baseline following COVID in March 2021, based on a record from the Washington University COVID Clinic dated 3/3/21 that indicated his impairment was near baseline. Dr. Selby testified he would agree and would pick the middle of the month, or March 15th, as his MMI date. He stated he did not know because he was not there. He opined that Petitioner should have recovered more quickly than someone with severe COVID that required hospitalization or ventilation.

Dr. Selby testified that Petitioner's continued complaint of shortness of breath is subjective. He believed that Petitioner would benefit from losing weight and that his symptoms would improve or resolve with aerobic activity and weight loss. He opined that losing weight also helps with sleep apnea. Based on Petitioner's health issues, including the uncontrolled sleep apnea, Dr. Selby opined Petitioner would have developed issues like shortness of breath and fatigue regardless of his COVID diagnosis. He opined that Petitioner's current state is due to his morbid obesity, sleep apnea, diabetes, and hypothyroidism.

He testified that the bihilar adenopathy found on Petitioner's chest x-ray taken in his office could have been a result of sarcoidosis, lymphoma, or an inflammatory response to an infection. Dr. Selby believed that Petitioner's ongoing fevers were more likely caused by another source, such as recurrent sinus infection or other infection. He admitted that COVID is a cause of fevers and he was not aware of the last time Petitioner had a sinus infection and had no knowledge of other infections. Dr. Selby testified he had no objective findings that Petitioner had asthma, but he opined in his report that Petitioner sounded like he had pre-existing asthma that had been flared by COVID.

Dr. Selby testified that Dr. Newcomb's records were "absolutely blatantly false." He testified you cannot put too much credibility on subjective shortness of breath complaints. He testified he had no information to suggest that Petitioner's obesity caused shortness of breath or fatigue prior to his COVID infection, and that his obesity did not restrict his ability to perform his job prior to his COVID infection. He opined that Petitioner's condition was going to happen to him sooner or later in his life whether he got COVID or not.

Dr. Selby was asked if he agreed with the World Health Organization that approximately 10 to 20% of people with COVID experience a variety of long-term effects after they recover from their initial illness, and he replied that he did not trust the WHO and was very skeptical of anything he read that came from it. Dr. Selby was asked if he agreed with the Center for Disease Control's statement that some people with COVID continue to experience symptoms that can last for months after being infected and may have pneumonia or recurring symptoms at a later time and that this could happen to anyone who had COVID-19, even if the initial illness was mild. He responded, "I don't know that I would state that necessarily," but admitted that it was possible.

Dr. Selby testified he has seen people have post-COVID symptomology that interfered with their life, and that post-COVID symptoms included tiredness or fatigue. He testified he has heard that post-COVID symptoms worsen after a physical or mental effort, but there was no objective proof of that happening. He could not opine that fever was a post-COVID symptom because fever can be caused by so many things. He agreed that anxiety and depression are seen in people who reported post-COVID symptoms and conditions. He admitted that people who have underlying health conditions prior to a COVID-19 infection could be more affected by post-COVID conditions and agreed that Petitioner had underlying health conditions that pre-dated his COVID infection. Dr. Selby agreed that COVID could aggravate, accelerate, or exacerbate deconditioning. He admitted there was still much to learn about COVID and it was difficult to predict how long post-COVID conditions could last for any given patient.

CONCLUSIONS OF LAW

Issue (C): Whether Petitioner was last exposed to an occupational disease on January 19, 2021 that arose out of and in the course of his employment by Respondent?

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

It is undisputed Petitioner was tested for COVID-19 at the end of his shift on 1/19/21 and that he was contacted by Respondent's COVID-19 command center on 1/21/21 that his test was positive. He was ordered off work for 14 days to quarantine. Petitioner testified that around the time he received his positive results he began to experience mild symptoms. Over the following days and weeks, his symptoms progressed, and he began experiencing fatigue, tiredness, body aches, shortness of breath, cough, loss of taste and smell, and a low-grade temperature.

Petitioner alleges 1/19/21 as the date of accident or manifestation date, which is consistent with the Occupational Diseases Act, as amended. 820 ILCS 310/1(g)(8). Respondent does not dispute that Petitioner tested positive for COVID-19 on 1/19/21, but disputes that Petitioner contracted the virus from an exposure arising out of and in the course of his employment.

An "occupational disease" is a disease arising out of and in the course of employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation must arise out of a risk "peculiar to or increased by the employment and not common to the general public."

On June 5, 2020, the Illinois Legislature amended the Occupational Diseases Act (ODA) to provide benefits for certain classes of workers who may have contracted COVID-19 at the workplace. The COVID-19 amendment is contained in paragraph 1(g) of the Act and states:

> "In any proceeding before the Commission in which the employee is a
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> COVID-19 first responder or front-line worker as defined in this subsection, if the employee's injury or occupational disease resulted from exposure to and contraction of COVID-19, the exposure and contraction shall be rebuttably

presumed to have arisen out of and in the course of the employee's first responder or front-line worker employment and the injury or occupational disease shall be rebuttably presumed to be causally connected to the hazards or exposures of the employee's first responder or front-line worker employment. (emphasis added). 820 ILCS 310/1(g).

> (2) The term "COVID-19 first responder or front-line worker" means: all individuals employed as police, fire personnel, emergency medical technicians, or paramedics; all individuals employed and considered as first responders; all workers for health care providers, including nursing homes and rehabilitation facilities and home care workers; corrections officers; and any individuals employed by essential businesses and operations as defined in Executive Order 2020-10 dated March 20, 2020, as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees. For purposes of this subsection only, an employee's home or place of residence is not a place of employment, except for home care workers. 820 Ill. Comp. Stat. Ann. 310/1(g)
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> (4) The rebuttable presumption created in this subsection applies to all cases tried after June 5, 2020 (the effective date of Public Act 101-633) and in which the diagnosis of COVID-19 was made on or after March 9, 2020 and on or before June 30, 2021 (including the period between December 31, 2020 and the effective date of this amendatory Act of the 101st General Assembly).
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> (6) In order for the presumption created in this subsection to apply at trial, for COVID-19 diagnoses occurring on or after June 15, 2020, an employee must provide a positive laboratory test for COVID-19 or for COVID-19 antibodies.

Simply stated, exposure and contraction of the COVID-19 virus are presumed to have arisen from the work environment and the occupational disease is presumed to be causally connected to the hazards or exposures of employment. As such, the presumption creates a *prima facie* case that the injury arose out of and in the course of employment. If not rebutted, Petitioner is entitled to benefits afforded under the ODA. If rebutted, Petitioner loses the benefits of the presumption, and must prove his case in the same manner as required under the ODA.

The Arbitrator finds Petitioner to be a "COVID-19 first responder or front-line worker" as he was employed as a correctional officer at Shawnee Correctional Center. Petitioner's manifestation date of 1/19/21 also falls within the period set forth in the Act for which the rebuttable presumption applies. As Petitioner's manifestation date occurred after June 15, 2020,

Petitioner must provide a positive laboratory test for COVID-19. It is undisputed Petitioner had a positive laboratory test for COVID-19 on 1/19/21 and he was directed to remain off work until his isolation period expired. The medical records further confirm his positive diagnosis of COVID-19. Therefore, the Arbitrator finds that the rebuttable presumption set forth in 820 ILCS 310/1(g)(6) applies in this case.

Respondent may rebut the presumption created by 820 ILCS 310/1(g) by evidence, including, but not limited to, the following:

> (A) the employee was working from his or her home, on leave from his or her employment, or some combination thereof, for a period of 14 or more consecutive days immediately prior to the employee's injury, occupational disease, or period of incapacity resulted from exposure to COVID-19; or
>
> (B) the employer was engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices based on updated guidance issued by the Centers for Disease Control and Prevention or Illinois Department of Public Health or was using a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to the employee's injury, occupational disease, or period of incapacity resulting from exposure to COVID-19. For purposes of this subsection, "updated" means the guidance in effect at least 14 days prior to the COVID-19 diagnosis…For purposes of this subsection, "personal protective equipment" includes, but is not limited to, items such as face coverings, gloves, safety glasses, safety face shields, barriers, shoes, earplugs or muffs, hard hats, respirators, coveralls, vests, and full body suits; or
>
> (C) the employee was exposed to COVID-19 by an alternate source.

820 ILCS 310/1(g)(3).

The COVID-19 presumption is an ordinary presumption. Respondent need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease. The legislation creates a rebuttable presumption similar to the rebuttable presumption that already exists within the ODA. The COVID-19 Amendment to the Illinois Occupational Diseases Act employs established precedent found in *Kevin Johnston v. Illinois Workers' Compensation Commission* to support the addition of this Act. In *Johnston*, the Appellate court found that in order to rebut the presumption, "some evidence sufficient to support a finding that something other than the claimant's occupation caused his condition" is sufficient. In that event, the presumption will cease to operate, and Petitioner will have to establish, by a preponderance of the evidence, the COVID-19 disease was contracted at her place of employment by introducing

evidence at trial as if the presumption never existed. The presumption merely shifts the burden of production, not the burden of persuasion. It operates in the employee's favor only if the employer provides no evidence to rebut causation.

In the present case, there was no evidence admitted at arbitration that Petitioner was working from home or on leave from Respondent's facility for fourteen (14) days prior to his injury on 1/19/21. It was undisputed at arbitration that Petitioner continued to work his regular midnight shift as a correctional officer immediately prior to testing positive for COVID-19 on 1/19/21. Therefore, Respondent has failed to rebut the presumption under Subsection (g)(3)(A).

No evidence was admitted at trial to show Petitioner was exposed to COVID-19 by an alternate source. Petitioner testified that he lives with his wife and three dependent children. Petitioner and his wife both testified they were fastidious in wearing personal protective equipment and observing social distancing. Mrs. Miller worked a hybrid schedule in an administrative role from home and work. She did not have any direct contact with patients nor did she come into direct contact with anyone known to be infected with COVID-19. Both Petitioner and Mrs. Miller testified that their two oldest children attended school on a hybrid schedule, only going to school in the mornings. They were required to wear face masks at school. Petitioner testified that his two oldest children had special needs and therefore had minimal interaction with others. Their youngest child attended an in-home daycare with one staff member and at most five other children. The child wore a face mask to daycare and removed the mask while at daycare. They testified that if there was an outbreak at school or daycare they were immediately notified and they were not made aware of any COVID-19 outbreaks around January 2021.

Petitioner testified he had limited interaction with people outside of work as his family remained socially isolated. They did not shop in stores and their groceries were pre-ordered and placed in the trunk of their vehicle by store employees. Petitioner testified that he obsessively worked out prior to 1/19/21 and the gym he attended just reopened around the time he tested positive for COVID-19. However, Petitioner did not return to the gym as he was taking a month off as was his annual custom. He testified that in the days and weeks prior to his positive COVID-19 test, none of the members of his household had tested positive for COVID-19 or had come in contact with anyone who had COVID-19.

The Arbitrator finds that Respondent did not introduce any evidence to rebut Petitioner's testimony or show Petitioner was exposed to COVID-19 by an alternate source. To the contrary, Petitioner testified that while employees of Respondent were required to wear masks and gloves and socially distance, not all of them followed the rules. Petitioner testified that inmates were only required to wear masks when they left their cell. While inmates were required to wear masks outside of their cell, it was not uncommon for them to fail or refuse to do so. Major Walker agreed that not all inmates wore their mask when they left their cells.

While performing his job duties, Petitioner came in close contact with coworkers and inmates. He worked in a cell block that housed 400 inmates and had a COVID-19 isolation wing. Inmates were not typically wearing masks when he delivered their food trays to them at 4:00 a.m. and they were in their cells. Major Walker testified that in January 2021 inmates were tested

for COVID-19 twice weekly. He testified that in January 2021 two inmates housed in units in which Petitioner worked tested positive for COVID-19.

Petitioner testified that in the weeks prior to 1/19/21 he came in contact with inmates in the isolation wing that housed COVID-positive inmates. Major Walker was present in the arbitration room when Petitioner testified. Major Walker testified that the only part of Petitioner's testimony he disagreed with was that he worked in the COVID isolation wing. He testified that at that time he directed one to two officers to feed the COVID-positive inmates for safety reasons. Petitioner was assigned to Units 1C and D from September 2020 through March 2021. He testified that if Petitioner assisted in feeding on the COVID isolation wing it was his choice and not a direction. He agreed that Petitioner could have volunteered to help staff on the COVID-positive wing, but he does not know if he did or not.

Based on the foregoing evidence, the Arbitrator finds that Respondent has failed to provide some evidence to rebut the presumption under Subsection (g)(3)(C).

The Arbitrator next considers whether Respondent rebutted the presumption by presenting evidence of its actions to reduce the transmission of COVID-19 in the fourteen (14) days prior to 1/19/21, pursuant to Subsection (g)(3)(B).

There was no evidence admitted at trial that Respondent engaged in or applied to the fullest extent possible, or enforced to the best of its ability any measures to reduce the transmission of COVID-19 at its facility, other than Major Walker's testimony that all staff were required to wear masks and gloves "pretty much at all times", and inmates were required to wear masks when they were out of their cells. Petitioner and Major Walker agreed that inmates did not always wear a mask when leaving their cells. Further, inmates were not required to wear masks while in their cells and employees, such as Petitioner, were in close contact with inmates at that time.

Respondent did not produce any evidence, by way of testimony or documents, that it implemented policies and procedures in accordance with CDC or IDPH guidelines, required workplace sanitation and social distancing, or had any health and safety practices to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to 1/19/21. No such guidance from these governmental entities was introduced at arbitration. Therefore, the Arbitrator cannot state Respondent's policies and procedures were based on updated CDC and IDPH guidance, let alone the guidance those entities published that were effective on or about 1/19/21.

There was no evidence admitted at arbitration that Respondent was using a combination of administrative controls or PPE to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to 1/19/21. Major Walker testified that if officers were interacting in the housing unit wings, they had gowns and face shields to use. He testified that depending on the exposure risk, staff could choose to wear PPE as needed, but at a minimum they had to wear a mask and gloves. Petitioner testified that not all of his coworkers abided by the PPE requirement.

The evidence supports that Respondent failed to adequately implement and provide workplace sanitation, health and safety practices, and PPE. Based on the totality of the evidence, the Arbitrator does not find that Respondent rebutted the presumption set forth in 820 ILCS 310/1(g)(6). Therefore, the Arbitrator finds that Petitioner was exposed to an occupational disease on 1/19/21 that arose out of and in the course of his employment by Respondent.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he/[she] has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Com'n*, 207 Ill.2d 193 (2003).

A disease may be an accidental injury and may be compensable if it is contracted accidently or as a result of an accident. *John Rissman & Son v. Industrial Commission.*, 323 Ill. 459, 154 N.E. 203 (1926); *Permanent Const. Co. v. Industrial Commission*, 380 Ill. 47, 43 N.E.2d 557 (1942). The aggravation of a preexisting condition or disease may be an accidental injury and may be compensable if it meets the requirement that the occurrence be traceable to a definite time, place, and cause. *Riteway Plumbing v. Industrial Commission*, 67 Ill.2d 404, 367 N.E.2d 1294, 10 Ill.Dec. 528 (1977); *Quaker Oats Co. v. Industrial Commission*, 66 Ill.2d 418, 362 N.E.2d 1045, 6 Ill.Dec. 223 (1977).

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident and decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill.2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96-97, 197 Ill. Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 666, Ill. Dec. 347, 442 N.E.2d 908 (1982).

The Arbitrator finds that Petitioner's contraction of COVID-19 is more probably than not traceable to his employment with Respondent. Petitioner testified that he would come into personal contact with inmates and coworkers, some of whom were not wearing masks or other PPE. Major Walker testified that in January 2021 two inmates housed in units 1C and D, the wings on which Petitioner was assigned, tested positive for COVID-19. Petitioner testified that he worked on the COVID isolation wing at times, which could not be disputed by Major Walker.

There was no evidence that Petitioner went anywhere except work and home in the 14 days prior to 1/19/21. Although Mrs. Miller was not experiencing any symptoms, she tested for COVID-19 the day Petitioner received his positive results on 1/21/21. Mrs. Miller tested positive on 1/21/21, supporting the probability that she contracted COVID-19 from Petitioner, not an alternate source. There is no evidence that Petitioner's children were exposed to or were positive for COVID-19 in the 14 days prior to 1/19/21.

While Dr. Selby and Dr. Shen agree that Petitioner had COVID-19, Dr. Selby did not believe that Petitioner's current condition of ill-being was causally related to his COVID infection but rather his deconditioning and weight. The Arbitrator is less persuaded by the opinions of Dr. Selby than those of Dr. Shen. Dr. Shen credibly testified that after taking Petitioner's history, performing an examination, and reviewing his records, Petitioner has long-

haul COVID related to his exposure on 1/19/21. Both doctors agreed that Petitioner had the same symptoms and impairments including brain fog, fatigue, vertigo, dizziness, stiffness, and lack of stamina. Both physicians agreed that those symptoms have been associated with long-haul/post-COVID. Every physician who examined Petitioner, other than Dr. Selby, agreed that his conditions were related to long-haul COVID. Dr. Shen further explained that people with obesity such as Petitioner tend to have more complications from COVID.

Dr. Shen testified that COVID-19 is a disease in evolution that could include a constellation of signs and symptoms, including neuromuscular, psychiatric, respiratory, cardiac, and G.I. symptoms that persist for weeks or months after COVID-19. He testified that the American Journal of Respiratory and Critical Medicine concluded that long-haul COVID is a real impairment, and it would be years before they had robust statuses on its final outcome and course. Dr. Shen testified there is no medication known to reverse long-haul COVID and the best thing to do is treat the symptoms, including anxiety and depression, physical therapy, and to render supportive care and wait for the disease to heal.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the exposure that manifested on 1/19/21.

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

Issue (K): Is Petitioner entitled to 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 Mrg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co., v. Indus. Comn'n*, 785 N.E.2d 18 (1st Dist. 2001). Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Dye v. Illinois Workers' Comp. Comm'n*, 2021 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193, 1198.

The Arbitrator concludes that the medical treatment rendered to Petitioner to address his COVID-19 infection and subsequent post-COVID syndrome was reasonable and necessary to relieve and cure the effects of his work-related injury and the sequela of said injury. Respondent shall therefore pay all reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1, directly to the medical providers pursuant to the Illinois medical fee schedule or PPO agreement, whichever is less, pursuant to the stipulation of the parties and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any medical expenses previously paid and a credit for any and all medical expenses paid through its group medical plan, as stipulated by the parties.

The Arbitrator further finds that Petitioner has not reached maximum medical improvement as his treatment to date has not relieved the effects of his work exposure. Respondent shall authorize and pay for the prospective treatment relating to his long-haul COVID-19 syndrome, as recommended by Dr. Newcomb and his treating physicians.

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

Petitioner claims entitlement to additional temporary total disability benefits for the period 10/16/22 through 1/18/23. The parties stipulated that all temporary total disability benefits have been paid through 10/15/22 and that Respondent is entitled to a credit of $41,743.56 in TTD benefits paid. Respondent disputes liability for TTD benefits.

Petitioner was placed off work for 14 days immediately following his positive COVID test. Dr. Newcomb continued to place Petitioner off work on a monthly basis. On 12/20/22, Dr. Shen opined that Petitioner was not capable of performing his correctional officer job duties due to his COVID related impairments. Petitioner has consistently remained off work since his exposure on 1/19/21.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period 1/20/21 through 1/18/23, of which Respondent has already paid through 10/15/22. Therefore, Respondent shall pay Petitioner additional temporary total disability benefits of $673.26/week for 13-4/7th weeks, commencing 10/16/22 through 1/18/23, as provided in Section 8(b) of the Act. Respondent shall receive a credit of $41,743.56 in TTD benefits paid through 10/15/22.

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

April 10, 2023

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003946
Case Name	Frederick Timmons v. Continental Tire the Americas, Inc.
Consolidated Cases	22WC003951;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0235
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Andrew Keefe

DATE FILED: 5/21/2024

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Timmons,

Petitioner,

vs. NO: 22 WC 3946

Continental Tire the Americas, 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, causal connection, medical causation, medical expenses, temporary total disability, permanent partial disability, and statute of limitations, 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 14, 2023, is hereby affirmed and adopted.

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

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

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

May 21, 2024

MP:yl
o 5/9/24
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/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003946
Case Name	Frederick Timmons v. Continental Tire the Americas, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Andrew Keefe

DATE FILED: 2/14/2023

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Frederick Timmons
Employee/Petitioner

v.

Continental Tire the Americas, Inc
Employer/Respondent

Case # **22** WC **3946**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **09/15/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 7, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***N/A*** causally related to the accident. See Order below.

In the year preceding the injury, Petitioner earned $**51,313.45**; the average weekly wage was $**1061.30**.

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

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

Respondent ***N/A*** paid all appropriate charges for all reasonable and necessary medical services. See Order below.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**2,776.94** for other benefits, for a total credit of $**2,776.94**.

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

ORDER

The Arbitrator finds that this case is duplicative of 22WC3951. All the facts and issues are identical. Therefore, the Arbitrator finds it unnecessary to make any conclusions as to the issues or award any benefits, as all the issues are addressed in 22WC3951 and benefits were awarded in that case.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

FEBRUARY 14, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on September 15, 2022, 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 date of the accident, which was alleged to have been February 7, 2020; 3) the causal connection between the accident and the Petitioner's bilateral carpal tunnel syndrome; 4) medical bills; 5) entitlement to temporary total disability (TTD) benefits from April 27, 2022, through June 2, 2022; 6) the nature and extent of the Petitioner's injury and 7) "statute of limitations" – whether the Petitioner's Application for Adjustment of Claim was filed with the limits of the Illinois Workers' Compensation Act (the Act). This case was consolidated with 22WC3951, in which the Petitioner also alleged the same injuries with an accident date of March 16. 2020.

The parties stipulated that the Respondent paid for a nerve conduction study on February 28, 2020, and a visit to an orthopedic surgeon on March 16, 2020.

FINDINGS OF FACT

As of February 7, 2020 – the reported date of injury in this case – the Petitioner was 48 years old and employed with Respondent as an innerliner operator. (AX1, T. 14) At the time of arbitration, he had been working for the Respondent for the past 13 years. (T. 12) The Petitioner said he was working two 8-hour shifts and two 12-hour shifts each week. (T. 21)

At the arbitration hearing, videos of various work duties were shown, and the Petitioner described the tasks shown on the videos and which of those tasks were hand intensive. (T. 21-47) These tasks included: pulling hitch pins; loading slab rubber that is stuck together and has to be ripped apart; grabbing scraps of rubber from a "book" and tossing them into a mill; cutting mill strips and blending; pushing and pushing on shell changers when changing shelves; and folding

rubber and pounding it with his fist or a flat hand. (Id.) He said the books and mill work were the most hand-intensive jobs. (T. 43)

The Petitioner said that the worker in the video taking scraps from the book was working with a "pretty fresh" book. (T. 26-27) He said that the longer the rubber sat in the book, it got stuck and he had to grab the scraps and jerk them – sometimes using a crowbar to break them loose. (T. 26-27) He said that although the video depicted the worker removing four or five pieces of rubber from a leaf, he had books with 30 small pieces in one leaf, with each being stuck. (T. 27) He said each book has 26 leaves/pages, each page takes 30-45 minutes to process, and he processed four to five books per shift. (T. 32-33, 53-54) He said there were occasions when the books were "messed up" – meaning that the rubber scraps were stacked about 4 inches high and become stuck when the leaf is shut down on top of them. (T. 34) He said the pieces of rubber can weigh 5-40 pounds and be of different sizes and thicknesses. (T. 40) He said he worked on fewer books in 2019 and 2020 – they came, went away, came back, went away and came back. (T. 66)

The Petitioner pointed out that the videos didn't show the worker performing cutting or blending on the mill, which he described as grabbing the rubber as it rolls out of the mill and using a small mill knife to cut the rubber, rolling it with the other hand to blend the rubber. (T. 27-28) The Petitioner demonstrated the procedure and said he performed blending every 30 minutes or so. (T. 29, 47) He said that in blending, he performs one long, solid cut – cutting and pulling for about 30 seconds. (T. 67) He said he did this 10-12 times per shift. (Id.) He also described cutting the mill strip, for which he makes between four and 100 cuts per shift, with the cuts taking two seconds. (T. 69-70)

The Petitioner said that when he ran out of books, he would work on "skids" 3-4 feet high that contained rubber stacked in layers of usually four pieces with the layers separated by a liner.

(T. 48-49) These pieces also were thrown in the mill. (T. 49) He said pulling rubber from the skids was different from pulling it from the books in that a majority of the pieces are stuck together. (T. 49-50) He said that although he did not throw books very often anymore, he still did skids, which he said were harder to throw than books. (T. 65) He said the skids were not depicted in the videos. (T. 51) Also not depicted in the videos was re-rolling liners, which the Petitioner described as using a hand crank to adjust liners on an empty cassette. (T. 51-53)

A written description of job duties was prepared on November 21, 2017, by senior industrial engineer Jason Miller that described job duties for an innerliner operator. (RX2) The duties included an average of three shell changovers (6.7 percent of an eight-hour shift), 22 squeegee cassette changes (11.9 percent of an eight-hour shift), five rework book procedures (9.3 percent of an eight-hour shift), 11 skid changes (4.1 percent of an eight-hour shift), line observations (58 percent of an eight-hour shift) and break time (10 percent of an eight-hour shift). (Id.) Mr. Miller did not testify.

The Petitioner testified that the job description was not accurate in stating that 9.3 percent of his workday was spent working with the books. (T. 48) He said performing book work takes up probably 40 percent of his shift. (T. 72) Regarding the task of observing the line, the Petitioner said he does that while working on the books. (T. 48)

Michael Galloway, lead supervisor for preparation for the Respondent, testified that he supervised the Petitioner's position since August 2018. (T. 91) He said he reviewed the job description and believed it was "pretty accurate" and that the percentages of times the duties were performed were "pretty close." (T. 92) He said the knives used at the mill had been subject to ergonomic studies. (T. 93) He said the Petitioner stopped performing work on books in July or August of 2020. (T. 97) He said the Petitioner did "some" skid work in 2020. (T. 96) He said it

would take an hour to do a skid, and a worker would do two, maybe three skids per shift. (Id.) He opined that the physical requirements were the same for skids as they were for books. (T. 113)

Mr. Galloway testified that the videos were recorded in 2017 and acknowledged that they did not reflect changes in the Petitioner's work duties as of 2020. (T. 101) He said the videos were sent to Dr. Brown because the Petitioner's injury was reported in 2017. (Id.)

The Petitioner acknowledged that in September 2017, he had numbness and tingling in his hands and pain in his elbows. (T. 13) He reported this to his supervisor and to the nurse's station. (T. 55, RX6) He assumed it was work-related but said he didn't know what was going on. (T. 55-56) He admitted filling out a Statement of Events on September 28, 2017, that claimed injuries to his wrists and elbows from everyday work. (T. 57, RX5) He did not remember having a nerve conduction study performed but said he may have. (T. 13-14) Later in his testimony, he agreed that he had tests performed on September 19, 2017. (T. 59) These tests were performed by neurologist Dr. Sajjan Nemani at Sleep and Neurology Ceter of Southern Illinois. (RX4) The tests were supportive of a diagnosis of moderate right and mild left carpal tunnel syndrome and minimal right ulnar neuropathy at the elbow. (Id.) The Petitioner testified that he was unaware of being diagnosed with carpal tunnel syndrome at that time. (T. 14) He did not recall the doctor with whom he followed up after the tests and said he was told that he didn't have carpal tunnel and didn't need surgery. (T. 60) He said he was not referred to an orthopedic surgeon to address carpal tunnel syndrome. (T. 61) The Respondent introduced a referral order from. Michael Murray, a physician assistant at Ultimed Plus 1 that was dated September 27, 2017, that stated a diagnosis of bilateral carpal tunnel syndrome and referred the Petitioner to Dr. Joon Ahn, an orthopedic hand surgery specialist at the Orthopaedic Center of Southern Illinois. (RX6) It appeared that an appointment was made for October 16, 2017. (Id.) The Petitioner testified that he did not recall

seeing the referral form nor being told he had an appointment scheduled for October 16, 2017. (T. 62) He said he never saw Dr. Ahn. (Id.)

The Petitioner testified that since 2017, the numbness and tingling continued, and he reported it to his supervisor in 2020. (T. 14-15) At that time, he was sent to the safety department, and a nurse sent him to have a nerve conduction study. (T. 15) The tests were conducted by physiatrist Dr. Boris Khariton on February 28, 2020. (RX4) The Petitioner reported intermittent pain, numbness and tingling in his hands and fingers for more than three years, with his symptoms being worse on the right side. (Id.) Dr. Khariton found evidence of bilateral median motor-sensory focal distal neuropathy at the wrist which could represent bilateral carpal tunnel syndrome. (Id.) The findings were mild on the median motor nerve bilaterally, moderate on the left median sensory nerve and severe on the right median sensory nerve. (Id.) The bilateral ulnar motor-sensory and radial sensory studies were normal. (Id.)

The Petitioner said the nurse at work referred him to Dr. David Brown, an orthopedic surgeon at The Orthopedic Center of St. Louis. (T. 81) On March 16, 2020, the Petitioner saw Dr. Brown and discussed his job duties. (T. 15-16) Dr. Brown noted that the Petitioner was right-hand dominant and reported working 8-12 hours per day and 40+ hours per week. (RX1, Deposition Exhibit 2) The Petitioner said his job entailed grabbing and pulling rubber, using a knife to cut rubber on the mill and operating walkies. (Id.) The Petitioner reported a three-year history of gradual progressive numbness and tingling in both his hands, right greater than left. (Id.) Dr. Brown examined the Petitioner, reviewed the nerve studies from February 28, 2020, diagnosed chronic progressive bilateral carpal tunnel syndrome and recommended surgery. (Id.) The Petitioner testified this was when he first found out he had carpal tunnel syndrome and that Dr. Brown tried to get surgery approved through the Respondent, but it was not approved. (T. 16, 18)

On July 13, 2020, Dr. Brown reviewed the videos and job description and reported that if the videos and job description were accurate, he would not consider the job duties as the type of activities that would cause carpal tunnel syndrome and concluded the Petitioner's condition was not causally related to his job duties. (RX1, Deposition Exhibit 3)

Nerve studies were performed again on February 9, 2022, that suggested moderate carpal tunnel syndrome on the right and mild on the left. (PX4) The Petitioner next sought treatment from Dr. Matthew Bradley, an orthopedic surgeon at Metro East Orthopedics, on March 16, 2022. (PX2) Dr. Bradley reviewed the tests from February 9, 2022, and examined the Petitioner. (Id.) The Petitioner testified that he discussed the details of his job with Dr. Bradley. (T. 76) Dr. Bradley's records reflected that the Petitioner reporting driving and scrapping (pulling heavy rubber out and throwing it aside). (PX2) On a form, the Petitioner reported: lifting and carrying up to 10 pounds continuously, up to 25 pounds frequently and up to 50 pounds occasionally; driving, reaching, repetitive hand use, pushing, pulling and tool use continuously; and job duties of "tugers, walkies, mill, rubber feeding, scrap work, computer, pulling, pushing and pinching." (PX1, Deposition Exhibit 2)

Dr. Bradley diagnosed bilateral carpal tunnel syndrome and opined that the chronic repetitive work the Petitioner described as occurring on a daily basis was causally related to the development of the condition and the need for future medical treatment, including surgical intervention. (PX2) Dr. Bradley performed a left open carpal tunnel decompression on April 27, 2022, and an open right carpal tunnel release on May 18, 2022. (Id.) At a follow-up visit on June 2, 2022, the Petitioner reported that the numbness and tingling had resolved, and he was no longer having any significant pain. (Id.) He reported only some mild stiffness that resolved with usage. (Id.) Dr. Bradley found the Petitioner to be at maximum medical improvement. (Id.)

Dr. Brown testified consistently with his reports at a deposition on August 26, 2022. (RX1) He said that at the time of his examination of the Petitioner, he was not asked to comment on medical causation. (Id.) He said that in determining whether the Petitioner's work was a contributing factor to his condition, the videos were the most valuable information. (Id.) He said the job description and videos showed that almost 70 percent of the workday was simply observing, waiting or taking breaks, with the majority of the rest of the time driving a vehicle. (Id.) He said that only one activity – presumably feeding the scraps into the mill – could be a risk factor if done enough over a long period of time, but it was performed less than 10 percent of the workday. (Id.)

On cross-examination, Dr. Brown admitted that when he initially recommended surgery, his staff sought approval from the workers' compensation insurance carrier. (Id.) He said that at that time, he assumed the insurance company had accepted the Petitioner's claim. (Id.) He said that in giving his later opinion, he assumed the video and job descriptions were accurate and a fair representative of the Petitioner's job duties. (Id.) He said that if there were other activities that were not shown, that could potentially change his opinion. (Id.) He acknowledged that the Petitioner's work could be an occupational risk factor if he were using forceful grasping on a more frequent basis or grasping heavier pieces than those depicted on the video. (Id.)

Dr. Bradley testified consistently with his records at a deposition on September 6, 2022. (PX1) He said that at the Petitioner's initial visit, he reviewed the work activity form with the Petitioner and tried to understand exactly what the Petitioner did at work that he felt led to his condition. (Id.) He thought the repetitive squeezing of heavy rubber and occasionally pulling on it when it became stuck certainly contributed to the development of carpal tunnel syndrome. (Id.) On cross-examination, Dr. Bradley admitted that he had not seen the nerve studies from 2017 or 2020 but said they would not change his opinions. (Id.)

The Petitioner testified that although the numbness and tingling in his hands were gone, he still experienced stiffness and a little weakness. (T. 54)

CONCLUSIONS OF LAW

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

The Arbitrator finds that this case is duplicative of 22WC3951. All the facts and issues are identical. Therefore, the Arbitrator finds it unnecessary to make any conclusions as to the issues or award any benefits, as all the issues are addressed in 22WC3951 and benefits were awarded in that case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC003951
Case Name	Frederick Timmons v. Continental General Tire the Americas, Inc.
Consolidated Cases	22WC003946;
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0236
Number of Pages of Decision	19
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Andrew Keefe

DATE FILED: 5/21/2024

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Timmons,

Petitioner,

vs. NO: 22 WC 3951

Continental Tire the Americas, 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, causal connection, medical causation, medical expenses, temporary total disability, permanent partial disability and statute of limitations, 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 14, 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 $51,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 21, 2024

MP:yl
o 5/9/24
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	22WC003951
Case Name	Frederick Timmons v. Continental Tire the Americas, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Eric Kirkpatrick
Respondent Attorney	Andrew Keefe

DATE FILED: 2/14/2023

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Frederick Timmons
Employee/Petitioner

v.

Continental Tire the Americas, Inc
Employer/Respondent

Case # **22** WC **3951**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **09/15/2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 16, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**51,313.45**; the average weekly wage was $**1061.30**.

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

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**2,776.94** for other benefits, for a total credit of $**2,776.94**.

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

ORDER

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit 4 pursuant to the fee schedule, 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 temporary partial disability benefits of $707.53/week for 5 1/7 weeks, commencing 4/27/22 through 6/2/22, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $636.78/week for 36.1 weeks, because the injuries sustained caused the 9% loss of the left hand and 10% loss of use of the right hand, as provided in Section 8(e) of the Act.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

FEBRUARY 14, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on September 15, 2022, 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 date of the accident, which was alleged to have been March 16, 2020; 3) the causal connection between the accident and the Petitioner's bilateral carpal tunnel syndrome; 4) medical bills; 5) entitlement to temporary total disability (TTD) benefits from April 27, 2022, through June 2, 2022; 6) the nature and extent of the Petitioner's injury and 7) "statute of limitations" – whether the Petitioner's Application for Adjustment of Claim was filed with the limits of the Illinois Workers' Compensation Act (the Act). This case was consolidated with 22WC3946, in which the Petitioner also alleged the same injuries with an accident date of February 7, 2020.

The parties stipulated that the Respondent paid for a nerve conduction study on February 28, 2020, and a visit to an orthopedic surgeon on March 16, 2020.

FINDINGS OF FACT

As of March 16, 2020 – the reported date of injury in this case – the Petitioner was 48 years old and employed with Respondent as an innerliner operator. (AX1, T. 14) At the time of arbitration, he had been working for the Respondent for the past 13 years. (T. 12) The Petitioner said he was working two 8-hour shifts and two 12-hour shifts each week. (T. 21)

At the arbitration hearing, videos of various work duties were shown, and the Petitioner described the tasks shown on the videos and which of those tasks were hand intensive. (T. 21-47) These tasks included: pulling hitch pins; loading slab rubber that is stuck together and has to be ripped apart; grabbing scraps of rubber from a "book" and tossing them into a mill; cutting mill strips and blending; pushing and pushing on shell changers when changing shelves; and folding

rubber and pounding it with his fist or a flat hand. (Id.) He said the books and mill work were the most hand-intensive jobs. (T. 43)

The Petitioner said that the worker in the video taking scraps from the book was working with a "pretty fresh" book. (T. 26-27) He said that the longer the rubber sat in the book, it got stuck and he had to grab the scraps and jerk them – sometimes using a crowbar to break them loose. (T. 26-27) He said that although the video depicted the worker removing four or five pieces of rubber from a leaf, he had books with 30 small pieces in one leaf, with each being stuck. (T. 27) He said each book has 26 leaves/pages, each page takes 30-45 minutes to process, and he processed four to five books per shift. (T. 32-33, 53-54) He said there were occasions when the books were "messed up" – meaning that the rubber scraps were stacked about 4 inches high and become stuck when the leaf is shut down on top of them. (T. 34) He said the pieces of rubber can weigh 5-40 pounds and be of different sizes and thicknesses. (T. 40) He said he worked on fewer books in 2019 and 2020 – they came, went away, came back, went away and came back. (T. 66)

The Petitioner pointed out that the videos didn't show the worker performing cutting or blending on the mill, which he described as grabbing the rubber as it rolls out of the mill and using a small mill knife to cut the rubber, rolling it with the other hand to blend the rubber. (T. 27-28) The Petitioner demonstrated the procedure and said he performed blending every 30 minutes or so. (T. 29, 47) He said that in blending, he performs one long, solid cut – cutting and pulling for about 30 seconds. (T. 67) He said he did this 10-12 times per shift. (Id.) He also described cutting the mill strip, for which he makes between four and 100 cuts per shift, with the cuts taking two seconds. (T. 69-70)

The Petitioner said that when he ran out of books, he would work on "skids" 3-4 feet high that contained rubber stacked in layers of usually four pieces with the layers separated by a liner.

(T. 48-49) These pieces also were thrown in the mill. (T. 49) He said pulling rubber from the skids was different from pulling it from the books in that a majority of the pieces are stuck together. (T. 49-50) He said that although he did not throw books very often anymore, he still did skids, which he said were harder to throw than books. (T. 65) He said the skids were not depicted in the videos. (T. 51) Also not depicted in the videos was re-rolling liners, which the Petitioner described as using a hand crank to adjust liners on an empty cassette. (T. 51-53)

A written description of job duties was prepared on November 21, 2017, by senior industrial engineer Jason Miller that described job duties for an innerliner operator. (RX2) The duties included an average of three shell changovers (6.7 percent of an eight-hour shift), 22 squeegee cassette changes (11.9 percent of an eight-hour shift), five rework book procedures (9.3 percent of an eight-hour shift), 11 skid changes (4.1 percent of an eight-hour shift), line observations (58 percent of an eight-hour shift) and break time (10 percent of an eight-hour shift). (Id.) Mr. Miller did not testify.

The Petitioner testified that the job description was not accurate in stating that 9.3 percent of his workday was spent working with the books. (T. 48) He said performing book work takes up probably 40 percent of his shift. (T. 72) Regarding the task of observing the line, the Petitioner said he does that while working on the books. (T. 48)

Michael Galloway, lead supervisor for preparation for the Respondent, testified that he supervised the Petitioner's position since August 2018. (T. 91) He said he reviewed the job description and believed it was "pretty accurate" and that the percentages of times the duties were performed were "pretty close." (T. 92) He said the knives used at the mill had been subject to ergonomic studies. (T. 93) He said the Petitioner stopped performing work on books in July or August of 2020. (T. 97) He said the Petitioner did "some" skid work in 2020. (T. 96) He said it

would take an hour to do a skid, and a worker would do two, maybe three skids per shift. (Id.) He opined that the physical requirements were the same for skids as they were for books. (T. 113)

Mr. Galloway testified that the videos were recorded in 2017 and acknowledged that they did not reflect changes in the Petitioner's work duties as of 2020. (T. 101) He said the videos were sent to Dr. Brown because the Petitioner's injury was reported in 2017. (Id.)

The Petitioner acknowledged that in September 2017, he had numbness and tingling in his hands and pain in his elbows. (T. 13) He reported this to his supervisor and to the nurse's station. (T. 55, RX6) He assumed it was work-related but said he didn't know what was going on. (T. 55-56) He admitted filling out a Statement of Events on September 28, 2017, that claimed injuries to his wrists and elbows from everyday work. (T. 57, RX5) He did not remember having a nerve conduction study performed but said he may have. (T. 13-14) Later in his testimony, he agreed that he had tests performed on September 19, 2017. (T. 59) These tests were performed by neurologist Dr. Sajjan Nemani at Sleep and Neurology Ceter of Southern Illinois. (RX4) The tests were supportive of a diagnosis of moderate right and mild left carpal tunnel syndrome and minimal right ulnar neuropathy at the elbow. (Id.) The Petitioner testified that he was unaware of being diagnosed with carpal tunnel syndrome at that time. (T. 14) He did not recall the doctor with whom he followed up after the tests and said he was told that he didn't have carpal tunnel and didn't need surgery. (T. 60) He said he was not referred to an orthopedic surgeon to address carpal tunnel syndrome. (T. 61) The Respondent introduced a referral order from. Michael Murray, a physician assistant at Ultimed Plus 1 that was dated September 27, 2017, that stated a diagnosis of bilateral carpal tunnel syndrome and referred the Petitioner to Dr. Joon Ahn, an orthopedic hand surgery specialist at the Orthopaedic Center of Southern Illinois. (RX6) It appeared that an appointment was made for October 16, 2017. (Id.) The Petitioner testified that he did not recall

seeing the referral form nor being told he had an appointment scheduled for October 16, 2017. (T. 62) He said he never saw Dr. Ahn. (Id.)

The Petitioner testified that since 2017, the numbness and tingling continued, and he reported it to his supervisor in 2020. (T. 14-15) At that time, he was sent to the safety department, and a nurse sent him to have a nerve conduction study. (T. 15) The tests were conducted by physiatrist Dr. Boris Khariton on February 28, 2020. (RX4) The Petitioner reported intermittent pain, numbness and tingling in his hands and fingers for more than three years, with his symptoms being worse on the right side. (Id.) Dr. Khariton found evidence of bilateral median motor-sensory focal distal neuropathy at the wrist which could represent bilateral carpal tunnel syndrome. (Id.) The findings were mild on the median motor nerve bilaterally, moderate on the left median sensory nerve and severe on the right median sensory nerve. (Id.) The bilateral ulnar motor-sensory and radial sensory studies were normal. (Id.)

The Petitioner said the nurse at work referred him to Dr. David Brown, an orthopedic surgeon at The Orthopedic Center of St. Louis. (T. 81) On March 16, 2020, the Petitioner saw Dr. Brown and discussed his job duties. (T. 15-16) Dr. Brown noted that the Petitioner was right-hand dominant and reported working 8-12 hours per day and 40+ hours per week. (RX1, Deposition Exhibit 2) The Petitioner said his job entailed grabbing and pulling rubber, using a knife to cut rubber on the mill and operating walkies. (Id.) The Petitioner reported a three-year history of gradual progressive numbness and tingling in both his hands, right greater than left. (Id.) Dr. Brown examined the Petitioner, reviewed the nerve studies from February 28, 2020, diagnosed chronic progressive bilateral carpal tunnel syndrome and recommended surgery. (Id.) The Petitioner testified this was when he first found out he had carpal tunnel syndrome and that Dr. Brown tried to get surgery approved through the Respondent, but it was not approved. (T. 16, 18)

On July 13, 2020, Dr. Brown reviewed the videos and job description and reported that if the videos and job description were accurate, he would not consider the job duties as the type of activities that would cause carpal tunnel syndrome and concluded the Petitioner's condition was not causally related to his job duties. (RX1, Deposition Exhibit 3)

Nerve studies were performed again on February 9, 2022, that suggested moderate carpal tunnel syndrome on the right and mild on the left. (PX4) The Petitioner next sought treatment from Dr. Matthew Bradley, an orthopedic surgeon at Metro East Orthopedics, on March 16, 2022. (PX2) Dr. Bradley reviewed the tests from February 9, 2022, and examined the Petitioner. (Id.) The Petitioner testified that he discussed the details of his job with Dr. Bradley. (T. 76) Dr. Bradley's records reflected that the Petitioner reporting driving and scrapping (pulling heavy rubber out and throwing it aside). (PX2) On a form, the Petitioner reported: lifting and carrying up to 10 pounds continuously, up to 25 pounds frequently and up to 50 pounds occasionally; driving, reaching, repetitive hand use, pushing, pulling and tool use continuously; and job duties of "tugers, walkies, mill, rubber feeding, scrap work, computer, pulling, pushing and pinching." (PX1, Deposition Exhibit 2)

Dr. Bradley diagnosed bilateral carpal tunnel syndrome and opined that the chronic repetitive work the Petitioner described as occurring on a daily basis was causally related to the development of the condition and the need for future medical treatment, including surgical intervention. (PX2) Dr. Bradley performed a left open carpal tunnel decompression on April 27, 2022, and an open right carpal tunnel release on May 18, 2022. (Id.) At a follow-up visit on June 2, 2022, the Petitioner reported that the numbness and tingling had resolved, and he was no longer having any significant pain. (Id.) He reported only some mild stiffness that resolved with usage. (Id.) Dr. Bradley found the Petitioner to be at maximum medical improvement. (Id.)

Dr. Brown testified consistently with his reports at a deposition on August 26, 2022. (RX1) He said that at the time of his examination of the Petitioner, he was not asked to comment on medical causation. (Id.) He said that in determining whether the Petitioner's work was a contributing factor to his condition, the videos were the most valuable information. (Id.) He said the job description and videos showed that almost 70 percent of the workday was simply observing, waiting or taking breaks, with the majority of the rest of the time driving a vehicle. (Id.) He said that only one activity – presumably feeding the scraps into the mill – could be a risk factor if done enough over a long period of time, but it was performed less than 10 percent of the workday. (Id.)

On cross-examination, Dr. Brown admitted that when he initially recommended surgery, his staff sought approval from the workers' compensation insurance carrier. (Id.) He said that at that time, he assumed the insurance company had accepted the Petitioner's claim. (Id.) He said that in giving his later opinion, he assumed the video and job descriptions were accurate and a fair representative of the Petitioner's job duties. (Id.) He said that if there were other activities that were not shown, that could potentially change his opinion. (Id.) He acknowledged that the Petitioner's work could be an occupational risk factor if he were using forceful grasping on a more frequent basis or grasping heavier pieces than those depicted on the video. (Id.)

Dr. Bradley testified consistently with his records at a deposition on September 6, 2022. (PX1) He said that at the Petitioner's initial visit, he reviewed the work activity form with the Petitioner and tried to understand exactly what the Petitioner did at work that he felt led to his condition. (Id.) He thought the repetitive squeezing of heavy rubber and occasionally pulling on it when it became stuck certainly contributed to the development of carpal tunnel syndrome. (Id.) On cross-examination, Dr. Bradley admitted that he had not seen the nerve studies from 2017 or 2020 but said they would not change his opinions. (Id.)

The Petitioner testified that although the numbness and tingling in his hands were gone, he still experienced stiffness and a little weakness. (T. 54)

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?
Issue (D): What was the date of the accident.

The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of employment, and that involves as an element a causal connection between the accident and the condition of claimant. *Cassens Transp. Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 199 Ill. Dec. 353 (2nd Dist. 1994) An injury is considered "accidental" even though it develops gradually over a period of time as a result of repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Id*. Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor. *Laclede Steel Co. v. Indus. Comm'n.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (Ill. 1955)

The Arbitrator finds the Petitioner to be credible. His descriptions and demonstrations of how he used his hands at work were detailed and believable. Dr. Bradley believed the Petitioner's condition was work-related based on his discussions with the Petitioner about his work activities.

Although Dr. Brown did not state in his initial report that the Petitioner's condition was work-related, it can be assumed that he thought it was at the time because he sought approval for

the surgery from the workers' compensation insurance carrier. After reviewing the videos and job description, Dr. Brown opined that the Petitioner's condition was not work-related. However, the Arbitrator finds Dr. Brown's opinion was based on incomplete information. Compared with the Petitioner's description of his job duties and his narration of the videos, it is apparent that the videos depict only a snippet of the Petitioner's work under optimal conditions. There were other job tasks – cutting, blending and skids – that were not depicted. Likewise, the written job description did not describe all the Petitioner's tasks.

Regarding scrapping rubber from books, even if the Arbitrator assumes the worker in the video was performing the task in an average manner, the time he spent on this task did not add up to 9.3 percent of a workday. The worker in the video took about a minute and a half to throw three pages of a book. Assuming the worker kept that pace for four books -- without stopping, cutting, blending or having to unstick any of the rubber – it would have taken about an hour, which is 12.5 percent of an eight-hour day. If time is added in for cutting, blending and prying apart stuck rubber, that percentage would certainly be higher. By Dr. Brown's admission, more frequent forceful grasping and grasping heavier pieces of rubber could be a contributing factor to carpal tunnel syndrome. Another issue with the reliability of the videos and the job description is that they were prepared in 2017 and may not accurately reflect what the Petitioner was doing in the five years before he underwent surgery.

The Arbitrator finds the most accurate description of work came from the Petitioner himself. This is what Dr. Bradley relied upon and, presumably, what Dr. Brown relied upon when giving the green light to carpal tunnel surgery at Respondent's expense.

Therefore, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his bilateral carpal tunnel syndrome arose out of and in the course of his employment.

As to the date of injury, the Illinois Supreme Court has held that the date of an accidental injury in a repetitive trauma compensation case is the date on which the injury "manifests itself," which means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home vs Industrial Commission,* 115 Ill.2d 524, 505 N.E.2d 1026, 1029, 106 Ill.Dec. 235 (1987) 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. *Oscar Mayer & Co. v. Industrial Commission,* 176 App.3rd 607, 610, 531 N.E. 2d 174.

Evidence was presented to suggest a manifestation date in September 2017. Although there was a nerve study then that suggested bilateral carpal tunnel syndrome and a referral was made to an orthopedic surgeon, there is no evidence that the Petitioner was ever informed of a potential diagnosis. Other than the nerve study and referral order, there were no medical records from Dr. Nemani, PA Murray or Dr. Ahn that anyone informed the Petitioner that he had carpal tunnel syndrome or that it was related to his work. The Petitioner assumed that his numbness and tingling was due to his work activities, but that does not equate to the fact of an injury and causal relationship being plainly apparent. In addition, the Petitioner was able to work for several more years, which further supports a manifestation date later than September 2017.

The Arbitrator finds that under the circumstances in this case, the fact of the injury and the causal relationship of the injury to the employment would have become plainly apparent to a reasonable person on March 16, 2020, when the Petitioner saw Dr. Brown.

Issue (O): Was the Petitioner's Application for Adjustment of Claim timely filed?

Section 6(d) of the Act provides that the right to file an application shall be barred unless the application is filed within three years after the date of the accident where no compensation has been paid or with two years of the date of the last payment of compensation, whichever is later.

Due to the finding above that the appropriate date of accident was March 16, 2020, and the application was filed on February 15, 2022, the Arbitrator finds the application was timely filed. In addition, the parties stipulated that the Respondent paid for treatment by Dr. Brown, which also leads to the conclusion that the application was timely filed.

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

Based on the causation findings above regarding whether the injury was in the course of and arose out of employment, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that his bilateral carpal tunnel syndrome is causally related to the accident.

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

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

Based on the above findings and the fact that Dr. Brown was recommending carpal tunnel surgery in 2020, the Arbitrator finds the medical services provided were reasonable and necessary, and the Respondent has not paid the bills for this treatment. Therefore, the Respondent is ordered to pay the medical expenses contained in Petitioner's Exhibit 4 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts

already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of April 27, 2022, through June 2, 2022. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990).

Based on the findings above regarding causation and the fact that the Petitioner was off for surgery until being found to be maximum medical improvement and returned to work on June 2, 2022, the Arbitrator finds the Petitioner was entitled to TTD benefits from April 27, 2022, through June 2, 2022. The Respondent is entitled to a credit of $2,779.94 for nonoccupational indemnity disability benefits paid.

Issue (L): What is the nature and extent of the Petitioner's injury?

Pursuant to Section 8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." *Id.*

(i) **Level of Impairment.** No impairment rating was submitted. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation.** The Petitioner continues to work as in his same position and faces the same physical challenges as prior to the accident. Therefore, the Arbitrator places significant weight on this factor.

(iii) **Age.** The Petitioner was 48 years old at the time of the injury. He has many work years left during which time he will need to deal with the residual effects of the injury. The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity.** There was no evidence of limitation of the Petitioner's earning capacity. Therefore, the Arbitrator places no weight on this factor.

(v) **Disability.** The Petitioner testified that although the numbness and tingling in his hands was gone, he still experienced stiffness and a little weakness. The Arbitrator puts some weight on this factor.

Therefore, the Arbitrator finds the Petitioner's temporary total disability to be 9 percent of the left hand and 10 percent of the right hand.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013796
Case Name	Harry Riddle v. The American Coal Co.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0237
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

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

DATE FILED: 5/21/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HARRY RIDDLE,

Petitioner,

vs. NO: 17WC013796

THE AMERICAN COAL CO.,

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 occupational disease, causation, nature and extent and "Sections 1(d)-(f) Occupational Diseases Act," and being advised of the facts and law, affirms and adopts, with the following changes, the Decision of the Arbitrator, which is attached hereto and made a part hereof.

We correct scrivener's errors on page 9 in the last paragraph by striking "Smith" and replacing with "Meyer" and, in the same sentence, striking "May 10" and replacing with "August 13."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2023 is hereby affirmed and adopted.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 21, 2024

SE/
O: 5/7/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013796
Case Name	Harry Riddle v. The American Coal Co.
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Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	14
Decision Issued By	Jeanne AuBuchon, Arbitrator

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

DATE FILED: 3/21/2023

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

HARRY RIDDLE
Employee/Petitioner

v.

THE AMERICAN COAL CO.
Employer/Respondent

Case # **17** WC **013796**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Herrin**, on **October 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **February 5, 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 ***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's earnings were **$158,828.80** and his average weekly wage was **$.3,054.40**.

On the date of accident, Petitioner was **64** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

No benefits are awarded.

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

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

Jeanne L. AuBuchon

Signature of Arbitrator

MARCH 21, 2023

PROCEDURAL HISTORY

This matter proceeded to trial on October 20, 2022, pursuant to Section 7 of the Illinois Workers' Occupational Diseases Act (820 ILCS 310) (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained an occupational disease arising out of and in the course of his employment, including whether the requirements of Sections 1(d)-(f) were met; 2) the causal connection between exposure to the occupational disease and the Petitioner's current condition of ill being; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

An Application for Adjustment of Claim was filed on May 9, 2017, wherein the Petitioner alleged he sustained an occupational disease of his lungs and/or heart as a result of inhalation of coal mine dust, including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 44 years, with the date of last exposure being February 15, 2016. (Id.)

The Petitioner was 62 years old at the time of his last exposure. (AX2) He lives in Raleigh, Illinois, with his wife. (T. 10) He graduated from high school and worked in mining for about 44½ years – basically all of it underground – during which time he was regularly exposed to rock and coal dust. (T. 11) On the last date of exposure, the Petitioner was working as assistant mine superintendent for the Respondent. (T. 13-14) He said he was exposed to coal dust on his last day of employment and left the mine because the walking and crawling that he had to do in his job got to be too much for him and affected his breathing (T. 13-14)

The Petitioner began his mining career in 1972 as a bottom laborer and mine operator with Freeman Coal Company. (T. 15-16) From 1972 through 1990, he worked as a mine operator and face boss for Old Ben Coal Company. (T. 16) From 1990 through 2000, he worked as assistant mine superintendent for Arch Mining. (T. 16-17) From 2000 through 2002, he worked in a mine

in Alabama for the U.S. Steel Company as a production manager. (T. 17) From 2002 through 2006, he was employed by Murray Energy – predecessor of the Respondent – as a general mine superintendent. (T. 17-18) From 2006 through 2008, he worked at Precision Mining Equipment Company bidding jobs at mines. (T. 18-19) From 2008 through 2011, he worked as general manager at North American Coal Company. (T. 19) From 2011 through 2013, he worked for Murray Energy at the Pan America mine in Kentucky. (Id.) In 2013, he returned to work for the Respondent at the Galatia mine, where he worked until his retirement in 2016. (T. 19-20)

While working at the mines, the Petitioner underwent periodic chest X-ray screenings by the National Institute for Occupational Safety and Health (NIOSH). (T. 34) He received letters regarding the results of those screenings but, at the time of Arbitration, did not have copies. (T. 34-35) None of the prior screenings were submitted as evidence.

After retiring, the Petitioner signed up for Social Security benefits and moved to Mississippi, where he ran a fishing guide service until the COVID pandemic. (T. 30-33) He draws a $76 per month pension from the United Mine Workers union. (T. 33) The Petitioner testified that he currently gets winded very easily when doing activities. (T. 20) He said he first started noticing problems with his breathing in 2014 because his legs would hurt, walking in the mud. (T. 21) He said he has had pneumonia several times. (Id.) He said he can walk at a normal pace on level ground without breathing problems for 400 or 500 feet. (T. 21-22) He said he notices breathing issues the most when walking and has problems launching a boat to go fishing because he has to walk up an incline. (T. 22-23) He said his breathing issues have gotten a lot worse than when he first noticed them. (T. 23-24) He uses an Albuterol nebulizer for breathing issues. (T. 24) He said he stopped hunting because he can't walk through his woods. (T. 25) He said he mows his yard with a riding mower but has someone else do his weed-eating. (Id.) He said he

had wanted to work until he was 65 and was offered a bonus to stay with the mine until it closed but he declined, stating that his breathing was one of the biggest reasons. (T. 27)

The Petitioner acknowledged having a heart attack in April 2017. (T. 33) He was treated by the Stern Cardiovascular Clinic and underwent an angioplasty in which a stent was placed in his carotid artery. (RX6) As of January 19, 2022, he had diagnoses of coronary heart disease, hypertension and left ventricular hypertrophy that was being managed with medication. (Id.) The Petitioner testified that he was a smoker since he was 17 or 18 and currently smoked a pack or less a day. (T. 28-29)

Medical records from the Petitioner's primary care physicians at HMC Medical Clinic and Galatia Primary Care from February 28, 2005, through September 30, 2021, showed that the Petitioner was diagnosed with emphysema beginning on September 18, 2017, and continuously since. (RX4, RX5) He was diagnosed with bronchitis on January 24, 2013; March 14, 2013; April 22, 2014; August 3, 2015; December 9, 2015; December 15, 2015; January 13, 2020; and April 23, 2021. (Id.) He was diagnosed with pneumonia on August 5, 2015, that was seen on X-rays. (Id.) Follow-up X-rays showed that the lungs were clear by December 17, 2015. (Id.) A pre-employment screening chest X-ray and lung function tests on August 27, 2008, were normal. (RX4) Chest X-rays on December 13, 2012, and September 26, 2014, were normal. (RX4, RX5) A chest CT scan on May 10, 2019, showed multiple 2-5 millimeter bilateral soft-tissue pulmonary nodules and pulmonary fibrosis, with no change on a follow-up scan August 13, 2019. (RX4)

On March 13, 2017, Dr. Henry K. Smith, a "B-reader" radiologist, examined a chest X-ray of the Petitioner taken on February 28, 2017, and found interstitial fibrosis of classification p/p in all lung zones bilaterally of a profusion 1/1 and mild thickened minor interlobar fissure. (PX2, Deposition Exhibit 2) He found no chest wall placques, calcifications or large opacities. (Id.) He

diagnosed simple coal workers' pneumoconiosis. (Id.) Dr. Smith testified consistently with his report at a deposition on February 27, 2020. (PX2) He explained that the fibrosis classification of p/p stood for the smallest of small, round opacities/abnormal densities. (Id.) The profusion rating grades the concentration or density of these opacities, with normal being a zero and the lowest level of mild pneumoconiosis being 1/0. (Id.) Dr. Smith said the 1/1 profusion would be in the mid-range of the mild type of preponderance of small opacities. (Id.) He said reading films is an art and is not exact. (Id.)

On September 25, 2017, at the request of his attorney, the Petitioner saw Dr. Suhail Istanbouly, a board-certified practitioner in internal medicine, pulmonary medicine, critical care medicine and sleep medicine. (PX1, Deposition Exhibit 2) In his report, Dr. Istanbouly noted that the Petitioner had a 25-pack-year history of smoking and a recent heart attack. (Id.) The Petitioner did not recall being diagnosed with asthma or COPD in the past and was not on any inhaled or nebulized bronchodilator in the past. (Id.) He denied chronic daily cough but said he did cough occasionally with the cough being more prominent in the morning and brisk walking being another triggering factor for the cough. (Id.) The cough was mild in intensity and occasionally productive of slight yellow sputum. (Id.) The Petitioner reported frequent episodes of nocturnal dyspnea (labored breathing) and exertional dyspnea – getting short of breath by walking a quarter of a mile with no changes from six months prior. (Id.)

Lung function tests (also known as a spirometry) conducted that day at Harrisburg Medical Center revealed mild, nonspecific ventilatory limitation with no evidence of hyperactive airways with FEV1 (forced expiratory volume) 79% predicted that improved to 85% predicted after bronchodilator treatment; FVC (forced vital capacity) 77% predicted that improved to 82% after bronchodilator treatment; and FEV1/FVC (FEV1 as a percentage of FVC) of 77%. (Id.) Dr.

Istanbouly reviewed the test results, the chest X-ray from February 28, 2017, and Dr. Smith's report. (Id.) A physical examination was normal. (Id.) Dr. Istanbouly diagnosed the Petitioner with simple CWP due to long-term coal dust inhalation and possible early-stage chronic obstructive pulmonary disease (COPD) equally related to long-term coal dust inhalation and smoking. (Id.) In his report, Dr. Istanbouly wrote that the Petitioner's long-term coal dust inhalation seemed to be a significant contributor to his chronic respiratory symptoms of intermittent cough, sputum production and exertional dyspnea in addition to the abnormality on the spirometry test and chest X-ray. (Id.) He said it was advisable for the Petitioner to avoid any further exposure to coal dust to prevent the progression of his pulmonary disease. (Id.) He also emphasized the importance of smoking cessation. (Id.)

In a deposition on December 14, 2021, Dr. Istanbouly testified consistently with his report. (PX1) He said it was not unusual for a person with a positive chest X-ray for CWP to be asymptomatic and have a normal physical examination in the early stages of the disease. (Id.) He said the improvement in the Petitioner's lung function on the spirometry testing after bronchodilator treatment was not significant enough to meet criteria for hyperactive airway disease. (Id.) He said lungs can be damaged (focal impairment), but a person could have normal spirometry tests, which are a measurement of global impairment. (Id.) He said a person can have shortness of breath, daily cough or CWP and have normal pulmonary function and normal pulse oximetry (oxygen level of the blood). (Id.) He said he reviewed the chest X-ray and found it showed CWP.

Dr. Istanbouly testified that COPD can be multifactorial in origin with more than one insulting agent that can cause it. (Id.) He said there is no test that could rule out one agent versus another. (Id.) He explained the disease process of CWP – that fine particles are inhaled and reach

the deep parts of the airways ending in the alveoli (tiny air sacs that allow for gaseous exchange), causing a local irritation or inflammation that end up with a tiny scar that are the small, round opacities on an X-ray. (Id.) He said that in the long run, these scars replace normal lung tissue and affect the gas exchange. (Id.) He said the scar tissue, which is permanent, is sometimes referred to as fibrosis and causes a form of emphysema to occur. (Id.)

On cross-examination, Dr. Istanbouly acknowledged that the Petitioner did not report a history of respiratory disease. (Id.) He agreed that other causes for exertional dyspnea included heart disease and deconditioning, in general, and that smoking would be associated with cough, sputum and dyspnea on exertion. (Id.) He agreed smoking would predispose the Petitioner to pulmonary infection and pneumonias. (Id.) Although he agreed that the Petitioner's FEV1/FVC was above the lower limit of normal, Dr. Istanbouly stated that there was nonspecific ventilatory limitation – meaning that obstructive or restrictive defect could not be ruled out. (Id.) He acknowledged that the Global Initiative on Obstructive Lung Disease (GOLD) guidelines for the diagnosis of obstruction provides that for a diagnosis of COPD, an FEV1/FVC ratio would have to be less than 70 percent. (Id.) He added that he could not use that finding alone to rule out COPD, as the Petitioner had risk factors for COPD (smoking and coal dust inhalation), along with chronic respiratory symptoms and abnormal spirometry with a chest X-ray. (Id.) Regarding the chest X-ray, he said he reads the X-ray himself (although he is not a B-reader) and relies on his own interpretation as well as the B-reader report. (Id.) Dr. Istanbouly did not review the Petitioner's medical records. (Id.)

On February 7, 2018, at the request of the Respondent, Dr. Cristopher Meyer, a "B-reader" radiologist, reviewed the February 28, 2017, chest X-ray and found no radiographic findings of CWP. (RX2, Deposition Exhibit B) He noted that the Petitioner's lungs were adequately

expanded, and there were no small-rounded, small-irregular or large opacities. (Id.) He saw atherosclerotic calcification in the thoracic aorta. (Id.) In his report, Dr. Meyer disagreed with Dr. Smith's findings, stating that the examination was normal. (Id.)

At his deposition on September 11, 2018, Dr. Meyer testified consistently with his report. (RX1) Like Dr. Smith, he explained the classifications of abnormalities found on a chest X-ray. (Id.) He said the Petitioner's chest X-ray was of a lesser quality because of edge enhancement, which changes the contrast of the edge of structures, making the lungs look like they have more interstitial markings than then actually do. (Id.) However, he said the Petitioner's X-ray was of sufficient diagnostic quality to interpret for the presence of black lung. (Id.) Dr. Meyer agreed that other than pathology, the next best diagnostic took for detection of CWP is a chest CT. (Id.) On cross-examination, Dr. Meyer testified that a negative X-ray does not necessarily rule out CWP. (Id.) He acknowledged that similar experts with similar credentials may disagree on the reading of chest films. (Id.)

Dr. Meyer issued another report on April 28, 2020, after having reviewed the Petitioner's chest CT scan performed on August 13, 2019. (RX3, Deposition Exhibit A) He stated there were no findings of CWP but there was minimal ground-glass opacity with septal lines that were nonspecific and may be mild edema or infection. (Id.) He noted that smoking-related respiratory bronchiolitis may have that appearance. (Id.) He reviewed the original radiology report for the study and disagreed with the findings of bilateral fibrotic change, stating that minimal ground-glass opacity and smooth septal lines are not consistent with fibrosis and would be more characteristic of smoking-related changes. (Id.) He said the scattered bilateral nodules were more consistent with intrapulmonary lymph nodes. (Id.) Dr. Meyer testified consistently with his report at a deposition on January 5, 2022. (RX3)

A review of the Petitioner's medical records was conducted on June 23, 2020, by Dr. David Rosenberg, a board-certified physician in internal medicine, pulmonary disease and occupational medicine hired by the Respondent. (RX2, Deposition Exhibit B) He concluded that the Petitioner did not have a coal mine dust related disorder. (Id.) Based on the radiographic findings in totality, he found there were no definite parenchymal changes of a pneumoconiosis. (Id.) He said the Petitioner ha no restriction or definite obstruction. He noted that the Petitioner had recurrent episodes of bronchitis and had pneumonia in relationship to his long and continued smoking history. (Id.) He said the Petitioner's pulmonary function tests were not disabled and he was not disabled from a respiratory perspective. (Id.) Dr. Rosenberg said the Petitioner's recurrent coughing and congested undoubtedly related to his long and continued smoking history. (Id.) He performed a B-reading of the February 28, 2017, and found no abnormalities. (Id.)

Dr. Rosenberg testified consistently with his report at a deposition on May 11, 2022. (PX1) He said the Petitioner's lung function tests were above the lower limit of normal, his diffusing capacity (ability for oxygen to get into the bloodstream) was normal. and the Petitioner did not suffer from COPD or an obstruction. (Id.) He said that based on the testing, the Petitioner was capable of heavy manual labor from a respiratory standpoint. (Id.) Regarding the chest X-ray, Dr. Rosenberg said he did not see emphysema, and neither did any of the other B-readers. (Id.)

On cross-examination, Dr. Rosenberg testified that people with normal X-rays and lung function tests can have CWP. (Id.) He agreed that similarly qualified and educated physicians can and do disagree as findings on X-rays, especially regarding the low-grade profusions of 0/1 and 1/0. (Id.)

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 the Petitioner suffer an occupational disease which arose out of and in the course of his employment by the Respondent?

Section 1(d) of the Act provides that the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendering disabling as a result of the exposure of the employment. Further, such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.

The Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease as defined by the Act. Although Dr. Smith reported small opacities on the Petitioner's chest X-ray and Dr. Istanbouly diagnosed the Petitioner with CWP, there were no other indications of lung disease, according to the other experts. Although the Petitioner had previous diagnoses of bronchitis and emphysema, Dr. Istanbouly did not review the Petitioner's prior medical records to give an opinion as to whether these were related to CWP or simply to the Petitioner's smoking and/or heart disease. In addition, two sets of lung function tests showed normal functioning.

On the other hand, Drs. Meyer and Rosenberg's testimony correlated with the Petitioner's broader medical history. Although they recognized that different B-readers could reach different conclusions when reading X-rays and it was possible for someone with negative chest X-rays to have CWP, they saw no evidence of the disease. A possibility that the Petitioner has CWP does not suffice for proof by a preponderance of the evidence. In addition, Dr. Smith reviewed the May 10, 2019, CT scan, which would give greater detail than an X-ray, and found no evidence of CWP but evidence of edema or infection and changes related to smoking. The Arbitrator notes that Dr. Meyer made these findings without knowledge of the Petitioner's 26-pack-year smoking history.

Dr. Rosenberg reviewed the Petitioner's prior medical records, as well as the chest X-ray and lung function tests and determined the Petitioner did not have CWP. Aside from the opinion of Dr. Istanbouly, who did not review the Petitioner's prior medical records or CT scan, there was no evidence to rebut the opinions of Dr. Rosenberg, whose analysis was more thorough than Dr. Istanbouly. For these reasons, the Arbitrator gives greater weight to Drs. Meyer and Rosenberg's opinions.

Regarding the element of disablement, Section 1(e) of the Act provides defines the term as an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment.

There was little to no evidence of disablement that could be connected to CWP. Although the Petitioner suffered from bronchitis, emphysema and dyspnea, it is at least as likely that this is caused by his heart disease and/or smoking. Therefore, the Arbitrator finds that the Petitioner has not proved disablement by a preponderance of the evidence.

Lastly, Section 1(f) of the Act provides that no compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease. Based on the findings above, this issue is not reached.

Based on all of the above, the Arbitrator finds that the Petitioner has not proved by a preponderance that he suffers from a compensable occupational disease, as defined by the Act, that arose out of and in the course of his employment with the Respondent.

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

This issue was addressed above under Issue C.

Issue L: What is the nature and extent of the Petitioner's injury?

In light of the findings above, the Arbitrator does not reach this issue.

Issue O: Other issues: Disease, causation and Sections 1(d)-(f) of the Occupational Diseases Act.

These issues were addressed above under Issue C.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC006504
Case Name	Jackie Gaston v. State of Illinois - Warren G. Murray Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0238
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Mary Massa, Nathan Becker
Respondent Attorney	Caitlin Fiello

DATE FILED: 5/21/2024

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACKIE GASTON,

Petitioner,

vs. NO: 22WC006504

STATE OF ILLINOIS /
WARREN G. MURRAY CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, affirms and adopts, with the following changes, the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the finding of accident but strikes the last paragraph on page 4 and the first paragraph on page 5. We also affirm the permanent partial disability award but modify factor (iv) to give it no weight.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 8, 2023 is hereby affirmed and adopted.

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

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

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.

May 21, 2024

SE/
O: 5/7/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC006504
Case Name	Jackie Gaston v. Warren G. Murray Center
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Nathan Becker
Respondent Attorney	Natalie Shasteen

DATE FILED: 5/8/2023

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

/s/ Edward Lee, Arbitrator
Signature

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

May 8, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jackie Gaston
Employee/Petitioner
v.

Case # 22 WC 006504

Consolidated cases:

Warren G. Murray Center
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 **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **4/13/2023**. 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 **11/26/2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$50,600.10**; the average weekly wage was **$1,032.66**

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

Respondent is entitled to a credit of $**Any Amount Paid** Section 8(j) of the Act.

ORDER

Accident

The Arbitrator finds Petitioner sustained accidental injuries that arose out of and in the course of her employment on November 26, 2021. This is based on the testimony of Petitioner and the medical records.

Causation

The Arbitrator finds Petitioner's injury, an avulsion fracture of the right distal fibula, is causally related to her work injury of November 26, 2021. Respondent's causation dispute was based off their accident defense. Having found for Petitioner regarding accident, there is no true causation issue.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,855.00 to SSM Health, $1,360.00 to the Orthopaedic Center of Southern Illinois as provided in Sections 8(a) and 8.2 of the Act. As well as, $127.40 to Petitioner for out-of-pocket expenses paid to the Orthopaedic Center of Southern Illinois.

Respondent shall be given a credit of $**any amount 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.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $688.44/week for 4 and 1/7 weeks, commencing December 9, 2021 through January 6, 2022, as provided in *Section 8(b) of the Act.*

Nature and Extent

Respondent shall pay Petitioner permanent partial disability benefits of $619.61 per week for 25.05 weeks, because the injuries sustained caused 15% loss of use of the right foot/ankle.

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

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

Edward Lee
Signature of Arbitrator

MAY 8, 2023

Jackie Gaston	)	**Case # 22 WC 006504**
Employee/Petitioner	)	
	)	
v.	)	
	)	
Warren G. Murray Center	)	
Employer/Respondent	)	

FINDING OF FACT

This claim came before Arbitrator Edward Lee, in Mt. Vernon, Illinois, on April 13, 2023. On March 10, 2022, Petitioner, Jackie Gaston, filed an Application for Adjustment of Claim alleging an injury to her right foot/leg resulting from a November 26, 2021, work injury. Respondent is disputing 1) Accident; 2) Causation; 3) Medical Benefits; 4) TTD Benefits; and 5) Nature and Extent.

MEDICAL HISTORY

On November 27, 2021, Petitioner presented to SSM Health Medical Group Express Care for medical treatment. The history of present illness stated: "[Petitioner] presents to clinic with complaints of right ankle pain and lateral ankle swelling. Also, some pain in the right foot with ambulation rating pain 1/10. Abrasion to left knee due to a work injury that occurred on 11/26/2021 at Murray Center. Patient states that she rolled her ankle on a sidewalk. Patient states they have been employed at Murray Center for 15 years. Denies any previous injury to extremity." PX 3 at 2. X-rays performed revealed: "there is a small avulsion fracture of the distal fibula with concomitant soft tissue swelling over the lateral malleolus." PX 3 at 6. Petitioner was given an orthopedic walking boot. She was held off work until November 30, 2021, and referred to an orthopedic surgeon. PX 3 at 5.

On November 29, 2021, Petitioner presented to the Orthopedic Center of Southern Illinois for treatment. She was seen by Jamie Smith, MSN, FNP. The history of present illness stated: "a 57-year-old female presents to the clinic today for complaints of right ankle pain. On 11/26/21 she rolled her ankle on the sidewalk and fell at work. She was seen at the express care and diagnosed with a distal fibula avulsion fracture. She was placed in a short Cam Walker boot. She has been full weight bearing." PX 1 at 1. Petitioner complained of 2/10 pain. The pain was throbbing and intermediate. There was swelling and bruising of the left foot/ankle. Id. Petitioner was instructed to continue to wear the Cam Walker boot and to take over-the-counter medications as needed for pain. She was allowed to return to work on sedentary duty. PX 1 at 1.

On December 16, 2021, Petitioner returned to the Orthopedic Center of Southern Illinois. Her pain level was at 1/10. There was mild swelling and tenderness over the distal fibula. The Cam Walker was discontinued, and she was provided an ASO brace. She was continued on sedentary work. PX 1 at 5.

On January 7, 2022, Petitioner once again was seen at the Orthopedic Center of Southern Illinois. She was 6 weeks post right ankle distal fibular avulsion fracture. She was full weight

bearing on the ASO brace. She reported 0/10 pain. Petitioner asked to be released to full duty. Minimal swelling and tenderness was noted over the distal fibula. X-rays revealed closed nondisplaced very small avulsion at the distal aspect of the fibula. She was instructed to use the ASO brace as needed with activities. She was released to full duty until the follow-up on an as-needed basis. PX 1 at 6.

On March 15, 2022, Petitioner returned to the Orthopedic Center of Southern Illinois. History of present illness stated: "57-year-old female presents to clinic today currently 3.5 to 4 months status post-right ankle distal fibular fracture. She was released at her January she wanted to go back to work. She did not have her do physical therapy. She has continued to have some ankle pain as well as pain in the plantar aspect of the foot. She has not had any new injury or trauma. Physical examination revealed mild swelling of the lateral malleolus, and near full range of motion. The assessment on that date stated: "3 and a half months status post-right ankle distal fibular avulsion fracture with continued pain and swelling." PX 1 at 7. She was given an order for physical therapy. Id.

On April 21, 2022, Petitioner returned to the Orthopedic Center of Southern Illinois. She had been doing physical therapy, which was going well. She was regaining mobility. Petitioner reported a 1/10 pain. Minimal swelling was noted at physical examination, and she had near full range of motion. Physical therapy was continued. PX 1 at 8.

On May 27, 2022, Petitioner once again was seen at the Orthopedic Center of Southern Illinois. She had completed physical therapy and was doing well. She reported 1/10 pain. Physical examination revealed full range of motion. She was released from care and told to return on an as-needed basis. PX 1 at 9.

At the direction of medical staff at the Orthopedic Center Southern Illinois, Petitioner participated in physical therapy at SSM Health St. Mary's, in Centralia, from March 25, 2022 through May 16, 2022. PX 2.

TESTIMONY

Petitioner testified at trial on April 13, 2023. She is a 58-year-old female employed as a Residential Services Supervisor for Respondent, Warren G. Murray Center. Petitioner has been employed with Respondent since 2006. She injured her right foot/ankle on November 26, 2021. On the date of injury, her job assignment was Temporary Residential Services Supervisor.

Regarding the accident, Petitioner testified she fell while walking from the administrative building to a residential facility called Grape Cottage. Immediately before the accident she had completed her paperwork at the administration building and was going to Grape Cottage to perform the job duties of a Residential Services Supervisor. Immediately upon leaving the administrative building she walked down a concrete sidewalk ramp. While walking down the ramp she stepped on some gravel with her right foot, which caused her right foot to skid off the edge of the concrete sidewalk. There was a large rut in the ground next to the sidewalk, which Petitioner's foot went into causing her to fall. Petitioner testified the accident happened between 7 and 7:30 PM, and that it was "kind of dark out." She testified the lights in that area were not on.

She believes the darkness contributed to the accident. At trial, Petitioner reviewed Respondent's exhibit 1, page 4, which reflected Petitioner documented the accident as having occurred when she "stepped on rock + rolled or stepped on edge of walk falling to right." RX1 at 4.

Petitioner testified that the large rut she encountered was caused by staff members driving golf carts on the sidewalk. The sidewalk is not wide enough for the golf carts. Therefore, one side of the golf cart must stay on the ground, which causes ruts to form. Petitioner testified the ruts created next to the sidewalk by the golf carts are larger than a normal sidewalk rut or drop-off.

When asked to clarify exactly how the accident occurred, by the Arbitrator, Petitioner stated: "I stepped on gravel on concrete, and my right foot skidded. And then when it caught on the right, it threw me down there." She went on to testify: "it skidded into the rut, and when it hit, it threw me down because I wasn't skidding anymore." Trial Tran at 12.

Petitioner testified she was taking her standard route from the administrative building to Grape Cottage. At the time of the injury, she was carrying paperwork in her right hand.

After the injury, Petitioner went to her car, because that was closest, and drove to Grape Cottage. The registered nurse at Grape Cottage gave her an ice pack for her right ankle. She was able to finish her shift.

The morning after the accident, Petitioner reported to SSM Express Care, in Centralia. X-rays revealed an avulsion fracture of the right distal fibula with soft tissue swelling over the lateral malleolus. She was provided a Cam Walking boot and referred to an orthopedic surgeon.

Petitioner then sought treatment at the Orthopedic Center of Southern Illinois, on November 29, 2021. She was told to stay in the walking boot and allowed to work with restrictions. Petitioner testified that Respondent initially accommodated the restrictions.

On January 7, 2022, Petitioner reported a 0/10 pain with minimal swelling in the ankle and foot. She requested the Orthopedic Center of Southern Illinois to release her to full duty.

On March 15, 2022, Petitioner returned with complaints of continued swelling, pain, and reduced range of motion in the right ankle. Petitioner testified she had not sustained any new injuries to the right ankle between January 7, 2022 and March 15, 2022. Petitioner testified she had daily pain complaints with the right ankle from January 7, 2022 through March 15, 2022. Petitioner felt the treatment she was receiving on March 15, 2022 was directly related to the injuries she sustained on November 26, 2021. On March 15, 2022, Petitioner was allowed to continue to work full duty and provided a referral to physical therapy. Petitioner participated in physical therapy at St. Mary's in Centralia from March 25, 2022 through May 16, 2022.

Petitioner testified she continues to have pain in the right ankle. Further, she testifies that doing a lot of walking causes her to have increased pain in the right ankle. Petitioner testified her continuing right ankle issues do not affect your ability to perform her regular duties. However, she does experience pain while working for Respondent. Petitioner testified she has to do a lot of walking on concrete for her job. Petitioner also testified her right ankle hurts when she walks outside of work.

Initially after the accident, Respondent accommodated the restrictions. However, Respondent stopped accommodating the restrictions. Petitioner's last day of light duty was December 8, 2021. Petitioner returned to full duty on January 7, 2022. She was not paid temporary total disability for this time off.

Conclusions of Law

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

The Arbitrator finds Petitioner sustained accidental injuries that arose out of and in the course of her employment on November 26, 2021. This is based on the testimony of Petitioner and the medical records.

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.

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. Here, there is no dispute Petitioner was performing the job tasks of a Temporary Residential Services Supervisor at the time of the injury. She was physically on Respondent's property walking from the administration building to Grape Cottage to perform her supervisor duties. Therefore, the Arbitrator finds Petitioner's injury occurred in the course of her employment.

The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement, it must be shown the injury had its origin in some risk connected with, or incidental to, the employment so to create a causal connection between the employment and the accidental injury. The three categories of risk are: 1) risk distinctly associated with the employment, 2) risk personal to the employee, and 3) neutral risk which have no particular employment or personal characteristics.

The Arbitrator finds Petitioner's accident, stepping on gravel while descending a sidewalk ramp causing her foot to slide off the edge of the sidewalk into a large rut, was a risk distinctly associated with her employment. Petitioner credibly testified she encountered three defects on Respondent's property. First, there was gravel on the concrete ramp, which caused her foot to slide. Second, there was a large rut next to the sidewalk. The large rut was bigger than a normal sidewalk drop-off because the golf carts used by Respondent's staff. Lastly, Petitioner credibly testified there were no lights on, and the darkness contributed to her accident. These three defects create a risk distinct to Petitioner's employment.

In support of this finding, the Arbitrator relies on the Illinois Supreme Court's ruling in *McAllister v. Illinois Worker's Compensation Commission*. Per *McAllister*, an injury "arises out of" an employee's employment if she can show she was performing 1) acts the employee was instructed to perform by her employer, 2) acts the employee had a common-law or statutory duty

to perform, or 3) acts the employee might reasonably be expected to perform incident to the employee's assigned duties. *Kevin McAllister v The Illinois Workers' Compensation Commission 2020 IL 124848*

Here, Petitioner was assigned to be a Temporary Residential Services Supervisor. Petitioner credibly testified she must travel between the administrative building and Grape Cottage to perform her job duties. She testified she was taking her normal path from the administrative building to Grape Cottage. Walking between these two buildings was clearly foreseeable by Respondent and required to complete her job tasks.

Therefore, the Arbitrator finds the Petitioner has proven by a preponderance of the evidence that her injuries had their origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Thus, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that her injuries 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 injuries?

The Arbitrator finds Petitioner's condition of ill being, avulsion fracture of the distal fibula with concomitant soft tissue swelling over the lateral malleolus, is causally connected to her work injury of November 26, 2021. The Arbitrator bases this opinion on the testimony of Petitioner and the medical records presented at trial.

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

The Arbitrator finds that all the treatment to date was reasonable and necessary to treat Petitioner's injury. This opinion is based on the medical evidence and testimony, as well as the Arbitrator's causation finding noted above.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,855.00 to SSM Health, $1,360.00 to the Orthopaedic Center of Southern Illinois as provided in Sections 8(a) and 8.2 of the Act. As well as, $127.40 to Petitioner for out-of-pocket expenses paid to the Orthopaedic Center of Southern Illinois. Respondent shall receive an 8(j) credit for amounts paid by Respondent based group health plan.

Issue (K): Temporary Total Disability*:*

Respondent shall pay Petitioner temporary total disability benefits of $688.44/week for 4 and 1/7 weeks, commencing December 9, 2021 through January 6, 2022, as provided in *Section 8(b) of the Act.* Respondent's defense to temporary total disability benefits was based on the disputed accident.

Issue L: **Nature and extent of Petitioner's injuries?**

The Arbitrator notes 820 ILCS 305/8.1b governs determination of permanent partial disability. In particular, the Arbitrator is to consider the following factors:

(i) The reported level of impairment pursuant to the AMA evaluation under the Sixth Edition;
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by the treating medical records.

No one single factor shall be the sole determinant of disability.

With regard to Petitioner's right foot/ankle and each of the foregoing factors, the Arbitrator notes the following:

(i) Neither party submitted an AMA evaluation and, therefore, no weight is given to this factor.
(ii) The occupation of the injured employee: Petitioner is a Residential Services Supervisor for Respondent. She is required to do a lot of walking as a Residential Services Supervisor. The Arbitrator gives this factor some weight.
(iii) Petitioner's age at the time of his injury: Petitioner was 57 years old at the time of her injury. At this age, Petitioner will likely continue to experience her disability throughout the remainder of her life. Petitioner's age is given some weight.
(iv) Petitioner's future earning capacity: The Arbitrator notes Petitioner returned to work at her regular job, and subsequently received a raise. This factor is given little weight.
(v) Evidence of disability corroborated by the treating medical records. Petitioner credibly testified she continues to have pain in the ankle and foot when she walks too much. Further, Petitioner testified consistently with the medical records. The Arbitrator gives this factor more weight.

Having considered all of the factors as required by statute, the Arbitrator concludes Petitioner has been permanently partially disabled to the extent of 15% loss of use of the right foot. Therefore, Respondent is ordered to pay Petitioner $619.61 per week for 25.05 weeks, under Section 8(e) for her right foot/ankle injury.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC022209
Case Name	Lisa McKinley v. City of Pekin
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0239
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mark Wilson
Respondent Attorney	John Kamin

DATE FILED: 5/22/2024

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LISA MCKINLEY,

Petitioner,

vs. NO: 21 WC 22209

CITY OF PEKIN,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed under Section 19(b) of the Act by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary total disability (TTD) benefits and penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission 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 as it relates to prospective medical care. On June 16, 2023, Petitioner's treating physician, Dr. Dworsky, noted that Petitioner was one year out from her left total knee arthroplasty and was still having a lot of issues. He administered a cortisone injection into Petitioner's left knee, encouraged her to increase her activities and requested that she report her progress following the injection. The record from the June 16, 2023 visit does not contain a recommendation or prescription for a specific procedure to be performed in connection with the care and treatment of Petitioner's left knee. Rather, Petitioner testified at arbitration that as of June 16, 2023, she was advised to follow-up with Dr. Dworsky on July 28, 2023. As such, the Commission finds no prospective treatment or procedure(s) to award under Section 8(a) of the Act. The Arbitrator's award in this regard is therefore stricken.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 26, 2023 is hereby modified as stated and otherwise affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall 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.

May 22, 2024

CAH/pm
O: 5/9/24
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	21WC022209
Case Name	Lisa McKinley v. City of Pekin
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	Mark Wilson
Respondent Attorney	John Kamin

DATE FILED: 7/26/2023

THE INTEREST RATE FOR THE WEEK OF JULY 25, 2023 5.27%

/s/Bradley Gillespie, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Lisa McKinley
Employee/Petitioner

v.

City of Pekin
Employer/Respondent

Case # **21** WC **022209**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bradley Gillespie**, Arbitrator of the Commission, in the city of **Bloomington**, on **6/29/23**. 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, **May 10, 2021**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**57,144.36**; the average weekly wage was $**1,098.93**.

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

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

Respondent shall be given a credit of $**1,883.90** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,883.90**.

Respondent is entitled to a credit **for all benefits paid through group insurance** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $732.62/week for 20 3/7 weeks, from July 23, 2021 through August 8, 2021 and from February 28, 2022 through July 5, 2022 as provided in Section 8 of the Act. The Respondent is entitled to credit for $1,883.90 in benefits it has paid to date.

Respondent is ordered to pay for the follow-up appointment with Dr. Dworsky including all non-surgical treatment recommended for Petitioner's left knee.

Respondent shall pay the outstanding reasonable and necessary medical services outlined in Petitioner's Exhibit 1, pursuant to the fee schedule, and as provided in Section 8(a) and 8.2 of the Act. Respondent shall pay these amounts directly to Petitioner.

Respondent is entitled to a credit of all benefits paid under its group health plan pursuant to Section 8(j). Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider for the services for which it is claiming said credit.

The Arbitrator finds that Respondent reasonably relied upon its Independent Medical Examination and penalties/attorney fees are hereby denied.

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

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

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

Bradley D. Gillespie JULY 26, 2023

Signature of Arbitrator

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LISA MCKINLEY,	)	
	)	
Petitioner,	)	
	)	**Case No. 21WC22209**
v.	)	
	)	
CITY OF PEKIN,	)	
	)	
Respondent.	)	

19(b) DECISION OF THE ARBITRATOR

Lisa McKinley [hereinafter "Petitioner"'] filed an Application for Adjustment of claim in this matter alleging accidental injuries to her left knee on May 10, 2021, while working for the City of Pekin [hereinafter "Respondent"]. (Arb. Ex. 2)This matter proceeded to hearing on June 29, 2023, in Bloomington, Illinois (Arb. Ex. 1). The following issues were in dispute:

- Causal Connection
- Payment of Medical Bills Incurred
- Prospective Medical Treatment
- Temporary Total Disability
- Penalties

FINDINGS OF FACT

On May 10, 2021, Petitioner was employed in the Solid Waste Department as a recycle truck driver for the Respondent. (Tr. p. 12) She began working for the Respondent in 1995. *Id.* When Petitioner began working for Respondent, she worked as a school bus driver and a yard crew person. *Id.* She began working in solid waste in 2004. *Id.* On May 10, 2021, she was pulling a big heavy cardboard box to her truck when she twisted her left knee. (Tr. p. 13) Petitioner reported her injury to her employer. *Id.* Respondent directed Petitioner to IWIRC. *Id.* Petitioner testified that before May 10, 2021, she had never had any problems with her left knee, nor had she received treatment to her left knee. (Tr. pp. 14-15)

Petitioner first received treatment at IWIRC on May 18, 2021, where she was diagnosed with a sprained knee medial (tibial) collateral ligament. (PX #2) She was returned to work with light duty restrictions. *Id.* On May 21, 2021, she was referred for physical therapy. *Id*. On June 23, 2021, a left knee MRI was performed that showed a large complex flap tear of posterior horn and body of the medial meniscus; mild to moderately large hemarthrosis with a 7mm intra-articular loose body, possibly a meniscal fragment; grade 2 medial collateral ligament sprain; and tricompartmental osteoarthritic type degenerative change. *Id.* Eventually, she was referred to Midwest Orthopedics. (PX #2)

On July 6, 2021, Petitioner saw Dr. Michael Gibbons of Midwest Orthopedics. (PX #3)

Petitioner provided a history of pulling a large cardboard box to her truck at work on May 10, 2021, when she twisted her knee. *Id.* She denied any previous left knee pain or injuries. *Id.* She had undergone a meniscectomy on her right knee around 2013. *Id.* Her left knee exam revealed minimal crepitus; pain on flexion and extension; moderate medial tenderness and mild lateral tenderness with palpation; and moderate effusion. (PX #3) A left knee x-ray showed mild to moderate medial compartment osteoarthritis and minimal patellofemoral arthritis. *Id.* She was diagnosed with a large medial meniscus flap-tear and mild tricompartmental osteoarthritis. *Id.* An arthroscopy was recommended. *Id.*

On July 23, 2021, Petitioner underwent a left knee arthroscopy with partial medial meniscectomy and chondroplasty performed by Dr. Gibbons. (PX #6)

Her surgery was approved by the workers' compensation carrier. (Tr. p. 15) Following surgery, Petitioner was placed off work until August 8, 202,1 and was paid workers' compensation benefits for that time period. (Tr. pp. 15-16)

On August 3, 2021, Petitioner followed up with Midwest Orthopedics. (PX #3) She was released to return to sedentary work as of August 9, 2021. *Id.* These restrictions were in place until September 6, 2021, and then Petitioner returned to regular duty. *Id.*

Petitioner testified that upon returning to work her left knee was still painful. (Tr. p. 16) She described pain getting in and out of the truck. *Id.* Her knee hurt even when just sitting. *Id.* Petitioner was in constant pain. *Id.* Each stop, she would walk down three steps to get out of the truck; walk back to the back of the truck to get the cart; put the cart on the truck; dump it; put the cart back; and then walk back up the three steps to enter the truck. (Tr. p. 17) Sometimes she had to walk on uneven ground and over potholes. *Id.* Sometimes she would have to lift the cart to get it positioned so it could be lifted and dumped into the truck. (Tr. pp. 17-18)

On August 31, 2021, Petitioner saw Dr. Gibbons and stated she was still experiencing pain and stiffness in her left knee after prolonged sitting. (PX #3) She noted that a couple days prior her left knee partially gave way going down steps. *Id.* At this point, Petitioner was still not back to full duty work. *Id.* Her exam showed minimal crepitus, mild medial tenderness with palpation, and a large effusion. *Id.* Dr. Gibbons recommended she continue taking Aleve and increase to twice daily. (PX #3) She was told to return to work without restrictions on September 6, 2021, and return as needed. *Id.*

On September 20, 2021, Petitioner followed up with Dr. Gibbons. (PX #3) She reported that she returned to full duty work picking up recycling and driving a garbage truck. *Id.* Her pain had worsened with walking and using stairs, which she did frequently at her work. *Id.* She peported swelling and stiffness. *Id.* She had noticed clicking in her left knee. (PX #3) Her pain was located on the anteromedial aspect of her left knee. *Id.* She reported taking Tylenol for pain. *Id.* Her physical exam revealed pain with extension and flexion; moderate medial tenderness with palpation; and a moderate effusion. *Id.* Her left knee was aspirated, and a cortisone injection was given. (PX #3) She was continued on full duty work. *Id.*

On October 19, 2021, Petitioner followed up with Midwest Orthopedics and reported continued left knee pain and swelling. (PX #3) She had received no relief from the corticosteroid injection given at her last office visit and was requesting the initiation of Euflexxa. *Id.* Upon exam, she had a mild to moderate effusion. *Id.* Her left knee was injected with the first dose of Euflexxa. *Id.* She was allowed to continue activities as tolerated. *Id.* On October 26, 2021, the second dose of Euflexxa was given. (PX #3) On November 2, 2021, Petitioner reported no change in her left knee pain. *Id.* Upon exam, she had a mild to moderate effusion. *Id.* The third and final injection of Euflexxa was given. *Id.* She was told to come back on an as needed basis. (PX #3) She was given light duty only restrictions with no pushing, pulling, or climbing as of November 3, 2021. *Id.*

On November 16, 2021, Petitioner returned to Dr. Gibbons. (PX #3) She reported no improvement from the injections, and she was experiencing increased pain. *Id.* Her swelling had increased again. *Id.* She was still working but felt did not feel like she could continue due to pain. *Id.* Petitioner reported driving a garbage truck and having to climb in and out of it all day. (PX #3) An x-ray was performed that showed severe bone on bone medial compartment osteoarthritis and moderate patellofemoral osteoarthritis that had progressed significantly in the last 3 months. *Id.* She was unable to do her job and the pain was severely limiting her daily activities. *Id.* A total knee arthroplasty was recommended. *Id.* She was given restrictions of no lifting, pushing, pulling, bending, squatting, or climbing. (PX #3)

Petitioner continued to work until February 28, 2022. (Tr. p. 20)

On February 24, 2022, Petitioner attended a pre-op left total knee arthroplasty evaluation. (PX #3) She reported pain with walking and climbing stairs. *Id.* She was having episodes of instability. *Id.* An antalgic gait pattern was observed. *Id.*

Petitioner attended a Section 12 examination with Dr. Geoffrey Van Thiel at the request of Respondent. (RX #1, Ex.2) Petitioner reported continued swelling as well as pain in the knee. *Id.* Dr. Van Thiel's examination showed tenderness to palpation over the anterior joint, medial joint, and lateral joint. *Id.* Dr. Van Thiel opined that the May 10, 2021, work accident directly resulted in her left knee medial meniscus tear that was appropriately treated with maximum medical improvement on November 2, 2021. *Id.* He opined that any additional treatment including a left knee replacement would be related to a normal progression of her pre-existing osteoarthritis and unrelated to the May 10, 2021, work injury. (RX #1, Ex.2) His current diagnosis was severe medial compartment arthritis. *Id.* Dr. Van Thiel's opinion was based on the fact that severe osteoarthritis would not develop in a period of 4-5 months following a left knee arthroscopy with meniscectomy. *Id.* Therefore, the onset of severe medial compartment osteoarthritis was, more likely than not, due to a normal progression of pre-existing osteoarthritis and not related to the meniscus tear and the subsequent treatment. *Id.* He further opined that as of November 2, 2021 Petitioner could return to work with no restrictions. (RX #1, Ex.2)

Based upon Dr. Van Thiel's opinion, Respondent did not authorize the total knee

replacement. (Tr. p. 19)

On March 2, 2022, Dr. Gibbons performed the cemented cruciate-sacrificing medial-congruent left total knee arthroplasty procedure. (PX #3)

Petitioner was off work from February 28, 2022, to July 5, 2022. She was not paid any workers' compensation benefits during this time period. (Tr. p. 20)

Petitioner continued to follow up with Midwest Orthopedics for therapy. (PX #3) On March 16, 2022, she was still having swelling and was transitioning from her walker to a cane as tolerated. *Id.* On March 25, 2022, Dr. Gibbons noted that Petitioner stopped using her cane at home unless her knee was sore. *Id.* She reported that she still did not feel like she has full strength of her left knee. *Id.* Petitioner reported that stairs and getting up from low surfaces were still hard for her. (PX #3) On April 8, 2022, her pain was a 2-3/10. *Id.* She felt ready to transition to a home exercise program. *Id.*

On April 12, 2022, she reported to P.A. Jeffrey Roberts that she was "still sore, but I can get around." (PX #3) She was independent with a home exercise program. *Id.* She continued taking Norco and occasionally Tylenol Extra Strength to assist with pain. *Id.* On June 20, 2022, she reported her left knee was "about the same." *Id.* She continued her home exercise program. (PX #3) She reported pain and a clicking with increased activity as well as stairs. *Id.* A subtle effusion was noted upon examination. *Id.* She was to return to regular duty work as of July 6, 2022. *Id.*

On June 30, 2022, Petitioner presented for a fitness for duty evaluation at IWIRC at the request of Respondent. (PX #2) She reported that she was not sure if she was ready to return to work because she was having trouble going down stairs and her knee was catching. *Id.* She passed her evaluation and was able to return to work without restrictions on July 6, 2022. *Id.*

Petitioner testified that the fitness for duty evaluations she had done in the past involved simulating her job duties like lifting 50 pounds onto a shelf, walking on a beam, and squatting for a certain number of minutes. (Tr. p. 23) Whereas, the June 30, 2022 evaluation, was pretty much can you touch the floor and can you bend your knees. *Id.* She testified that she returned to work despite still having difficulties. (Tr. pp . 23-24)

On October 3, 2022, Petitioner followed up with Dr. Gibbons. (PX #3) She reported ongoing left knee pain. *Id.* She had returned to work about 3 months prior and reported complaints of knee pain at the end of her day particularly after a long route. *Id.* Her physical exam revealed a mild joint effusion and mild medial tenderness. *Id.* She was reassured that her knee was clinically stable and that she likely just aggravated it a bit as she has a physical job. (PX #3)

On March 3, 2023, Petitioner saw Dr. Bradley Dworsky at Hinsdale Orthopedics for a second opinion. (PX #8) She testified that she wanted a second opinion from Dr. Dworsky because it seemed like Dr. Gibbons thought she was healed, and she felt like something was still wrong

with her knee. (Tr. p. 25) She gave a history of pain starting on May 10, 2021, from a work injury. (PX #8) She subsequently underwent a left knee medial meniscectomy but continued to have pain in her knee. *Id.* She had undergone a left knee total arthroplasty on March 2, 2022, went through physical therapy, and had been back to work without restrictions. *Id.* She stated that she got better after the total knee arthroplasty but had never been completely asymptomatic. *Id.* She complained of medial knee pain that was worse with weightbearing activities. (PX #8) She reported soreness and achiness. *Id.* Her clinical exam showed mild peripatellar discomfort. *Id.* Dr. Dworsky's impressions were left knee patellofemoral disorder and 1 year status post left knee total joint arthroplasty. *Id.* Dr. Dworsky felt that Petitioner needed to regain strength and balance in her patellofemoral tracking and physical therapy was recommended. (PX #8)

On May 16, 2023, Petitioner went to her initial physical therapy evaluation. (PX #9) She had a positive Ober test; decreased tissue flexibility in the quad/ITB; decreased knee mobility, strength, and overall function. *Id.* She stated that most of her pain occurred with going up and down steps and getting up after prolonged sitting. *Id.* She described her discomfort as a strain most of the time. *Id.* She stated that the only thing that makes it better is Biofreeze or Aleve. (PX #9) She completed an intake form indicating moderate difficulty with: walking a mile; performing her usual work; performing light activities around her home; standing for 1 hour; squatting; and engaging in her usual hobbies or recreational activities. *Id.* She attended 11 physical therapy sessions. *Id.* On June 9, 2023, Petitioner was discharged from physical therapy. *Id.* Compared to her initial evaluation, she showed improvements in knee range of motion, hip/knee strength, and overall function. (PX #9) At the time of her discharge, she continued to present with signs and symptoms consistent with patellofemoral syndrome. *Id.* She stated most of her pain continued to occur with squatting and steps. *Id.* She was educated on a home exercise program. *Id.*

On June 16, 2023, Petitioner followed up with Dr. Dworsky. (PX #8) She reported that physical therapy had not completely resolved the issue. *Id.* She reported her pain as five out of ten, aching, sharp, and intermittent aggravated by activity and position change. *Id.* A left knee joint injection/arthrocentesis was performed to delineate the source of her pain and to help resolve it. *Id.*

Petitioner testified that the injection helped for a couple days. (Tr. p. 27) Her next appointment with Dr. Dworsky was scheduled for July 28th. (Tr. p. 26) It was her understanding that her upcoming appointment Dr. Dworsky would determine what treatment recommendations would be made based on how the injection affected her knee. (Tr. p. 27)

Petitioner described her current condition of her left knee as a constant dull ache even at rest that gets more painful when she starts getting active. *Id.* Her job requires her to stand up while driving the truck, so she stands almost the entire shift, walking up and down three steps at each stop. (Tr. pp. 27-28) All of her work activity is painful and it has been a struggle since her initial injury on May 10, 2021. (Tr. p. 27)

The Arbitrator found Petitioner to be a credible witness whose testimony is supported by the medical records.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision related to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator incorporates by reference the Findings of Fact set forth in the foregoing paragraphs.

"To obtain compensation under the Workers' Compensation Act (820 ILCS 305/2 (West)), a claimant must show by a preponderance of the evidence that he or she has suffered a disabling injury arising out of and in the course of his or her employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203 (2003). The arising out of component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. Sisbro, 207 Ill.2d at 203. A claimant need prove only that some act or phase of his or her employment was a causative factor in the ensuing injury. *Twice Over Clean, Inc. v. Industrial Comm'n*, 348 Ill. App.3d 638, 643 (2004), appeal allowed, 211 Ill.2d 617 (2004). 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*, 207 Ill.2d at 205.

Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury. Teska v. Industrial Comm'n, 266 Ill. App.3d 740, 742 (1994). That other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant. *Lasley Construction Co. v. Industrial Comm'n*, 274 Ill. App.3d 890, 893 (1995); see also *International Harvester Co. v. Industrial Comm'n*, 46 Ill.2d 238, 245 (1970)" *Vogel v. Industrial Comm'n*, 354 Ill. App.3d 780, 786 (2005).

In the instant case, it is undisputed that the Petitioner had a work accident on May 10, 2021, causing a left medial meniscus tear requiring a left knee arthroscopy with meniscectomy. Likewise, it is undisputed that prior to the May 10, 2021, work accident Petitioner never had any prior left knee problems; nor had she ever received any treatment on her left knee in the past.

The Arbitrator notes that Respondent has accepted responsibility for the left knee medial meniscus tear and treatment received following the May 10, 2021, accident through November 2, 2021, which is the date its Section 12 examiner, Dr. Van Thiel, opined that Petitioner had reached maximum medical improvement. The Arbitrator also notes that as of November 2, 2021, Petitioner had been given light duty only restrictions with no pushing, pulling, or climbing. (PX #3)

On May 9, 2022, Dr. Gibbons' evidence deposition was taken. (PX #7) Dr. Gibbons is board certified in orthopedic surgery. (PX #7 p. 5) He specializes in knees and shoulders. (PX #7 p. 6) He estimates that he performs approximately 500 knee surgeries a year with half being

arthroscopies and half being total knee replacements. *Id.* He testified that at Petitioner's first visit with him on July 6, 2021, he reviewed the MRI films, performed a clinical examination, and ultimately decided to proceed with an arthroscopic surgery. (PX #7 pp. 7-10) He thinks that they probably discussed a total knee replacement at that time, but he did not think her arthritis was far enough along to warrant that. (PX #7 pp. 10-11) X-rays showed mild to moderate arthritis. Dr. Gibbons was pleasantly surprised that she had less arthritis than he thought she would have. (PX #7 p. 12) After her arthroscopic procedure, another set of x-rays was ordered. The x-rays revealed severe bone on bone medial compartment arthritis on the left side, which was a big change from before her original surgery. (PX #7 p. 17) Dr. Gibbons opined that the meniscus tear from the work related accident started the process. (PX #7 pp. 17-18) Dr. Gibbons explained that the function of the meniscus is to help protect the articular cartilage and when the meniscus is torn, there is increased joint contact and stress, which then leads to wear and tear of the articular cartilage, which in this particular case resulted in a fairly rapid deterioration of the joint. It is fair to say that the tear probably increased the development of the osteoarthritis in the knee. There certainly seems to be a causal relation just based on the timing. (PX #7 p. 18) Dr. Gibbons also testified that a work accident such as the type sustained by the Petitioner can cause a pre-existing asymptomatic arthritic condition to become symptomatic. (PX #7 p. 26)

On June 14, 2022, Respondent's Section 12 physician, Dr. Van Thiel testified via evidence deposition. (RX #1) Dr. Van Thiel is a board certified orthopedic surgeon specializing in hips, knees, and shoulders. (RX #1 p. 5) He testified consistent with his IME report. (RX #1, Ex.2) He related the medial meniscus tear and the arthroscopic procedure to repair the tear to the May 10, 2021, work accident. (RX #1 pp. 7-8) He opined that the need for the left total knee replacement and the onset of the severe osteoarthritis was a normal progression of a pre-existing condition that would have been unrelated to the May 10, 22021,work injury. (RX #1 p. 10) He noted that the June 23, 2021, MRI report noted the arthritis to be moderate, but he found it to be moderate to severe. (RX #1 pp. 10-11) He opined that as of November 2, 2021, Petitioner had reached maximum medical improvement related to the consequence of the May 10, 2021, injury and repair of the medial meniscus tear. (RX #1 p. 15) On cross-examination, Dr. Van Thiel estimated that he performs probably 90% of his legal-medical consultation work on behalf of the defense. (RX #1 p. 16) He agreed that as of November 2, 2021, Petitioner was still experiencing significant symptoms and had restrictions of no lifting, no pushing, no pulling, no bending, no squatting, and no climbing. (RX #1 pp. 17-18) He agreed that the total knee replacement performed by Dr. Gibbons was reasonable, necessary, and appropriate. (RX #1 p. 18) He agreed that there are instances where there is a variation between something that appears arthroscopically compared to what the pre-operative imaging showed, and that the surgeon would be in a better position to give an opinion on the status of the cartilage, including the arthritis, at the time of the surgery. (RX #1 pp. 19-20) He was not aware of any intervening accident or trauma since the May 10, 2021, work accident. (RX #1 p. 20) He was not aware of Petitioner ever having any left knee pain or discomfort prior to the May 10, 2021, work accident. (RX #1 p. 21) He agreed that since May 10, 2021, there was no indication that Petitioner was ever pain free in her left knee. (RX #1 p. 22) He testified that he thinks Petitioner developed pain in her knee and is associating it with an accident that could be either secondary to the onset of an arthritic pain or secondary to the meniscus tear that's the result of the trauma. (RX #1 p. 23)

The Arbitrator finds the opinions of Dr. Gibbons to be more persuasive than those proffered by Dr. Van Thiel. Additionally, the Arbitrator recognizes that no evidence was presented demonstrating Petitioner was having any difficulties performing her regular job duties as a recycle truck driver prior to the May 10, 2021, work accident, nor was there any evidence presented of any type of intervening cause that would break the causal connection chain from the accident and Petitioner's current state of ill-being. Petitioner was under care consistently following her May 10, 2021, work injury. Accordingly, the Arbitrator finds that Petitioner has met her burden of proving her current condition of ill-being is causally related to the accident of May 10, 2021.

In support of the Arbitrator's Decision related to (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 and concludes as follows:

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law in the preceding paragraphs.

Petitioner introduced evidence of medical expenses totaling $138,667.96, which she incurred during the course of her left knee treatment as follows: IWIRC - $4,213.68; Midwest Orthopedics - $14,466.50; UnityPoint - $107,187.45; Specialists in Medical Imaging - $956.00; Methodist Anesthesia - $5,772.00; DJO - $250.00; Advanced Mobile Diagnostics - $455.33; Hopedale Medical - $321.00; Hinsdale Orthopedics - $978.00; Athletico - $4,068.00. Of this amount, Respondent has paid $25,596.06, group health has paid $36,109.51, discounts were given in the amount of $69,039.90; and Petitioner has paid $589.00. There remains $7,333.49 in unpaid bills (IWIRC - $178.20; Specialists in Medical Imaging - $810.28; Methodist Anesthesia - $3,963.00; Hinsdale Orthopedics - $1.70; and Athletico - $2,380.31)

Having found the requisite causal relationship, the Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary. As such, Respondent is responsible for all the bills related to the treatment received by Petitioner totaling $138,667.96 subject to the limitations of the Medical Fee Schedule provided for in the Act.

In support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law as set forth in the preceding paragraphs.

Petitioner testified that every day is a struggle at work because of left knee pain. (Tr. p. 27) She feels like her left knee has not healed and that something is still wrong with it. (Tr. p. 25) She testified that the recent injection Dr. Dworsky provided her only helped for a couple days. (Tr. p.

27) Her next appointment with Dr. Dworsky was scheduled for July 28, 2023, to see how the knee responded to the injection and to determine her next course of treatment. (Tr. pp. 26-27)

Having found the requisite causal relationship, the Arbitrator finds that ongoing follow up treatment with Dr. Dworsky including all non-surgical treatment recommended is reasonable, necessary, and causally related to the May 10, 2021, work accident and orders Respondent to authorize and pay for said treatment.

In support of the Arbitrator's Decision related to (L.), What temporary total disability benefits are due, the Arbitrator finds and concludes as follows:

Respondent stipulated that Petitioner was temporarily totally disabled from July 23, 2021 through August 8, 2021. (Arb.1) The Arbitrator incorporates the Findings of Fact and Conclusions of Law set forth above. The Arbitrator finds Petitioner was temporarily totally disabled from February 8, 2022 through July 5, 2022 consistent with Petitioner's testimony and the medical evidence.

Having found the requisite causal relationship, the Arbitrator finds that the Petitioner was temporarily totally disabled from July 23, 2021, through August 8, 2021, and from February 28, 2022, through July 5, 2022, a period of 20 3/7 weeks.

In support of the Arbitrator's Decision related to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law as stated in the paragraphs above. The Arbitrator finds that Petitioner's Petition for Penalties and Attorney Fees are not well received. (PX #10 & PX #11) The Arbitrator finds that Respondent's reliance on the medical opinion of its Section 12 examiner, Dr. Van Thiel, to be reasonable given the circumstances presented. To award penalties in this circumstance would nullify Respondent's ability to rely on its Independent Medical Examiner. Wherefore, the Arbitrator finds and concludes that penalties and attorney fees are not warranted. Penalties and attorney fees are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC018574
Case Name	Cynthia Smith v. University of Illinois University Payroll & Ben MC547
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0240
Number of Pages of Decision	42
Decision Issued By	Kathryn Doerries, Commissioner, Amylee Simonovich, Commissioner

Petitioner Attorney	James Miller
Respondent Attorney	Brad Antonacci

DATE FILED: 5/23/2024

/s/Kathryn Doerries, Commissioner

Signature

DISSENT: /s/Amylee Simonovich, Commissioner

Signature

24IWCC0240

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Smith,

Petitioner,

vs. NO: 17 WC 18574

University of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, reasonableness and necessity of medical treatment, TTD, credit for overpayment of benefits, and permanent partial disability, being advised of the facts and law, reverses and modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

Regarding Issue (F), the Commission reverses the Arbitrator's finding that Petitioner's right shoulder condition after January 13, 2017, is causally related to the work accident of January 11, 2017. The Commission further reverses the Arbitrator's findings that Petitioner's cervical spine and left shoulder conditions are casually related to the work accident. The Commission, therefore, further reverses the Arbitrator's award of medical expenses incurred after January 13, 2017, and reverses the award of TTD benefits for the period of April 11, 2017 through November 17, 2020. In doing so, the Commission strikes the Arbitrator's Conclusions of Law and substitutes the paragraphs designated below for Issues (J), (K) and (L).

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

Petitioner testified she injured her right shoulder while placing a deceased patient into a mortuary storage cabinet during the evening of January 11, 2017. Petitioner reported the injury later that night to her supervisor and was sent to the emergency room. Petitioner presented to the University of Illinois Hospital emergency department on January 11, 2017 at 11:09 p.m. (T. 348)

At 11:13 p.m., Petitioner was initially screened by a triage nurse, Kristin Kubiniec. (T. 348) The ED registration "reason for visit" noted that Petitioner presented for a "W/C injury to the RT arm." Petitioner reported feeling a sudden pop in her right shoulder while moving a patient in the morgue. She complained of right shoulder pain and tingling in the right hand. (T. 348) There was no reported neck injury or left shoulder injury. (T. 348) Dr. Carissa Tyo then evaluated Petitioner at 12:14 a.m. on the 12th. (T. 343) Per the history obtained by Dr. Tyo, Petitioner provided the same accident description and complained of right shoulder pain. There was no mention of any neck injury or left shoulder injury. Petitioner denied upper extremity weakness and the doctor's Review of Systems indicated there was "no neck pain." (T. 343) Dr. Tyo also noted the absence of tingling and numbness. (T. 343) Dr. Tyo diagnosed right shoulder sprain. Dr. Alexandra D'Agostini next saw Petitioner at 12:34 a.m. (T. 354) Per the history obtained by Dr. D'Agostini, Petitioner identified herself as a UIC employee working as a transporter when she felt a pop and acute onset of right shoulder pain while moving a patient in the morgue. Dr. D'Agostini noted that Petitioner was "abducting at the shoulder and flexing the elbow" at the time of the injury. (T. 354) Petitioner also complained of radiating pain down her arm but she again denied neck pain, numbness, and tingling. (T. 354) On examination, Dr. D'Agostini noted the neck was non-tender and testing with Spurling's maneuver was negative. (T. 356) Dr. D'Agostini also noted full 5/5 motor strength and full range of motion including full flexion, abduction, external rotation and internal rotation. (T. 356) Dr. D'Agostini diagnosed right shoulder strain, prescribed a sling for comfort, and directed Petitioner to follow-up with employee health services. (T. 356)

Following the emergency room visit, Petitioner completed a First Report of Injury form and described a right shoulder injury while putting a patient in the morgue. There was no reported neck injury and no reported left shoulder injury. (T. 2810)

Petitioner followed up with University Health Service on January 13, 2017, and reported a right shoulder injury while transferring a body to the morgue. (T. 132) She complained of pain, stiffness, and tightness in the right shoulder. There was no reported neck injury and no reported left shoulder injury. There were also no documented radiating upper extremity symptoms and no reported right-hand symptoms. The attending advanced practical nurse, Gerald Bedore, noted that the intake form completed by Petitioner indicated the injury was work-related. The intake form is not part of the records; however, inasmuch as both the "chief complaint" and "presenting problem" identify the work injury as a right shoulder injury with no other injury noted, it is reasonable to infer that Petitioner did not mention any neck pain or left shoulder pain on the intake form. (T. 132) On examination, Petitioner exhibited tenderness over the AC joint and the supraspinatus. Motor strength was intact in all groups. APN Bedore noted right shoulder motion was painful with abduction and external rotation; however, there was no loss of motion indicated. The APN diagnosed a right shoulder sprain/strain and released Petitioner to return to full duty work without restrictions. The APN prescribed Ibuprofen and a home exercise program. No further follow-up

appointments were indicated. APN Bedore directed Petitioner to "*contact UHS with any questions or concerns*." (T. 132) (Emphasis added) Petitioner testified she returned to work on January 14, 2017.

Approximately six weeks after being released, Petitioner saw her primary care physician, Dr. Ulaszek, on February 21, 2017. (T. 2879) Petitioner complained of sinus congestion and moderate discomfort in the facial maxillary area bilaterally. Per the documented history, Petitioner *denied* having any other complaints. (T. 2879) On examination, Dr. Ulaszek noted that Petitioner's neck was supple and non-tender. (T. 2880)

Petitioner continued working full duty through April 10, 2017, representing a period of three months after being released by University Health Service. Petitioner testified she continued to have "excruciating" pain which progressively worsened during this three month period; however, Petitioner never followed-up with University Health Service despite being instructed to contact UHS with any concerns when she was released by APN Gerald Bedore on January 13, 2017. Petitioner also did not seek any treatment for her work injury with any other treating providers during this three month period. Petitioner had an opportunity to discuss her work injury and any pain complaints she may have had when she saw Dr. Ulaszek for sinus infection on February 21, 2017; however, she *denied* having any other complaints aside from the sinus infection at that time.

Petitioner initially testified she had been released for light duty work by University Health Service; however, on cross-examination Petitioner agreed she was released to full duty. Petitioner further agreed on cross-examination that she performed her regular duties from January 14, 2017 through and including April 10, 2017.

Respondent's witness, Keiquan Brown, testified regarding this three month period. He was the transport manager overseeing Petitioner's department. Mr. Brown testified he spoke with Petitioner after she completed the First Report of Injury. At that time, Petitioner reported she injured her right shoulder. Petitioner did not report any other injuries during their conversation. (T. 82) Had Petitioner mentioned any pain complaints regarding her neck or left shoulder during this conversation, he would have amended the First Report of Injury. (T. 83) Mr. Brown further testified Petitioner returned to full duty work and continued working full duty through April 2017. Mr. Brown testified that Petitioner's regular job duties involved lifting between 15 and 20 times per day. (T. 80) If heavier lifting was involved, Petitioner would team lift with other employees and there was equipment available to assist with moving patients. Mr. Brown testified Petitioner's job required lifting up to 50 pounds, and possibly up to 75 pounds depending on weight distribution when lifting with an assistant. (T. 80) He further testified that Petitioner never reported any pain complaints or difficulties performing her job duties during this three month period. (T. 82-84) Mr. Brown identified Petitioner's immediate supervisor as Anece Maybon. Had Petitioner reported any complaints or difficulties to her immediate supervisor instead of Mr. Brown, then her immediate supervisor would have reported any such complaints or difficulties to Mr. Brown. (T. 85) Mr. Brown testified that Anece Maybon never reported any complaints or difficulties concerning Petitioner during the three month period. Petitioner confirmed on cross-examination that she did not seek any treatment between her January 13, 2017, visit to University Health Service and April 10, 2017. (T. 58)

On April 11, 2017, Petitioner returned to University Health Service seeking treatment for right shoulder pain and was evaluated by APN Gerald Bedore. (T. 138) There was no mention of any neck complaints and no mention of any radiating upper extremity or hand symptoms. She reported that her shoulder pain never subsided following the January 11, 2017, work injury and complained that her pain was increasing. As discussed below, she reported a recent second accident to a physical therapist on April 17, 2017, which was not disclosed to APN Bedore. On examination, the APN noted that range of motion was quite limited in all planes of movement and motor strength was limited in all groups. APN Bedore further noted positive findings with Neer's, Hawkins, and Apley scratch test. It was his assessment that Petitioner had impingement syndrome and possible adhesive capsulitis in the right shoulder. (T. 138) APN Bedore did not indicate whether he tested both active and passive range of motion or only active range of motion. Significant loss of motion with passive range of motion testing is generally a basic criterion for diagnosing adhesive capsulitis, a/k/a frozen shoulder. APN Bedore ordered physical therapy for the right shoulder.

On April 17, 2017, Petitioner presented for a physical therapy evaluation with Kyle Feldman at University of Illinois at Chicago Medical Center. (T. 401) Petitioner described her work-related right shoulder injury on January 11, 2017. Notably, the University of Illinois Hospital emergency department had provided her with an arm sling prior to discharge January 12, 2017; however, Petitioner reported she "did not wear it past that day." (T. 401) Petitioner reported she had returned to work and continued working until last Tuesday when her pain became intolerable. (T. 401) Petitioner reported that her shoulder pain "became constant" at that time. She rated her right shoulder pain as "now 8/10 constantly." The therapist documented a four month history of right shoulder and arm pain and cervical spine symptoms with right arm weakness. This is the first time that cervical symptoms were mentioned in the medical records. Petitioner also reported that "*3 weeks ago she had a patient fall back on her and they both fell back into the wall*." (T. 401) Petitioner stated this accident made her pain worse that day but did not increase the pain in her arm overall. She reported the pain was already worse by that point. Mr. Feldman attempted to test for both active and passive range of motion; however, he noted he was unable to fully assess motion as Petitioner asked him to stop. (T. 406) This finding was consistent for limitation of motion secondary to pain and not necessarily indicative of developing adhesive capsulitis. During the examination, Mr. Feldman noted positive impingement and drop-arm testing.

At trial, Petitioner testified this second accident occurred sometime near the end of March or early April 2017. (T. 59) She further testified she was pushed into the wall during this incident. The impact "practically brought me to my knees." (T. 60) She further testified it was after this incident with the patient in late March or early April that she then "went back for more medical treatment for [her] right shoulder." (T. 60) Petitioner further testified she was placed on light duty restrictions when seen by APN Bedore on April 11, 2017. She testified that light duty was not available in her department. (T. 28) This was the first time that work restrictions had been issued. There is no evidence that Petitioner reported this second work injury to Respondent and Petitioner did not file an Application for Adjustment of Claim for this accident.

Petitioner returned to University Health Service on April 26, 2017, complaining of severe stabbing pain in the right shoulder. (T. 142) APN Bedore noted guarding with motion and assessed possible component for adhesive capsulitis, however, during his examination Petitioner was

"hesitant to participate in exam of the R shoulder" and he was unable to "complete active or passive range of motion." At this visit, there was no mention of any neck pain and Petitioner denied arm numbness and weakness. She also denied hand symptoms. (T. 142) The next UHS clinic note from May 8, 2017, noted "compensatory neck pain is improving." (T. 148)

Petitioner received physical therapy and continued treating after the second accident and underwent an MRI of the right shoulder on May 21, 2017. (T. 150) The MRI showed mild intramuscular edema in the subscapularis, suspicious for strain/mild interstitial tear in the subscapularis. The study also showed a degenerative changes involving the labrum with suspicion for possible posterior labral tear, and low grade tendinosis involving the supraspinatus and infraspinatus. (T. 150-151) Following the MRI, APN Bedore recommended consultation with orthopedics.

Petitioner presented to Dr. Amir El Shami on May 26, 2017. (T. 379) She provided a consistent accident history regarding the January 11, 2017 injury. Petitioner did not disclose the second accident. She denied neck pain and she denied numbness or tingling. Petitioner also denied left-sided symptoms. On examination of the cervical spine, Dr. Shamir found full range of motion and a negative Spurling's test. (T. 383) For the right shoulder, he noted guarding with movement but did not indicate loss of motion with testing for passive range of motion. (T. 381) Dr. El Shamir diagnosed right rotator cuff strain with significant guarding secondary to impingement. (T. 383) He did not diagnose adhesive capsulitis. He administered an injection to help with pain reduction and range of motion.

On June 16, 2017, Petitioner returned to Dr. El Shamir and reported significant pain relief. (T. 377) There were no documented neck complaints or radiating upper extremity symptoms on June 16, 2017. On examination of the right shoulder, Dr. El Shamir again noted guarding but found *full range of motion*. (T. 378) He diagnosed rotator cuff strain and bursitis. It is significant that Petitioner had full range of shoulder motion at this visit as she was over five months out from the January 2017 work injury.

Petitioner next saw Dr. El Shamir on July 7, 2017, with continued guarding but no diagnosis for adhesive capsulitis. (T. 375-376) During the July 7, 2017 visit, Petitioner reported intermittent right-sided neck pain and tingling in her right fingertips, prompting Dr. El Shamir to recommend an MRI for the cervical spine. (T. 375) She denied left-sided symptoms. (T. 375)

On August 28, 2017, Petitioner presented to Dr. William Heller at Midland Orthopedic Associates for evaluation of her right shoulder on a referral from her primary care physician, Dr. Ulaszek. (T. 3000) Petitioner reported she injured her shoulder at work in January 2017 and complained of ongoing pain despite having previously received therapy and an injection. On examination, Dr. Heller noted positive findings with Hawkin's and Jobe's testing. He reviewed the MRI and noted minimal tendinopathy. During his examination, Dr. Heller specifically tested for passive range of motion and found full forward flexion. He also noted external rotation to 80 degrees and internal rotation to T12. (T. 3000) He diagnosed rotator cuff tendinopathy. Dr. Heller recommended ultrasound guided injection for the shoulder. These range of motion findings were documented *seven and half months out* from the January 2017 work accident.

Dr. El Shamir re-evaluated Petitioner on August 24, 2017. (T. 370) She complained of significant right shoulder pain and neck pain. For the right shoulder, Dr. El Shamir noted "patient has limited range of motion, similar to previous exams." (T. 372) Dr. El Shamir performed a repeat injection. He noted that authorization for the cervical MRI had been denied. On September 21, 2017, Petitioner returned to Dr. El Shamir after the second injection and reported the injections provided temporary relief. (T. 366) She complained of radiating pain into the right upper extremity. Dr. El Shamir noted Petitioner denied having any other traumas or injuries other than the January 11, 2017 accident. (T. 360) Dr. El-Shamir suspected possible cervical radiculopathy. Regarding the right shoulder, Dr. El Shamir noted the lack of improvement despite undergoing two injections and therapy. He referred Petitioner to Dr. Goldberg for surgical consultation concerning her right shoulder. (T. 367)

Petitioner first presented to Dr. Goldberg on September 29, 2017. (T. 362) Petitioner reported having continued right shoulder pain since the original injury which later became "severe in April." There was no mention of neck pain. She did not disclose the second accident in late March/early April. Petitioner reported the two shoulder injections received from Dr. El Shamir helped to partially alleviate her pain but failed to help her lack of mobility. On examination, Dr. Goldberg noted that Petitioner's ability to perform flexion and extension with her right arm was well preserved. During testing with internal and external rotation, however, Dr. Goldberg found significantly diminished motion compared to the left side. He documented external rotation to 7 degrees and internal rotation to zero degrees. (T. 363) These range of motion findings were in marked contrast to those documented by Dr. Heller one month earlier. Dr. Goldberg diagnosed adhesive capsulitis and discussed non-surgical and surgical options. (T. 362-364) Petitioner initially opted for continued therapy in lieu of surgery. On December 22, 2017, Petitioner agreed to undergo surgery which was scheduled for January 16, 2018; however, due to denied authorization, Petitioner elected to use her group health insurance and underwent the procedure on March 19, 2018. (T. 526-527) Dr. Goldberg performed a right shoulder capsular release, subacromial decompression, biceps tenotomy, and distal clavicle excision. (T. 2199) During the surgery, Dr. Goldberg noted findings confirming the middle glenohumeral ligament was the source of the adhesive capsulitis. There was no documented finding for labral tear. (T. 2199–2203) The post-operative diagnoses were confined to adhesive capsulitis and biceps tendinitis.

Dr. Goldberg saw Petitioner for post-operative follow-up care on March 28, April 6, and May 11, 2018. (T. 860, 850, 848) On April 3, 2018, Dr. Siemionow covered for Dr. Goldberg when Dr. Goldberg was not in the clinic that day. (T. 852-853) Petitioner presented for shoulder pain and stiffness at the request of her primary care physician. Notably, Dr. Siemionow, a spine surgeon, wrote that Petitioner had "no other complaints" other than the post-operative shoulder pain and stiffness. (T. 852) He also performed a neurological exam and noted sensation intact to light touch from C5 to T1.

On June 22, 2018, Petitioner returned to Dr. Goldberg and complained of neck pain with a pulling sensation. Dr. Goldberg noted a positive Spurling's test. (T. 846) Dr. Goldberg ordered an MRI of the cervical spine which was completed on July 5, 2018. (T. 1135-1136) The MRI demonstrated degenerative disc osteophyte complex and facet joint arthropathy with mild foraminal narrowing bilaterally at C4-C5. Identical findings were noted for C5-C6. A disc bulge was seen at C6-C7 without compromise of the foramina. Other findings included possible synovial

cysts at C7-T1 and malalignment of the spine at multiple levels. On a referral from Dr. Goldberg, Petitioner presented to Dr. Siemionow for cervical spine evaluation. Dr. Siemionow evaluated Petitioner on August 21, 2018 and began treating her for cervical spine related complaints. Meanwhile, Petitioner continued to follow-up with Dr. Goldberg and she last saw Dr. Goldberg on October 8, 2018. (T. 856)

When Petitioner initially presented to Dr. Siemionow on August 21, 2018, he documented neck pain with *left* arm pain. (T. 1329) Five weeks prior, Petitioner attended a physical therapy session on July 31, 2018, and complained her pain felt like it was starting to spread to her left arm. (T. 1564) As confirmed by Petitioner's attorney, the July 18, 2018 therapy note documented the first complaint for left arm pain, almost 19 months out from the original work injury. (Petitioner's response brief at 11) Dr. Siemionow described the left arm pain as diffuse pain from the shoulder to the elbow. Dr. Siemionow's documented history reflected left arm pain since the injury; however, this is contradicted by the medical records and by Petitioner's response brief. Additionally, when seen by a physical therapist on August 30, 2018, the documented history indicated "*after the surgery* the pt states *neck started to hurt on the left side, which was then followed by L shoulder pain.*" (T. 1143) (Emphasis added) Petitioner further reported that the left-sided neck pain was similar to her prior right-sided neck pain, "but without a traumatic mechanism of injury." (T. 1143) Under the heading for prior treatment, the therapist noted "None for L shoulder." This suggests that either Petitioner provided a conflicting history to Dr. Siemionow, or Dr. Siemionow inaccurately assumed the left arm pain started with the work injury. Dr. Siemionow reviewed the MRI and diagnosed disc herniations at C4-C5 and C5-C6 and ordered physical therapy. (T. 1331)

Dr. Siemionow re-evaluated Petitioner on October 2, 2018, at which time he noted Petitioner complained of left upper extremity radicular pain as well as "new left shoulder pain." (T. 1319) This was the first time Petitioner specifically complained of left shoulder pain. Dr. Siemionow noted that Petitioner developed her left shoulder pain after her last appointment. Petitioner reported she had recently re-started therapy. Dr. Siemionow recommended continued therapy and indicated a cervical injection may be appropriate if therapy failed to help.

On December 18, 2018, Petitioner returned to Dr. Siemionow with continued neck pain radiating into the left arm. Dr. Siemionow noted a positive Spurling's test on the left side. He deferred examination for the left shoulder as Petitioner had been diagnosed with left shoulder adhesive capsulitis and was being seen by Dr. Goldberg. (T. 1299) Dr. Siemionow ordered a cervical epidural injection. The injection was performed on January 17, 2019. Petitioner returned for follow-up on January 29, 2019 and reported some improvement. Petitioner next saw Dr. Siemionow on March 5, 2019 and reported severe neck pain after attempting a new exercise at therapy. (T. 1283) She went to the emergency room where she was diagnosed with torticollis.

A repeat cervical MRI performed on March 14, 2019, demonstrated protruding discs at C4-C5 and C5-C6; however, the radiologist noted there was no mass effect on the thecal sac or exiting nerve roots. The C6-C7 level was negative for any abnormalities or changes. (T. 1129) Petitioner also underwent EMG testing which demonstrated left-sided abnormal findings suggestive for multi-level nerve root lesions between C5 and T1. Dr. Siemionow re-evaluated Petitioner on June 11, 2019 for review of the MRI and EMG results. (T. 1263) He recommended an epidural steroid

injection. On September 10, 2019, Petitioner reported one week of temporary relief following the injection. Petitioner indicated she did not want surgery and Dr. Siemionow commented that Petitioner would need to quit smoking if she decided to pursue spine surgery in the future. (T. 1249)

Petitioner continued treating with Dr. Siemionow and Dr. El Shamir from January 2020 through March 2022. Petitioner underwent a third MRI of the cervical spine in July 2020 which showed similar findings as the prior study. Petitioner received trigger point injections and medial branch blocks. All of the injections were performed for the left side. Dr. Shamir also referred Petitioner to a massage therapist and to Dr. Cyr for osteopathic treatment. At trial, Petitioner testified she was still seeing the massage therapist and Dr. Cyr.

Dr. Goldberg testified Petitioner's right shoulder condition and motion improved after surgery. He opined that the right shoulder had recovered near perfectly. (T.220) According to Dr. Goldberg, an "interstitial tear" in lay terms is a partial tear associated with a strain; the bigger problem was adhesive capsulitis. (T. 194-196, 192) Dr. Goldberg opined that the January 11, 2017 injury caused a muscle strain and labral tear that progressed into adhesive capsulitis. (T. 226) As mentioned above, Dr. Goldberg's operative report did not document any labral tear and his post-operative diagnoses were limited to adhesive capsulitis and biceps tendonitis. Regarding the neck pain, Dr. Goldberg testified that adhesive capsulitis *would not* be a cause for neck issues. (T. 200, 202) Dr. Goldberg's testimony on direct examination revealed his knowledge of Petitioner's accident history was limited to the January 11, 2017 injury. (T. 224) Dr. Goldberg had no knowledge of the second accident in late March/early April and he predicated his causation opinion on his understanding that Petitioner never got better after the first injury. (T. 224, 230) Dr. Goldberg declined to provide a causation opinion for the neck and indicated he would defer to Dr. Siemionow. (T. 238)

Dr. Siemionow testified Petitioner presented to him with a history of neck pain and left arm pain "since" her injury in January 2017. (T. 911) As mentioned, Petitioner conceded the first documented complaint for left-sided symptoms occurred approximately 19 months out from the original right shoulder injury and Petitioner reported to a therapist that the left sided complaints started after the right shoulder surgery. When Petitioner returned on October 2, 2018, Dr. Siemionow noted a new complaint for left shoulder pain. He testified Petitioner developed left shoulder pain after his initial evaluation in August. (T. 921) When asked whether the left shoulder pain emanated from the cervical spine or from the shoulder itself, Dr. Siemionow replied, "good question" and testified the left shoulder pain could be either a referred pain from the spine or represent a shoulder problem. He ultimately concluded the left shoulder pain was from the cervical spine based on the EMG test which showed findings involving the deltoid muscle.

Dr. Siemionow opined that Petitioner's cervical spine condition was causally related to the original work injury as an exacerbation of a pre-existing condition. (T. 974) Dr. Siemionow testified his causation opinion was based on the history he obtained from Petitioner along with the diagnostic testing. (T. 974) On cross-examination, Dr. Siemionow testified his causation opinion could change if the history was different. (T. 990-992) Dr. Siemionow testified that neck pain manifesting within two to three months following trauma could reasonably be causally related. Beyond that timeframe, the condition is probably unrelated. (T. 992-994) Addressing the recent

left-sided symptomology, Dr. Siemionow testified there can be "crosstalk" inside the nerves and that connections between pathways can crisscross. (T. 1001-1001) He further testified it's not uncommon for one side of the neck to cause another side of the neck to become symptomatic. (T. 1002) Like Dr. Goldberg, none of the histories recorded by Dr. Siemionow referenced the second accident in late March or early April. Dr. Siemionow was also never questioned regarding the second accident and the preceding February visit with Dr. Ulaszek when Petitioner denied having any complaints aside from her sinus infection.

Dr. El Shami is a physiatrist and sports medicine physician. On January 7, 2022, he authored an opinion report requested by Petitioner's attorney. (T. 2330) Dr. El Shamir opined that the January 11, 2017, work injury caused a cervical strain with an exacerbation of an underlying degenerative condition. He noted the injury then led to a chronic myofascial pain syndrome involving the left side of the neck, the left shoulder, and proximal left arm. (T. 233) Dr. El Shamir later testified that the three month gap between the injury and the first documented complaint for neck pain did not impact his causation opinion because the way that injuries and pain develop is never cut and dried. (T. 2286) Dr. El Shami further testified that the 18-month gap between the injury and the first documented left-sided symptoms on July 31, 2018 did not impact his causation opinion. (T. 2288) On cross-examination, Dr. El Shamir agreed his opinions were based in part on the accuracy and completeness of the history obtained from Petitioner. (T. 2291) Dr. El Shamir testified his opinions could change if Petitioner provided an incomplete history. Dr. El Shamir testified he was aware that Petitioner had been working after her injury. (T. 2295-2296) He was never questioned, however, regarding Petitioner's denial of any complaints in February 2017, or her second accident in late March or early April. Indeed, on re-direct, Dr. El Shamir answered "No" when asked whether Petitioner ever mentioned any kind of other accident that could be causing this. (T. 2307)

Respondent's Section 12 examining physician, Dr. Hennessy, first examined Petitioner on December 15, 2017. Dr. Hennessy re-examined Petitioner on April 2, 2020. Dr. Hennessy testified via deposition and addressed the shoulder and cervical spine conditions. For the right shoulder, Dr. Hennessy testified Petitioner sustained a sprain/strain injury resulting from the work accident on January 11, 2017. He opined that the right shoulder sprain resolved itself when she returned to full duty and remained on full duty for three months without seeking medical care. (T. 2715) Dr. Hennessy also noted Petitioner saw Dr. Ulaszek for a sinus condition in February 2017, at which time the documented history clearly noted Petitioner had no other complaints. (T. 2715) Dr. Hennessy agreed Dr. Goldberg found adhesive capsulitis which was clearly documented by the intraoperative findings in May 2018; however, Dr. Hennessy opined that the adhesive capsulitis was not related to the January 2017 work injury. (T. 2711-2712) Dr. Hennessy noted the medical records he reviewed supported his opinion that the January 2017 work accident caused a right shoulder sprain and that the subsequent onset of adhesive capsulitis was unrelated. (T. 2712)

Dr. Hennessy testified that traumatically induced adhesive capsulitis can develop within a few months; however, in this case there were multiple doctors who documented full range motion during that time interval. (T. 2718) On that basis, Dr. Hennessy concluded that Petitioner's adhesive capsulitis was not a post-traumatic adhesive capsulitis. (T. 2719) Dr. Hennessy found it significant that that Dr. Heller found full range of motion. (T.2711, 2717) Significantly, Petitioner also developed some left shoulder stiffness after the onset of the right shoulder problem, thus

indicating Petitioner was susceptible to this condition. Dr. Hennessy testified that the bilateral shoulder problems were consistent with a non-traumatic onset seen in middle aged, overweight women. (T. 2719-2720) Dr. Hennessy testified that adhesive capsulitis can spontaneously occur in middle aged women. (T. 2720)

Regarding the cervical spine, Dr. Hennessy testified Petitioner had degenerative disc disease at C4-C5 and C5-C6 and to a lesser extent some degenerative disease at C6-C7. (T. 2710) He opined these were chronic conditions which pre-dated the January 2017 accident, as evidenced by osteophyte complexes and facet arthropathy which takes years to occur. (T. 2710-2711) Dr. Hennessy further testified that if in fact Petitioner had injured her cervical spine during the January 2017 work injury, the neck pain would have manifested far earlier, it not immediately, then within a week or two. (T. 2714-2715) Dr. Hennessy further testified that during his evaluation, Petitioner repeatedly disagreed with the accuracy of the histories documented by her treating doctors. Petitioner continually asserted that she told multiple doctors about her cervical pain running down her arm but those doctors frequently noted the absence of neck pain and the absence of radicular symptoms. (T. 2713) Dr. Hennessy also noted an incongruity between Dr. Siemionow's opinion report finding causation years after the accident and Dr. Siemionow's examination on April 3, 2018, while covering for Dr. Goldberg during which he documented that Petitioner had no other complaints beside the shoulder and found normal sensation related to C5 to T1.

Parenthetically, Dr. Hennessy noted in his second IME report the cervical MRI failed to show any significant left-sided foraminal stenosis or left central stenosis and thus her left arm complaints did not correlate with the MRI and could not be objectified. (T. 2774) Dr. Hennessy further noted in his report that Petitioner complained of symptoms associated with the left C7 nerve distribution, those being the 2nd, third and fourth fingers in the left hand, and yet there was no evidence for stenosis at the left C6-C7 level. (T. 2774) Dr. Hennessy noted that two radiologists as well as Dr. Siemionow also found no stenosis at that level on the left side. (T. 2774) Dr. Hennessy testified that he as well as most doctors place greater reliance on MRI imaging than EMG test results when it comes to diagnosing radiculopathy. (T. 2721-2722) For that reason, he testified the EMG test results should be discounted. (T. 2774)

As for the left shoulder, Dr. Hennessy noted the MRI report indicated mild rotator cuff tendinopathy and some minimal degenerative changes. (T. 2712) In his opinion, the left shoulder condition was not related to the work injury. (T. 2715)

On cross-examination, Dr. Hennessy testified that 2% to 5% of the population will develop adhesive capsulitis. (T. 2729-2730) He further testified that it is more common that middle aged women will develop the condition. He also agreed that obesity and diabetes are known risk factors for adhesive capsulitis. (T. 2730) Dr. Hennessy agreed Petitioner does not have diabetes but she is overweight. During his first IME in December 2017, Petitioner was 5'4" in height and weighed 152 pounds. He agreed Petitioner's BMI was in the area of 27 and a BMI of 30 is considered obese. (T. 2728-2729)

Petitioner did not file an Application for Adjustment of Claim for second accident sustained in late March or early April 2017. Pursuant to Section 9020.20(b) of the Commission's Rules, a filed Application "must be limited to one accident or claim." 50 Ill. Adm. Code 9020.20(b). As

such, the Application filed for the January 11, 2017 accident does not confer the Commission with jurisdiction to separately award benefits for the second accident. Consequently, Petitioner's claim for TTD benefits and medical expenses incurred after April 10, 2017, can only be awarded if that treatment and disability are causally related to the original January 11, 2017 accident. Additionally, permanency relative to the claimed cervical spine condition, the right shoulder adhesive capsulitis, and the left shoulder condition can only be awarded if those conditions are causally related to the original January 11, 2017, accident.

The Commission finds that Petitioner sustained a right shoulder strain arising out of and in the course of her employment on January 11, 2017. The Commission further finds Petitioner's right shoulder strain resolved itself and reached MMI when she returned to full duty employment on January 14, 2017. The Commission also finds that the subsequent onset of adhesive capsulitis in the right shoulder is not causally related to the accident. We further find that Petitioner's cervical spine condition and left shoulder conditions are not causally related. In so finding, the Commission finds it significant that Petitioner worked full duty without seeking medical treatment for three months.

This Commission has previously denied benefits based on lack of causation where there has been a gap in treatment. See, e.g., *Meraz vs. Minute Men Staffing*, 15 IWCC 30, 2015 Ill. Wrk. Comp. LEXIS 30, *Olcikas vs. Dominick's Finer Foods, Inc.*, 2009 Ill. Wrk. Comp. LEXIS 1098, *Mercado vs. Trak Auto Inc.*, 02 IIC 412, 2002 Ill. Wrk. Comp. LEXIS 398, *Dial vs. Small Newspaper Group, Inc. d/b/a Ottawa Publishing Co.*, LLC, 23 IWCC 0170, 2023 Ill. Wrk. Comp. LEXIS 175. The Commission's decision in *Meraz vs. Minute Men Staffing*, cited above, is instructive. In that case, the Commission found it significant that "There was a five and a half month gap between September 20, 2011 and March 1, 2012" and that "Petitioner testified that he had continuing left hip pain during the gap, yet he did not seek treatment." *Meraz vs. Minute Men Staffing,* 2015 Ill. Wrk. Comp. LEXIS at 51.

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury in certain circumstances. *International Harvester v. The Industrial Commission,* 93 Ill. 2d 59, 442 N.E.2d 908 (1982). The Commission finds those circumstances are not present in this case by reason of the three-month gap in time between the January 11, 2017 accident and the resumption of treatment following the unfiled second accident. See, e.g., *Freeman vs. Monee Fire Department*, 21 IWCC 0503, 2021 Ill. Wrk. Comp. LEXIS 519 (finding the facts of the case did not fit within a chain of events analysis due to gaps in treatment). Though Petitioner reported her shoulder pain never subsided when she returned to University Health Service in April 2017, her reported persistent and progressively worsening pain was inconsistent with her continued full duty work with extensive daily lifting. Her reported ongoing and worsening pain was also inconsistent with her denial of pain complaints when she saw her primary care physician during this period. We also note Petitioner reported using the arm sling for one day and never used it again during the subsequent three month period.

Based on Petitioner's prompt return to full duty work, her failure to follow up with UHS, her denial of pain complaints when seen by her primary care physician in February 2017, and the gap in treatment between January 13, 2017 and April 10, 2017, we find Petitioner sustained a right

shoulder strain as a result of the January 11, 2011 work injury and had reached MMI when she returned to full duty. We find Petitioner's statements regarding the uninterrupted nature of her right shoulder injury not credible and find she has not credibly proven by a preponderance of the evidence that her resumption of treatment and disability after April 2017 was causally related.

Regarding the subsequent onset of adhesive capsulitis, Dr. Hennessy credibly testified that traumatically induced adhesive capsulitis can develop within a few months; however, in this case Petitioner's adhesive capsulitis was unrelated as she exhibited full range of motion for a period exceeding a few months. On June 16, 2017, Dr. El Shamir examined the right shoulder and noted full range of motion when she was over five months out from the January 2017 work injury. (T. 378) On August 28, 2017, Petitioner presented to Dr. William Heller for evaluation of her right shoulder at the request of her primary care physician, at which time Dr. Heller found full forward flexion, external rotation to 80 degrees, and internal rotation to T12. (T. 3000) This shows Petitioner did not have adhesive capsulitis when she was *seven and half months out* from the January 2017 work accident. Though Petitioner had limited range of motion prior to these evaluations, there is a distinction between diminished motion secondary to pain and a loss of motion secondary to the inability to move the arm past a certain point as seen with adhesive capsulitis, a/k/a frozen shoulder. Accordingly, we find Petitioner's adhesive capsulitis was not a post-traumatic adhesive capsulitis and was not causally related to the January 11, 2017 accident.

We further note there was no neck injury sustained at the time of the January 11, 2017 work accident. The first documented complaint for neck pain was found in a physical therapy note dated April 17, 2017. (T. 401) This documented cervical spine issue came after the second unfiled accident of late March/early April. Dr. Siemionow testified that neck pain manifesting within two to three months following trauma could reasonably be causally related and beyond that timeframe the condition is probably unrelated. (T. 992-994) He further testified his causation opinion could change if the history was different. None of the histories recorded by Dr. Siemionow referenced the second accident in late March or early April and Dr. Siemionow was never questioned regarding the second accident. Dr. Siemionow was also unaware of the February visit with Dr. Ulaszek when Petitioner denied having any complaints aside from her sinus infection. As such, this Commission is left to speculate whether this "different history" would change Dr. Siemionow's causation opinion. The documented complaints for neck pain occur at the end of Dr. Siemionow's three month timeframe for causation purposes; however, the second accident was not addressed and there is insufficient credible evidence for us to conclude that the original accident was a cause or contributing cause for the cervical spine condition. We also observe that Dr. Siemionow treated Petitioner for neck pain with a new onset of left-sided upper extremity symptoms which Petitioner has conceded did not start until after her shoulder surgery.

Petitioner's left shoulder complaints began long after the work injury. While under the care of Dr. Siemionow for cervical complaints, he noted the new onset of left shoulder pain which developed between his initial evaluation on August 21, 2018 and his second evaluation on October 2, 2018. (T. 919, 921) At the request of Petitioner's attorney, Dr. Goldberg prepared a narrative opinion report on December 10, 2018. Regarding the left shoulder, Dr. Goldberg diagnosed "bursitis and perhaps labral and cuff symptoms." (T. 1303-1307) Addressing causation, Dr. Goldberg advised: "In terms of her left sided symptoms, it is hard to attribute it due to a shoulder injury at the time of the incident based on the records reviewed." (T. 1307) Dr. Goldberg went

on to speculate that the left-sided symptoms may have been acquired secondary to overuse or possibly due to a cervical injury from the work injury. (T. 1307) As mentioned, Dr. Siemionow concluded the shoulder pain came from the cervical spine condition. For the reasons discussed above, we conclude Petitioner has not proved causation between her cervical spine condition and the original work accident. We likewise conclude Petitioner has not proved causation between her left shoulder condition and the original accident.

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

The Commission adopts the Conclusions in Issue (F) and incorporates those conclusions into this section regarding Petitioner's entitlement to medical expenses. Therefore, based on the Commission's findings regarding causation, the Commission finds that Petitioner's medical treatment after January 13, 2017 was not causally related to the subject work accident. The only unpaid medical bill claimed by Petitioner incurred on or before January 13, 2017 relates to the emergency room services provided on January 11, 2017 in the amount of $1,142.15. We find the treatment provided on and before January 13, 2017 was reasonable and necessary, and award payment of this bill under Sections 8(a) and 8.2 of the Act.

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

The Commission adopts the Conclusions in Issue (F) and incorporates those conclusions regarding Petitioner's entitlement to TTD. The Commission concludes therefore, that Petitioner is not entitled to TTD for the period she was off work after April 11, 2017.

Issue (L): What is the nature and extent of the injury?

The Commission must consider the five factors set forth in Section 8.1b(b) of the Act for guidance in determining the nature and extent of any permanent partial disability. The five factors are: (i) the reported level of impairment pursuant to subsection, if any; (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 factor shall be the sole determinate 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 are explained below. The enumerated factors were considered as follows:

With regard to subsection (i) of Section 8.1b(b), the Commission notes that no impairment report and/or an opinion was submitted into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regard to subsection (ii) of the Section 8.1b(b), the occupation of the employee, the Commission notes that the Petitioner was employed as a transporter for the hospital at the time of the injury. After returning to work on January 14, 2017, Petitioner performed her regular job duties without restrictions and without difficulty. Petitioner's regular job duties involved lifting between 15 and 20 times per day, with lifting up to 50 pounds, and possibly up to 75 pounds depending on

weight distribution when lifting with an assistant. Had it not been for the subsequent unrelated conditions of ill-being, Petitioner would have continued working in her full capacity as a transporter and we give moderate weight to his factor.

With regard to subsection (iii) of the Section 8.1b(b), the age of the employee at the time of injury, the Commission notes that the Petitioner was 52 years old at the time of the accident. The Commission gives some weight to this factor.

With regard to subsection (iv) of the Section 8.1b(b), the Petitioner's future earning capacity, the Commission notes that Petitioner would have continued working as a transporter but for her subsequent unrelated conditions of ill-being. The Commission therefore gives little weight to this factor.

With regard to subsection (v) of the Section 8.1b(b), the evidence of disability corroborated by the treating medical records, the Commission notes that Petitioner suffered a compensable right shoulder strain on January 11, 2017, and was released to full duty with no restrictions on January 13, 2017. As Petitioner sought no further treatment for three months, we have concluded the shoulder strain reached MMI when she returned to work on January 14, 2017. We further note Petitioner is left-hand dominant. The Commission gives some weight to this factor.

The Commission notes that determination of permanent disability is not simply a calculation, but a valuation of all five factors as stated in the Act. Therefore, having considered the factors enumerated in Section 8.1b(b) of the Act, 820 ILCS 305/8.1b(b), the Commission finds that as result of the accidental injury sustained on January 11, 2017, the Petitioner has sustained permanent partial disability to the extent of 1% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on May 19, 2023, is hereby reversed and modified for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator’s award of reasonable and necessary medical services incurred after January 13, 2017 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses related to the right shoulder through and including January 13, 2017 under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of TTD benefits for the period of April 11, 2017 through November 17, 2020, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Petitioner the sum of $484.73 per week for a period of 5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 1% loss of use of the person as a whole.

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

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

No bond for the removal of this cause to the Circuit Court by Respondent is required pursuant to § 19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 23, 2024
KAD/swj
O 3/26/34
42

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

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

DISSENT

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

It is undisputed that Petitioner sustained a compensable accident in the course of her employment on January 11, 2017. She was initially diagnosed with a sprain/strain of the right shoulder and returned to her normal work duties as a patient transporter. When Petitioner presented for medical care on April 11, 2017, she was diagnosed with right shoulder rotator cuff impingement syndrome and possible adhesive capsulitis and was restricted to no use of the right arm.

Respondent's Section 12 Examiner, Dr. Ryon Hennessy, admitted that adhesive capsulitis does not have an immediate onset. He testified that if Petitioner's adhesive capsulitis was caused by trauma, "[i]t would be developing over the few – the next few months of the injury, and she clearly had well documented full range of motion by multiple doctors, including two orthopedic surgeons, myself in 2017, and Dr. Heller in January 2018." RX1, p. 23-24. Petitioner's diagnosis of adhesive capsulitis just three months after her injury certainly fits Dr. Hennessy's timeline. Notably, Dr. Goldberg agreed with Dr. Hennessy's timeline. He testified, "Adhesive capsulitis is not an instantaneous event. It's a progressive event. So say something triggers it the day of the incident. She might have normal motion that day, but it just gets progressively worse and worse with her stiffness, and eventually it becomes more and more symptomatic." PX3, p. 35.

On April 11, 2017, the physical examination states, "Range of motion is quite limited in all planes of movement." PX2. Additionally, during the April 17, 2017, physical therapy evaluation, the therapist noted that Petitioner's right shoulder range of motion was limited. PX3. Petitioner's right shoulder range of motion remained limited during her April 26, May 8, and May 23, 2017, appointments. PX2. Petitioner's range of motion gradually improved; however, her symptoms did not resolve, and she demonstrated "highly irritable pain" when she was discharged from physical therapy on July 26, 2017.

Dr. El Shami continued to note Petitioner's limited range of motion in the right shoulder from May through September 2017. PX5. On September 29, 2017, Dr. Benjamin Goldberg noted Petitioner's limited range of motion, and diagnosed right shoulder adhesive capsulitis. PX3. On December 15, 2017, Dr. Goldberg recommended Petitioner undergo right shoulder surgery because the adhesive capsulitis still had not resolved. In November and December 2017, the physical therapist also noted Petitioner's continued right shoulder decreased range of motion. Additionally, during her pre-operative clearance appointment in February 2018, the doctors wrote that Petitioner was unable to raise or hyperpronate her right arm.

After carefully reviewing the evidence, I did not find any doctors who noted that Petitioner had full range of motion in her right shoulder following the January 11, 2017, work injury. Instead, contrary to Dr. Hennessy's assertion, numerous medical professionals documented significant deficits in Petitioner's right shoulder range of motion as well as the presence of adhesive capsulitis from April 11, 2017, until her March 19, 2018, right shoulder surgery. These include: Gerald M. Bedore, APN, David Charles Marder, MD, Anne Orzechowski, NP, Amir El Shami, MD Benjamin Goldberg, MD, Dr. Falck, Dr. Hughes, Kyle Feldman, PT, DPT, OCS, CSCS, Mark Hermes, SPT, Anita H. Sanches, PT, DPT, Michael Griggs, PT, DPT, Emily Nicklies, PT, DPT, OCS, FAAOMPT, Sharrone Davis, PT.

Furthermore, Dr. Hennessy's narrative report contradicts his testimony that Petitioner exhibited full range of motion during his December 15, 2017, evaluation. In his report, Dr. Hennessy wrote that "[i]nternal range of motion of the right shoulder was only to the low lumbar spine; however, on the left, it went to the thoracolumbar junction." RX2. Dr. Heller's report also contradicts Dr. Hennessy's testimony, as Dr. Heller wrote that Petitioner's external rotation was only to 80 degrees and internal rotation brought the thumb to T12. RX5. Dr. Goldberg testified that normal external rotation of the shoulder would be 90 degrees. PX3, p. 12. Dr. Goldberg also credibly testified that as a result of the January 11, 2017, work accident, Petitioner "sustained a muscle strain initially with a labral tear that progressed into adhesive capsulitis a/k/a frozen shoulder a/k/a stiff shoulder, which was her main problem." PX3, p. 32.

The credible evidence overwhelmingly proves that Dr. Hennessy's claim that several doctors documented that Petitioner had full range of motion in all planes of the right shoulder, was simply wrong. In fact, Petitioner's condition followed Dr. Hennessy's expected course of adhesive capsulitis developing within a few months of trauma. Petitioner sustained a right shoulder sprain/strain on January 11, 2017, and was diagnosed with adhesive capsulitis on April 11, 2017.

I would also affirm the Arbitrator's conclusions regarding the causal connection of Petitioner's cervical spine condition to the January 11, 2017, work accident. Dr. Hennessy opined that Petitioner's cervical spine condition is not causally related to her work injury, because "the medical records…were replete with doctors, including Dr. Goldberg and Dr. Siemionow, a spine surgeon himself, where…they listed no neck pain and no radiculopathy and normal neurologic findings proximate to the time of the injury." RX1, p. 18. Once again, the credible medical evidence thoroughly contradicts Dr. Hennessy's opinion.

In the emergency department on January 11, 2017, the triage nurse recorded "c/o tingling to right hand." Petitioner is first noted to have symptoms consistent with C5 radiculopathy at her

physical therapy evaluation on April 17, 2017. Petitioner also complained of right lateral neck pain. This was continuously documented throughout her physical therapy sessions until her discharge on July 26, 2017. On May 8, 2017, it was noted that Petitioner's "compensatory neck pain [was] improving." Petitioner reported "mild discomfort, which radiates to RUE, on full neck extension" while performing cervical range of motion maneuvers. This was noted again on May 23, 2017.

On July 7, 2017, Petitioner complained to Dr. El Shami of significant right neck pain, with numbness and tingling while doing her exercises. The doctor expressed concern for neurologic symptoms relating to neck pain and a possible underlying herniated cervical disc and ordered a cervical MRI. Unfortunately, by the September 21, 2017, office visit, Dr. El Shami still had not received approval for the MRI, despite Petitioner's ongoing cervical complaints. In April 2018, Petitioner complained of intermittent right neck pain and stiffness during her postoperative physical therapy evaluation. The therapist continued to note Petitioner's right-sided neck pain even at Petitioner's discharge from physical therapy on July 31, 2018. Furthermore, Dr. Goldberg documented Petitioner's ongoing complaints of neck pain when he examined her in May and June 2018.

The cervical spine MRI was finally conducted on July 5, 2018. When Dr. Krzysztof Siemionow began treating Petitioner's cervical spine condition on August 21, 2018, he prescribed additional physical therapy. Eventually, Petitioner also underwent cervical epidural steroid injections. An EMG showed nerve root lesion involvement between C5-T1, the same location noted by her physical therapist back on April 17, 2017. Dr. Siemionow credibly testified that Petitioner was a surgical candidate. T. 958. Petitioner continued to treat conservatively with Dr. El Shami for her cervical spine through 2020 and 2021.

I agree with the Arbitrator's conclusion that, Drs. El Shami, Goldberg, and Siemionow all credibly testified that Petitioner's cervical spine condition is causally related to her work accident. These opinions far outweigh those of Dr. Hennessy, who blatantly ignored the documentation of Petitioner's complaints when forming his opinions.

For these 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	17WC018574
Case Name	Cynthia Smith v. University of Illinois
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	24
Decision Issued By	Ana Vazquez, Arbitrator

Petitioner Attorney	James Miller
Respondent Attorney	Brad Antonacci

DATE FILED: 5/19/2023

THE INTEREST RATE FOR THE WEEK OF MAY 16, 2023 4.98%

/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

Cynthia Smith
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # **17** WC **018574**

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, Illinois**, on **September 26, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 11, 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 $**42,009.76**; the average weekly wage was $**807.88**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**23,544.07** for TTD, $**0** for TPD, $**0** for maintenance, and $**8,322.42** for medical benefits paid, for a total credit of $**31,866.49**.

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

ORDER

Respondent shall pay for the reasonable and necessary medical services, as provided in Petitioner's Exhibits 6 and 7, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay to Petitioner temporary total disability benefits of **$538.59/week** for **188 1/7 weeks**, commencing April 11, 2017 through November 17, 2020, as provided in Section 8(b) of the Act. Per the Parties' stipulation, Respondent is entitled to a credit in the amount of **$23,544.07** for TTD paid to Petitioner by Respondent.

The Arbitrator finds that Petitioner's cervical condition of ill-being is now permanent in nature. Since the record is void to suggest a reduction in earning capacity, the Arbitrator finds that Petitioner qualifies for an award based on a loss of trade, pursuant to Section 8(d)2. Accordingly, Respondent shall pay Petitioner permanent partial disability benefits of **$484.73/week** for **200 weeks** because the injuries sustained caused the **40%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's request for penalties/attorney's fees under Sections 19(k), 19(l) and 16 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.

Ana Vazquez

Signature of Arbitrator

MAY 19, 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) unpaid medical bills, (3) temporary total disability ("TTD") benefits, (4) the nature and extent of Petitioner's claimed injuries, (5) penalties/attorney's fees pursuant to Sections 19(k), 19(l), and/or 16 of the Illinois Workers' Compensation Act ("the Act"). Arbitrator's Exhibit ("Ax") 1. All other issues have been stipulated. Ax1. The Parties stipulated that Respondent is entitled to a credit in the amount of $23,544.07 for TTD benefits paid to Petitioner by Respondent and $8,322.42 for medical benefits paid by Respondent. Ax1 at No. 9.

FINDINGS OF FACT

Petitioner testified that at the time of arbitration she was 58 years of age. Transcript of Proceedings on Arbitration ("Tr.") at 13. Petitioner is left-handed. Tr. at 13. Petitioner obtained her GED in 1992. Tr. at 13-14. Petitioner has been employed by Respondent as a Patient Transporter I since October 16, 2000. Tr. at 14.

Duties

Petitioner testified that her duties as a Patient Transporter I consisted of transporting patients, blood, equipment, and whatever was needed throughout the hospital. Tr. at 14. Petitioner testified that when taking a patient from a hospital room for a test, it was done by cart or wheelchair. Tr. at 14-15. Petitioner testified that they would transfer the patient from the bed to the cart, and if the patient could not move, medical assistants and nurses would assist. Tr. at 15. Transferring the patient required Petitioner to pull the patient over. Tr. at 16. Petitioner also transported deceased patients, which required the help of two or more people. Tr. at 17. Petitioner testified that there were about seven rows of chambers for bodies in the morgue. Tr. at 17. The highest row was six feet. Tr. at 18. To put the patient in the highest row, a hydraulic cart was needed. Tr. at 18. The hydraulic cart raised the patient and would be partially inside the chamber and connect. Tr. at 18. Petitioner testified that they would push the patient into the chamber from the hydraulic cart. Tr. at 18.

Accident

Petitioner testified that on January 11, 2017, she was transporting a deceased patient to the morgue with a coworker, Marina Sherma. Tr. at 19. Petitioner's shift began at 3 p.m. and the incident occurred "[s]omewhere around 9:26, 9:40, somewhere around that time." Tr. at 19. Petitioner testified that she and Ms. Sherma were trying to put the deceased patient into the chamber at the top of the right side of the morgue. Tr. at 19. Petitioner and Ms. Sherma had transferred the patient from the morgue cart to the hydraulic cart, raised the hydraulic cart up, and pushed the patient inside the slot. Tr. at 20. Petitioner testified that after the patient had been pushed inside the slot, the hydraulic cart was stuck, and Petitioner and Ms. Sherma put their arms up overhead and were trying to yank the cart out. Tr. at 20-21. Petitioner testified that she was pulling the cart with all her might. Tr. at 21. Petitioner testified that as she was pulling the hydraulic cart, she heard a snap in her right shoulder when the cart "finally yanked." Tr. at 21. Petitioner testified that her shoulder felt a little tight and that she continued working. Tr. at 22. Petitioner testified that her shift ended at 11:30 p.m. and that she did not finish her shift. Tr. at 22. Petitioner testified that she tried to take another call and that is when she started to feel pain in her

shoulder. Tr. at 22. Petitioner completed the next call and then went to her supervisor, Ms. Anece Maybon, and reported the injury. Tr. at 22-23. Petitioner then went to the emergency room. Tr. at 23.

On cross examination, Petitioner agreed that she wrote that she injured her right shoulder on the First Report of Injury form, Respondent's Exhibit ("Rx") 5, and that she did not write that she injured her neck or left shoulder. Tr. at 52-53.

Pre-accident medical records summary

On January 26, 2014, Petitioner presented at Mercy Hospital and Medical Center and was seen by Dr. David Ulaszek for complaints of moderate right-sided posterior neck pain. Rx6 at 352-353. Petitioner reported that the neck pain began Sunday morning, she awoke with moderate neck pain, and it had worsened over the next few days. Petitioner also reported moderate spasm of the right posterior neck. Petitioner denied upper extremity radiation. Petitioner was assessed with a probable moderate cervical strain. Petitioner was instructed to rest and avoid overexertion. Petitioner was released to return to work on January 27, 2014. Petitioner was prescribed Norco and Flexeril.

On December 16, 2016, Petitioner presented to Dr. Ulaszek for follow up of headaches. Rx6 at 90-91. Dr. Ulaszek noted that Petitioner reported that "[t]oday while waking up from sleep just bit of right-hand numbness, but now resolved." Petitioner's diagnosis was migraine with aura.

Medical records summary

On January 11, 2017, Petitioner presented at the Emergency Department of University of Illinois Hospital and Health Sciences System. Petitioner's Exhibit ("Px") 3, Deposition Exhibit ("Dx") 3 at 25-40 of 173. Petitioner presented for evaluation of an acute shoulder injury that occurred at work. A consistent accident history was noted. Petitioner reported pain with range of motion, no weakness, and no history of a similar injury to her right shoulder. No back pain or neck pain was noted. X-rays of Petitioner's right shoulder were obtained and were negative for acute osseous abnormality. Px3, Dx3 at 26 of 173; Px8 at 6. Petitioner's diagnosis was shoulder sprain. Petitioner testified that she complained of right shoulder pain that radiated to her fingertips and numbness in her fingertips when she presented to the emergency room. Tr. at 24.

On January 13, 2017, Petitioner presented at University of Illinois/Chicago with a chief complaint of right shoulder injury while transferring a body to the UI Hospital Morgue. Px1; Rx7 at 6. Petitioner's assessment was sprain/strain of the right shoulder. Petitioner was instructed to initiate a home exercise program and was dispensed Ibuprofen. Petitioner was allowed to return to work without restrictions. Petitioner testified that she returned to her normal work duties until April 10, 2017. Tr. at 26, 57. Petitioner testified that she performed her regular duties as a patient transporter during this time. Tr. at 57. Petitioner testified that during the time that she was working, the pain in her right shoulder was excruciating and worse, and that she was having problems with numbness. Tr. at 26. Petitioner did not seek any medical treatment for her right shoulder, neck, or left shoulder between January 13, 2017 and April 10, 2017. Tr. at 58. Petitioner testified that at the end of March 2017 or beginning of April 17, 2017, a patient fell back on her shoulder and she was pushed into the wall by the patient. Tr. at 59. When asked if the pain was worse after this incident, Petitioner responded "[n]o, it was already worse." Tr. at 60. Petitioner then testified that the patient falling on her made the pain worse. Tr. at 60. Petitioner went back for right shoulder treatment after this incident. Tr. at 61.

Petitioner returned to University of Illinois/Chicago for follow up of her right shoulder injury on April 11, 2017. Px1; Rx7 at 8, 9. Petitioner reported that the pain in her right shoulder did not subside after she initially reported the injury in January 2017. Petitioner also reported not being able to sleep on the right side and that the pain had increased. Petitioner's assessment was right shoulder rotator cuff impingement syndrome and possible adhesive capsulitis. Physical therapy was ordered, and Petitioner was dispensed Ibuprofen. Petitioner was allowed to return to work with the restriction of no use of the right arm. Petitioner testified that Respondent had no light duty work in the department. Tr. at 28.

Petitioner presented for a physical therapy evaluation on April 17, 2017, at which time Petitioner reported that three weeks prior a patient had fallen back on her and that she and the patient fell back into the wall. Px3, Dx3 at 74 of 173. Petitioner also reported that it made the right shoulder pain worse that day but did not increase the pain in her arm overall, and that the pain was already worse at that point. The record reflects limited cervical range of motion in all directions with right rotation most limited, as well as a positive Spurling's test for right upper trapezius pain. Px3, Dx3 at 77 of 173. Right neck pain was also noted with extension, "R SB," and right rotation. Positive results for compression test, drop arm test, and impingement were also noted. C5 lateral glides reproduced right arm pain. The physical therapy evaluation record reflects an assessment of signs and symptoms consistent with C5 cervical radiculopathy, as well as right extraarticular versus intraarticular pathology. Px3, Dx3 at 79 of 173. The record also reflects that the cervical assessment reproduced right shoulder pain and noted that hand weakness and increased symptoms down the right upper extremity helped support the cervical aspect of pathology.

Petitioner presented for follow up at University of Illinois/Chicago on April 26, 2017. Px1; Rx at 11-12. A consistent accident history was noted. Petitioner reported that since the accident, she had had severe stabbing in the right shoulder, that she returned to work, and that she had been dealing with the pain at work for several months. It was noted that modified duty was not available to Petitioner and that she had been off work. Petitioner denied numbness, tingling, and weakness in the right arm and hand. Petitioner's assessment was rotator cuff strain versus biceps strain likely, and adhesive capsulitis could not be ruled out. A full rupture was doubted given Petitioner's continued and constant pain for months and shoulder mobility. Petitioner was instructed to continue with physical therapy, and naproxen and tramadol were prescribed.

Petitioner participated in 16 sessions of physical therapy from April 17, 2017 through July 26, 2017. Px3 at 81-136 of 173. The physical therapy record of June 30, 2017 notes that Petitioner reported stumbling into a wall and hitting her right shoulder after she woke up and stood up and felt lightheaded. Px3 at 99 of 173. The record also notes "[s]he reported it hurt but more of a hit soreness." The physical therapy record of July 26, 2017 notes that Petitioner continued to demonstrate highly irritable right shoulder pain. Additional physical therapy was recommended. Petitioner testified that the physical therapy did not help. Tr. at 29.

Petitioner presented at Mercy Hospital and Medical Center on May 1, 2017 with complaints of right shoulder pain. Rx6 at 43. A consistent accident history was noted. It was noted that Petitioner continued to work, the pain worsened in April, and she had to stop working due to pain and decreased range of motion. Petitioner wanted to return to work. Petitioner had participated in five sessions of physical therapy without relief. It was also noted that it had been more than four months of constant pain and decreased range of motion. Examination of Petitioner's right shoulder elicited a positive Neer's test and

a positive lift off test. Rx6 at 44. Petitioner's diagnosis was right shoulder pain. An MRI of the right shoulder was ordered.

On May 8, 2017, Petitioner returned to University of Illinois/Chicago for follow up. Px1; Rx7 at 14. Petitioner reported that her shoulder was still very painful during physical therapy sessions and with minimal pain reduction. Petitioner also reported that her neck pain was improving. On exam, Petitioner had a positive Hawkin's test. Full range of motion of the cervical spine/neck was noted, along with Petitioner's report of mild discomfort that radiated into the right upper extremity on full neck extension. Petitioner's assessment was a strain to the right shoulder, with compensatory neck pain noted as improving. Petitioner was instructed to continue with use of tramadol and physical therapy. An MRI was ordered.

Petitioner underwent a right shoulder MRI on May 21, 2017. Px1; Rx7 at 15-16; Rx8 at 7. The MRI demonstrated (1) mild intramuscular edema of the subscapularis, suspicious for strain/mild interstitial tear, (2) posterior labral tear, and (3) low grade tendinosis of the distal supraspinatus and infraspinatus tendons. Petitioner returned to University of Illinois/Chicago for follow up on May 23, 2017, at which time Petitioner's assessment was strain to right shoulder while moving a cadaver, improving compensatory neck pain, and a likely posterior labral tear. Px1; Rx7 at 18-19. Petitioner was instructed to discontinue physical therapy and request an orthopedic consult.

Petitioner presented to Dr. Amir El Shami at the University of Illinois-Chicago Sports Medicine Department on May 26, 2017 for evaluation of right shoulder pain. Px3, Dx3 at 57-59 of 173. A consistent accident history was noted. Petitioner reported that she had continued to have pain in her right shoulder since the January 11, 2017 injury. Dr. El Shami noted that Petitioner had decreased range of motion, that she could not lay or sleep on her right side, and that she continued to have spasming and grinding of the shoulder. Petitioner denied numbness or tingling, neck pain, and left-sided symptoms. Dr. El Shami noted that Petitioner felt weak subjectively over the shoulder and that her pain was on the anterior aspect of the shoulder. On exam, Petitioner had pain with Neer's, Hawkin's, empty can, resisted, and internal and external rotation. Petitioner had tenderness anteriorly and laterally along the shoulder of the humerus of the greater tuberosity and over the posterior joint line. There was no tenderness over the upper trapezius, and a negative Spurling's and full cervical range of motion were noted. Dr. El Shami reviewed the x-rays of January 12, 2017, as well as the MRI of May 21, 2017. Dr. El Shami's assessment was right shoulder strain with a rotator cuff strain with significant guarding and secondary impingements. Dr. El Shami recommended a subacromial bursa corticosteroid injection into the shoulder, which he administered on that date. Petitioner was kept off work. On June 16, 2017, Dr. El Shami noted that Petitioner reported that the injection provided 40% to 50% improvement in her overall symptoms and that the excruciating pain she was having had improved. Px3, Dx3 at 55-56 of 173. On exam, Neer's and Hawkin's tests elicited pain and the empty can testing elicited mild discomfort without weakness. A negative Spurling's was also noted. Dr. El Shami's assessment was right shoulder strain with rotator cuff strain and subacromial bursitis status post subacromial cortisone injection with improvement. Dr. El Shami recommended physical therapy and he kept Petitioner off work. Petitioner testified that the injections helped her condition somewhat, and the relief did not last permanently. Tr. at 29.

Petitioner returned to Dr. El Shami on July 7, 2017. Px3, Dx3 at 53-54 of 173. Petitioner reported difficulty reaching behind and pain with overhead reaching. Petitioner reported experiencing right neck pain, which "comes and goes." Petitioner also reported experiencing numbness and tingling in the fingertips of her right hand when she exercised. Petitioner denied left-sided symptoms. Dr. El Shami noted a positive

Spurling's for neck to shoulder pain and tenderness over the cervical paraspinal muscles. Dr. El Shami's assessment was right shoulder strain with rotator cuff strain and subacromial bursitis. Dr. El Shami noted that Petitioner had persistent debility of the right upper extremity with some neurologic symptoms of neck pain and a concern for possible underlying herniated disk. Dr. El Shami ordered an x-ray of the cervical spine to rule out any osteoarthritis and an MRI of the cervical spine to rule out any neural foraminal stenosis or other areas of pinched nerves that could explain Petitioner's symptoms. Petitioner was kept off work. On August 24, 2017, Petitioner returned to Dr. El Shami and reported significant neck and right shoulder pain with decreased range of motion and tightness. Px3, Dx3 at 49-51 of 173. Petitioner denied new traumas, falls, or other injuries and she also denied numbness and tingling in the upper extremities. Dr. El Shami's impressions were right shoulder strain, subacromial bursitis, and cervical radiculopathy. Dr. El Shami continued to recommend a cervical MRI, physical therapy, and a repeat shoulder injection. Dr. El Shami noted that the physical therapist had noted findings consistent with radiculopathy as well. Dr. El Shami administered an injection into the subacromial bursa on this date.

Petitioner presented to Dr. William Heller at Midland Orthopedic Associates at Wabash on August 28, 2017 for evaluation of a right shoulder injury, as referred by Dr. Ulaszek. Rx6 at 190. Petitioner reported that she was still having pain and weakness in her shoulder. Petitioner's assessment was right shoulder rotator cuff tendinopathy. Dr. Heller recommended an ultrasound guided corticosteroid injection of her right shoulder and noted that the MRI did not suggest the need for surgery.

Petitioner followed up with Dr. El Shami on September 21, 2017. Px3, Dx3 at 45 of 173. Dr. El Shami noted that the injection into Petitioner's glenohumeral joint provided short-lived relief. Petitioner reported significant pain over her right shoulder upper trapezius that radiated into the right upper extremity into the forearm. Petitioner denied any falls, traumas, or other injuries. A positive O'Brien's was noted on exam of the right shoulder. Full range of motion of the cervical spine with a positive Spurling's for the neck and upper trapezius pain on the right side were also noted on exam. Dr. El Shami's impressions were right shoulder strain, subacromial bursitis, possible labral tear, and possible cervical radiculopathy. Dr. El Shami referred Petitioner to Dr. Goldberg for consultation, given Petitioner's continued right shoulder debility and unimproved symptoms. Dr. El Shami recommended a cervical MRI to ensure that there was no underlying cervical radiculopathy. Dr. El Shami restricted Petitioner to no use of the right arm.

Petitioner presented to Dr. Benjamin Goldberg on September 29, 2017. Px4, Dx3A at 136-137 of 543. A consistent accident history was noted. Dr. Goldberg noted that the right shoulder MRI demonstrated tendinosis of Petitioner's rotator cuff muscles and a possible posterior labrum tear. Dr. Goldberg noted that on exam, Petitioner lost the last 10 to 15 degrees of full flexion and the last 20 degrees of abduction of the right shoulder as compared to the left, and her external rotation was about seven degrees and her internal rotation was about zero degrees with abduction and 40 degrees with abduction. Dr. Goldberg noted that Petitioner's range of motion on the left side was limber, suggesting that she was extremely stiff on the right side in the external rotation and internal rotation planes. Dr. Goldberg noted that treatment options were discussed, including surgical intervention. Petitioner followed up with Dr. Goldberg on October 20, 2017 and October 30, 2017. Px4, Dx3A at 131- of 543. On October 20, 2017, Dr. Goldberg recommended physical therapy and a 20-pound pushing, pulling, and carrying restriction for her right upper extremity. On October 30, 2017, Dr. Goldberg's assessment was adhesive capsulitis of the right shoulder.

On November 6, 2017, Petitioner presented for a physical therapy consult. Px4, Dx3A at 12-18 of 543. This record notes Petitioner's report of left shoulder pain "pulling" with activity across the anterior

shoulder to pectoral area. It also notes that "[Petitioner] feels that [left] shoulder pain has increased as she uses [it] for a majority of her activities now." Px4, Dx3A at 13 of 543.

Petitioner participated in approximately six sessions of physical therapy for her right shoulder from November 13, 2017 through December 6, 2017. Px4, Dx3B at 298-317 of 543.

Petitioner next saw Dr. Goldberg on December 15, 2017, at which time he noted Petitioner's options were to live with and manage the right shoulder pain or have a surgical capsular release. Px4, Dx3A at 18-129 of 543. On December 22, 2017, Petitioner elected to proceed with right shoulder surgery, consisting of right shoulder arthroscopy with subacromial decompression, biceps tenotomy, and distal clavicle excision for her adhesive capsulitis. Px4, Dx3A at 125-126 of 543. Petitioner followed up with Dr. Goldberg on February 23, 2018 Px4, Dx3A at 116-117 of 543.

On March 19, 2018, Petitioner underwent a (1) right shoulder arthroscopy, (2) subacromial decompression, (3) capsular release, (4) biceps tenotomy, and (5) distal clavicle excision. Px4, Dx3B at 539-541 of 543. Petitioner's postoperative diagnoses were (1) right shoulder adhesive capsulitis and (2) biceps tendinitis.

Petitioner followed up postoperatively with Dr. Krzysztof Siemionow on April 3, 2018 and with Dr. Goldberg on March 23, 2018, April 6, 2018, and May 11, 2018. Px4, Dx3A at 104-111 of 543. On May 11, 2018, Dr. Goldberg noted that if Petitioner continued having pain in her neck, her neck would be worked up as the pathology of the pain. Petitioner presented for follow up of postoperative right shoulder pain with General Medicine on April 3, 2018 and April 20, 2018. Px4, Dx3A at 39-45 of 543. X-rays of Petitioner's right shoulder were obtained on April 3, 2018 and demonstrated (1) interval resorption or resection of an approximately 15mm length of distal clavicle, (2) no clear-cut fracture elsewhere, and (3) no dislocation of the glenohumeral joint. Px4, Dx3A at 30 of 32. Petitioner presented to Dr. Suzanne Falck on June 1, 2018, at which time she reported improvement of the right shoulder with physical therapy but was experiencing neck pain. Px4, Dx3A at 36-38 of 543. Petitioner reported that the neck pain was new. Dr. Falck's assessment was right sided neck pain. Petitioner testified that her right shoulder symptoms improved after surgery. Tr. at 64.

Petitioner returned to Dr. Goldberg on June 22, 2018. Px4, Dx3A at 101-102 of 543. Petitioner reported that she continued to have neck pain and a pulling sensation. Regarding the right shoulder, Petitioner reported that she was overall doing better. X-rays of the right shoulder were obtained and showed normal postoperative changes. Dr. Goldberg ordered physical therapy and an MRI and x-rays of the cervical spine. Petitioner underwent a cervical MRI on July 5, 2018, which demonstrated (1) malalignment of the cervical spine most prominent at the C4-5, C5-6, and C6-7 levels, producing straightening at C6-7 and anterior angulation at the C5-6 and C4-5 levels, (2) C4-5 posterior disc-osteophyte complex with uncovertebral and facet arthropathy producing mild narrowing of the thecal sac and of the neural foramina bilaterally, (3) C5-6 posterior disc-osteophyte complex with uncovertebral and facet arthropathy producing mild narrowing of the thecal sac and of the neural foramina bilaterally, (4) C6-7 posterior disc bulge with minimal effacement of ventral CSF space but no compromise of the neural foramina, and (5) fluid-filled diverticuli at the C7-T1 level external to the neural foramina possibly representing synovial cysts or diverticula arising from the nerve root sleeves. Px4, Dx3A at 27-28 of 32.

Petitioner participated in approximately 28 sessions of physical therapy from April 9, 2018 through July 31, 2018. Px4, Dx3A at 216-248 of 543; Px4, Dx3B at 249-297 of 543. On April 25, 2018, Petitioner reported right-sided neck pain. On May 16, 2018, Petitioner reported increased pain in the left side of

the neck and along the upper trapezius muscle, which she described as a pulling pain/tightness. Px4, Dx3B at 269. On May 29, 2018, June 4, 2018, June 21, 2018, July 3, 2018, and July 31, 2018, Petitioner reported a pulling sensation or pain in the right side of her neck. Px4, Dx3A at 216, 237, 246 of 543; Px4, Dx3B at 255, 263 of 543. On July 31, 2018, Petitioner reported that she was still experiencing a severe pulling on the right side of the neck, and that she felt like her pain was starting to spread to her left arm. Px4, Dx3A at 216. Petitioner testified that when she participated in physical therapy following shoulder surgery, she noticed that she was having a hard time turning to the left. Tr. at 36. Petitioner testified that while doing exercises at physical therapy, she felt pulling at her neck that radiated down her left arm to the fingertips, making the fingertips numb. Tr. at 37. The exercises did not bother her right arm. Tr. at 37. Petitioner testified that her neck pain had not gone away prior to the surgery. Tr. at 37.

Petitioner presented to Dr. Krzysztof Siemionow on August 21, 2018 for complaints of neck pain and left arm pain, as referred by Dr. Goldberg. Px4, Dx3A at 97-98 of 543. A consistent accident history was noted. Petitioner reported that since the January 11, 2019 accident, she had experienced neck pain that became more symptomatic after her shoulder surgery in March 2018. Petitioner complained of diffuse pain in the left arm from the shoulder to the elbow. Dr. Siemionow reviewed the MRI of the cervical spine and noted that it showed disk disease at C4-5 and C6-7. Dr. Siemionow's assessment was herniated disks at C4-5 and C5-6. Dr. Siemionow recommended physical therapy for the neck and left arm. Petitioner was kept off work.

Petitioner returned to Dr. Goldberg on September 7, 2018, at which time she reported complete improvement of pain in her right shoulder. Px4, Dx3A at 94-95 of 543. Dr. Goldberg noted that from a right shoulder standpoint, Petitioner was cleared to return to work, and she did not have any work limitations.

Petitioner next saw Dr. Siemionow on October 2, 2018, at which time she complained of left upper extremity radicular pain and new left shoulder pain. Px4, Dx3A at 92-93 of 543. She also complained of stiffness in her left shoulder that had developed since her last appointment. Dr. Siemionow's assessment noted that Petitioner had degenerative disc disease at C4-5 and C5-6 and that she appeared to have some adhesive capsulitis of her left shoulder. He recommended that Petitioner continue with physical therapy for her neck and referred Petitioner to Dr. Goldberg for her left shoulder. He continued to keep Petitioner off work.

Petitioner returned to Dr. Goldberg on October 8, 2018. Px4, Dx3A at 89-91 of 543. Petitioner reported pain in her left shoulder which was similar to the pain she had been experiencing in the right shoulder prior to surgery. The left shoulder pain was not worsened by overhead use of the hand. Dr. Goldberg administered a left shoulder cortisone injection and ordered physical therapy and a left shoulder MRI. On October 9, 2018, Petitioner underwent a left shoulder MRI, which revealed (1) mild supraspinatus tendinopathy without tear, (2) mild arthritis of the acromioclavicular joint, and (3) mild degenerative changes of the fibrocartilage of the anterior glenoid. Px4, Dx3A at 25 of 32.

Petitioner participated in approximately nine sessions of physical therapy from September 27, 2018 through October 29, 2018. Px4, Dx3A at 196-215of 543.

On January 14, 2019, Dr. Goldberg recommended physical therapy for Petitioner's left shoulder. Dx3A at 80-81 of 543. Petitioner underwent a cervical epidural steroid injection at the left C4-5 level on January 17, 2019. Px4, Dx3A at 159-160 of 543. On January 29, 2019, Petitioner reported that she noticed

improvement in her pain, especially with rotation of her neck following the cervical epidural injection. Px4, Dx3A at 78-79 of 543. Petitioner was kept off work. Petitioner followed up with Dr. Goldberg for left shoulder adhesive capsulitis on February 8, 2019. Px4, Dx3A at 76-77 of 543.

On March 5, 2019, Petitioner reported to Dr. Siemionow and she reported that she began experiencing severe neck pain while attempting a new exercise in therapy. Px4, Dx3A at 74-75 of 543. She reported that she was diagnosed with torticollis at Holy Cross Hospital on March 1, 2019. Dr. Siemionow recommended a repeat cervical MRI, and he kept Petitioner off work. On March 29, 2019, Dr. Goldberg noted that Petitioner had been participating in physical therapy for her left shoulder, which was helping, and that Petitioner had a setback with her neck in physical therapy and had increased neck spasms. Petitioner complained of radicular pain from her neck down into her left hand and some associated numbness in her hand, as well as subjective weakness. Px4, Dx3A at 72-73 of 543. Dr. Goldberg noted that Petitioner's left shoulder was improving with physical therapy and that Petitioner was not interested in other interventions for the left shoulder at that time. Dr. Goldberg placed Petitioner on a one-pound lifting, carrying, pushing, and pulling restriction. Petitioner underwent a cervical spine MRI on March 14, 2019, which revealed disc degeneration at C4-5 and C5-6. Px4, Dx3A at 23 of 32. On April 9, 2019, Dr. Siemionow recommended Petitioner undergo an EMG and he kept Petitioner off work. Px4, Dx3A at 69-70 of 543. Petitioner underwent an EMG on June 7, 2019. Px4, Dx3A at 14 of 32. The EMG findings demonstrated that the needle EMG of the left upper extremity was abnormal for moderately decreased recruitment pattern in the deltoid, biceps, triceps, and FCU. The impressions of the EMG were evidence of multi-level cervical nerve root lesions between left C5-T1 consistent with early motor unit dropout and no evidence of ongoing denervation, peripheral neuropathy, plexopathy, or myopathy. On May 31, 2019, Dr. Goldberg noted that Petitioner's left shoulder adhesive capsulitis was improving with home stretching. Dr. Goldberg recommended Petitioner follow up with Dr. Siemionow for her neck. Px4, Dx3A at 67-68 of 543. On June 11, 2019, Dr. Siemionow recommended a cervical epidural injection, and he kept Petitioner off work. Px4, Dx3A at 64-65 of 543.

Petitioner saw Dr. Goldberg on July 12, 2019 for follow up of left shoulder stiffness. Px4, Dx3A at 62-63 of 543. Petitioner reported improved left shoulder symptoms with physical therapy. Dr. Goldberg noted that Petitioner's main problem was her neck and that Petitioner continued with pain in the neck that went down her left upper extremity. Dr. Goldberg noted that Petitioner was improving from her left shoulder stiffness. He noted, "[a]t this point, we would ask to see her back if her cervical spine has been significantly improved and she still has residual problems with the shoulder." Petitioner testified that she last treated for her left shoulder with Dr. Goldberg on July 12, 2019. Tr. at 67.

Petitioner underwent a cervical epidural steroid injection at the C7-T1 levels on July 15, 2019. Px4, Dx3A at 147-150 of 543. On July 23, 2019, Dr. Siemionow recommended repeating the cervical epidural injection. Px4, Dx3A at 59-60 of 543. Petitioner was kept off work. Petitioner underwent trigger point injections into the left paraspinal and left trapezius muscles on July 31, 2019. Px4, Dx3A at 140 of 543.

Petitioner followed up with Dr. Siemionow on September 10, 2019 and reported persistent neck pain and numbness down her left arm. Px4, Dx3A at 56-58 of 543. Petitioner reported relief for one to one and half weeks following the cervical epidural injections. Petitioner did not want surgical intervention at that time. Dr. Siemionow noted that if Petitioner wanted to proceed with surgery in the future, she would need to stop smoking. Petitioner was kept off work. Petitioner returned to Dr. Siemionow on January 14, 2020. Px4, Dx3A at 54-55 of 543. Petitioner reported that her symptoms were the same. Dr. Siemionow's assessment was neck pain and left upper extremity radiculopathy. Dr. Siemionow did not recommend

surgery at that time because Petitioner was a smoker and because she was not interested in pursuing further surgery at that time. Dr. Siemionow referred Petitioner to a PM&R colleague for further evaluation and nonoperative management of her neck pain and radiculopathy.

Petitioner returned to Dr. El Shami on February 13, 2020, as referred by Dr. Siemionow, for neck pain. Px4, Dx3A at 177-179 of 543. Dr. El Shami noted that Petitioner had been experiencing neck pain since 2017, and that the neck pain radiated into her left upper extremity with associated spasms. Dr. El Shami's assessment was history of cervical radiculopathy and significant polymyalgias of the shoulder girdle and neck. Dr. El Shami recommended physical therapy and prescribed medications. Petitioner followed up with Dr. El Shami on March 26, 2020. Px4, Dx3A at 175-176 of 543.

On June 10, 2020, Dr. El Shami provided Petitioner with trigger point injections to her left neck and shoulder girdle. On June 23, 2020, Petitioner saw Dr. Siemionow, at which time he noted that Petitioner complained of neck pain and radicular pain down the left upper extremity to below the elbow. Px4, Dx4 at 3-4. Dr. Siemionow's assessment was neck pain and left upper extremity radiculopathy. A new cervical spine MRI was recommended to assess for progression of degenerative changes and new findings that would explain Petitioner's complaints. Petitioner underwent a cervical spine MRI on July 3, 2020, which demonstrated degeneration of the cervical spine similar to that seen in the MRI of May 14, 2019.

Petitioner followed up with Dr. Siemionow on July 21, 2020. Px4, Dx4 at 1-2. Dr. Siemionow reviewed the cervical spine MRI and noted that the results showed multilevel degenerative disc disease without any acute signs of disc herniation of cord compression. Dr. Siemionow recommended physical therapy. Petitioner returned to Dr. El Shami on October 2, 2020. Px5, Dx4. Petitioner was not interested in injections or physical therapy. Petitioner was open to trying osteopathic manipulative medicine. Dr. El Shami noted that Petitioner was treated for multiple tender points with counterstrain and a combination of indirect and direct myofascial release and thoracic inlet release. Petitioner reported that her neck pain and spasms were gone after the osteopathic treatment. On October 9, 2020, Petitioner requested to continue with osteopathic treatment. Px5, Dx4.

Dr. El Shami administered trigger point injections into the left upper and middle trapezius musculature on January 14, 2021. Px5, Dx4. Dr. El Shami recommended Petitioner follow up with the pain clinic for a left C5-6 cervical epidural steroid injection. Petitioner continued to follow up with Dr. El Shami through 2021. Px5, Dx4. On March 31, 2021, Petitioner underwent left C4-7 medial branch blocks. On May 6, 2021, Dr. El Shami noted that the medial branch blocks did not provide Petitioner with long term relief. Dr. El Shami prescribed clinical massage therapy. During Petitioner's treatment with Dr. El Shami, Dr. El Shami referred Petitioner to Dr. Andrea Cyr for continued osteopathic treatment. On September 30, 2021, Dr. El Shami noted that Petitioner reported that she had three falls within the last month due to fainting. Petitioner testified that the osteopathic treatment provided some relief. Tr. at 43-44.

Petitioner returned to Dr. El Shami on March 3, 2022. Px4, Dx5. Dr. El Shami noted that Petitioner's care had been transferred to Dr. Cyr for Dr. Cyr to provide osteopathic manipulation. Dr. El Shami noted that Petitioner had less overall pain and swelling in the left shoulder. He noted that Petitioner's left upper trapezius remained tight. Dr. El Shami also noted that weather affected Petitioner's pain, and that snow, rain, or precipitation increased achiness and spasms to Petitioner's entire left upper extremity. Dr. El Shami noted that Petitioner's right side was doing well and that it hurt only with weather changes. Dr. El Shami noted that Petitioner experienced numbness in her fingertips and that activities of daily living, such as cooking and cleaning, continued to bother her. Dr. El Shami noted that Petitioner reported that she had

been invited bowling, but that she did not feel comfortable attempting to bowl because of the level of pain that she anticipated would develop. Dr. El Shami's assessment was history of right rotator cuff tear, status post repair, chronic left shoulder girdle dysfunction with underlying scapular dyskinesis and cervical radiculitis. Dr. El Shami noted that Petitioner was on a good path in terms of managing her myofascial symptoms. He recommended she continue with clinical massage therapy and osteopathic manipulations from Dr. Cyr. Dr. El Shami noted that Petitioner could follow up with him on an as-needed basis in the future. Petitioner testified that she has continued to see Dr. Cyr every six to eight weeks and sees Ms. Lirella Jean, a massage therapist, every two weeks. Tr. at 44. Petitioner testified that none of the doctors have returned her to full duty work since the accident. Tr. at 44.

Current condition

Petitioner has not returned to work at Respondent. Tr. at 69. Petitioner has not looked for work or applied for work in any capacity since April 2017. Tr. at 69.

Petitioner testified that at the time of arbitration, her right shoulder was at "at least 85 percent of the capacity." Tr. at 32. Petitioner testified that when it rains, her shoulder aches and "[i]t feels like – like a elephant is sitting on both of my shoulders." Tr. at 32. Petitioner testified that snow aggravates her condition and that when it snows, her shoulder feels the same as it does when it rains. Tr. at 32. Petitioner testified that she still gets some tingling in her right hand and fingertips. Tr. at 33. Petitioner testified that she does not bowl or skate anymore, and that she does not visit too many people anymore because of the spasms that she gets in her arm. Tr. at 33, 68. Petitioner testified that she feels ashamed and that she does not want to be around people when she is in pain. Tr. at 33. Petitioner testified that she does not do much cooking because she has a hard time lifting big pots and that it hurts to use a can opener. Tr. at 34. Her son does most of the cooking. Tr. at 34. Petitioner testified that she cannot handle too much weight. Tr. at 34. Petitioner demonstrated reaching overhead, and she testified that she felt a pull on the left side of her neck while reaching overhead. Tr. at 35-36.

Regarding her neck, Petitioner testified that putting glasses and dishes away causes spasms down her left arm. Tr. at 37.

Regarding her left shoulder, Petitioner testified that she gets pulling in her neck, spasms in her arm from the shoulder down past the elbow, and numbness in the fingertips. Tr. at 45. Petitioner testified that weather changes affect her left arm and neck, and that "[t]he rain makes it just so unbearable, even the pain medicine doesn't work." Tr. at 45. Petitioner testified that she does not cook because of her neck and left arm as well. Tr. at 45. She also does not do much vacuuming and does light laundry. Tr. at 46. She cannot carry a full basket of laundry. Tr. at 46. Petitioner testified that when grocery shopping, her son lifts the heavy items and heavy bags. Tr. at 46. Petitioner testified that she can lift between five and 10 pounds. Tr. at 47. Petitioner testified that if she lifts heavier than 10 pounds, she experiences spasms and pulling in her neck. Tr. at 47. Petitioner testified that her son helps more with household chores and grocery shopping than he did prior to the accident. Tr. at 74.

Petitioner testified that she would consider surgery if her condition deteriorates. Tr. at 47.

Testimony of Keiquan Brown

Respondent called Keiquan Brown to testify on its behalf. Tr. at 75. Mr. Brown has been employed at Respondent for 14 years, and his position at the time of arbitration was Transporter manager, Central Storage Manager I. Tr. at 77. Mr. Brown testified that he was in the position of Transporter manager,

Central Storage Manager I on January 11, 2017. Tr. at 77-78. Mr. Brown's job duties consist of hiring, terminating, and managing the day-to-day activities at the Transportation Department. Tr. at 78. Mr. Brown testified that he knows Petitioner, that her position was Transporter I, and that he was Petitioner's manager. Tr. at 78. Mr. Brown testified that the duties of a Transporter I consisted of receiving requests to take patients, visitors, or patient-related items and transport them to a location. Tr. at 79.

Mr. Brown testified that the maximum weight Petitioner would have lifted in her position at Respondent was upwards of 50 to possibly 75 pounds, and that she would perform this duty between 15 and 20 times a day. Tr. at 80. Mr. Brown testified that if there was a heavier weight that needed to be lifted, that would be done with assistance from individuals on the unit. Tr. at 81. Mr. Brown testified that there are weight lifting devices that assist with moving a patient. Tr. at 81.

Mr. Brown testified that he recalled Petitioner reporting an accident that occurred on January 11, 2017, that he spoke with Petitioner via phone within 24 to 48 hours of the injury, and that Petitioner reported that she injured her right shoulder while moving a patient into the morgue. Tr. at 82. Petitioner did not report any neck or left shoulder injuries or symptoms at that time. Tr. at 82. Mr. Brown testified that Petitioner returned to work full time and at full duty following the January 11, 2017 accident, that she worked until April 2017, and that she performed all of the regular duties of a Patient Transporter during that time. Tr. at 83. Mr. Brown testified that Petitioner did not tell him that she was having any issues while working during that time, that she was experiencing pain, or that she was experiencing symptoms in her right shoulder, right arm, left shoulder, left arm, or neck during that time. Tr. at 83-84.

Mr. Brown testified that Petitioner would have reported symptoms or issues with working to him or Ms. Maybon, Petitioner's supervisor. Tr. at 84. Mr. Brown testified that if Petitioner had reported symptoms to Ms. Maybon, he would have known about it as it would have been reported to him via email, phone call, or direct conversation. Tr. at 85. Mr. Brown testified that Ms. Maybon did not report any complaints that Petitioner was making to him between January 2017 and April 2017. Tr. at 85.

Mr. Brown testified that Petitioner last worked at Respondent in April 2017 and that to his knowledge, Petitioner did not attempt to return to work at Respondent. Tr. at 85-86.

Evidence deposition of Dr. Benjamin Goldberg

Dr. Goldberg testified by way of evidence deposition on December 21, 2018. Px3. Dr. Goldberg testified as to his education and credentials as an orthopedic surgeon. Px3 at 7-9.

Dr. Goldberg testified that as a result of the injury, Petitioner probably sustained a muscle strain initially with a labral tear that progressed into adhesive capsulitis, which was her main problem. Px3 at 32. Dr. Goldberg opined that the treatment that he and Dr. El Shami had ordered was related to the injury. Px3 at 32. Dr. Goldberg testified that Petitioner would continue to have mild pain in her right shoulder, three small incisions in the shoulder, and slight cosmetic asymmetry between the two biceps, and that it was possible but less likely than not that Petitioner would experience some functional weakness in the arm or cramping in the arm on an intermittent basis. Px3 at 33. Dr. Goldberg testified that if Petitioner were to lift heavier items with the right arm, the arm might feel a slight cramp in the biceps. Px3 at 33. Dr. Goldberg agreed that Petitioner sustained more than a strain that resolved the following day. Px3 at 34.

Dr. Goldberg explained that adhesive capsulitis is not an instantaneous event, it is progressive and eventually becomes more symptomatic. Px3 at 35. Dr. Goldberg testified that he suspects that the adhesive capsulitis began on the date of the accident, it progressed, and eventually plateaued until he

saw Petitioner. Px3 at 35. Dr. Goldberg testified that if Petitioner had sustained a strain that had truly resolved, Petitioner would have had a normal MRI in May 2017. Px3 at 36-37. Dr. Goldberg testified that sometimes a neck problem can cause an issue in the left shoulder, and sometimes overusing the left shoulder while the right shoulder is painful or recovering from surgery can cause an overuse injury on the left shoulder. Px3 at 37.

On cross examination, Dr. Goldberg agreed that he would not expect any permanent restrictions for Petitioner's right shoulder moving forward. Px3 at 38. Dr. Goldberg deferred to opinions regarding Petitioner's neck injury to Dr. Siemionow. Px3 at 38. Dr. Goldberg agreed that he did not believe that Petitioner would require any further surgery to her right shoulder. Px3 at 43.

Evidence deposition of Dr. Kris B. Siemionow

Dr. Siemionow testified by way of evidence deposition on November 17, 2020. Px4. Dr. Siemionow testified as to his education and credentials as an orthopedic surgeon with a specialty in spine surgery. Px4 at 4-9.

Dr. Siemionow testified that based on the history Petitioner provided and everything that he reviewed, including the EMG, MRI, and Petitioner's age, he felt that Petitioner had an exacerbation of a preexisting degenerative condition as a result of the injury. Px4 at 41. Dr. Siemionow testified that the treatment that he rendered to Petitioner for her neck was reasonable and related to the injury. Px4 at 42. Dr. Siemionow testified that at the time of his deposition he believed that Petitioner was at maximum medical improvement ("MMI") for conservative management. Px4 at 42. Regarding surgery, Dr. Siemionow testified that Petitioner's symptoms would have to be bad enough to warrant the risk of surgery, and she would have to have the right type of pathology on MRI and quit smoking to be a surgical candidate. Px4 at 42. Dr. Siemionow testified that at the time of his deposition, he did not believe that Petitioner could perform her job as a transporter. Px4 at 44. Dr. Siemionow testified that at the time of his deposition, Petitioner's problems were permanent until future reevaluation and potential treatment with surgery. Px4 at 44. Dr. Siemionow testified that Petitioner would need occasional evaluations by a pain management physician, medication, periodic evaluation of the ongoing radiculopathy by a health care provider that specializes in spine, and possibly physical therapy. Px4 at 44-45. Dr. Siemionow agreed that Petitioner's left shoulder symptoms can be stemming from her neck, and he explained that C5 nerve affects the shoulder and deltoid area, that Petitioner had an EMG that confirmed that the deltoid muscle is affected, which is a neck problem, and that Petitioner also had shoulder problems, including adhesive capsulitis. Px4 at 46. Dr. Siemionow kept Petitioner off work each time he saw her. Px4 at 35.

On cross examination, Dr. Siemionow explained that he believed that Petitioner could not perform her job duties because he did not think that it was safe for someone with an active cervical radiculopathy, as demonstrated by EMG, to perform that degree of intensity from a heavy lifting perspective. Px4 at 47. Dr. Siemionow testified that regarding the cervical spine, he thought it was reasonable for someone in Petitioner's condition to undergo a functional capacity evaluation to see what her work restrictions are and make those restrictions permanent. Px4 at 48. Dr. Siemionow further testified that "But you know, if there's some opportunities for sedentary duty or something like that, I'm not saying that I'm excluding that, right? But we have to, obviously, keep all this in context of it's not only the neck, it's the shoulder, too, so…' Px4 at 48. Dr. Siemionow agreed that he would need to reevaluate Petitioner before recommending any future surgery. Px4 at 48. Dr. Siemionow testified that if Petitioner were to undergo surgery in the future, "then we would need to reevaluate her, see how she heals and, you know, what her restrictions are after that. However, if we're saying that she's going to elect to not have surgery in the

future, then from my perspective, she is permanent right now." Px4 at 48. When asked if it was his opinion that even with further conservative treatment that Petitioner's condition is likely not to improve, Dr. Siemionow responded, "I think that's the best way to put it." Px4 at 49. Regarding Petitioner complaining of neck symptoms in March 2017, Dr. Siemionow testified that neck symptoms within the first two to three months, or eight to 12 weeks, of the injury is reasonable, and anything beyond that is probably unrelated. Px4 at 51. Regarding whether the torticollis was caused by the 2017 work injury, Dr. Siemionow testified that it was part of the whole spectrum, and he was not sure whether it was a true torticollis versus just an inflammation or flare up. Px4 at 52-53. He further explained that having treated Petitioner, he "would have just kind of put it into the flare-up category where she's got a sensitive neck, the EMG is showing nerve irritation, and she kind of overdid it and had, you know, a flare-up, for lack of better words." Px4 at 53. Regarding a delayed reaction to an aggravation of a neck condition, Dr. Siemionow testified that you could injure the neck and the pain is referred to the shoulder, and conversely, you can injure the shoulder and the pain is referred to the neck, and that treatment for a shoulder injury itself can harm the neck. Px4 at 54. Regarding whether it is typical for a neck condition to switch from one side of the neck to the other, Dr. Siemionow testified that it was migratory and that once the nerves become inflamed, the inflammation can spread. Px4 at 54-55. Dr. Siemionow testified that you always have to investigate the patient for a potential neck problem in a shoulder case that is not improving after standard treatment, and that in Petitioner's case she did end up with a right-sided deltoid positive on the EMG, which would explain some, if not a lot, of the shoulder pathology or shoulder complaints that Petitioner was talking about. Px4 at 60-61.

On redirect examination, Dr. Siemionow testified that generally, a lot of people that have neck pathology that radiates to the shoulder think they have a shoulder problem and not a neck problem. Px4 at 62. Dr. Siemionow also testified that he did not think that a lack of complaints means that there is a not a problem originating from the neck. Px4 at 62. Dr. Siemionow testified that the conservative care that he mentioned that Petitioner could undergo would help her relieve some of the symptoms and keep her condition from degenerating more. Px4 at 62-63.

On recross examination, Dr. Siemionow testified that Petitioner would need occasional pain management consultation and potential muscle relaxants or anti-inflammatories to keep Petitioner in a "steady-state zone," and that if Petitioner did not receive access to this treatment, her symptomology could worsen. Px4 at 63-64.

Evidence deposition testimony of Respondent's Section 12 examiner, Dr. Ryon Hennessy

Dr. Hennessy testified by way of evidence deposition on February 10, 2021. Rx1. Dr. Hennessy testified as to his education and credentials as an orthopedic surgeon. Rx1 at 4-6.

Dr. Hennessy examined Petitioner twice. Rx1 at 6. Dr. Hennessy's testimony focused on his second examination of Petitioner. Rx1 at 7. Dr. Hennessy saw Petitioner for a second examination on April 2, 2020. Rx1 at 7. Dr. Hennessy testified that one difference in the history provided by Petitioner was that in the 2017 examination, Petitioner denied prior cervical complaints and right shoulder complaints, however, the records that were forwarded for his review for the April 2020 examination revealed that Petitioner had cervical pain and radiculopathy in 2014. Rx1 at 8. Dr. Hennessy listed the records he reviewed in preparation of the second examination. Rx1 at 8-10. He did not review the left shoulder MRI of May 2017. Rx1 at 10. Dr. Hennessy performed a physical examination of Petitioner. Rx1 at 10-12.

Dr. Hennessy testified that based on his examination and review of Petitioner's records, his diagnosis as to Petitioner's neck was degenerative disk disease C4-5, C5-6, and mildly at C6-7. Rx1 at 15. Dr. Hennessy testified that in his opinion, the degenerative disk disease C4-5, C5-6, and mildly at C6-7 were chronic conditions that predated January 2017. Rx1 at 15-16. Dr. Hennessy testified that his diagnosis as to Petitioner's left shoulder was mild rotator cuff tendinopathy and some minimal degenerative change. Rx1 at 17. Regarding Petitioner's right shoulder, Dr. Hennessy testified that his diagnosis was a sprain and that Petitioner developed adhesive capsulitis, which was not related to the accident. Rx1 at 17.

Dr. Hennessy testified that Petitioner's neck condition was not related to the accident, because she had been treated in 2014 for degenerative changes, "so clearly they had been symptomatic prior to the accident." Rx1 at 17-18. Dr. Hennessy testified that the strongest support for this opinion was that Dr. Goldberg and Dr. Siemionow listed no neck pain, no radiculopathy, and normal neurologic findings proximate to the time of injury, and that Dr. El Shami also noted that Petitioner denied neck pain, numbness, and tingling in May 2017. Rx1 at 18-19. Dr. Hennessy testified that he did not find that Petitioner's left shoulder condition was connected to her work injury. Rx1 at 20.

Dr. Hennessy testified that as to MMI for Petitioner's neck injury, MMI would not apply as there was no injury. Rx1 at 20. Dr. Hennessy testified that as to MMI for Petitioner's left shoulder, MMI would not apply as he found no evidence of injury related to the work accident. Rx1 at 20. Regarding Petitioner's right shoulder, Dr. Hennessy testified that "[i]n my opinion, the sprain that she sustained on January 11, 2017, resolved – January 12, 2017, excuse me, when she returned to full duty work without restrictions and did so for three months without seeking medical care, and in that interval three months, she saw Dr. Ulaszek, her primary care physician in February 2017 for a nasal issue and his notes clearly state she had no other complaints." Rx1 at 20-21. Dr. Hennessy testified that it was his opinion that Petitioner was able to return to work on January 12, 2017, "but it's actually what happened." Rx1 at 21.

Dr. Hennessy testified that he found that Petitioner's treatment for the degenerative changes to her neck was reasonable but was not related to the accident. Rx1 at 21. Dr. Hennessy testified that Petitioner's left shoulder treatment was reasonable but was not related to the accident. Rx1 at 21. Regarding Petitioner's right shoulder, Dr. Hennessy testified that treatment for the sprain when she was initially seen was reasonable and that subsequent treatment, which started months later, was unrelated to the accident. Rx1 at 22. Dr. Hennessy testified that with regard to the accident, Petitioner was treated appropriately for the right shoulder sprain which resolved and needed no further treatment on January 12, 2017. Rx1 at 22. Regarding the left shoulder and spine, Dr. Hennessy testified that those conditions were unrelated, and therefore, treatment would not be necessary with regard to the accident. Rx1 at 23.

Dr. Hennessy testified that Petitioner's prognosis for the right shoulder sprain she sustained was excellent, as she returned to work full duty and sought no care for three months. Rx1 at 23. Dr. Hennessy testified that Petitioner's prognosis without regard to the accident was poor, as she exhibited pain behavior, withdrawal, and give-way weakness, and her symptoms were out of magnitude with the objective findings. Rx1 at 23.

Dr. Hennessy testified that if the adhesive capsulitis were based on a trauma, it would develop over the next few months following the injury, and that doctors, therapists, and two orthopedic surgeons found full range of motion 11 and 12 months after the accident. Rx 1 at 24. Dr. Hennessy testified that he did not find the adhesive capsulitis to be posttraumatic adhesive capsulitis. Rx1 at 24. Dr. Hennessy testified that to support his opinion further, Petitioner not only developed adhesive capsulitis a year after the

accident, but Petitioner also developed it in her left shoulder, which shows that Petitioner, as a middle-aged overweight woman, was susceptible to it and it was not related to trauma. Rx1 at 24-25.

On cross examination, Dr. Hennessy testified that in 2020 he had performed approximately 70 IMEs, and that more than 90-percent of those were for respondents. Rx1 at 28-29. Dr. Hennessy testified that in general, the interview and exam portion of an IME for him is about 45 minutes; however, in Petitioner's case, it was an hour and 45 minutes. Rx1 at 30. Dr. Hennessy testified that his IME reports take a minimum of two hours to complete, but Petitioner's IME was a nine-hour report with all the records. Rx1 at 30. Dr. Hennessy testified that in December 2017, Petitioner was 5'4" and weighed 152 pounds with a body mass index ("BMI') around 27. Rx1 at 34. A BMI of 26 would be at the low rate of overweight. Rx1 at 34. In April 2020, Petitioner was 5'4" and weighed 171 pounds with a BMI of 29, placing Petitioner in the overweight category just under the obese threshold, which is a BMI of 30 to 40. Rx1 at 33. Dr. Hennessy agreed that adhesive capsulitis was common among middle-aged overweight women, that between two percent and five percent of people suffer from it and clarified that by "common" he meant that most of the common people that suffer from adhesive capsulitis are middle-aged women. Rx1 at 24-25. Dr. Hennessy testified that in his experience, obesity is a factor in developing adhesive capsulitis. Rx1 at 35. Diabetes is also a risk factor for adhesive capsulitis. Rx1 at 35. Dr. Hennessy testified that to his knowledge, Petitioner had no diagnosis of diabetes. Dr. Hennessy testified that he read Dr. Goldberg's report and agreed that Dr. Goldberg had seen Petitioner on more occasions than he had. Rx1 at 36. Dr. Hennessy also read Dr. Siemionow's report. Rx1 at 36. Dr. Hennessy testified that he reviewed postoperative therapy records for the period of May 2018 through June 2018, and those were all the postoperative therapy records he had. Rx1 at 37. On redirect examination, Dr. Hennessy testified that he believed that he was given the complete set of records of Dr. Goldberg's and Dr. Siemionow's treatment. Rx1 at 40.

Evidence deposition testimony of Dr. Amir Said El Shami

Dr. El Shami testified by way of evidence deposition on March 9, 2022. Px5. Dr. El Shami testified as to his education and credentials as a physiatrist with a focus in sports medicine. Px5 at 5-7.

Dr. El Shami testified that he performed a Spurling's test on Petitioner on May 26, 2017 because shoulder pain is often a presenting symptom of a neck issue. Px5 at 11. Petitioner had full cervical range of motion at that time. Rx5 at 11. Dr. El Shami testified that Petitioner having full cervical range of motion at that time did not mean that she did not have a cervical injury, and that it meant that she could move her neck fully on that date. Px1 at 11. Dr. El Shami also performed a Spurling's test on June 16, 2017, which was negative, and indicated that there was no active or serious nerve impingement coming from Petitioner's cervical spine at that time. Px5 at 14. Dr. El Shami testified that on July 7, 2017, Petitioner complained of right-sided neck pain, which was a new complaint. Px5 at 14. Dr. El Shami testified that Petitioner's Spurling's test on that date was positive for shoulder pain and neck to shoulder pain and that Petitioner had some tenderness over her cervical paraspinal musculature in her neck that extended into her upper trapezius. Px5 at 15. Dr. El Shami testified that Petitioner's grip strength was diminished that day, which indicated that Petitioner was in a lot of pain or that she had weakness emanating from her neck because of an irritated nerve. Px5 at 16. Dr. El Shami testified that at that time, he still thought that Petitioner had a right shoulder strain from her rotator cuff with possible subacromial bursitis, but he was also concerned for a possible herniated disk because of the neck pain and symptoms.

Dr. El Shami testified that Petitioner's report of starting to experience left arm symptoms in July 2018 indicated to him that either Petitioner's neck was causing symptoms to her left side and/or during her

recovery from right shoulder surgery, Petitioner was compensating and experiencing an overuse injury to her left shoulder. Px5 at 20-21. Dr. El Shami testified that on February 13, 2020, Petitioner complained of neck pain with radiation into her left upper extremity, associated spasms, grip weakness, and numbness and tingling of her bilateral fingers, left worse than right. Px5 at 23-24. Dr. El Shami testified that this was the first time he had addressed any left-sided symptoms. Px5 at 24. Dr. El Shami testified that his assessment on that date was cervical radiculopathy with secondary muscle myalgias of the shoulder girdle and neck. Px5 at 25.

Dr. El Shami testified that the fact that Petitioner began experiencing neck pain a few months after the injury did not concern him, other than he felt that her issues were worsening over time rather than improving. Px5 at 44-45. Dr. El Shami testified that his opinion that Petitioner's left shoulder condition is related to the work accident would not change because Petitioner did not complain of left shoulder pain until July 31, 2018. Px5 at 45. Dr. El Shami testified that there are reasonable reasons why Petitioner could have developed left shoulder pain, either from an untreated and undiagnosed neck injury or issue or as a compensatory issue after her right shoulder surgery. Px5 at 46. Dr. El Shami testified that his opinion at the time of his deposition was that Petitioner suffered a cervical strain in addition to an exacerbation of an underlying cervical degenerative condition as a result of the work injury on January 11, 2017. Px5 at 46. Dr. El Shami testified that Petitioner's neck and left shoulder injuries were an indirect result of the January 11, 2017 accident. Px5 at 46-47. Dr. El Shami testified that the treatment that he rendered for Petitioner's neck and left shoulder was reasonable and related to the injuries that she sustained on January 11, 2017. Px5 at 47. Dr. El Shami testified that Petitioner's neck and left shoulder conditions are permanent, and he explained that they were permanent because it had been five years since the injury and there had been a continuous degree of debility in the shoulder that he did not anticipate would resolve spontaneously. Px5 at 47. Dr. El Shami testified that based on Petitioner's current condition, he did not believe that petitioner that Petitioner was able to carry out her job duties. Px5 at 48. Dr. El Shami testified that the treatment Petitioner would require in the future included myofascial pain-relieving modalities such as clinical massage therapy, osteopathic manipulation, periodic visits with a physical therapist, and medications. Px5 at 48.

On cross examination, Dr. El Shami testified that it was possible that Petitioner's neck injury was not caused by the January 11, 2017 accident, but that his suspicion on subsequent visits was that Petitioner had an underlying cervical issue that was undiagnosed. Px5 at 52. Dr. El Shami testified that he was aware that Petitioner had been working after she got hurt. Px5 at 53. Dr. El Shami testified that it was possible that Petitioner's neck symptoms were improving and that her nerve impingement could be coming from her shoulder on September 21, 2017 when she had full cervical range of motion on exam. Px5 at 54. Dr. El Shami testified that it was possible that Petitioner's nerve impingement symptoms on February 13, 2020 could have been caused by something other than the 2017 injury. Px5 at 57. Dr. El Shami testified that he had last seen Petitioner the week prior to his deposition, and that at that time he instructed Petitioner to follow up with him as needed and to continue her treatment with Dr. Cyr and her clinical massage therapist. Px5 at 58. Dr. El Shami agreed that Petitioner was only treating for her neck and left shoulder at her most recent visit. Px5 at 58. Dr. El Shami testified that the unsuccessful medial branch block indicated that Petitioner's pain was not coming from the bony structures of her cervical spine, but that she could still have a herniated disk and pinched nerve. Px5 at 59. A medical branch block would not be used to diagnose a herniated disk or radiculopathy. Px5 at 59. Dr. El Shami testified that by definition, a degenerative condition would have existed prior to the onset of symptoms and that sometimes those degenerative conditions do not present as symptoms until an injury or insult occurs. Px5 at 60-61. Dr. El Shami testified that the basis for his opinion that Petitioner would be unable to perform her job duties was based on the history and what Petitioner had reported, including that any

repetitive action flared up and increased her pain. Px5 at 61-62. Dr. El Shami testified that the job duties that were listed to him did not seem practical or reasonable for Petitioner to participate in knowing Petitioner and how she would react, and they would likely worsen her overall pain. Px5 at 62.

On redirect examination, Dr. El Shami testified that Petitioner did not mention to him any other accident that could be causing her problems. Px5 at 62-63. Dr. El Shami testified that his opinion that Petitioner's neck and left shoulder problems were indirectly caused by the accident did not change, though Petitioner's left shoulder and neck complaints did not arise until after the accident date. Px5 at 63.

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 her right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission,* 44 Ill. 2d 214 (1969).

Credibility is the quality of a witness which renders her evidence worthy of belief. 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 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's behavior and conduct during the hearing and finds her to be a credible witness. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

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 her employment was a causative factor in her ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *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 her 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 her 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 her right shoulder, cervical spine, and left shoulder are causally related to the January 11, 2017 injury. The Arbitrator relies on the following in support of her findings: (1) the medical records of the University of Illinois Hospital, (2) the medical records and testimony of Dr. El Shami, (3) the medical records and testimony of Dr. Goldberg, (4) the medical records and testimony of Dr. Siemionow, (5) the fact that none of the records in evidence reflect any right shoulder or left shoulder issues or treatment prior to January 11, 2017, and (6) the fact that none of the records in evidence reflect any cervical spine issues or treatment after January 26, 2014. The evidence demonstrates that Petitioner was able to work full duty and without restrictions immediately prior to the work accident.

The Arbitrator has considered the opinions of Dr. Hennessy and finds that they do not outweigh the opinions of Dr. El Shami, Dr. Goldberg, and Dr. Siemionow. The Arbitrator notes that Dr. Hennessy's opinions are inconsistent with Petitioner's persistent complaints, continuous symptomology, and treatment records. The Arbitrator finds that overall, the record supports: (1) Dr. El Shami's opinions that Petitioner suffered a cervical strain in addition to an exacerbation of an underlying cervical degenerative condition as a result of the January 11, 2017 accident, and that Petitioner could have developed left shoulder pain from an untreated and undiagnosed neck injury or issue or as a compensatory issue after Petitioner's right shoulder injury, (2) Dr. Goldberg's opinions that Petitioner sustained a right shoulder muscle strain initially with a labral tear that progressed into adhesive capsulitis, that sometimes a neck problem can cause an issue in the left shoulder or overuse of the left shoulder while the right shoulder is painful or recovering from surgery can cause an overuse injury of the left shoulder, and that if Petitioner had a strain that had truly resolved, Petitioner would have had a normal MRI in May 2017, and (3) Dr. Siemionow's opinions that Petitioner had an exacerbation of a preexisting cervical degenerative condition as a result of the January 11, 2017 accident and that Petitioner's left shoulder symptoms can be stemming from her neck, as the C5 nerve affects the shoulder and deltoid area and Petitioner had an EMG that confirmed the deltoid muscle was affected. The Arbitrator notes that Dr. Hennessy testified that Petitioner's neck condition was not related to the accident because Petitioner had been treated in 2014 for degenerative changes, which were "clearly" symptomatic prior to the January 11, 2017 accident. The Arbitrator finds Dr. Hennessy's testimony and opinions in this regard unpersuasive, where the record of January 26, 2014 reflects that Petitioner sought treatment for right-sided neck pain, which was diagnosed as a probable moderate cervical strain, and no diagnostics exams were ordered, and Petitioner was released to return to work the following day. The Arbitrator further notes that there are no records which reflect that Petitioner presented for any follow up or further treatment for a cervical spine condition until January 11, 2017.

Additionally, the Arbitrator notes that while Petitioner testified that a patient fell back on her right shoulder at the end of March 2017 or April 2017, Petitioner testified that "[n]o, it was already worse," when asked if the pain in her right shoulder was worse after this incident. Petitioner's testimony is corroborated by the physical therapy record of April 17, 2017, which reflects that Petitioner reported that the incident made her pain worse for the day, but did not increase the pain in her arm overall, and that the pain was already worse at that point. Thus, the Arbitrator finds that this incident did not break the chain of causal connection.

In resolving the issue of causal connection, the Arbitrator also finds: (1) that Petitioner was at MMI as to her right shoulder adhesives capsulitis and biceps tendinitis on September 7, 2018, the date which Dr. Goldberg cleared Petitioner to return to work without any limitations, (2) that Petitioner reached MMI as to her left shoulder adhesive capsulitis on July 12, 2019, the last date that Petitioner treated for her left

shoulder with Dr. Goldberg, and (3) that Petitioner reached MMI as to her cervical spine condition on November 17, 2020, the date that Dr. Siemionow testified that he believed that Petitioner was at MMI for conservative management. The Arbitrator notes that while surgical treatment of Petitioner's cervical spine condition had been discussed, Dr. Siemionow testified that Petitioner's symptoms would have to be severe enough to warrant the risk of surgery and Petitioner would have to have the right type of pathology on MRI and quit smoking to be a surgical candidate.

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

Consistent with the Arbitrator's prior finding regarding the issue causal connection, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent has not yet paid all appropriate charges. At arbitration, Petitioner presented unpaid medical bills from University of Illinois Hospital & Health Science System, Px6, and Gray Medical, Inc., Px7. As the Arbitrator has found that Petitioner's treatment has been reasonable and necessary, the Arbitrator finds that all bills, as provided in Px6 and Px7, are awarded and that Respondent is liable for payment of these bills, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent is entitled to a credit for any payments made towards the awarded outstanding expenses and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Issue K, whether Petitioner is entitled to TTD, the Arbitrator finds as follows:

Consistent with the Arbitrator's prior findings, the Arbitrator finds that Petitioner is entitled to TTD benefits. Petitioner claims that she is entitled to TTD benefits from April 11, 2017 through September 26, 2022, the date of arbitration. Ax1, No. 8. Respondent disputes Petitioner's claim, and Respondent claims that Petitioner is not entitled to TTD. Ax1 at No. 8.

The evidence demonstrates that during Petitioner's years-long treatment for her right shoulder, cervical spine, and left shoulder conditions, Petitioner's treating physicians have restricted her work abilities or have kept her off work entirely. The Arbitrator notes that while Petitioner was cleared to return to work from a right shoulder standpoint by Dr. Goldberg on September 7, 2018, Petitioner continued with either work restrictions, including a one-pound lifting, carrying, pushing, and pulling restriction by Dr. Goldberg on March 29, 2018, or was kept off work by Dr. Siemionow for her cervical spine condition. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from April 11, 2017 through November 17, 2020, the date that Dr. Siemionow testified that Petitioner was at MMI for conservative management for her cervical spine condition.

Per the Parties' stipulation, Respondent is entitled to a credit in the amount of $23,544.07 for TTD benefits paid to Petitioner by Respondent. Ax1, No. 9.

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 52 years of age and was employed at Respondent as a patient transporter. Following the January 11, 2017 accident, Petitioner returned to work full-time and at full duty the following day and worked at Respondent until April 10, 2017. Petitioner did not return to work at Respondent after April 10, 2017 and has not worked or looked for employment since. The Arbitrator notes that Dr. El Shami and Dr. Siemionow both testified that based on her current cervical condition, Petitioner cannot perform or carry out her job duties as a patient transporter. The Arbitrator assigns more weight to these factors.

With regard to criterion (iv), the Arbitrator notes that 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 January 11, 2017 accident, Petitioner suffered from right shoulder adhesive capsulitis and biceps tendinitis, a cervical strain and exacerbation of an underlying/preexisting cervical degenerative condition, and left shoulder adhesive capsulitis.

Treatment for Petitioner's right shoulder consisted of (1) corticosteroid injections into the subacromial bursa of the right shoulder on May 26, 2017 and August 24, 2017, (2) a right shoulder arthroscopy, subacromial decompression, capsular release, and biceps tenotomy, and distal clavicle excision on March 19, 2018, and (3) preoperative and postoperative physical therapy. Dr. Goldberg released Petitioner to return to work without restrictions on September 7, 2018, and the evidence demonstrates that Petitioner has not sought treatment for her right shoulder since then. Dr. Goldberg testified that Petitioner would continue to have mild pain in her right shoulder, three small incisions in the shoulder, and slight cosmetic asymmetry between the two biceps. Px3 at 33. He also testified that it was possible but less likely than not that Petitioner would experience some functional weakness in the arm or cramping in the arm on an intermittent basis and that Petitioner's right arm might feel a slight cramp in the biceps when lifting heavier items with the right arm. Px3 at 33. At arbitration, Petitioner testified that the weather affects her right shoulder, causing aches, and that she continues to experience some tingling in her right hand and right fingertips. Petitioner testified that she does not do much cooking, as she has a hard time lifting pots and has pain when using a can opener.

Petitioner underwent a cortisone injection and participated in physical therapy for treatment of her left shoulder adhesive capsulitis. Petitioner last sought treatment for her left shoulder on July 12, 2019. Petitioner underwent multiple epidural steroid injections, trigger point injections, and medial branch blocks for treatment of the cervical spine, and she participated in physical therapy as well. Per Dr. Siemionow's testimony on November 17, 2020, Petitioner was at MMI for conservative management of her cervical spine condition. Dr. Siemionow and Dr. El Shami testified that Petitioner's cervical condition is permanent, and that Petitioner is not capable of performing her duties as a patient transporter. At arbitration, Petitioner testified that she continues to experience a pulling-sensation in her neck, spasms in her left arm from the shoulder down past the elbow, and numbness in her left fingertips. Petitioner testified that she also does not cook much, does not do much vacuuming, and does only light

laundry because of her neck and left arm. Petitioner testified that if she lifts heavier than 10 pounds, she experiences spasms and pulling in her neck. The Arbitrator assigns more weight to this factor.

The Arbitrator finds that Petitioner's cervical spine condition of ill-being is now permanent in nature. Since the record is void to suggest a reduction in earning capacity, the Arbitrator finds that Petitioner qualifies for an award based on a loss of trade, pursuant to Section 8(d)2.

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 40% loss of the person as a whole, or 200 weeks of permanent partial disability compensation, at the rate of $484.73.

Issue M, whether penalties/attorney's fees should be imposed upon Respondent, the Arbitrator finds as follows:

Petitioner's claim for penalties and attorney's fees is denied. The record does not support an award of Section 19(l) penalties and the Arbitrator finds that Respondent's disputes in this case are not vexatious or in bad faith, such that Section 19(k) penalties and/or Section 16 attorney's fees are merited.

Ana Vazquez

_____

ANA VAZQUEZ, ARBITRATOR

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC001476
Case Name	Nicolas Flores v. Utility Construction
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0241
Number of Pages of Decision	25
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Donna Zadeikis
Respondent Attorney	Joseph LaRocco

DATE FILED: 5/23/2024

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nicolas Flores,

Petitioner,

vs. NO: 20 WC 1476

Utility Construction,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the Arbitrator's finding that Dr. McNally, and subsequently Dr. Pelinkovic, was/is Respondent's choice of physicians and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 13, 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 $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

May 23, 2024

o5/8/24
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	20WC001476
Case Name	Nicolas Flores v. Utility Construction
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision (A)
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Mark DePaolo
Respondent Attorney	Zane Thompson

DATE FILED: 7/13/2023

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

/s/Michael Glaub, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

Nicolas Flores Case # **20** WC **01476**
Employee/Petitioner

Utility Construction
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Geneva**, on **May 24, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/23/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**67,728.96**; the average weekly wage was $**1,302.48**.

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

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

Respondent shall be given a credit of $**151,196.49** 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 authorize and provide for prospective medical care in the form of revision fusion surgery as prescribed by Dr. Dalip Pelinkovic for treatment to the lumbar spine.

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

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

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

Michael Glaub JULY 13, 2023
Signature of Arbitrator

ICArbDec19(b)

BACKGROUND

This cause comes before the Arbitrator pursuant to Petitioner's Motion pursuant to Sections 19(b) and 8(a) of the Workers' Compensation Act. On the record, the parties agree that the primary issue before the Arbitrator is Petitioner's right to access a revision fusion surgery at the expense of respondent. That surgery is disputed by Respondent based upon causal connection. Additionally, there may be some issues with regard to TTD and medical bills. The parties agree that Petitioner is receiving TTD benefits at the time of the trial and has been continuously for the prior three years. Further, the parties agree that although there may be some unpaid medical bills at the current time, medical bills have been paid by Respondent throughout this matter and that there are not specific medical bills which are disputed at this time.

FINDINGS OF FACTS

Testimony of Petitioner Nicolas Flores

The testimony of Petitioner, Nicolas Flores, was taken through an interpreter. Mr. Flores was employed on August 23, 2019, by Utility Construction Company. Mr. Flores was a union laborer. He had been a laborer for 26 years. He has worked for Respondent for 26 years. (TX 14-15)

On August 23, 2019, Petitioner was working at a job replacing pipes. They were 10' long and weighed 40 lbs each. The pipes were being placed beneath ground level and in order to place them, petitioner used a jackhammer to break concrete and a hand shovel to shovel dirt. The broken concrete was placed into a dumpster by Petitioner. He had been doing this job for many years. On the day of the accident, Petitioner was bending over with a piece of pipe in both hands. Each piece weighed 40 lbs. He felt a sharp and severe pain in his back. (TX 14-19) He reported this to

his supervisor, Ron Fritz, the following day. (TX 20) A written accident report was made. (TX 44) His supervisor directed him to go to the clinic at Sherman Hospital. He did so on a few occasions over the next few days. At first the pain was only in his back but a few days later it began to go into his legs. He was told at the clinic to go to A doctor through his health network. His primary home network was Marcon Medical Partners. He went to Marcon Medical clinic and was prescribed physical therapy. (TX 19-20)

From Marcon clinic he was sent to other doctors and was also sent to physical therapy, MRI testing, and ultimately referred to a surgeon, Dr. Thomas McNally. (TX 20-22)

His first visit to Dr. Thomas McNally was on January 29, 2020. Between the day of the accident and the first visit to Dr. McNally, he had undergone a great deal of physical therapy, as well as injections. He had been off work for a majority of that time. His pain, when he saw Dr. McNally, was an 8 out 10. He had pain going down his leg on the right side. The pain on his left side and into his left leg had greatly resolved. Dr. McNally took him off work and prescribed additional physical therapy. In December 2020 Dr. McNally told him he needed to have surgery in his lower back. That surgery took place on February 22, 2021. This was performed by Dr. McNally at Alexian Brothers Medical Center. Following the surgery, he was prescribed and underwent a great deal of physical therapy. His pain continued down the right leg and the thigh through the knee, the ankle and all the way through his foot. In July 2021, Dr. McNally left the practice and moved to a different address. (TX 26) Petitioner stayed at the Suburban Orthopaedic clinic and came under the care of Dr. Dalip Pelinkovic. (TX 22-25)

Dr. Pelinkovic also prescribed physical therapy, which Petitioner underwent. Dr. Pelinkovic also prescribed an EMG. Petitioner was not getting better while he was under Dr. Pelinkovic's care and he was in a great deal of pain. Dr. Pelinkovic made a recommendation for

a revision surgery on April 5, 2022. (TX 27-28) The surgery recommended by Dr. Pelinkovic was also recommended by Dr. Kern Singh, the "insurance company" doctor. Petitioner discussed the prospective surgery with his physician and his attorney. He made the election to undergo the surgery recommended by Drs. Pelinkovic and Singh (revision fusion surgery). He described his current situation as "a lot of pain every day…to lay down, to go to the bathroom. I can't even have relations with my wife, nothing. If I bend, the pain does not go away even with 3 or 4 pills, medication." His pain has not gotten better this past year at all. (TX 28)

On cross-examination, the Petitioner testified that he had never seen a chiropractor prior to the August 23, 2019 date. (TX 32-33) He was not experiencing any back pain prior to that time. Furthermore, Petitioner did not tell hospital personnel at Sherman Hospital that this was not a work-related accident. Petitioner testified that on each of his three visits to Sherman Hospital, there was no interpreter present though the medical records may indicate otherwise. (TX 32-35) Petitioner also testified that he was not aware that there was a difference in the surgical recommendations of Dr. McNally and Dr.Singh.

Testimony of Kern Singh, M.D. (Respondent's Section 12 Examiner)

Dr. Singh is a board-certified and fellowship trained orthopaedic surgeon. He began conducting examinations of Petitioner Nicolas Flores at the request of Respondent pursuant to Section 12 on January 10, 2020. He reviewed medical records and surveillance videos of Petitioner at that time. He also reviewed an MRI of September 16, 2019. Based upon his review and his examination, he concluded that Mr. Flores had spondylolisthesis at L4-5 as well as a disk herniation at that level (TX pg 9) His ultimate diagnosis was degenerative spondylolisthesis and disk herniation at L4-5. These diagnoses were causally related to the work accident. Dr. Singh believed Petitioner suffered from a pre-existing spondylolisthesis. The activities described by

Petitioner represented an aggravation of his pre-existing condition. At the time of his first examination, Dr. Singh recommended an epidural injection and possible surgical intervention. He did not believe the Petitioner was at MMI at that time. (RX 1, pp 9-12)

At that point, Dr. Singh, noted that treating doctor, Dr. McNally, was recommending a multi-level surgery including an L2-L3 laminectomy and a fusion at L4-5 and L5-S1. Dr. Singh did not agree with this recommendation. Dr. Singh's recommendation was laminectomies at L4-5, and L5-S1. He additionally recommended a single-level fusion at L5-S1. Dr. Singh did not feel that a fusion was indicated at the L4-5 level. This is because he did not see any additional instability on the repeat MRI (MRI dated 7/16/2020) and further felt that only a laminectomy was needed to address the stenosis at the L4-5 level. Petitioner underwent the surgery as recommended by Dr. McNally including the fusion at the L4-5 level. (RX 1, pp 13-17) Following the surgery, Dr. Singh had the opportunity to examine Petitioner as well as additional records. He also reviewed the MRI from May 17, 2021. His impression at that time was that the Petitioner had back pain without lower extremity pain. He did not find any evidence of symptom magnification. He noted that Dr. McNally performed the additional fusion at L4-5. He noted at the time Petitioner was not an MMI and recommended an FCE and then potentially work. His opinion was that Petitioner could return to work with a 20 lb restriction which was related to the accident. Dr. Singh further testified that the two-level fusion versus the one-level fusion put the Petitioner at a much greater risk of not returning to work at full duty. He did feel that Petitioner was not at MMI at that time. (RX 1, pp 17-19)

In October, 2021, another Section 12 examination was performed by Dr. Singh. At that time, Dr. Singh had the benefit of a CT myelogram that had taken place on October 27, 2021. His

impression of the CT myelogram was that there was no fusion at L4-5. It was Dr. Singh's impression that the patient required a revision fusion at the L4-5 level. (RX 1, pp 19-20)

Though Dr. Singh felt that the prescribed fusion at L4-5 was medically necessary, it was his opinion that it was not causally related. Dr. Singh's reasoning was that the necessity for the revision surgery was a failure of the L4-5 fusion and that the L4-5 fusion was not reasonably necessary or related to the work accident. (RX 1, pp 20-22) Dr. Singh did not recommend a bone stimulator in order to promote a fusion at the L4-5 level.

Dr. Singh again recommended an additional surgery in the form of a revision of the L4-5 laminectomy and a fusion. He continues to believe that the surgery is not related to the original accident because he did not recommend a fusion of the L4-5 level only a laminectomy. Furthermore, because the fusion at that level failed, the revision now necessary would be unrelated to the original accident, as the failed fusion was not necessary to begin with. Dr. Singh further opines that the Petitioner's current disability, as demonstrated by the FCE with a valid and full effort, indicates his permanent work restrictions.

At the time of his October 4, 2021, examination, the Petitioner was in a significantly high level of pain. If one of Dr. Singh's patients continued to have difficulty following a fusion surgery, he believes it would be medically reasonable for them to undergo a CT myelogram. Dr. Singh believes that the decision to perform a two-level fusion placed the patient at a greater risk for non-union. Dr. Singh did not see the medical indication for the fusion at L4-5 level. To clarify his opinion, "the patient still needs L4-5 treatment for his L4-5 failed fusion. I don't feel it's causally related for reasons I've mentioned previously." (RX 1, pp 30-31)

Dr. Singh further indicates that there is a school of thought or many surgeons that believe a laminectomy and a fusion is a treatment option for degenerative disk disease and micro instability, however, Dr. Singh believes that the fusion at the L4-5 level is medically unnecessary. (RX 1, pp 30-33) When asked if Dr. McNally violated the standards of care in performing the L4-5 fusion, Dr. Singh stated he did not have an opinion in that regard as he did not examine the Petitioner pursuant to "Standard of Care." He continues to believe that the treatment required at the L4-5 level was decompression only. However, Dr. McNally performed a decompression and fusion. Dr. Singh believed that the necessity for an L4-5 decompression was caused by the Petitioner's accident. (RX 1, p 39)

Dr. Singh's fusion rate is very high (but he does have patients with partial union or non-union). Non-union is a debilitating sequelae of an attempted fusion. Petitioner is in significant pain in every position. Dr. Singh believes that Petitioner is in absolute need of fusion revision surgery. He continues to believe it is not causally related because it was not the surgery recommended by him originally.

Testimony of Dalip Pelinkovic, M.D.

Dr. Dalip Pelinkovic was called for testimony by Petitioner. He is a board-certified orthopaedic surgeon and has been board-certified since approximately 2010. He currently practice at Suburban Orthopaedics. Dr. Pelinkovic joined the practice at Suburban Orthopaedics in August 2018. He took over Petitioner's care in July of 2021 as Dr. McNally had left the practice. At the time that he took over Dr. McNally's practice, Petitioner had already undergone surgery by Dr. McNally. (PX 8, pp 7-10) His first visit in July 2021, Petitioner presented to Dr. Pelinkovic with severe pain in the lower extremities. The Petitioner had undergone physical therapy. His pain

level was anywhere from 5 out of 10 to 8 out of 10 on the analog visual scale. He was off work and had been off work for some time. (PX 8, p 11)

As a result of his clinical examination, Dr. Pelinkovic noted not only the pain but the weakness in the right foot and the right leg. He believe that the Petitioner was still unable to work. He ordered a CT scan with contrast (a CT myelogram). That test is performed in the hospital and Dr. Pelinkovic saw the Petitioner following the test on November 2, 2021. Dr. Pelinkovic read the CT myelogram of 10/22/21 as a delayed union at that L4-5 level. This is a pain causing condition. Dr. Pelinkovic had ordered a bone stimulator for the Petitioner but this was not authorized. (PX 8, p 16) Dr. Pelinkovic understood the differences in the surgical recommendation by Dr. Singh from the surgery performed by Dr. McNally in 2021 but Dr. Pelinkovic agreed with the need for the initial surgery performed by Dr. McNally. He described the pros and cons of each procedure as follows:

> "So if you want to go on a one or two-level procedure, obviously, a one-level procedure is a smaller procedure, it takes less time, there are fewer possible side effects, less risks with a smaller. Disadvantages, if you undergo a smaller surgery, maybe it doesn't resolve all the symptoms and the patient remains symptomatic." (PX 8, p 22)

Dr. Pelinkovic has no opinion as to which surgery should have been originally performed. He was not involved with the patient at that time. (PX 8, pp 20-23) The additional surgery is needed at the L4-5 level because it has not healed. The non-union prevents Petitioner from doing activities of daily living. Petitioner takes narcotics. If the fusion were able to be healed, his disability would be less. The Petitioner has currently plateaued. He will remain disabled if he is not allowed to undergo the proposed fusion to L4-5 level. (PX 8, pp 24-27)

Dr. Pelinkovic reviewed the results of Dr. McNally's surgery:

> "So I reviewed the CT scan and x-rays. It looked that the fusion construct was intact, properly done with good technique. I didn't see any complication of the surgery. But the fusion has not healed." (PX 8, p 28)

Dr. Pelinkovic did not examine the Petitioner and did not evaluate the Petitioner prior to undertaking his care. He has no opinion with regard to whether the surgery performed by Dr. McNally was correct. Dr. Pelinkovic was aware of the Petitioner's FCE that he underwent. It was a valid FCE and did release Petitioner to return to work within the light duty category. Dr. Pelinkovic states the Petitioner may have a knee problem, however, his lower back problem, and specifically the non-union at L4-5 is the cause of his current disability. (PX 8, p 39) Dr Pelinkovic disagrees with Dr. Singh's opinion that the Petitioner could return to work with restrictions of 20 lbs.

> "Well, that's Dr. Singh's opinion, who has single visits with the patient at various time points. As you can see, I saw the patient one, two, three, four, five, six, seven, eight, nine or even ten times here. So I have a little different perspective. I'm his treater. The patient has 8 out of 10. I feel with that amount of pain, he has difficulty performing or going back to work."
>
> "You know, we talked about it, they're based upon his having 8 out of 10, they're based on his having a nonunion at L4-5, they're also based on the fact that he's on narcotics." (PX 8, pp 41-42)

Dr. Pelinkovic believes that the fusion at L5-S1 showed adequate decompression and healing. Both he and Dr. Singh have the same recommendations for surgery for the Petitioner. (PX 8, p 24)

Testimony of Thomas McNally, M.D.

Dr. McNally has been practicing since 2002. He is board-certified in orthopaedic and fellowship trained in spinal surgeries. He currently practices orthopaedic medicine and spinal surgeries. He is on staff at Weiss Hospital in Chicago. Almost 100 percent of his patient population are spinal patients (PX 9, p 6) In the year 2020 he was associated with the Suburban

Orthopaedic group where he practiced orthopaedic medicine and spinal surgery. He had been there for about 14 years. During that time, Nicolas Flores came under his care. (PX 9, pp 6, 7) He first saw Petitioner on January 28, 2020. He had lower back pain which radiated into his leg. He had been seeing a pain doctor at that time. He was still having frequent and sharp pain. Dr. McNally had the benefit of x-rays as well as an MRI which had been taken of Petitioner. His initial impression was that he had a lumbar strain superimposed on multilevel significant degenerative changes in areas of severe stenosis and a very large disk herniation at L4-5. His opinion at that time was that his lumbar strain and large disk herniation at L4-5 were the result of a work-related injury. (PX 9, pp 7-11) The first thing that Dr. McNally did was restart physical therapy. He felt that the natural course of disk herniation is that it can reabsorb with time. He had hoped that would occur with time for the Petitioner. (PX 9, p 12). The Petitioner had approximately six sessions of physical therapy sessions after the first visit with Dr. McNally. When he returned to Dr. McNally, he continued with low back pain. He still had not had an EMG. He noticed some relief in the pain with physical therapy but he was not well with great leg numbness and tingling. At that time, Dr. McNally attributed the reduction in pain to time and anti-inflammatory medication. Following an EMG, he saw Petitioner April of 2020. The EMG indicated L5-S1 radicular disease as well as a little bit of peripheral polyneuropathy. The EMG fit in with what Dr. McNally believed was the Petitioner's correct diagnosis.

> "The right-sided S1 radiculopathy was consistent with the MRI findings of severe stenosis. He has it on both sides, but definitely had it on the right at L5-S1. Then the possible L5-S1 radicular disease is consistent with a very large L4-5 disc herniation he had with compression of the left L5 nerve root as it traverses the L4-5 disc space; and then the S1, just like on the right, there was severe lateral recessed stenosis at L5-S1 as well as the right and it objectified the patient's complaints." (PX 9, p 14)

Although Dr.McNally did not know it initially, the Petitioner had been sent to a Section 12 examination just a few days prior to his first visit with Dr. McNally. Dr. McNally reviewed the initial report from Dr. Singh, dated 1/10/2020. Though Dr. Singh opined in his first report that the patient might benefit from an L4-5 laminectomy and microdiscectomy versus an L4-5 laminectomy and instrumented fusion, Dr. McNally did not make any surgical recommendation at that point. That was because the Petitioner continued to express some improvement with his ongoing physical therapy. (PX 9, pp 14-17)

Petitioner then underwent an epidural steroid injection at L5-S1 with Dr. Dmitri Novoseletsky. The injection had no positive effect on the Petitioner. Dr. McNally, therefore, made a recommendation of surgery as a treatment option. Petitioner wanted to continued on physical therapy and another injection. The Petitioner continued to show some relief (about 40%) from this treatment. (PX 9, pp 19-20)

Dr. McNally then recommended a closed MRI. The closed MRI will

> "usually better discrimination or better illustration of the fine details of the anatomy compared to open MRIs. It's like comparing a dot matrix computer printer to a laser printer. Laser printers are fit for better focus." (PX 9, p 20)

After reviewing the closed MRI which was dated July 16, 2020, his initial interpretation of the Petitioner's original MRI was confirmed:

> "It was very similar to my interpretation of the patient's original MR except that the disc herniation at L4-5 was no longer nearly as massive as it was and that's the nature history of a disc herniation where the body attempts to resorb it, but there were multilevel degenerative changes and there are areas of severe stenosis pretty much at every level of his lumbar spine." (PX 9, p 21)

When he saw Petitioner on July 23, 2020, he recommended another injection with Dr. Novoseletsky and physical therapy. He saw Petitioner again in August, 2020, following his third injection (right S1 transforaminal epidural steroid injection). The Petitioner was still having low

back pain and still having severe radiating pain in the right buttock and posterior thigh. (PX 9, p 23) On October 15, 2020, he saw Petitioner again. He had just completed a full set of injections and had gone through multiple rounds of physical therapy.

> "By this time, it was more than a year since his work injury and he was still pretty symptomatic and we, again, laid out the surgical options and the nonsurgical options. At this point, it would have been to basically live with symptoms or possibly have a spinal cord stimulator placed and he was deciding what he wanted to do." (PX 9, p 23-24)

The Petitioner indicated that he wished to avoid surgery altogether. Therefore, Dr. McNally started him on some more physical therapy and more conditioning. The work conditioning was in the form of getting him back to work. Petitioner was relatively tolerant of his symptoms when he wasn't doing much, however, when he attempted to get back to work, his pain was much worse. When Dr. McNally saw him again on December 10, 2020, the work conditioning had stirred up his symptoms. At this point, the Petitioner was interested in his surgical options. (PX 9, pp 25-26)

Dr. McNally saw Petitioner again on December 22, 2020, and made a plan for recommended surgery.

> "At L5-S1 he had severe stenosis and had the spondylolisthesis, which is instability. So he needed a fusion at that level. At L4-5, the stenosis and the lateral recesses was so severe and because of the shape of the facets that if you attempted to only decompress at L4-5 without fusing right above a fused level at L5-S1, it would be doomed to failure.
>
> In order to adequately decompress and stabilize the spine, he required a fusion at that level as well. So fusion at L4-5, L5-S1, decompression at L2-3, L4-5, and L5-S1. When you're trying to decide what surgery to operate on, every single level of his lumbar spine had surgical lesions. But whether they were causing the symptoms – whether they were causing the symptoms or not is what causes the – the differing opinions amongst physicians about what levels to treat and how to treat those levels." (PX 9, p 26-27)

Dr. Singh continued to recommend L4-5 and L5-S1 laminectomy and a single level fusion at L5-S1. This was quite a bit different than the surgery that Dr. Singh had recommended earlier by virtue of his report dated January 10, 2020.

> "It's very different ….I think it's probably just dictation errors or transcription errors. He most likely was talking about the L5-S1 fusion originally and just had the numbers confused while he was dictating. I don't think he was confused. I think just the transcription wasn't correct." PX 9, p 29) Dr. McNally, though, continued to recommend the two-level fusion. "He has – at this point in time, he had very severe stenosis at L2-3 with symptoms in thighs and he was having numbness in both of his legs. So the L2-3 needed to be addressed. L4-5, still he's calling it I think moderate stenosis. But, again, what I've described to you – and I can show you on the MRI that if you trimmed those facets at L4-5 without fusing, it would be doomed to failure.
>
> More like than not, it would fail and the patient would require another surgery. There's also stenosis at L3-4, but what I was trying to do was treat the patient's main symptoms so that he could respond and get back to work, which is what he wanted to do. So at L2-3, the facets were amenable to decompression without fusion. At L4-5 and L5-S1, a fusion was required." (PX 9, p 30)

Dr. McNally prescribed the two-level fusion as described. Dr. McNally continues to believe that decompression alone at L4-5 was inappropriate.

> "The facet and the amount of stenosis at L4-5….I can share it if you let me – give me the power to share screen….But the main reason on this case was because I was trying to pick the levels that he had the most severe pathology to try to give him the best chance of getting through with one surgery." (PX 9, p 33)

The Petitioner remained under Dr. McNally's care for several months following the surgery. He noted that his pre-op pain was 10 out of 10. Following the surgery, it was 6 out of 10 and many of his symptoms had improved. He had a decrease in his leg pain, he wasn't having radiating pain. He would occasionally experience leg pain but it would quickly dissipate. He was still having numbness in a small area of his left thigh. He saw Dr. McNally again in April 2021 following his surgery. Dr. McNally started him on post-op physical therapy at that time. A month later, on May 11, 2021, "he was still kind of doing okay." Still had pain at 8 out of 10 but he had stopped using his back brace. He was still having some tingling in his left thigh and getting some

pain radiating to his right thigh that would reach his right knee. Dr. McNally ordered another MRI in May 2021 in order to make sure there wasn't fluid collection or a new disc herniation. He continued the Petitioner on physical therapy and saw him again in June 2021. His professional assistant (PA) saw him on that day. He discussed the findings of his PA and the findings of the MRI with his PA and he was on board with the recommendations of additional physical therapy for the Petitioner. (PX 9, p 39)

Dr. McNally left the practice of Suburban Orthopaedics on June 1, 2021. Following, Dr. McNally reviewed records and films of the Petitioner all the way up until July 14, 2022. From those records and test results, he believes that the Petitioner was still symptomatic. After an MRI of October of 2021, Dr. McNally believes that people started going down the wrong trail, specifically, "Dr. Pelinkovic and Dr. Singh based on that CT scan [of October 2021] diagnosed him with a nonunion at L4-5, which is way too early to diagnose someone with a nonunion at L4-5. Fusions take a long time. Just like I told you…." (PX 9, pp 41-42)

Dr. McNally believed that at least a year should lapse between surgery and assessment for union. Dr. McNally further believes, based upon x-rays that he saw from July 2022, that Petitioner has a very solid fusion but cannot say for sure what is causing his continued symptoms. However, Dr. McNally continues to believe that if a decompression only was performed at L4-5, the decompression at L5-S1 as well as L4-5 was likely to break down. Dr McNally then opined that if he were correct, that if the pain generators were at the L2-3 and L3-4 levels as opposed to non-union of the fusion, they would still be related to the original accident. (PX 9, pp 43-44) Hypothetically, if Dr. Singh and Dr. Pelinkovic were correct, that is, if there were no solid fusion at L4-5, then the appropriate treatment would be a revision of the fusion surgery as called for by both Drs. Singh and Pelinkovic. Again, Dr. McNally attributes the totality of Petitioner's low back

symptoms to be resulting from his claimed accident. The risk of non-union is a common and known risk of a fusion surgery.

> "But unfortunately it's still a known risk and one of the very major risks I gave to the patient prior to him embarking on this course, and I always talk with the patients about how the cascade that I just told you about, once you fuse one level, the other level become more at risk and he had changes at so many different levels, he was at risk for needing a revision. So that's why a lot of people try to avoid surgery in the first place and why for a year I attempted to treat him nonoperatively." (PX 9, pp 48-49)

However, Dr. McNally believes that there are other possibilities that are pain generators for the petitioner.

> "Then the other pain generator could just be that the nerves never recovered, that they were subjected to massive trauma from that massive disc herniation and then living in a constricted environment before the disc herniation, after the herniation, [scarring] from the natural healing of the disc herniation, and then subjected to the trauma of surgery.
>
> So his pain could be permanent from that and maybe require a spinal cord stimulator. At trial first to see if it works and then possibly implantation of a permanent spinal cord stimulator to treat his symptoms." PX 9, p 50

In further explanation of his decision to perform a fusion at L4-5, Dr. McNally testified that:

> "If you look at the facets, they are malformed and what we call it is opposed to the 45-degree angle that facets have on the axial images, his were more straight up and down and if you removed too much from the straight up and down, then there's nothing to hold the spine forward. So it would – if you did an adequate decompression without fusion, you would be destabilizing the spine." PX 9, p 62

CONCLUSIONS OF LAW

Causal Connection/Prospective Medical Care

The Arbitrator finds that Petitioner's need for surgery in the form of a revision fusion is caused by and related to his work accident of August 23, 2019. Therefore, Petitioner is entitled to revision surgery as recommended by Drs. Singh and Pelinkovic, at the expense of Respondent. In so finding, it should be noted that the Arbitrator has carefully considered the case of *Zick v. Industrial Commission, 93 Ill.2d 353 (Ill. 1982)*.

Prior to *Zick*, the "but for" rule had been used to determine the causal relationship of any medical care related to an industrial accident. That is, but for the industrial accident, the medical care sought would not have been required. In the *Zick* case, the evidence indicated that the claimant's foot was injured when the employer's forklift lowered onto it allegedly resulting in an injury to the foot for which compensation was sought. The employer's physicians proved to the court that the claimant suffered from a mistreated congenital anomaly that was unrelated to the work accident. The Commission found that the claimant's physician had treated her for a congenital anomaly, and that the claimant had sustained no injury to that part of her foot. Claimant's physician stated that the accident had caused an injury to the sesamoid bones and her great toe joint and, furthermore, that he performed surgery because the claimant's foot was not responding to more conservative treatment of steroid injections and immobilization. That testimony was countered by Respondent's physicians' testimony who had carefully examined the records and x-rays of claimant's foot. Both physicians found no indication of trauma or fracture of the foot. These physicians further testify that, in the absence of a fracture, the surgery that had been performed on claimant's foot was contraindicated, and, furthermore, that the claimant's overall condition of ill-being was caused by overtreatment.

Furthermore, in the Zick case, claimant chose her own physician. This factor becomes important in the analysis of the present case.

> "For example, in *Lincoln Park Coal Brick Co. v. Industrial Com.* (1925), 317 Ill. 302, cited by the claimant, the respondent required an employee to undergo a medical examination conducted by a doctor that respondent selected. During the examination, and as a result of the doctor's negligence, the employee was burned by an X-ray machine. In holding the injury compensable, this court stated:
>
> > "[Respondent] refused to pay further compensation until the nature, extent and probable duration of the disability could be ascertained, and required [claimant] to submit to an examination by a physician of its selection to determine that question. If there had been no injury there would have been no examination, and if there had been no examination there would have been no burn. The burn resulted in the examination which the law authorized [respondent] to require to be made to ascertain whether [claimant] was entitled to further compensation for the injury * * *." 317 Ill. 302, 306-07.
>
> Similarly, in *Kivish v. Industrial Com.* (1924), 312 Ill. 311, respondent's insurance company refused to compensate claimant for a work-related injury unless he underwent hospital treatment. While in the hospital, claimant contracted influenza and subsequently died. In holding that claimant's death was caused by his original injury, this court reasoned:
>
> > "[I]t is not possible to determine definitely and absolutely whether the injuries received by him were the proximate cause of his death. Two things are certain: one, that he was severely injured in the line of his employment and that he never recovered from those injuries; and the other, that he went to the hospital for treatment in compliance with the demands of the insurance company which was paying the compensation due the injured employee from his employer. We have held that while the *362 employee must submit to proper treatment at the request of the employer or forfeit his right to compensation, the employer is, on the other hand, liable for the consequences of a surgical operation to which the injured employee submits in compliance with the employer's demand. (*Mt. Olive Coal Co. v. Industrial Com.*, 295 Ill. 429; *Joliet Motor Co. v. Industrial Board*, 280 id.148.)" 312 Ill. 311, 316-17." ***Zick v. Industrial Commission, 93 Ill.2d 353 (Ill. 1982)***

After careful consideration, the Arbitrator finds that the present case is distinguished from *Zick* in the following ways:

I. The surgery sought by the claimant is not unrelated to the original accident. Both doctors, McNally and Singh, agree that the Petitioner's accident caused the need for surgery at, primarily, L4-5 and L5-S1. The differences in opinion, and the basis for Respondent's claim, is that Dr. McNally performed both a decompression and a fusion at L4-5 while Dr. Singh recommended only a decompression at L4-5. This is completely opposite of the case of Zick in which the Respondent proved that the condition diagnosed by the treating physician was not present. The commission further determined that the condition which was proven was a congenital anomaly and the disability of the claimant occurred as a result of overtreatment to her foot for a nonexistent condition. In the case at bar, Dr. McNally gives significant reasons as to why the L4-5 disk level had to be fused and not merely decompressed. (See PX 9, page 30, and also page 62, wherein Dr. McNally opines as to the need for decompression and fusion as opposed to fusion alone.

Therefore, the issue in the present case is not whether Dr. McNally's original surgical treatment was optimal, but whether the treatment rendered by Dr. McNally (fusion + decompression at L4-5 level) was due to the original accident. The answer to this question is "yes," as all doctors agree that the L4-5 disc was injured in the accident and needed treatment. As such, for this reason alone, *Zick* is distinguished and does not apply.

II. The claimant in *Zick* chose her own physician. That is different from this case. Petitioner clearly testified that he was told by his supervisor to visit a specific emergency clinic (at Sherman Hospital) and further, clearly states that at the Sherman Hospital he was referred to see a physician through his health network. His health network referred him to

see Dr. McNally. Therefore, Dr. McNally must be considered Respondent's choice of physician. It is further noted that Petitioner did not even understand there to be an issue as to which specific surgery he was to receive.

III. The Arbitrator further notes that the *Zick* case has been distinguished on numerous occasions since it was published. In so finding, the Arbitrator notes *Lewis v. IWCC, 5-20-0302WC*. In that case a discussion of the intricacies of *Zick* are noted.

> "**[*P133]** In *Zick*, although the employer presented evidence of possible mistreatment of the claimant's condition, the question presented was "whether [the claimant's] disability **[*62]** resulted from trauma [sustained in the forklift accident], or whether it was due to a congenital anomaly aggravated by medical mistreatment." ***Id. At 359***. The Commission found, and the *Zick* court later affirmed, that the claimant's current condition of ill-being resulted from medically improper and unnecessary surgeries that were *unrelated* to the accidental injury. ***Id. At 360***. In contrast, here, there is no question that claimant's treatment in the form of steroid injections was for purported symptoms *related* to her condition of ill-being in her lumbar spine—a condition that the Commission found to be caused by the May 2, 2014, accident. Thus, we find *Zick* inapposite to the present case." *Lewis v. Ill. Workers' Comp. Comm'n, No. 5-20-0302WC.*

SUMMARY

The above discussion is on point for the purposes of the case at bar. The distinctions in this case from *Zick* are unrefuted. First, it is unrefuted in that Petitioner's injury caused medical damage to his disk at L4-5. The current dispute is not whether this is related to his original accident but rather whether the proper surgical treatment was decompression or decompression plus fusion. Additionally, the discussion reemphasizes the importance of choice of physician. Citing Collier, the *Lewis* court emphasized that surgical treatment which causes improper and unnecessary surgeries that are unrelated to an accidental injury and that are rendered by a physician of petitioner's choice will not result in liability to the respondent. Clearly, this case is different from *Zick* in these two respects.

Accident

The Arbitrator finds that the Petitioner sustained an accident on August 23, 2019, arising out of an in the scope of his employment with Respondent. In so finding, the Arbitrator notes testimony of Petitioner wherein he describes his activities on the date of the accident.

Petitioner testified that he is, and has been for many years, employed as a laborer for Respondent. On the day of his accident, he was engaged in laying pipe beneath ground level. His tasks on that day included breaking cement with a jackhammer, loading broken concrete into a dumpster, digging and shoveling with a hand shovel, and placing and joining the pipes in their position beneath ground level. The pipe was in 10-foot sections, weighing approximately 40 lbs. each. Petitioner, while bent over in joining the pipes together and which he held in each hand, felt significant pain in his lower back. This is what he reported to his supervisor. A written accident report was made. This description of activity sufficiently describes an "accident" as defined by the Illinois Workers' Compensation Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016624
Case Name	David Kraner v. The Long Grove Fire Dept
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	24IWCC0242
Number of Pages of Decision	26
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Brian McManus Jr
Respondent Attorney	Glenn Blackmon

DATE FILED: 5/23/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID KRANER,

Petitioner,

vs. NO: 19 WC 016624

THE LONG GROVE FIRE DEPARTMENT,

Respondent.

DECISION AND OPINION ON PETITIONER'S
PETITION FOR REVIEW UNDER §19(h) AND §8(a) OF THE ACT

This cause comes before the Commission on Petitioner's Petition for Review under §19(h) and §8(a) of the Act, alleging a material increase in Petitioner's disability since an Arbitration Decision was issued by Arbitrator Gerald Napleton on October 6, 2021. No Commission Review of the Arbitrator's Decision was filed and the Arbitrator's Decision became a final Decision on November 5, 2021. (T. 11-12) Petitioner filed a timely Petition for Review under §19(h) and §8(a) of the Act on December 6, 2021. A hearing was held before Commissioner Kathryn A. Doerries on November 30, 2023, in Chicago, Illinois and a record was made. The Commission, having considered the entire record, finds that Petitioner failed to prove a material increase in disability. Accordingly, Petitioner's §19(h) Petition for benefits is denied. Petitioner's Petition for medical benefits pursuant to §8(a), for medical treatment to his left shoulder is granted, and for medical treatment to his right shoulder is denied, for the reasons set forth below.

> The purpose of a proceeding under section 19(h) is to determine if a petitioner's disability has "recurred, increased, diminished or ended" since the time of the original decision of the Industrial Commission. Ill. Rev. Stat. 1985, ch. 48, par. 138.19(h); *Howard v. Industrial Comm'n* (1982), 89 Ill. 2d 428, 433 N.E.2d 657. To warrant a change in benefits, the change in a petitioner's disability must be material. *United States Steel Corp. v. Industrial Comm'n* (1985), 133 Ill. App. 3d 811, 478 N.E.2d 1108. In reviewing a section

> 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. *Howard*, 89 Ill. 2d 428. Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Howard*, 89 Ill. 2d 428; *United States Steel Corp*., 133 Ill. App. 3d 811. *Gay v. Industrial Comm'n*., 178 Ill. App. 3d 129, 132, 532 N.E.2d 1149, 1151 (1989).

Petitioner alleges a material change in his disability and is seeking medical expenses and additional permanency as it pertains to both the left and right shoulders. At the subject Commission Hearing, Respondent entered into evidence the transcript of the proceedings at the Arbitration Hearing. (RX2)

BACKGROUND AND HISTORY

Petitioner was employed by Respondent, Long Grove Fire Protection District, as a firefighter paramedic/engineer. On November 26, 2018, Petitioner injured his left shoulder while responding to a tree down across the road incident. Petitioner had worked for Respondent for 22 years at the time of the November 26, 2018, accident. As a result of this accident, Petitioner underwent surgery on February 20, 2019, performed by Dr. Mark Levin, consisting of a left shoulder arthroscopy with rotator cuff repair, superior labrum anterior to posterior (SLAP) debridement, subacromial decompression with acromioplasty, and mini open biceps tenodesis. (PX3, RX9) Petitioner filed an Application for Adjustment of Claim (AAC) and eventually his case was tried before Arbitrator Gerald Napleton on June 25, 2021. The Arbitrator issued a Decision on October 6, 2021, awarding Petitioner the sum of $813.87/week for a period of 187.5 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a 37.5% loss of use of the person as a whole. (PX1, RX1)

Pertinent to that award was the following from the Arbitrator's Decision:

> Petitioner has not sought treatment with any other medical provider since the consultation with Dr. Levin on October 10, 2019. Petitioner testified at trial that the restrictions imposed by Dr. Levin and Dr. Balaram prevented him from returning to work as a firefighter. Petitioner acknowledged at trial that he was only restricted from overhead work with the left shoulder. No physician had put any restrictions on his right shoulder. Petitioner is right-hand dominant. In addition, Petitioner was not restricted from any activities below shoulder level, although Petitioner testified that they were concerned about fatigue. Dr. Levin's consultation notes from October 10, 2019, references left arm fatigue only with overhead motion. Petitioner testified that not being able to go back to work as firefighter was hard on him. He testified that he used to play softball and golf but cannot perform those activities anymore. Petitioner testified that he just does not have range with his left shoulder. He testified that it hurts, even when raking. He testified that his left shoulder gets fatigued quickly.

> Petitioner testified that he tried to find work as a truck driver but was prevented from working in that capacity because of his shoulder issues. Petitioner testified that he was awarded a line-of-duty disability pension from the Respondent's Pension Fund. He testified that he was currently receiving pension benefits consistent with 65% of his yearly salary at the rank he held at the time he was removed from the Respondent's payroll, not his wage at the time he was injured. Petitioner acknowledged that the wage he was earning at the time he was released was $97,019.23 and that the monthly benefit that he is earning from his pension was $5,255.21. He further acknowledged that this pension benefit is not taxable and that this pension benefit will increase over time until around age 60 through annual cost of living increases. Petitioner further testified that he is not aware of any pension-related restrictions that precludes him from finding employment in another field. (PX1, RX1. 6)

Petitioner also testified that one of his concerns is when he sleeps at night, he sleeps on his right shoulder and his left shoulder will fall asleep and he has tingling in his fingers. (RX2, 13) Petitioner further testified that his left arm injury affects his home life [a] lot with doing things around the house. He testified that the left shoulder "gets fatigued quick, and I'm finding again that I'm using my right shoulder the majority [of time] which is now starting to hurt more, too, from an injury I sustained years ago." (RX2, 16) At the end of work conditioning, on September 4, 2019, Petitioner reported his right shoulder was starting to hurt. (RX9)

Petitioner sustained an injury to his right shoulder six years prior to the 2018 accident, on October 21, 2012. (RX7) Petitioner underwent an MRI of his right shoulder on February 22, 2013, which, according to Dr. William Vitello, Respondent's Section 12 expert, showed a small intrasubstance tear of the rotator cuff near the insertion site and bone bruise in the greater tuberosity and small joint effusion. (RX7) Petitioner treated with Dr. Cummins at Lake Cook Orthopedics for his right shoulder including a subacromial steroid injection and physical therapy. *Id.* On August 6, 2013, Petitioner followed up with Dr. Cummins and thought he had done well non-operatively, however, Petitioner reported he had not "tested" the shoulder with activities such as throwing a ball or playing softball. By the time Petitioner met with Dr. Vitello for the Section 12 evaluation on December 4, 2013, he reported he was doing his job with Respondent without restrictions, however, he complained of discomfort and pain throwing. He also reported that he was limited in the amount of workout type of activities he could do. *Id.* Dr. Vitello's assessment was status post right shoulder partial thickness rotator cuff tear. *Id.* Petitioner did not undergo surgery to repair the right rotator cuff tear. (T. 38)

Petitioner entered into a settlement contract on May 16, 2014, in regard to his right shoulder injury. (RX8) As part of the settlement agreement Petitioner agreed to accept a 6% loss of use of the person as a whole, or $18,503.40. *Id.*

Petitioner testified at the Arbitration Hearing that the last time he saw Dr. Levin through Barrington Orthopedics for his 2018 left shoulder injury was October 10, 2019. (RX2, p. 17) Petitioner testified that he had not sought any treatment with any other medical provider for his left shoulder condition and that **no one recommended that he undergo any further treatment for his left shoulder.** (emphasis added) (RX2, 18-19)

Post Arbitration Hearing Treatment and Commission Testimony

At the Commission Hearing, Petitioner testified that at the previous trial he had some ongoing symptoms in his left shoulder after he was released by Dr. Levin. (T. 31) He agreed "[i]t was irritation, pain and it was like a poking or something bothering me, yes." *Id.* Petitioner testified that he could not lay on his left side. (T. 32) He sought treatment with Dr. Steven C. Chudik for the left shoulder condition and these claimed symptoms in September of 2021 after the Arbitration Hearing. *Id.* Dr. Chudik's records confirm the first consult on September 3, 2021. (PX2) Petitioner's history reported his treatment with an orthopedic surgeon and the surgery consisting of a "rotator cuff repair, open biceps tenodesis and SAD" (subacromial decompression). *Id.* Dr. Chudik documented that when Petitioner ended at MMI, he had continued stiffness and pain. The history continued, "[g]oing through his pension process he had x-rays done in July 2020 and a large needle was found in his should x-rays." *Id.*

Dr. Chudik's records confirm a left shoulder foreign body removal surgery was performed on October 28, 2021. (PX2, T. 109-111) Petitioner testified that Dr. Chudik performed that surgery at Salt Creek Surgery Center. (T. 28) He further testified Dr. Chudik recommended right arm surgery. (T. 28) Petitioner further testified that the medical bills incurred for Dr. Chudik's surgical removal of the foreign body and for treatment for his left and right arms were paid by his wife's carrier, Blue Cross Blue Shield. (T. 29-30) He was not sure the amount he paid out-of-pocket to meet their deductibles. (T. 29)

On November 8, 2021, Petitioner saw Dr. Chudik's physician assistant in follow-up to his left shoulder foreign body removal surgery. (PX2, T. 112) He reported that he had been putting ointment over the incision to keep soft but otherwise was having no issues. He reported having trouble with his right arm. *Id.* The November 8, 2021, office note further documents that Petitioner exercises regularly, his sutures were removed, steri strips were place without incident. Under the Recommendations section, it is noted that following Petitioner's initial left rotator cuff repair surgery he experienced irritation of his deltoid muscle, however, after his surgery with Dr. Steven C. Chudik, "his deltoid irritation has completely resolved. Additionally patient does feel more comfortable when sleeping. **We recommend continuing to use arm normally** (emphasis added) and follow up in four weeks for recheck." (PX2, T. 113)

Further, Petitioner's testimony on cross examination at the Commission Hearing confirms he was pain free in his left shoulder by November 8, 2021:

> Q. You had surgery -the foreign body removal surgery at the end of Oct. 2021, October 28, 2021?
> A. Correct.
> Q. And by November 8, 2021 Dr. Chudik was allowing you to resume normal activities within the bounds of your previous restrictions that were assessed in connection with the first left shoulder surgery and release by Dr. Levin?
> A. Yes, I had to follow same guidelines. Yes.
> Q. So approximately a week and a half after the foreign body removal surgery?
> A. I would imagine, yes.

Q. You had improved and you were allowed to resume your baseline activities?
A. The pain was gone, yes, if that's what you're asking**.**
Q. You were back to baseline at least as far as your restrictions were concerned?
A. With my left shoulder, yes. (T. 63-65)

Petitioner testified that after he returned to work in 2013 he continued to have symptoms affecting his right shoulder, but not what he was experiencing at the time of the Commission Hearing. (T. 39) Petitioner testified that his shoulder was achy. If he had a real busy day or used it like either during a big training exercise or on a fire or a call, sometimes depending how he moved it, it was achy. *Id*. Petitioner testified he continued to have symptoms involving the right shoulder, but did not seek medical treatment because he had full function without issues. (T. 39-40) Petitioner testified that when he was cleared, he told his doctor that there was discomfort. It was his understanding that the right shoulder symptoms he continued to experience, the achiness, was due to that rotator cuff tear that he sustained in 2012. (T. 40-41) He agreed that Dr. Chudik was the first doctor that he talked with about having pain in his right shoulder. (T. 41) Petitioner testified that the pain started after the initial surgery on his left shoulder from restrictions on his left side and he used his right (arm) more and more. "So when I did see Dr. Chudik, I did bring it up to him at the time of this that my right shoulder was really bothering me." (T. 41)

On December 17, 2021, Petitioner saw Dr. Chudik after undergoing a right shoulder MRI. He reported his symptoms were unchanged since the prior visit and that "his left shoulder is doing well." (PX2, T. 115) The section "Prior HPI" documents that Petitioner's right shoulder has been irritating and causing pain. Petitioner described the initial 2012 injury and reported that he was able to return to work and perform all his duties and responsibilities but still had periodic pain. The history further confirmed Petitioner reported that "since his left shoulder rotator cuff repair in 2019 by an outside doc, he has had to use his right arm for activities of daily living and all strenuous activities." *Id*. Dr. Chudik wrote "This caused his right shoulder to be re-aggravated from overuse and now needs further treatment." *Id.*

Dr. Chudik documented his shoulder exam. Inspection of both shoulders revealed no scars, wounds, deformity swelling, ecchymosis or muscle atrophy. Palpation of the right shoulder confirmed tender Ac joint and biceps tendon at the bicipital groove. All shoulder passive range of motion (ROM) was full and symmetric. Active range of motion in the right shoulder confirmed pain and (sic) end ranges of motion. Strength Testing in the right and left shoulder abduction, internal and external rotations were all 5/5. The right shoulder Apprehension tests (AB, ER, Ext and with forward flexion) and Neer's impingement test were all positive. The x-ray result was abnormal with flattening of the greater tuberosity. Dr. Chudik noted that Petitioner underwent a right shoulder MRI on December 10, 2021 at HOA. Results of the MRI were documented as abnormal showing a high grade tearing of the articular sided posterior central supra, degenerative changes at AC joint, signal in superior labrum, thickening of inferior capsule. Dr. Chudik's Impressions were listed as follows:

Impression #1: Right shoulder high grade tearing of the articular sided posterior central supra, thickening of inferior capsule.
Impression #2: s/p Left shoulder open deep foreign body, fluoroscopic assistance on 10/28/2021.

Dr. Chudik's recommendations noted, "[u]pon exam David presents with a right shoulder high grade tearing of the articular sided posterior central supra thickening of inferior capsule. We discussed since it is partially torn, he has some time to try conservative treatment as it won't retract and tear further too quickly. We recommend a formal bout of PT to begin to gain strength and motion and if it fails we will recommend a RCR (rotator cuff repair). This tear will need surgery eventually as all rotator cuff tears progress, but we will begin with conservative treatment." (PX2)

On January 30, 2022, Dr. Chudik authored a narrative report. In the report, Dr. Chudik details the medical records and diagnostics he reviewed pertinent to the left and right shoulders which included the records from Hinsdale Orthopedics and Barrington Orthopedics, which included office notes from Dr. Mark Levin and assessment and restrictions forms, imaging reports, physical therapy notes and the operative report from February 20, 2019 and one office note from Dr. Jason Rothstein from September 5, 2019. Dr. Chudik's final conclusions and opinions given to a reasonable degree of medical and orthopedic surgical certainty were listed as follows:

> I opine that:
>
> 1. As a result of the 11/26/2018 work-related injury, Mr. Kraner suffered a left shoulder rotator cuff tear, superior labral tear with involvement of the biceps tendon which required a left shoulder arthroscopic rotator cuff repair, superior labral (SLAP) debridement, and tenodesis of the bicipital tendon and subsequent left shoulder deep foreign body removal with fluoroscopic assistance on 10/28/2021.
> 2. As a subsequent consequence of the 11/26/2018 left shoulder work-related injury and surgery, Mr. Kraner experienced an aggravation of his right shoulder condition. Mr. Kraner's current bilateral shoulder conditions are causally related to the work- related injury sustained on 11/26/2018.
> 3. Mr. Kraner is at maximum medical improvement of his left shoulder. He requires treatment for his right shoulder, including physical therapy, injections, and future surgery.
> 4. Mr. Kraner's bills and medical care including doctor visits, diagnostic testing, therapy, and surgery were appropriate, necessary, and causally related to the 11/26/2018 work-related injury. (PX2)

On March 16, 2022, Dr. Chudik authored the only work status report he issued specifying Petitioner could return to modified work/activity on March 16, 2022, with no lifting greater than 15-20 pounds, no push/pull and no overhead reaching. There is no corresponding office note in the record although the work status report states next appointment in 8-12 weeks.

On May 26, 2022, Dr. Ajay Balaram authored an opinion report at the request of Respondent pursuant to Section 12. (RX5) He opined as follows:

IMPRESSION:

1. Seven months status post left arm foreign body removal.

2. Right shoulder partial thickness rotator cuff tear.

COMMENTS & RECOMMENDATIONS: Please see my comments and recommendations in response to the cover letter dated April 25, 2022.

1. *Please advise regarding your diagnosis for petitioner's left shoulder. Please advise whether the foreign body in petitioner's left shoulder was related to the petitioner's prior treatment for the left shoulder.· Please advise whether petitioner's condition of the left shoulder has improved since the foreign body was removed and to what extent.*
   I reviewed my previous independent medical evaluation and I do see a causal relationship between the patient's left shoulder condition and the reported work injury of 11/26/2018. As noted in my previous independent medical evaluation the foreign body was noted on radiographs. It apparently continued to cause the patient discomfort and he underwent surgical removal. I would deem this causally related given the relation to the previous surgical intervention. Although there is still a miniscule foreign body present, after removal of the large foreign body the patient does report some improvement in symptoms. It appears as though the left shoulder has reached a plateau in maximum medical improvement. No further treatment is expected.

2. *Please advise regarding your diagnosis for the right shoulder. Please advise whether petitioner's right shoulder condition is related to the claimed accident on November 26th, 2018, or is a pre-existing, personal condition. Please comment on the mechanism of the claimed injury to the right shoulder in detail.*
   There is no specific accident, trauma or incident noted to the right shoulder. The patient reports an injury to the right shoulder 10 years ago where he was diagnosed with a partial thickness rotator cuff injury and underwent conservative treatment with full recovery. He reports that increased use of the right upper extremity after left shoulder surgery has led to his current condition. His previous right shoulder injury 10 years ago had reached MMI and there does not appear to be a causal relationship associated with his original injury and his current right shoulder condition.

   Increased use of an upper extremity without injury, accident or trauma would not indicate a specific causal relationship or permanent aggravation of the patient's underlying condition. There were no work activities that led to a permanent aggravation or temporary exacerbation associated with the right shoulder. Given the previous injury 10 years ago had reached maximum medical improvement without residual discomfort I do not see a causal relationship between the patient's right shoulder condition and his reported work injury of 11/26/2018. Increased use of an extremity after a contralateral extremity surgery is not causative of new pathology. This would imply that increased use of an extremity would lead to permanent aggravation of underlying pathologies, or new pathology which is inconsistent with any medical or surgical certainty. Therefore, given the lack of accident, trauma or incident associated with the right shoulder as well as the patient's previous work injury reaching maximum medical improvement I do not see a causal relationship between the patient's right shoulder condition and the reported work injury of November 26, 2018.

3. *Please advise whether petitioner's treatment for his claimed left and right shoulders are reasonable, necessary, and causally related to the claimed accident on November 26, 2018.*
   The patient has undergone appropriate treatment for his left shoulder condition by his treating surgeon. I see this as being causally related to the November 26, 2018 injury. With regards to the right shoulder there is no indication that the patient's right shoulder injury is causally related to the November 26, 2018, injury but his treatment to date has been appropriate.

4. *Please advise whether petitioner requires additional treatment for either alleged shoulder condition. If so, is that treatment related to the claimed accident?*
   I would agree with the patient's treating surgeon that his left shoulder has reached maximum medical improvement. I do not see any need for further treatment at this level. With regards to the right shoulder, although further treatment may be required in the future, I do not see this as being causally related.

5. *Please advise if petitioner is at MMI for his claimed conditions. If so, when did he attain that status?*
   I would deem that the patient has reached maximum medical improvement for his work related left shoulder condition. I would deem he has reached this as of January 30th, 2022.

6. *Please advise if petitioner is capable of returning to work as a firefighter/paramedic.*
   As noted in my previous independent medical evaluation the patient has had objective pathology changes associated with the left shoulder. This would limit his ability to return to work as a firefighter. Please see my previous independent medical evaluation for rationale regarding his left shoulder condition and the permanent restriction. (RX5)

On July 11, 2022, Dr. Chudik testified via evidence deposition. (PX4) Dr. Chudik testified consistent with his narrative report, however, when asked specifically which surgery since the accident caused the aggravation to the right shoulder, Dr. Chudik testified that Petitioner's right shoulder condition worsened or was aggravated during the period he was healing following the left shoulder needle removal surgery on October 28, 2021. (PX4, 58-59, 65) On direct examination, Dr. Chudik answered the following question:

Q. What, if any, ongoing disability did the needle cause, and then your removal of the needle cause, if any.

A. I mean, there was the pain of surgery and the limitations afterwards and waiting for the wound to heal up, but I think in terms of his functional status of his shoulder, most of his limitations are due to the rotator cuff, and I don't think that left that unchanged--I mean, it did leave it unchanged. (PX4, 19)

Dr. Chudik testified further that Petitioner's "arm has been restricted for some time. His original injury was in 2018. He never really got back to full function, so there is some continued limitation of it, and there is no question that perioperatively removing this pin also caused some disability. We had to be really careful about the wound healing where it was at, because it was

up in the armpit, so I did restrict his movement and stuff to let that wound heal without complication." (PX4, 20-21)

On August 4, 2022, Dr. Balaram authored an addendum opinion report. (RX6) Dr. Balaram reviewed additional medical records including Dr. Lorenz's August 17, 2020, Independent Medical Evaluation evaluating Petitioner's left shoulder, Dr. Link's July 25, 2020 record, Dr. Tonino's July 13, 2020, Independent Medical Evaluation, Mr. Kraner's June 25, 2021 testimony and the July 11, 2022 evidence deposition of Dr. Chudik, Dr. Balaram was asked a series of interrogatories and answered as follows:

1. *Please review and address Dr. Chudik's Deposition testimony regarding the left and right shoulder conditions. Please advise if you agree or disagree with Dr. Chudik's testimony and why. In particular please address Dr. Chudik's allegations regarding statements about your causal connection opinions in your previous narrative report.*
   I have reviewed the deposition provided. There is indication from the treating surgeon that the natural history of a rotator cuff tear is to progress over time. The treating surgeon's medical records also indicate that the patient has had on and off pain since prior to his reported work accident in 2018. This would be consistent with the natural progression of the patient's underlying degenerative condition to the right shoulder. This is demonstrated by the on and off symptoms to the right shoulder prior to his left shoulder injury and subsequent surgical treatment.

2. *Please also address the condition of petitioner's left shoulder and comment on whether the foreign body removal surgery performed by Dr. Chudik resulted in a material change in petitioner's left shoulder condition since he completed his left shoulder treatment in October 2019 and the matter proceeded to trial on June 25, 2021.*
   Removal of a foreign body did not cause a material change in the petitioner's left shoulder condition. If anything, an improvement in the left shoulder would be indicated if the foreign body was causing persistent symptoms.

3. *Please review the attached medical records and comment on the timing and nature of the petitioner's right shoulder complaints. Please advise whether there has been any material change in the condition of the petitioner's right shoulder condition since he completed the left shoulder treatment in October 2019 and the matter proceeded to trial on June 25, 2021.*
   I have reviewed the multiple independent medical evaluations performed as well as the previous medical records provided. The patient did have ongoing right shoulder complaints as demonstrated in the treating surgeon's medical records as well as noted in Dr. Tonino's evaluation of the patient in July of 2020. Range of motion was decreased on the right shoulder. This would indicate that the patient had ongoing right shoulder complaints prior to the evaluation of Dr. Chudik. This is in contradiction to Dr. Chudik's report indicating that the patient developed right shoulder permanent aggravation after left shoulder foreign body removal in 2021. It is noted in the medical records that the patient has had on-and-off pain associated with the right shoulder. This was prior to the injury to the left shoulder in November of 2018. This would be consistent with the natural progression of a degenerative rotator cuff condition to the right shoulder.

> The argument presented indicates that the patient performed an "overuse" of the right upper extremity after his recent left shoulder surgery to remove the foreign body. This is inconsistent with the medical records indicating that the patient had ongoing symptoms associated with the right shoulder. In addition, I do not see use of an upper extremity with that trauma or incident as a causative factor for the patient's current right shoulder pathology. There is no evidence in the medical records indicating that the patient's left shoulder injury caused a material change in the patient's underlying right shoulder condition. Rather, this appears to be a natural progression of the degeneration associated with the patient's underlying pre-existing right shoulder condition. (RX6)

On September 6, 2022, Dr. Balaram testified via evidence deposition consistent with his narrative reports. (RX3) Dr. Balaram testified to the following regarding Petitioner's right shoulder:

> Q. What was that diagnosis?
> A. My diagnosis was right shoulder partial thickness rotator cuff tear.
> Q. How did you reach that diagnosis?
> A. Based on the objective findings associated with the patient's MRI as well as physical exam and history taken.
> ***
>
> Q. Doctor, in your opinion were those findings acute or chronic?
> A. It was my opinion that this is a degenerative rotator cuff condition associated with the right shoulder without evidence of an acute finding on MRI.
> Q. Doctor, do you have an opinion as to whether or not that right shoulder condition was caused by, permanently exacerbated by, or permanently accelerated by the November 26, 2018 accident?
> A. I did.
> Q. What was that opinion?
> A. It was my opinion that the patient had a natural progression of his underlying rotator cuff tendinosis with partial thickness tearing noted on MRI. There was no history given of any trauma, accident, or injury associated with the right shoulder. In addition, given the findings associated on MRI as well as the on- and- off pain the patient reported this appeared to be a natural progression of his underlying right shoulder degenerative disorder.
> Q. When you say there was a natural progression, can you just describe what you mean by that.
> A. On occasion, as patients develop tendonitis or even partial thickness tearing associated with the shoulder, as time goes on inflammation can continue. It can go up and down as far as the inflammation is concerned, but a lot of times the underlying condition can progress and over time partial thickness tearing can go on to a degenerative condition that ultimately requires treatment.
> Q. Is it your opinion that that's what occurred in this case?
> A. It was my opinion that without a history of trauma or accident associated with the right shoulder, natural progression of the patient's underlying rotator cuff

> condition which was noted in multiple medical records could be pre-existing the most recent left shoulder surgery, that I did not see that as being closely related to his reported work accident. (RX3, 23-25)

Dr. Balaram also testified that in his opinion the foreign body removal would be categorized as a minor procedure because there is no waiting on a tendon or bone to heal. Instead, the postoperative recovery is waiting for the incision to heal. (RX3, 26-27) Dr. Balaram opined that Petitioner reached maximum medial improvement for his left shoulder surgery. He further opined that Petitioner reached his baseline as far as the left shoulder condition after the most recent procedure. He noted that the same work restrictions would continue-the same ones that he had previously recommended with regard to the left shoulder given no real objective change in the underlying condition associated with the left shoulder. (RX3, 27-28) Dr. Balaram opined that the right shoulder condition was not causally related to the work accident. (RX3, 28)

Dr. Balaram further testified regarding his addendum report wherein he disagreed with Dr. Chudik's causation opinion with respect to Petitioner's right shoulder. He opined no specific incident or trauma was present to lead to a causal relationship between the right shoulder and Petitioner's previous left shoulder injury or subsequent treatment. It was his opinion that there was no causal relationship between the patient's right shoulder condition and his left shoulder injury. (RX3, 30) Dr. Balaram opined that the term "overuse" is a somewhat vague term. Further, Petitioner is a right-hand dominant person, and as such, the right upper extremity is "overused" compared to the left in the natural course of a day. (T. 31)

When asked if the left shoulder had materially changed subsequent to his pre-arbitration October 16, 2019, independent medical examination, Dr. Balaram testified he did not see a material change in the underlying condition with the left shoulder. If anything, Petitioner had an improved DASH score and more range of motion than his original evaluation, but there was still some lack of strength associated with it which indicated to him that there was no material decrease in the Petitioner's underlying condition. (RX3, 32-33)

On cross-examination Dr. Balaram testified that increased use of an upper extremity does not lead to pathology or permanent aggravation. He testified that it can lead to your arm being tired and having difficulty performing specific repetitive actions because the arm gets tired. Dr. Balaram testified that he did not see it as being a causal relationship developing pathology in the shoulder or making pathology worse. (RX3, 41) Dr. Balaram disagreed with Dr. Chudik's causation opinion. He testified the idea of overuse is a very vague term that does not imply causation. Dr. Balaram testified that if a patient had on and off symptoms associated with the right shoulder that became more symptomatic, that is the natural progression of underlying rotator cuff pathology, not secondary to overuse phenomenon. Dr. Balaram further testified that he considered this as continued pathology going forward. (RX3, 44)

Dr. Balaram also disagreed with the timeline Petitioner's attorney presented to him. At his initial evaluation in 2019 when restrictions were placed, Petitioner was already having right shoulder symptoms including by his description right shoulder pain and, in addition, decreased strength and positive provocative testing. Therefore, the timeline did not match up with what was being reported. For instance, Dr. Balaram noted Dr. Chudik's narrative report states that

Petitioner developed symptoms to the right shoulder after the most recent foreign body removal, but that was in direct contradiction to both Dr. Balaram's evaluation in 2019 as well as other independent medical evaluations noting on-and-off long-term shoulder pain associated with the right shoulder. Dr. Balaram agreed he did not have records indicating Petitioner treated with any doctor for his right shoulder complaints between 2013 and 2019. (RX3, 45-46)

At the Commission Hearing, Petitioner testified that he did have three medical opinions to obtain his duty disability pension. (T. 45-46) Of the three reports, the one authored by Dr. Pietro Tonino on July 13, 2020, was entered into evidence. (RX10) Petitioner had reported to Dr. Tonino that he had discomfort in the right shoulder and a prior right shoulder injury in the past. (RX10) Petitioner testified that there was some discomfort in his right shoulder prior to the foreign body removal surgery. (T. 48) Dr. Tonino evaluated Petitioner on July 13, 2020, which the Commission notes was eleven months prior to the Arbitration Hearing. Dr. Tonino's report states, "[x]-rays show what appeared to be a metallic body in the axillary area of the left shoulder." *Id.* Furthermore, Dr. Tonino specified that he gave Petitioner "copies of his x-rays to take to his treating physician." *Id.*

Petitioner did not return to his then treating physician, Dr. Levin. Instead, Petitioner had his first consult with Dr. Mark Chudik on September 3, 2021, three months after the Arbitration Hearing. (PX3, RX9) On January 30, 2022, Dr. Chudik authored a narrative report. Dr. Chudik's report confirmed that Petitioner was aware of the fact that he had a needle in his left shoulder since July 13, 2020, when he saw Dr. Tonino. Dr. Chudik's narrative report states the following.

> On 9/3/2021, Mr. Kraner presented to me for his continued left shoulder pain, tightness, and fatigue. We reviewed his previous x-rays that were performed in July 2020. **At that time, he was told there was a needle in the left shoulder that needed to be removed**. We obtained a new set of x-rays at his visit and the presence of the needle was confirmed, 4 cm length needle seen 2.5 cm inferior to glenoid and 1.25 cm medial to glenoid rim deep in the shoulder. (emphasis added) (PX2, T. 119-120)

In fact, Dr. Chudik testified that on September 3, 2021, Petitioner consulted him for left shoulder complaints. Dr. Chudik further testified, "[h]e said there was an x-ray that was done in July 2020 that found a large needle in his shoulder." (PX4, 67-68)

Dr. Chudik's narrative report also references an IME authored by his colleague from Hinsdale Orthopedics, Dr. Mark Lorenz, on August 6, 2020. When asked on cross examination if this IME was conducted in connection with his pension case, Dr. Chudik testified that he did not know all the details about it, but he knew it was an IME by Dr. Lorenz. (PX4, 48) Dr. Lorenz opined that Petitioner was unable to return to his job as a firefighter.

Petitioner sought treatment with Dr. Chudik first on September 3, 2021, which was between the Arbitration Hearing on June 25, 2021, and the time the Arbitrator issued his Decision on October 6, 2021. Petitioner underwent surgery on his left shoulder to have the

needle removed on October 28, 2021. Petitioner seeks payment of the medical expenses associated with that surgery and an increase in permanency based on a material change in his condition. Petitioner also alleges that he has aggravated a pre-existing condition in his right shoulder due to overuse syndrome despite the fact that his only restriction is overhead work with the left shoulder and he has not worked in any employment capacity since he stopped working in 2018 after his left shoulder work injury.

In his opening statement, Petitioner's attorney represented that the needle was discovered during a heart scan. (T. 6) Petitioner's attorney then represented that Petitioner went to get a second opinion because of this. (T. 7) When asked when the surgical instrument was discovered, Petitioner testified, "[m]y wife asked me to do a heart scan. I was- you know, she was concerned. She said go get a heart scan because I was feeling a little discomfort. She said-- my wife just wanted me to get one, so I went and got one. The guy—after I went on the table and he did my heart scan, he said you know you got a piece of metal in you." (T. 17-18) Petitioner further testified that after he found that out, he and his attorney decided he should go get a second opinion. So he went to Dr. Chudik. (T. 18)

Conclusions of Law

The Arbitration Hearing was on June 25, 2021. The Arbitrator's Decision noted that Petitioner had not sought treatment with any other medical provider for his left shoulder since the consultation with Dr. Levin on October 10, 2019. (PX1, RX1, 6) In fact, Petitioner testified that he had not sought any treatment with any other medical provider for his left shoulder condition and that no one recommended that he undergo any further treatment for his left shoulder. (RX2, 18-19) At the Commission Hearing, it was noted that Petitioner did have three medical opinions to obtain his duty disability pension. One of the three reports, the one authored by Dr. Pietro Tonino, was entered into evidence. (RX10) Dr. Tonino evaluated Petitioner on July 13, 2020. This was pertinent to Petitioner's testimony regarding his knowledge of the foreign body in his left shoulder, that was known to him prior to the Arbitration Hearing.

The Commission notes that the Petitioner's representation that the needle in his left shoulder was discovered during a heart scan does not comport with Dr. Tonino's July 13, 2020, report. Dr. Tonino's report documents that he advised Petitioner that his left shoulder x-rays showed what appeared to be a metallic body in the axillary area of the left shoulder, and that he gave Petitioner copies of his x-rays to take to his treating physician. Further, Petitioner told Dr. Chudik that he was aware of the presence of the needle since July 2020, as confirmed in Dr. Chudik's first history, and during Dr. Chudik's testimony. That means that Petitioner was aware there was a metallic body in his left shoulder eleven months prior to the Arbitration Hearing, yet he chose to wait to get a second opinion after the Hearing. Petitioner specifically testified that no medical provider recommended further treatment at the Arbitration Hearing, yet Dr. Tonino actually gave the x-rays to Petitioner so he could take the x-rays to his treating physician. Petitioner's testimony regarding the heart scan and denial of recommended further treatment at Arbitration are not misrepresentations without ramification.

The Commission finds that the misrepresentations regarding the discovery of the needle in Petitioner's left shoulder taint Petitioner's credibility. The Petitioner's choice to wait until

after the Arbitration Hearing to treat for the metallic foreign body in his left shoulder casts aspersion on the integrity of his testimony. Once the needle was removed, Petitioner reported to Dr. Chudik that his left shoulder was doing well. (PX2) Despite Petitioner's protestation, and Dr. Chudik's testimony, Dr. Chudik's records are devoid of any assigned restrictions or notations that Petitioner's left shoulder was impaired until months after his last office visit when Dr. Chudik authored a work status note on March 16, 2022. (PX2) There is no corresponding office note in the record. In fact, on November 8, 2021, Dr. Chudik's PA documented that following Petitioner's initial left rotator cuff repair surgery he experienced irritation of his deltoid muscle, however, after his surgery with Dr. Steven C. Chudik, his deltoid irritation had completely resolved. Additionally, it was noted that Petitioner felt more comfortable when sleeping. They recommended continuing "to use the arm normally" and Petitioner should follow up in four weeks for a recheck. (PX2, T. 113)

Dr. Chudik's December 10, 2021, and December 17, 2021, office notes document that Petitioner's left shoulder examinations confirmed abduction, internal and external rotation strength testing were all 5/5. On August 4, 2022, Dr. Balaram opined that if any change to Petitioner's left shoulder existed after the needle removal, his shoulder improved. (RX5, RX6) Dr. Balaram opined removal of a foreign body did not cause a material change in the Petitioner's left shoulder condition. If anything, an improvement in the left shoulder would be indicated if the foreign body was causing persistent symptoms. (RX6)

As a result, the Commission finds that Petitioner failed to prove that his left arm disability has materially increased since the Arbitration Hearing. The Commission finds that Petitioner is entitled to the medical costs for Dr. Chudik's office visits and for the October 28, 2021, surgery to remove the needle from the Petitioner's left shoulder pursuant to §8(a) and §8.2 of the Act. Petitioner testified that his wife's insurance carrier, Blue Cross Blue Shield, paid the bills and that he was unsure of the amount of out-of-pocket costs he paid. Respondent is liable for the medical bills to the extent that Petitioner can prove his out-of-pocket costs and reimbursement to Blue Cross Blue Shield subject to the lesser of the negotiated rate, the lesser of the healthcare's actual charges, or pursuant to the medical fee schedule. As the Appellate Court explained:

> Here, under the plain language of section 8(a) of the Act, the employer is required to pay (1) the negotiated rate, if applicable, or (2) the lesser of the health care provider's actual charges, or (3) according to a fee schedule. 820 ILCS 305/8(a) (West 2006). Contrary to claimant's assertion, there is no limiting language that requires the employer to pay the negotiated rate only when it is negotiated by the employer or the employer's *own* insurance carrier. Claimant attempts to create an ambiguity where none exists. The statute clearly requires the employer to pay "*the* negotiated rate." (Emphasis added.) Had the legislature intended to limit negotiated rates and agreements to those between the employer or the employer's own insurance carrier, it could have included this restriction; however, the legislature declined to do so. *Perez v. Ill. Workers' Comp. Comm'n*, 2018 IL App (2d) 170086WC, P19, 96 N.E.3d 524, 527.

On November 8, 2021, Dr. Chudik's Social History reflects that Petitioner reported he

"exercises regularly." However, when asked just five months prior at the Arbitration Hearing if he worked out, Petitioner answered, "No, it's genetics. My wife yells at me for not working out because of my heart, but, no, it's genetics. I'm genetically fit." (RX2, 26-27) At the Commission Hearing, Petitioner denied working out, playing softball or playing golf. (T. 55-56) He admitted he tried to swing a club but could not with his shoulders as they both feel achy. However, despite the note's absence in the record, Dr. Chudik testified that on March 16, 2022, Petitioner told him that he wanted to get back to his summer activities. (PX4, 106-107) Dr. Chudik further testified that Petitioner did physical therapy but he did not have the notes in front of him to identify the site or location. (PX4, 107-108) The Commission notes physical therapy notes were conspicuously omitted from the record and there are no corresponding medical bills listed in Petitioner's Exhibit 5. Further, the Petitioner's credibility was further strained by the discrepancy between his testimony that he does not exercise and Dr. Chudik's November 8, 2021 office note documenting Petitioner exercises regularly and Dr. Chudik's testimony regarding Petitioner's plan to go back to his summer activities.

Regarding his right shoulder, the Commission finds Petitioner failed to prove a causal connection between the work accident in November 26, 2018, and his present condition of ill-being. In so finding, the Commission bases this conclusion on Dr. Balaram's May 26, 2022, opinion report and his testimony. The Commission finds Dr. Balaram's opinions more persuasive than Dr. Chudik's. Petitioner testified that he does not want right shoulder surgery. Dr. Balaram testified that a rotator cuff tear does not heal on its own and would progress over time, consistent with Petitioner's on-and-off symptoms over the years. Dr. Chudik testified that Petitioner's right shoulder condition worsened or was aggravated during the period he was healing following the left shoulder needle removal surgery on October 28, 2021. (PX4, 58-59, 65) The Commission notes that Petitioner complained of pain in 2019 following work conditioning. (RX9, T. 721) At the Arbitration Hearing on June 25, 2021, Petitioner attributed the right shoulder condition to an old injury. (RX2, 16) Petitioner testified at the Commission Hearing that he had achiness in his right shoulder in the years between his 2013 release and the November 26, 2018, left shoulder injury. (T. 39, 40-41) Petitioner testified that he had pain in his right shoulder prior to the foreign body removal surgery performed by Dr. Chudik. (T. 44) Dr. Chudik testified that "[i]t is the natural history of rotator cuff tears to progress over time." (PX4, 100) Dr. Chudik testified that it would be possible to have some pain with certain motions. (PX4, 104)

In his January 30, 2022, narrative report, Dr. Chudik's causal connection was broad, "As a subsequent consequence of the 11/26/2018 left shoulder work-related injury and surgery, Mr. Kraner experienced an aggravation of his right shoulder condition." (PX2) Dr. Chudik documented in his December 17, 2021, office note that Petitioner reported his right shoulder has been irritating him and hurting since the first surgery. (PX2) The Commission finds that Dr. Chudik's opinion that the right shoulder worsened during the period he was healing between the October 28, 2021, second surgery performed by Dr. Chudik to remove the needle is disingenuous. The Commission notes that Dr. Chudik could not opine that the aggravation worsened after the first surgery because Petitioner did not claim his right shoulder was aggravated or accelerated or causally related to the 2018 work injury at the Arbitration Hearing. In fact, Petitioner testified at the June 25, 2021, Arbitration Hearing four months prior to the October 28, 2021, needle removal surgery that he had right shoulder pain he attributed to his old

injury. (RX2, 16) Further, Dr. Chudik's office note documents that Petitioner reported his right shoulder has been irritating him and hurting since the first surgery. Dr. Chudik's opinion notwithstanding, by November 8, 2021, eleven days post needle removal surgery, Dr. Chudik's PA documented that Petitioner could continue to use the left arm normally. (PX2, T. 113) Thus, the Commission infers Petitioner had been using his left arm to for activities of daily living within those eleven days.

Further, Petitioner's testimony on cross examination at the Commission Hearing confirms he was pain free in his left shoulder by November 8, 2021:

> Q. You had surgery -the foreign body removal surgery at the end of Oct. 2021, October 28, 2021?
> A. Correct.
> Q. And by November 8, 2021 Dr. Chudik was allowing you to resume normal activities within the bounds of your previous restrictions that were assessed in connection with the first left shoulder surgery and release by Dr. Levin?
> A. Yes, I had to follow same guidelines. Yes.
> Q. So approximately a week and a half after the foreign body removal surgery?
> A. I would imagine, yes.
> Q. You had improved and you were allowed to resume your baseline activities?
> A. The pain was gone, yes, if that's what you're asking**.**
> Q. You were back to baseline at least as far as your restrictions were concerned?
> A. With my left shoulder, yes. (T. 63-65)

Despite Dr. Chudik's testimony, his office note of November 8, 2021, contradicts that testimony. On cross-examination, Dr. Chudik testified that he did not immobilize Petitioner's left arm after surgery and he encouraged him to use his left shoulder as fast as possible, "within reason." (PX4, 76-77) Dr. Chudik wanted him to exercise the shoulder. (PX4, 77) Dr. Chudik could not recall if Petitioner was working and he could not detail activities allegedly causing an overcompensation type injury except activities of daily living, i.e. opening a door, making a sandwich, picking up things around the house, hygiene issues. (PX4, 79-80)

Dr. Chudik went on to testify Petitioner was "required to use his right shoulder for a period of time around my surgery, and it aggravated his condition. And we're trying to see if we can get this to be just a temporary thing." (PX4, 82-83) The Commission notes that none of the activities are documented in Dr. Chudik's office notes. When asked on cross examination as to how often Petitioner was doing those things, Dr. Chudik could not answer. (PX4, 84) Dr. Chudik conceded "I unfortunately did not write down any specifics in my note from that visit." (PX4, 87) Dr. Chudik could not identify any specific strenuous activity that Petitioner did during the healing period. Dr. Chudik testified, "So I told you I interviewed him on that day, on December 21st. We discussed it. I made those conclusions. I did not write down those specifics, what specific activities. Was he working in the yard? Was he working in the kitchen? Was he doing this or that? But the symptoms were an onset, and it was due to his activities of life—relevant when I'm trying to explain to you the mechanisms and the demands on the shoulder, which is common activities of daily living." (PX4, 90-91) "An expert opinion is only as valid as the reasons for the opinion." (Internal quotation marks omitted.) *Gross v. Illinois Workers'*

Compensation Comm'n, 2011 IL App (4th) 100615WC, ¶ 24, 960 N.E.2d 587. Therefore, the Commission finds that Dr. Chudik's opinion that the right shoulder pain started after the first surgery but was aggravated by overuse/compensating after the second surgery is not persuasive.

The Commission does not appreciate the difference in Petitioner's right shoulder complaints or symptoms before and after the October 28, 2021, needle removal surgery. Thus, the Commission finds that the Petitioner's right shoulder condition is not causally related to the November 18, 2018, work accident. Therefore, all benefits related to right shoulder treatment are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for benefits under §19(h) is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for medical benefits under §8(a) for medical treatment to the right shoulder is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for benefits under §8(a) for medical treatment to his left shoulder is granted. Accordingly, Respondent shall pay medical expenses for the Petitioner's left shoulder treatment with Dr. Steven Chudik, including the surgical expenses from the October 28, 2021, surgery and the four office visits on September 3, 2021, October 20, 2021, November 8, 2021, and December 17, 2021, as detailed in Petitioner's Exhibit 5, pursuant to the lesser of the negotiated rate, actual charges, or medical fee schedule, under §8(a) and Section 8.2 of the Act which allows for the rate as paid by Petitioner's spouse's group health insurance carrier, Blue Cross/Blue Shield, to represent the negotiated rate. (See *Perez v. Ill. Workers' Comp. Comm'n*, 2018 IL App (2d) 170086WC, 96 N.E.3d 524.) To the extent any balances remain regarding the awarded bills which stem from Petitioner's deductible, co-payments and/or co-insurance, the Respondent shall reimburse Petitioner accordingly pursuant to §8(a) of the Act.

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.

May 23, 2024
O032624
KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC016624
Case Name	KRANER, DAVID v. LONG GROVE FIRE PROTECTION DISTRICT
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Brian McManus, Jr.
Respondent Attorney	Glenn Blackmon

DATE FILED: 10/6/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 5, 2021 0.05%

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Kraner
Employee/Petitioner

Case # 19 WC 016624

v.

Consolidated cases: None

Long Grove Fire Protection District
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter. The matter was heard by the Honorable Gerald W. Napleton, Arbitrator of the Commission, in the city of Rockford, on 6/25/21. By stipulation, the parties agree:

On the date of accident, 11-26-18, 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 $77,031.76, and the average weekly wage was $1,481.38.

At the time of injury, Petitioner was 49 years of age, Married, with 0 children under 18.

Necessary medical services and temporary compensation benefits have been provided by Respondent as Petitioner received his full wages and benefits under the Public Employee Disability Act.

Respondent is not asserting any type of credit for TTD or indemnity, nor is there any claim by Petitioner for unpaid TTD.

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 $813.87/week for a period of 187.5 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a 37.5% loss of use of the person as a whole.

See attached Findings of Fact and Conclusions of Law

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 of 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

OCTOBER 6, 2021

FINDINGS OF FACT

Petitioner, David Kraner, testified that he was employed by the Respondent, Long Grove Fire Protection District, as a firefighter paramedic/engineer. Petitioner had worked for the Respondent for 22 years. Petitioner testified that he was involved in an accident on November 26, 2018 while he was responding to a call for a tree down across the road. Petitioner testified that he slipped and missed a step while exiting his fire engine causing his left shoulder to hold his entire body weight while hanging from the fire engine. He testified that he felt his left arm yank in and out of the socket and felt a shooting pain.

Petitioner testified that he got back into the rig after they removed the tree from the road. He testified that his lieutenant asked him what was wrong. Petitioner told the lieutenant that his left shoulder hurt but Petitioner assumed it was just a strain.

Upon returning to the station his battalion chief asked him what happened, and Petitioner told him. The next morning, Petitioner testified that his battalion chief approached him in the morning and asked him to raise his arm to check his range of motion. His battalion chief advised Petitioner that he needed to go to immediate care.

Petitioner testified that he first went to the Northwest Community Hospital Immediate Care Center where he was administered an X-ray. Records from NCH Immediate Care confirm that Petitioner was evaluated on November 26, 2018. At the consultation, Petitioner reported left shoulder pain after an injury. He reported falling off the rig the previous night, twisting his left shoulder. Petitioner was diagnosed with a left shoulder injury. He was advised to follow up with an orthopedic surgeon. He was released to return to work with light duty restrictions.

Petitioner remained off work after the consultation. The parties stipulated that Petitioner received his full wages and benefits under the Public Employee Disability Act while he was off work.

Petitioner followed up with an orthopedic physician, Dr. Mark Levin, at Barrington Orthopedics on November 29, 2018. Petitioner gave Dr. Levin a history of his accident. Dr. Levin diagnosed Petitioner with pain of the left shoulder joint. Based on the objective and abnormal findings, Dr. Levin was concerned about acute labral and biceps pathology in the left shoulder. He recommended that Petitioner begin physical therapy and undergo an MRI arthrogram of the left shoulder. Dr. Levin authorized Petitioner off work pending the results of the study.

Petitioner underwent an MRI arthrogram of the left shoulder on December 4, 2018 which revealed a shallow 3mm articular surface tear at the supraspinatus tendon, which continued as a delaminating interstitial tear more medially into the supraspinatus tendon, measuring up to 8mm in transverse dimension. The MRI also revealed moderate tendinopathy of the biceps tendon and moderate AC joint arthritis.

Petitioner returned to Dr. Levin who reviewed the MRI study. Dr. Levin believed the MRI demonstrated an undersurface tear of the rotator cuff which then continued diffusely through the rotator cuff with almost, but not quite, full thickness tearing. Dr. Levin performed a steroid injection in Petitioner's left shoulder and prescribed a course of physical therapy. Records document that Petitioner underwent physical therapy through Barrington Orthopedic Specialists.

On January 8, 2019, Petitioner returned to see Dr. Levin. Petitioner stated that his shoulder condition remained unchanged. Petitioner wanted to consider surgical options since he was not improving. Dr. Levin recommended that he proceed with surgery but advised that he should complete two more weeks of physical therapy before surgery. He continued Petitioner's light duty restrictions. Petitioner continued his physical therapy. His last date of physical therapy was on January 21, 2019.

Petitioner returned to see Dr. Levin on January 22, 2019. Petitioner had completed therapy and was continuing a home exercise program. Dr. Levin advised that Petitioner should proceed with surgery. Petitioner underwent left shoulder surgery at Schaumburg Surgery Center on February 20, 2019 consisting of left shoulder arthroscopy with rotator cuff repair, SLAP debridement, subacromial decompression with acromioplasty, and mini open biceps tenodesis.

Petitioner testified that he continued to undergo treatment following the surgery. He followed up with Dr. Levin post-surgery on February 26, 2019. Dr. Levin advised that Petitioner would begin physical therapy the following day. He was to remain off work. Petitioner resumed physical therapy with Barrington Orthopedics on February 27, 2019 as planned.

Petitioner next saw Dr. Levin on March 19, 2019. Petitioner reported a constant ache in his left shoulder at a pain rating of 3/10. He had not been taking Norco. Dr. Levin recommended that Petitioner continue with physical therapy. He was to remain off work. Petitioner continued undergoing physical therapy and then returned to see Dr. Levin two months later on May 14, 2019. Petitioner felt that he was progressing, but slowly. He continued to have positional pain in the upper arm. Dr. Levin advised that Petitioner should continue with physical therapy. He released Petitioner to work light duty, with no lifting or carrying with the left upper extremity. He was to return in one month.

About a month later, on June 11, 2019, Petitioner returned to see Dr. Levin. Petitioner again felt that he was progressing, but slowly. He reported ongoing positional pain in the upper arm. Dr. Levin diagnosed Petitioner with pain in the left shoulder. He recommended ongoing physical therapy and light duty restrictions. Petitioner continued with physical therapy through Barrington Orthopedic Specialists. Ongoing consultation notes document poor progress with range of motion.

Petitioner returned to see Dr. Levin on August 13, 2019. Petitioner reported that he felt the same since the last visit. He reported to Dr. Levin that he was "completely frustrated" because he did not know what would happen next. Physical examination showed that Petitioner had plateaued in range of motion. It had not improved since the last consultation. Dr. Levin advised that Petitioner should transition into a work conditioning program for the next two weeks. If they did not see any improvement, he advised that Petitioner would need a formal FCE to evaluate for potential permanent work restrictions.

Petitioner returned to Dr. Levin on September 3, 2019. Petitioner felt about the same since his last visit. He reported discomfort during work conditioning. Dr. Levin advised that Petitioner's range of motion had not improved over the last month. He advised that Petitioner had plateaued and was still having some pain. Because of his continued pain, Dr. Levin wanted Petitioner to be evaluated by Dr. Jason Rotstein in their practice. Petitioner was evaluated by Dr. Rotstein on September 5, 2019 for a second opinion on his left shoulder. Dr. Rotstein diagnosed Petitioner with a rotator cuff injury and pain in the left shoulder. He felt that Petitioner's symptoms were more representative of adhesive capsulitis, rather than internal derangement. Given his lack of progress, Dr. Rotstein recommended an MR arthrogram to evaluate the status of Petitioner's rotator cuff.

Petitioner underwent an MR arthrogram of the left shoulder on October 7, 2019. The MRI showed no full thickness rotator cuff tear. There was undersurface fraying of the distal supraspinatus and infraspinatus tendons consistent with post-surgical changes. There was also no discrete labral tear.

Records document that Petitioner last followed up with Dr. Levin on October 10, 2019. Petitioner reported that his symptoms were unchanged since his previous visit. Dr. Levin reviewed the MRI which showed no evidence of any additional pathology that could be addressed surgically. Dr. Levin advised that Petitioner was at MMI. He advised that Petitioner would not be able to go back to his work as a firefighter/paramedic because of the loss of above-shoulder/head motion and strength. He imposed permanent work restrictions of no above shoulder level work.

Petitioner was evaluated by Dr. Ajay Balaram at Respondent's request under Section 12 of the Act on October 16, 2019. Dr. Balaram issued a report dated October 25, 2019. Dr. Balaram advised that Petitioner had evidence of residual stiffness and loss of motion after surgical intervention. He advised that Petitioner's prognosis was good for activities of daily living, but he had a poor prognosis for return to the high demand level of a firefighter/paramedic, given his objective limitations in movement. Dr. Balaram concluded that Petitioner's left shoulder injury was causally related to the accident of November 26, 2018. Dr. Balaram advised that Petitioner's treatment had been appropriate. He advised that Petitioner had plateaued with therapy and no further formal treatment was necessary. Dr. Balaram advised that Petitioner had a very high demand level job. He advised that Petitioner was unable to elevate the left arm above head for above-head work and unable to perform many of the job requirements including climbing ladders, using overhead tools, as well as the possible need to lift heavy objects. Therefore, Dr. Balaram imposed permanent restrictions of no lifting overhead greater than 15 pounds as delineated by the patient's final physical therapy note.

Petitioner has not sought treatment with any other medical provider since the consultation with Dr. Levin on October 10, 2019. Petitioner testified at trial that the restrictions imposed by Dr. Levin and Dr. Balaram prevented him from returning to work as a firefighter. Petitioner acknowledged at trial that he was only restricted from overhead work with the left shoulder. No physician had put any restrictions on his right shoulder. Petitioner is right-hand dominant. In addition, Petitioner was not restricted from any activities below shoulder level, although Petitioner testified that they were concerned about fatigue. Dr. Levin's consultation notes from October 10, 2019 references left arm fatigue only with overhead motion. Petitioner testified that that not being able to go back to work as firefighter was hard on him. He testified that he used to play softball and golf but can't perform those activities anymore. Petitioner testified that he just does not have range with his left shoulder. He testified that it hurts, even when raking. He testified that his left shoulder gets fatigued quickly.

Petitioner testified that he tried to find work as a truck driver but was prevented from working in that capacity because of his shoulder issues. Petitioner testified that he was awarded a line-of-duty disability pension from the Respondent's Pension Fund. He testified that he was currently receiving pension benefits consistent with 65% of his yearly salary at the rank he held at the time he was removed from the Respondent's payroll, not his wage at the time he was injured. Petitioner acknowledged that the wage he was earning at the time he was released was $97,019.23 and that the monthly benefit that he is earning from his pension was $5,255.21. He further acknowledged that this pension benefit is not taxable and that this pension benefit will increase over time until around age 60 through annual cost of living increases. Petitioner further testified that he is not aware of any pension-related restrictions that precludes him from finding employment in another field.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision as to the nature and extent of Petitioner's injury, the Arbitrator finds as follows:

Petitioner is seeking benefits under Section 8(d)(2) of the Illinois Worker's Compensation Act. An award under Section 8(d)(2) of the Act is an award for permanent partial disability benefits and, therefore, must be evaluated under the five factors set forth in Section 8.1b of the Act. These five factors are:

(i) the reported level of impairment pursuant to the AMA Guidelines in subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of injury;
(iv) the employee's future earning capacity;
(v) the evidence of disability corroborated by the medical treatment records.

The Act under Section 8.1(b) further states that no single enumerated factor shall be the sole determinant of disability. The Arbitrator notes that Petitioner testified credibly at trial.

With regard to subsection (i), the Arbitrator notes that no AMA impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii), the occupation of the employee, Petitioner was employed as a firefighter paramedic/engineer at the time of the accident. The testimony of Petitioner and the medical evidence in the record from Dr. Levin and Dr. Balaram establishes that Petitioner is not able to return to work as a firefighter and has suffered a loss of trade as a result of his injury. The Arbitrator gives great weight to the factor as Petitioner has suffered a loss of trade.

With regard to subsection (iii), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. Due to his relative age and the number of years that he will live with the condition of ill-being, the Arbitrator gives some weight to this factor.

With regard to subsection (iv), Petitioner's future earning capacity, the Arbitrator notes that Petitioner was awarded a line-of-duty disability pension from the Respondent's Pension Fund. Petitioner testified that he is receiving a monthly, nontaxable pension benefit of $5,255.21 from the Respondent. The Arbitrator notes that this amount comes to $1,313.80 per week which is close to his stipulated average weekly wage of $1,481.38 and would exceed any applicable TTD rate. Per Petitioner's testimony, this pension benefit will also continue to increase at regular intervals. Petitioner testified further that he unaware of any prohibition on seeking employment in any other field. Respondent cites to a previous Commission decision in *Weiss v. Village of Schaumberg*, 17 I.W.C.C. 0096, *1 (2017). In *Weiss,* the Commission noted that a firefighter's duty disability pension mitigates any financial distress the petitioner's state of ill-being might otherwise cause. The Arbitrator gives little weight to this factor as the evidence demonstrates that petitioner has not experienced a reduction in his earning capacity.

With regard to subsection (v), the evidence of disability corroborated by the treatment records, Petitioner testified to problems with range of motion in his left shoulder at trial. He testified that his shoulder hurts even with raking the lawn at home. He testified that his shoulder fatigues quickly. He is unable to play softball and golf. He has difficulty sleeping at night. He has tingling in his fingers. The Arbitrator finds Petitioner's testimony to be corroborated by the medical treatment records. Medical records offered by the parties from Dr. Levin and Dr. Rotstein at the conclusion of Petitioner's treatment document that Petitioner plateaued with his left shoulder range of motion. Dr. Rotstein's consultation record dated September 5, 2019 documents that Petitioner was complaining of limitations with motion and overhead strength. Dr. Levin's final consultation note from October 10, 2019 documents that Petitioner complained of weakness and fatigue with overhead motion. The Arbitrator gives substantial weight to this factor.

Considering the record as a whole and taking the five factors under Section 8.1 into consideration, the Arbitrator awards Petitioner permanent partial disability benefits of 187.5 weeks at the maximum PPD rate of $813.87, as Petitioner has sustained a 37.5% loss of use of the man as a whole.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020641
Case Name	Maria Saldana v. Atlas Employment Services Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0243
Number of Pages of Decision	32
Decision Issued By	Maria Portela, Commissioner, Kathryn Doerries, Commissioner

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Timothy Furman

DATE FILED: 5/24/2024

/s/Maria Portela, Commissioner

Signature

DISSENT: /s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA SALDANA,

Petitioner,

vs. NO: 19 WC 20641

ATLAS EMPLOYMENT SERVICES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's Decision finding that Petitioner's right elbow condition is causally related to injuries sustained in the work accident on July 7, 2018. However, the Commission reverses the Arbitrator's Decision finding that the cervical spine condition is unrelated to the work accident and finds that Petitioner met her burden of proof that the current condition of ill-being as to the cervical spine is causally related to the work accident.

Petitioner testified that on July 7, 2018, she was employed as a labeler/packer on the assembly line. On the day of the accident, Petitioner stated she had just finished packing a box when the co-worker next to her took the box, which weighed approximately 40-45 pounds, and as he went to place it on a pallet the corner of the box struck Petitioner's right elbow. (T. 19) Petitioner clarified the box struck her in the right elbow right underneath the elbow, in the little sunken part, and she felt pain radiating from there all the way up to her ear on the right side. (T. 20) Petitioner also testified that after being struck by the box she felt a "pop" that went toward her ear. Petitioner further testified she

was knocked off balance when she was struck by the box, and that it shook her up, but that she didn't fall to the ground. (T. 26) Petitioner stated she immediately notified her manager of the accident and took a Tylenol. (T. 21) Petitioner also testified she never saw a doctor for her neck or arm prior to July 2018. (T. 54)

Petitioner was seen at Concentra on July 19, 2018. She gave a history of having been struck in the right elbow with a box on July 10, 2018, [sic] while at work. At that time, she complained of, among other things, neck pain. She was assessed as having a cervical myofascial strain. (Px1) Petitioner reported she continued to work and that she was having cervical/thoracic pain that was radiating down her right arm. Upon exam, Petitioner had tenderness in the level C4-7 of the cervical spine as well as bilateral muscle spasms. (Px1) X-rays on the same date revealed mild degenerative changes. Petitioner was given work restrictions for modified activity. (Px1)

Petitioner returned to Concentra on July 24, 2018, and was assessed with multiple conditions including a cervical muscle strain. On exam, palpation of the cervical spine revealed right-sided muscle spasms. (Px1) Petitioner was referred to physical therapy at Concentra for her cervical spine.

On July 31, 2018, Petitioner returned to Concentra with continued complaints of neck pain. She had not demonstrated any functional improvement and was assessed with a cervical muscle strain. (Px1) Petitioner was referred to occupational therapy for her right elbow, as well as instructed to continue physical therapy for her cervical spine.

Petitioner returned to Concentra on August 9, 2018, complaining of either radiating pain up from her hand and forearm or down from the neck. No exam of the cervical spine was noted. Petitioner was assessed with, among other things, a cervical muscle strain and cervical radiculitis. (Px1)

On August 21, 2018, Petitioner again returned to Concentra with an assessment of cervical muscle strain and cervical radiculitis. Petitioner was still working with restrictions but complained it was painful for her. She also continued to complain of neck pain. (Px1)

Petitioner returned to Concentra again on August 28, 2018, September 24, 2018, and October 4, 2018 – all with continued complaints of neck and arm pain. (Px1) During this time Petitioner continued to attend physical therapy at Concentra and her progress was noted to be slower than expected with Petitioner complaining of worsening of symptoms. (Px1)

On October 11, 2018, Petitioner underwent an MRI of her cervical spine which showed disc disease with degenerative changes at C3-4 and C7-T1 causing varying degrees of central canal and neural foraminal stenosis. (Px2)

On October 15, 2018, Petitioner again returned to Concentra. Palpation revealed right-sided muscle spasms and limited range of motion in her cervical spine. It was noted that her MRI showed bilateral neuroforaminal stenosis abutting the C6 nerve roots. She was assessed with cervical radiculitis and a cervical muscle strain. (Px1)

On October 22, 2018, Petitioner was first seen by Dr. Murtaza. She complained of 8-9/10 severe pain radiating down from her cervical spine down the posterolateral aspect of right extremity with significant numbness of the right hand. Dr. Murtaza felt that the MRI showed a significant broad-

based disc protrusion that seems to cause central canal stenosis, foraminal stenosis, and abuts the exiting C6 nerve root. Petitioner relayed a consistent mechanism of injury as that described in earlier records as well as her testimony. Dr. Murtaza continued work restrictions and felt Petitioner would benefit from an epidural steroid injection. (Px1)

On January 14, 2019, Petitioner first saw Dr. Salehi. She relayed a consistent mechanism of injury and pain complaints. He reviewed the MRI and opined Petitioner had a herniated disc at C7-T1 and cervical spondylosis. He felt her right arm symptoms may be due to moderate C5-6 foraminal stenosis and recommended she proceed with the epidural steroid injection. (Px1) On February 7, 2019, Petitioner underwent a cervical epidural steroid injection at C6. (Px3, Px5)

On February 25, 2019, Petitioner returned to Dr. Salehi for continued complaints of radicular pain from the neck into the right arm. At this time, she was also beginning to complain of left-sided numbness. Dr. Salehi referred Petitioner back to Dr. Murtaza for a possible spinal cord stimulator trial. (Px1)

Petitioner returned to Dr. Murtaza on March 29, 2019. At that time, Dr. Murtaza seemed hesitant to consider the spinal cord stimulator trial and wanted to refer Petitioner for an independent medical evaluation ("IME") for another opinion. He noted she got no relief from the epidural steroid injection or physical therapy. Dr. Murtaza kept Petitioner's work restrictions in place. (Px1)

On June 27, 2019, the Petitioner was seen by Dr. Mather for a second opinion IME. Dr. Mather believed Petitioner to be displaying several Waddell signs and did not feel that the mechanism of injury was consistent with her stated complaints. He denied causation, felt she was at maximum medical improvement ("MMI"), and stated she should be released to full duty without restrictions. (Rx1)

On July 26, 2019, Petitioner returned to Dr. Murtaza. At that time, she was assessed with cervical spondylosis with cervical radiculopathy into the right upper extremity. Dr. Murtaza recommended she try to return to work full duty per the IME recommendations, but if she was unable to do so, he would advise she adhere to her current restrictions consisting of no lifting greater than 5 pounds, no pushing or pulling more than 15 pounds and no reaching above her shoulders. Dr. Murtaza deferred to the IME for further recommendations but thought Petitioner may benefit from an EMG. (Px1)

Dr. Murtaza performed an EMG on November 4, 2019. It was his impression that there was electrodiagnostic evidence supportive of right C5-6 radiculopathy. (Px3)

Petitioner underwent an additional cervical spine MRI on February 4, 2020. Several disc herniations and protrusions were noted as well as central canal stenosis. (Px6)

Petitioner returned to Dr. Salehi on March 4, 2020 with continued complaints of constant neck pain with radiation down the right arm. Dr. Salehi noted the MRI showed significant foraminal stenosis at C5-6 on the left, moderate foraminal stenosis at C5-6 on the right and bulging discs at C3-4, C5-6 and C7-T1. He assessed her with other spondylosis with radiculopathy, cervical region and recommended a selective nerve root block. (Px7)

Petitioner underwent a nerve root block on March 6, 2020 for the diagnoses of 1) cervical discogenic pain syndrome; 2) cervical discogenic radiculopathy; 3) cervical axial pain syndrome and 4) cervical facet pain syndrome. (Px8) When Petitioner returned to Dr. Salehi on April 14, 2020, she reported 60% relief of her right sided neck and right arm pain to the elbow from the nerve block. Based on the positive response from the nerve root block, Dr. Salehi recommended a right C5-6 posterior foraminotomy. (Px7)

On July 9, 2020, Petitioner underwent a second IME with Dr. Mather. Dr. Mather was unaware Petitioner had undergone a nerve block, and he had not reviewed the February 2020 MRI films because the CD was cracked. Dr. Mather again noted Petitioner to have multiple Waddell signs, opined the EMG was inconclusive, felt her neck condition was unrelated to the work accident, and opined that she was at MMI. (Rx1)

Petitioner returned to Dr. Salehi on September 18, 2020. Dr. Salehi discounted Dr. Mather's IME opinions and opined that Petitioner was not at maximum medical improvement and that Petitioner had sustained an aggravation of an asymptomatic preexisting spondylosis given no prior history of neck or arm pain. (Px7) Petitioner returned to Dr. Salehi on November 3, 2020 and December 16, 2020 where he again recommended surgery. (Px7)

Based on the foregoing, the Commission reverses the findings of the Arbitrator as it relates to the cervical spine. The Commission finds that based on a chain of events theory, Petitioner demonstrated that prior to the work accident she had no prior problems with her cervical spine and/or right elbow nor sought medical treatment for those parts of her body, and that after the work accident of July 7, 2018, Petitioner had consistent and worsening complaints of pain and an inability to perform her job where she had been previously able to do so. Petitioner credibly testified and the medical evidence supported a consistent mechanism of injury and consistent complaints of pain. Additionally, the Commission finds Dr. Salehi's opinion that Petitioner sustained an aggravation of a pre-existing asymptomatic condition in her cervical spine to be more persuasive than that of Dr. Mather's. Therefore, the Commission finds that the Petitioner met her burden of proof as to accident and causation as it relates to the cervical spine and awards temporary total disability benefits, medical expenses and prospective medical care accordingly. Further, the Commission affirms the Arbitrator's finding of accident and resolution of injuries as to the right elbow injury.

Based on a chain of events theory, and supported by the opinions of Dr. Salehi that Petitioner's work accident caused an aggravation of her previously asymptomatic preexisting spondylosis, the Commission finds treatment to Petitioner's cervical spine was causally related to the work accident of July 7, 2018 and awards the following outstanding medical bills: Lake Shore Surgery Center (facility) - $3,434.15 (Px8); Lake Shore Surgery Center (physicians) - $325.00 (Px8); Western Touhy Anesthesia - $630.00 (Px10); Lakeshore Open MRI - $2400.00 (Px6); Neurological Surgery and Spine Center - $1,398.00 (Px7); Metropolitan Institute of Pain - $8,363.21 (Px3); Illinois Orthopedic Network - $400.00 (Px5).

Additionally, the Commission finds Petitioner is entitled to an additional period of temporary total disability benefits related to the cervical spine condition from June 30, 2019 through May 20, 2022 (150 6/7 weeks) for a total of $38,166.86 (150 6/7 x $253.00). The Respondent will receive a credit for $11,214.41 for the temporary total disability benefits paid for the period of October 14, 2018 through June 29, 2019 as it related to the right elbow.

Finally, the Commission awards the prospective medical treatment recommended by Dr. Salehi in the form of C5-6 foraminotomy and attendant care. Petitioner met her burden of proof that her cervical spine condition is causally related to the July 7, 2018 work accident. Dr. Salehi was more persuasive in his opinions and treatment recommendations than Dr. Mather. Petitioner was not at maximum medical improvement based on her ongoing complaints.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $253.00 per week for a period of 187-6/7 weeks, from October 14, 2018 through May 20, 2022, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall receive a credit of $11,214.41.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $16,950.36 as outlined in Px3, Px5, Px6, Px7, Px8 and Px10 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $53,363.81. 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.

May 24, 2024

MEP/dmm
O: 32624
49

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

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

DISSENT

I respectfully disagree with my colleagues and would affirm and adopt the Arbitrator's decision in its entirety. Petitioner sustained a trauma to the right elbow when struck by a box being pulled from the table for stacking onto a pallet. There was no trauma to any other part of the body and Petitioner did not fall to the floor. Two weeks later, Petitioner sought treatment for her elbow injury and complained of neck pain and radiating right arm pain. While the elbow injury resolved, the neck and arm pain turned into an chronic condition. Dr. Salehi initially determined there was insufficient cervical spine pathology to recommend surgery, only to later reverse course and recommend a foraminotomy. The Arbitrator, in my view, correctly found Petitioner failed to prove an accidental injury to the cervical spine. In reversing the Arbitrator's finding, the majority relies on a chain of events analysis and the opinions of Dr. Salehi; however, the medical evidence irrefutably shows Petitioner's symptoms are entirely non-organic and the diagnosis is anatomically inconsistent with Petitioner's clinical presentation and unsupported by the diagnostic injections, imaging, and EMG findings. Respondent's Section 12 examining physician, Dr. Mather, credibly explained the medical science and demonstrated why Petitioner's cervical spine complaints are psychogenic in nature. For the reasons discussed below, I respectfully dissent.

I. Mechanism of Injury

While placing labels on frozen food packages, a co-worker, who was placing the packages into boxes and transferring completed boxes onto a pallet, inadvertently struck Petitioner's right elbow with the "corner of the box." (T. 13, 15) Petitioner testified the co-worker was standing about three feet away from her. Petitioner pinpointed the location of the impact to the "little sunken part" underneath the elbow. (T. 20) Petitioner testified she heard a pop and felt pain radiating up her arm. Petitioner testified the co-worker apologized and in response she said "no, its fine" but she felt a great deal of pain. (T. 19) Petitioner testified the pain radiated from her elbow all the way up to her right ear. (T. 20) Petitioner demonstrated her positioning and the Arbitrator noted for the record that Petitioner's arms were situated at mid-torso level with elbows off to the side. (T. 25) Petitioner testified the impact shook her and "took me off balance." (T. 26) She did not, however, fall to the ground. Petitioner did not seek any treatment until thirteen days later on July 19, 2018. When seen at Concentra, she reported being struck in the elbow with a box; however, there was nothing mentioned about being shaken or pushed off balance. (T. 118-121) During her initial evaluation with Dr. Salehi on January 14, 2019, he documented the identical accident description with nothing mentioned about being shaken or pushed off balance. (T. 217)

Dr. Mather credibly opined that Petitioner could not have sustained a significant cervical spine injury by having her elbow hit with a box. He further noted that the mechanism of injury does not make sense with a cervical spine injury. When assessing the evidence, "common sense and life experience are part of the decision making process." *Dwyer vs. Circuit City*, 7 IWCC 1483, 2007 Ill. Wrk. Comp. LEXIS 1713. See also *Crowder vs. Butch Lumley*, 97 IIC 1020, 1997 Ill. Wrk. Comp. LEXIS 119 ("The arbitrator is not required to put aside her common sense and life experience in weighing the circumstantial evidence.") Even assuming Petitioner momentarily lost her balance, any resulting flexion/extension or lateral side-to-side motion would have unlikely exerted the degree of

force needed to cause a cervical spine injury. I would find there was no consistent mechanism of injury to support Petitioner's claimed cervical spine injury.

II. Dr. Salehi's Diagnosis

Dr. Salehi initially evaluated Petitioner on January 14, 2019, at which time Petitioner described right-sided neck pain with radiation down the arm to "all fingers with tingling and numbness down the entire right arm." (T. 217) Dr. Salehi noted Petitioner's sensory complaints were in a nondermatomal distribution. He reviewed the October 10, 2018 cervical MRI and noted mild bulging discs at C3-C4, C4-C5 and C5-C6 along with a herniation at C7-T1. He further noted moderate central stenosis at C4-5 and C5-C6 and left-sided foraminal stenosis at C6-C7. That said, Dr. Salehi also noted there was no significant neural compression. (T. 218) Notwithstanding the absence of any nerve root compression, it was Dr. Salehi's impression that Petitioner's right upper extremity symptoms may be due to foraminal stenosis at C5-C6 and he recommended an epidural injection at that level.

The epidural steroid injection, administered by Dr. Murtaza on February 7, 2019, failed to provide any relief. Per the documented result recorded by Dr. Salehi on February 25, 2019, Petitioner "had an injection about 3 weeks ago with no relief." (T. 219) At that time, Dr. Salehi determined there was "no significant pathology to recommend any surgical intervention." (T. 219) Dr. Murtaza also noted the same negative response in his March 29, 2019 progress note: "She had 0% relief with her epidural injection as well." (T. 221) If the C5-C6 level was the source, one would expect a positive response to the injection.

Petitioner underwent a repeat cervical MRI on February 4, 2020. (T. 258) The radiologist interpreted the imaging as showing four herniated discs, all with extruded nucleus pulposi, from C3-C6 through C7-T1 with varying degrees of central canal or foraminal stenosis. The radiologist also noted the thecal sac and spinal cord were unremarkable and there were no findings for nerve root impingement. On the surface, the updated MRI seemingly demonstrated progression in the disc pathology; however, when Petitioner returned to Dr. Salehi on March 4, 2020, he personally reviewed the MRI and described the discs as bulging. (T. 263)

On March 4, 2020, Dr. Salehi again diagnosed right-sided C5-C6 foraminal stenosis as the source of Petitioner's symptoms. He recommended a selective nerve root block and indicated surgery in the form of a foraminotomy may be needed depending on the response. (T. 263) During this visit, Petitioner reported numbness involving the entire right hand, particularly the third and fourth (middle and ring) fingers. As noted by Dr. Mather, the C5-C6 nerve distribution innervates the thumb and index finger, not the middle and ring fingers.

On April 14, 2020, Petitioner returned for follow-up and reported tingling in the "first four digits" or the thumb, index, middle and ring fingers. (T. 265) Dr. Salehi noted Petitioner reported 60% relief from the nerve block and formally recommended the surgery. Though on this occasion Petitioner reported symptoms in the thumb and index finger, she continued to report symptoms in the other fingers which do not anatomically correlate with the C6 dermatome. Additionally, Dr. Mather noted that Petitioner's diffuse arm and hand numbness encompassed the ulnar aspect of the hand "which is the wrong side of the hand for that surgery to even make any sense." (T. 300)

Regarding Petitioner's response to the diagnostic selective nerve root block, Dr. Mather credibly opined that the response was a failed response as the generally accepted threshold for a valid confirming diagnostic response is 70% or higher pain relief. (T. 333) In support of this opinion, Dr. Mather provided a medical study published in the American Journal of Neuroradiology. (T. 335-350) According to the medical study, nerve root blocks are moderately accurate with both false positives and false negatives when used to confirm a pain-generating nerve root. Dr. Mather's opinion regarding the threshold response needed for a confirming diagnosis was unrefuted.

The October 4, 2019, EMG test results likewise failed to support the diagnosis. Before addressing the electrodiagnostic findings, it should be noted that when Petitioner next saw Dr. Salehi on March 4, 2020, he only reviewed the second MRI completed on February 4, 2020, and there was nothing documented to indicate Dr. Salehi was made aware that an EMG test had been completed. (T. 262-264) Dr. Salehi recommended that Petitioner proceed with the selective nerve root block and based on the response to the nerve block he would determine if surgery was appropriate. Following the nerve block, Dr. Salehi next saw Petitioner on April 14, 2020, and formally recommended the right C5-C6 foraminotomy without reviewing any EMG test results. (T. 265-354) Inasmuch as Dr. Salehi did not rely on the EMG tests results for his diagnosis and surgical recommendation, we are left to speculate whether he would have found the EMG findings valid or not.

Dr. Murtaza's EMG report concluded that "All nerve conduction studies (as indicated in the following tables) were within normal limits." His report further noted "All F Wave latencies were within normal limits." (T. 238) On the following page, Dr. Murtaza described "increased polyphasic potentials" involving the brachioradialis and biceps muscles. (T. 239) Based the polyphasic potentials, Dr. Murtaza concluded the study was consistent for right C5-C6 cervical radiculopathy without evidence of active denervation. (T. 239) Dr. Mather testified he read the raw data and opined the EMG was normal because the insertional activity, fibrillations, positive sharp waves, and amplitudes were all normal. (T. 299) Dr. Mather testified that Polyphasia is a weak indicator for nerve involvement and commented that all humans will have some Polyphasia if tested. (T. 298-299) Dr. Mather further testified that Polyphasia is just part of normal nerve aging. In his second IME report, Dr. Mather indicated Polyphasia is a nonspecific finding and should not be confused with cervical radiculopathy. (T. 330) Because neither Dr. Murtaza nor Dr. Salehi testified, Dr. Mather's testimony regarding the electrodiagnostic findings was unrebutted on this topic.

Additionally, as noted by Dr. Mather, Petitioner's symptoms vacillated. Petitioner initially complained of right upper extremity symptoms and later complained of bilateral upper extremity symptoms. Her reported finger numbness also varied relative to the fingers affected. Petitioner also presented with other unusual complaints involving symptoms radiating to her right ear and left-sided facial numbness. Because Petitioner's subjective symptoms were widespread and failed to correlate anatomically, Dr. Salehi's assessment that the C5-C6 level was the source of the problem was inconsistent with Petitioner's clinical presentation and not supported by the objective medical findings.

III. Dr. Mather's Diagnosis

Dr. Mather opined Petitioner's symptoms were non-organic and psychogenic in nature. As such, Dr. Mather opined Petitioner's symptoms were inconsistent with the claimed cervical injury. His opinions were supported by the medical evidence.

On January 14, 2019, Dr. Salehi documented radiating pain with numbness and tingling in the entire right arm and pain in all five fingers. Petitioner also reported tingling in her right *leg* at times. Dr. Salehi noted Petitioner's sensory complaints were in a nondermatomal distribution. (T. 217) On February 25, 2019, Petitioner returned to Dr. Salehi with continuing right arm and hand symptoms and he again noted her sensory complaints were nondermatomal. Petitioner also reported left arm and left hand symptoms which started after she underwent an injection with Dr. Murtaza. She further reported numbness "going up the left side of the face to the eye." (T. 219) On March 4, 2020, Dr. Saheli documented numbness in the middle and ring fingers. (T. 262)

During Dr. Mather's first IME on June 27, 2019, Petitioner completed a pain diagram on which she reported bilateral upper extremity symptoms which again were diffuse and multi-dermatomal in nature. (T. 320) On examination, Petitioner held her right arm up in the air and reported it was too painful to put her arm down, though she later put her arm down without difficulty during the examination. (T. 319) Dr. Mather noted multiple Waddell findings including reported right arm pain radiating up to the neck with any arm movement, reported diffuse numbness in the left arm in all dermatomes, and cogwheeling during strength testing of her right upper extremity. Dr. Mather further found normal reflexes and a negative Hoffman's test. Based on the reported diffuse nature of the symptomology and his exam findings, Dr. Mather opined Petitioner's subjective complaints were non-organic.

After Dr. Salehi recommended surgery, Dr. Mather re-examined Petitioner on July 9, 2020, at which time Petitioner described numbness and tingling down the right arm and into the right hand along with numbness in the middle, ring, and small fingers. (T. 327) Petitioner reported she was unable to wear a bra due to sensitivity over her right trapezius from the bra strap. (T. 328) Dr. Mather observed, however, that Petitioner wore her purse directly over the same area. On examination, Dr. Mather noted another Waddell finding when Petitioner reported severe pain in her neck and right trapezius during axial compression applied to the top of Petitioner's head. (T. 328) Dr. Mather again found Petitioner's complaints were non-organic.

Thereafter, Dr. Salehi continued to document radiating symptoms involving the entire right arm and right hand. On November 3, 2020, Dr. Salehi documented constant neck pain with radiation down the right arm to the hand with numbness and tingling, particularly in the "2nd through 4th digits" or index, middle, and ring fingers. (T. 268) On examination, Dr. Salehi noted diminished sensation in the lateral aspect of the right arm and forearm. He also documented diminished sensation in the lateral aspect of the right thigh. (T. 269) Dr. Salehi documented similar symptoms on December 16, 2020.

Dr. Mather diagnosed Petitioner's cervical related complaints as psychogenic in nature with functional overlay. (T. 295) Asked to explain psychogenic, Dr. Mather testified that the symptoms were non-organic and unrelated to nerve root compression; Petitioner feels like she has these symptoms but they do not correlate with any organic condition. (T. 295) Notably, the first treating physician at Concentra, Dr. Davison, also noted that Petitioner's subjective complaints were out of proportion. (T. 141)

Based on the medical evidence, Dr. Salehi's recommended surgery is unlikely to cure or alleviate Petitioner's widespread symptomology. Dr. Mather noted that the C5-C6 nerve distribution

does not have any branches to the middle, ring and small fingers. As such, Petitioner's reported numbness does not correlate with the C6 dermatome. Dr. Mather further commented that numbness in the ring and small fingers correlates anatomically with the C8 nerve distribution, which as Dr. Mather observed, is two disc levels below the level at which Dr. Salehi has recommended for surgical intervention. In his addendum report of October 26, 2020, Dr. Mather ultimately concluded there are so many findings inconsistent with a C6 radiculopathy that it would be improper to recommend any surgery whatsoever to this patient. (T. 223)

For all the reasons discussed, I respectfully dissent from the majority opinion.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020641
Case Name	Maria Saldana v. Atlas Employment Services Inc
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Jonathan Schlack
Respondent Attorney	Jason Allain

DATE FILED: 3/16/2023

THE INTEREST RATE FOR THE WEEK OF MARCH 14, 2023 4.70%

/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)

Maria Saldana
Employee/Petitioner

v.

Atlas Employment Services, Inc.
Employer/Respondent

Case # **19** WC **020641**

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 **May 20, 2022**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **7/7/18**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**17,270.00 (48 wks)**; the average weekly wage was $**359.79**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of $**11,214.41 (10/14/18-6/29/19)** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**11,214.41**.

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

ORDER

Petitioner did prove that she sustained accidental injuries arising out of and occurring in the course of the employment on July 7. 2018 with respect to the right elbow (contusion) which has since resolved. She did not prove that she sustained accidental injuries arising out of and in the course of the employment on July 7, 2018, with respect to the cervical spine. Compensation and prospective medical as it relates to the cervical spine condition are denied.

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

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

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

MARCH 16, 2023

Signature of Arbitrator

FINDINGS OF FACT

Petitioner is not a native English speaker and testified using an interpreter.

Petitioner, Maria Saldana, testified that on July 7, 2018, she was working for Atlas on assignment with Home Chef. (Tr. 9-10). She had been working for Atlas for three (3) years. (Tr. 11). She testified she had multiple positions while working there. (Tr. 11). Her work essentially consisted of working as a line worker, a packer, and a laborer at a frozen foods plant. (Tr. 12).

On July 7, 2018, Petitioner testified that she was working the line, placing labels on the product, then putting the product in a box next to her. (Tr. 12). When she was done putting a label on the box, then she would put the product into another box and fill that box. (Tr. 13). Her coworker would then take that box and put it on the pallet once she was done with it. (Tr. 13). Petitioner testified that her job did not involve lifting the boxes. (Tr. 47).

When the coworker pulled the box to put it on the pallet, the corner of the box hit her elbow and she felt a sharp pain go from her elbow all the way up into her neck. (Tr. 13). She testified that the box hit her in the right elbow, underneath the elbow where it's a little sunken part, and felt pain radiate from there all the way up to her ear on the right side. (Tr. 20). She testified that she was caught off guard and knocked off balance but did not fall to the ground. (Tr. 25-26).

She testified that the coworker was standing right next to her, a little to the front of her, about a meter or three (3) feet away, pulling the bags that she was putting labels on. (Tr. 14, 21). She testified that the coworker was putting the bags into a box, which had enough room for 18 to 20 bags of the frozen food. (Tr. 15). Petitioner testified that the boxes weighed approximately 40 to 45 pounds. (Tr. 17). However, she also testified that she was unsure how much each of the bags that went into the box weighed and she was not required to lift the boxes. (Tr. 17, 48)

Petitioner testified that after she was struck by the box, she notified her manager and asked her if she could drink some water. (Tr. 21). She also testified that she took some Tylenol. (Tr. 21).

Concentra / Dr. Murtaza / Dr. Salehi

Petitioner testified, and the record reflects that she first presented to medical care with Concentra on July 19, 2018. (PX 1, p. 34; Tr. 29). She presented with pain on the right side of the body. (PX 1, p. 35). She noted that she was struck on the right elbow with a box but continued to work. (PX 1, p. 36). She had complaints of cervical/thoracic with pain radiating down her right arm. (PX 1, p. 36). Swelling and tenderness were noted in the right elbow as well as tenderness in the cervical spine. (PX 1, p. 37). Petitioner was assessed with a right elbow contusion, lateral epicondylitis, and a cervical strain. (PX 1, p. 34).

On July 19, 2018, Petitioner underwent an x-ray of the cervical spine which showed mild degenerative changes. (PX 1, p. 38). X-rays of the right elbow showed no acute findings. (PX 1, p. 39).

At the July 24, 2018, follow-up, Petitioner was 50% of the way toward meeting the physical requirements of the job. (PX 1, p. 47). Examination of the right elbow showed no swelling, but tenderness to the lateral epicondyle. (PX 1, p. 50). She had full range of motion of the cervical spine, neurovascularly intact and normal sensation, grip, and reflexes. (PX 1, p. 50). She was released to work with restrictions of no gripping/squeezing/pinching with the right upper extremity. (PX 1, p. 54). Petitioner testified that she provided the work restrictions to "Julie" with Atlas but continued to work under restrictions. (Tr. 39, 41).

On July 31, 2018, Petitioner returned to Concentra for a follow-up. (PX 1, p. 56). She was complaining about her right elbow and neck pain but had only made one PT and OT appointment. (PX 1, p. 56). Her neck pain was not radiating. (PX 1, p. 56). She was not tolerating therapy well but working transitional duty. (PX 1, p. 56). Examination of the cervical spine revealed pain out of proportion to the objective findings. (PX 1, p. 57).

Petitioner presented for a follow-up on August 9, 2018, reporting she was no better with mild improvement with therapy. (PX 1, p. 75). She was complaining of radiating pain up from her hand

and forearm or down from the neck. (PX 1, p. 75). Physical examination revealed tenderness in the lateral epicondyle, but full range of motion. (PX 1, p. 76).

On October 4, 2018, Petitioner returned for a follow-up. (PX 1, p. 122). She reported that her pain radiates from the right side of the neck down the right arm into the hand. (PX 1, p. 122). Physical examination revealed tenderness in the right paraspinal, right-sided muscle spasms, and limited range of motion. (PX 1, p. 123).

On October 11, 2018, Petitioner underwent an MRI of the cervical spine at Chicago Ridge Medical Imaging. (PX 2, p. 3). The impression was degenerative changes in the cervical spine with no obvious spondylosis or listhesis, disc disease with degenerative changes at C3-4 to C7-T1 causing varying degree of central canal and neural foraminal stenosis. (PX 2, p. 4).

At the October 15, 2018, follow-up, Petitioner reported that she did not feel she could continue to work with her current restrictions because she was taking too much medication to get through the day. (PX 1, p. 127). She had tenderness in the right paraspinal, muscle spasms, limited range of motion and decreased grip on the right. (PX 1, p. 128).

On October 22, 2018, Petitioner presented to Dr. Murtaza for an initial consultation. (PX 1, p. 130). She reported severe pain, radiating down from her cervical spine to the posterolateral aspect of the right extremity with numbness of the right hand. (PX 1, p. 130). Dr. Murtaza noted that an EMG revealed C5-6 radiculopathy, which was consistent with the MRI which showed a disc protrusion seeming to cause central canal stenosis, foraminal stenosis, and abutting the exiting C6 nerve root on the right. (PX 1, p. 130). Dr. Murtaza also noted findings on the MRI of leftward protrusions causing nerve root impingement at C7 and C8. (PX 1, p. 130). Physical examination revealed decreased range of motion, tenderness, positive Spurling's on the right side, weakness, and slightly diminished sensation. (PX 1, p. 130). The impression was radicular pain on the right, weakness, herniated disc, and radiculopathy. (PX 1, p. 130). A right sided C6 epidural injection was recommended along with work restrictions. (PX 1, p. 131).

On January 14, 2019, Petitioner presented to Dr. Salehi for an initial consultation. (PX 1, p. 133). Petitioner reported that she was hit in the right arm by a coworker moving a heavy box and felt pain shoot up to the right arm to the ear. (PX 1, p. 133). She complained of pain to the right side of the neck and ear, radiating down the right arm to all the fingers with tingling and numbness down the entire right arm and weakness of the right arm and hand grasp. (PX 1, p. 133). She also reported right leg tingling. (PX 1, p. 133). She reported therapy made her worse and she was taking Tylenol as needed. (PX 1, p. 133). She was diagnosed with a herniated disc at C7-T1 and cervical spondylosis. (PX 1, p. 134). Dr. Salehi noted that there was no significant neural compression, and that her symptoms may be due to moderate C5-6 foraminal stenosis. (PX 1, p. 134). She was to continue light duty restrictions. (PX 1, p. 134).

On February 7, 2019, Petitioner received a cervical epidural injection on the right at C6 from Dr. Murtaza via Metropolitan Institute of Pain. (PX 1, p. 5).

On February 25, 2019, she presented to Dr. Salehi for a follow-up, reporting the injection provided no relief. (PX 1, p. 135). Since the injection, Petitioner reported complaints of left-sided numbness on the arm to the hand going up the left side of the face to the eye. (PX 1, p. 135). She felt weakness in both hands. (PX 1, p. 135). Dr. Salehi indicated that her imaging showed moderate stenosis, but no significant pathology to recommend any surgical intervention. (PX 1, p. 135). She was referred back to Dr. Murtaza for a spinal cord stimulator trial and continue to work under the restrictions per Dr. Murtaza. (PX 1, p. 135).

Dr. Murtaza examined Petitioner on March 29, 2019, for a consultation regarding a spinal cord stimulator. (PX 1, p. 137). Dr. Murtaza indicated that the spinal cord stimulator was quite an invasive procedure, and he did not think that it would be the best option. (PX 1, p. 137). He recommended that she get a second opinion via an independent medical examination. (PX 1, p. 137).

Petitioner presented to Dr. Murtaza for a follow-up on July 26, 2019. (PX 1, p. 138). Petitioner reported that she did not feel she could return to full duty work and was frustrated with her continued pain. (PX 1, p. 138). Dr. Murtuza recommended Petitioner remain on light duty work

and noted that Petitioner may benefit from further diagnostic testing, including an EMG/NCV study of the right upper extremity. (PX 1, p. 139).

On November 4, 2019, Petitioner underwent an EMG/NCV with Dr. Murtaza via Metropolitan Institute of Pain. (PX 3, p. 9). The impression was evidence supportive of right C5-6 cervical radiculopathy with noted polyphasic potentials. (PX 3, p. 10).

On February 4, 2020, Petitioner underwent an MRI of the cervical spine at Lakeshore Open MRI. (PX 6, p. 3). The radiologist impression was multi-level disc herniations from C3-4 to C7-T1. (PX 6, p. 4).

Petitioner presented to Dr. Salehi on March 4, 2020, for a follow-up. (PX 7, p. 3) She presented with the new MRI and continued complaining of constant pain in the neck, radiating down the right arm into the hand, associated with numbness, particularly in the 3rd and 4th digits. (PX 7, p. 3). Petitioner's reflexes were normal. (PX 7, p. 4). Dr. Salehi reviewed the MRI and noted significant left C5-6 foraminal stenosis, moderate foraminal stenosis right C5-6, bulging disc C3-4, C5-6, and C7-T1. (PX 7, p. 4). He noted that her right arm symptoms were likely due to C5-6 foraminal stenosis and Petitioner was advised to proceed with the selective nerve root block at the right C5-6. (PX 7, p. 4). She was assigned light duty work restrictions. (PX 7, p. 4).

On April 14, 2020, Petitioner returned to Dr. Salehi for a follow-up noting 60% relief of the right sided neck and right arm pain to the elbow. (PX 7, p. 6). She reported continued tingling in the right first four digits and weakness in the right arm. (PX 7, p. 6). Dr. Salehi recommended surgical intervention in the form of a right C5-6 posterior foraminotomy. (PX 7, p. 7).

On September 18, 2020, Dr. Salehi issued a narrative response to Dr. Mather's IME from July 9, 2020. (PX 7, p. 8). He indicated that there were several issues with the report, the most significant being, that Dr. Mather stated that Petitioner did not undergo the selective nerve root block. (PX 7, p. 8). He noted that Petitioner underwent the nerve root block in March/April 2020 and that therefore Dr. Mather's entire report is invalid and should not be used in the basis for determining Petitioner's need for surgery. (PX 7, p. 8).

Petitioner presented to Dr. Salehi for a follow-up on November 3, 2020. (PX 7, p. 9). She reported continued constant pain in the neck with radiation down the right arm and hand associated with numbness and tingling, particularly in the 2nd through 4th digits. (PX 7, p. 9). She also reported weakness in the arm mostly due to pain. (PX 7, p. 9). Surgery was again discussed, and Petitioner wanted to proceed at that time. (PX 7, p. 10). Light duty restrictions were recommended. (PX 7, p. 10).

On December 16, 2020, Petitioner returned to Dr. Salehi for a follow-up. (PX 7, p. 13). She reported constant neck pain with radiation to the right arm to the hand associated with numbness and tingling, particularly in the 2nd through 4th digits with a lot of spasms and pain in the right elbow. (PX 7, p. 13). Surgery was again discussed, and Petitioner was to remain on restricted work. (PX 7, p. 14).

Dr. Mather/ Section 12 Examination and Deposition Testimony

Petitioner was examined by Dr. Steven Mather for an Independent Medical Examination (IME) on June 27, 2019, with an interpreter present (RX 1, p. 4). Dr. Mather is an Illinois licensed, board certified orthopedic surgeon with a focus on conditions of the adult spine; cervical, thoracic and lumbar. (RX 1, p. 2). He is published in his field and performs approximately 300-350 surgeries per year. (RX 1, p. 3).

At the examination, Petitioner provided a history of an incident wherein she was placing frozen bags of food items into a box. (RX 1, p. 4, 30). She indicated that one could fit 14-16 bags into a box (RX 1, p. 30). Another co-worker was twisting, holding one of the boxes and it slammed into her right elbow. (RX 1, p. 4, 30). Petitioner confirmed that accuracy of the reported mechanism. (Tr. 43-46).

Petitioner testified that she did not explain to Dr. Mather how the accident occurred, that he just asked her a few questions and examined her. (Tr. 32).

She reported that she felt pain in her right elbow and felt a noise move up her right arm to her shoulder and neck area. (RX 1, p. 30). She continued working and sought help from a supervisor asking for Tylenol, but her supervisor did not have any. (RX 1, p. 30). Petitioner then went out to her car, took some Tylenol and felt a little bit better but continued to work, seeking medical care approximately a week or two later. (RX 1, p. 30-31).

She reported that she was never married, though she has two (2) children and that she smokes very occasionally socially. (RX 1, p. 31). Petitioner testified that she has not had a cigarette in 20 years. (Tr. 46).

Dr. Mather performed a physical examination of Petitioner. (RX 1, p. 31). She was holding her right arm in the air, noting it was too hard to put it in her lap, although she was observed doing so later in the exam. (RX 1, p. 31). She reports that when she moves her arm, it radiates from her right hand, all the way up her neck, all dermatomes. (RX 1, p. 31). Motor examination revealed cogwheeling of the right upper extremity. (RX 1, p. 31). Sensation of the right hand and forearm was normal. (RX 1, p. 32). Dr. Mather noted that in summary, Petitioner had multiple positive Waddell findings including pain radiating up to the neck with any right upper extremity movement, diffuse anesthesia of the left upper extremity of all dermatomes and cogwheeling of the right upper extremity. (RX 1, p. 32).

Petitioner's pain diagram indicated bilateral arm symptoms with multi-dermatomal distribution. (RX 1, p. 32). Dr. Mather also reviewed MRI images of the cervical spine from October 10, 2018. (RX 1, p. 32). He noted that there was some mild cervical spondylosis at C7-T1 with no cord or root compression. (RX 1, p. 32). There was also minimal degenerative changes C3-4, C4-5, C5-6 without cord or root compression and the disks were all well-calcified. (RX 1, p. 32). Dr. Mather deemed the findings to be age appropriate. (RX 1, p. 35).

Dr. Mather diagnosed Petitioner with a right elbow contusion and psychogenic pain/functional overlay. (RX 1, p. 34). It was Dr. Mather's opinion that Petitioner had complaints of neck pain, right arm pain, paresthesias, and left arm paresthesias, that were inconsistent with the work injury of July 7, 2018. (RX 1, p. 34). He found these were psychogenic in nature and that Petitioner did

not sustain any significant cervical trauma or strain by being hit by a box in her right elbow, that her symptoms were nonorganic. (RX 1, p. 34). It was his opinion that Petitioner could not have had a significant cervical strain by having her elbow hit by a box, especially given the fact that she continued to work for a week. (RX 1, p. 34). Petitioner's prognosis was excellent, even if she had a minor cervical strain, which would have resolved itself in 1 to 2 weeks, with or without treatment. (RX 1, p. 34).

He noted that Petitioner had several positive Waddell findings including diffuse anesthesia of the left upper extremity, nondermatomal pain of the right upper extremity with any movement of the right arm and cogwheeling. (RX 1, p. 34).

Dr. Mather further indicated that Dr. Salehi stated there was no nerve root compression. (RX 1, p. 35). Petitioner's disks were well-calcified, and she did not sustain a "displacement". (RX 1, p. 35). There was no causal relationship to the improper diagnosis of cervical disk displacement and the injury. (RX 1, p. 35). Dr. Mather found that Petitioner required no further treatment relative to the cervical spine, and she could return to work without restrictions. (RX 1, p. 35). Petitioner did not require a cervical epidural steroid injection or MRI of the cervical spine. (RX 1, p. 35).

Dr. Mather also performed an AMA Impairment Rating finding that Petitioner did not have verifiable radicular complaints and did not have similar findings documented on multiple occasions, with no objective findings and varying symptoms. (RX 1, p. 37). Accordingly, he issued a 0% whole person impairment. (RX 1, p. 37).

On July 9, 2020, Petitioner was re-examined by Dr. Mather. (RX 1, p. 39). It was his opinion that she did does not have cervical pathology and did not sustain a cervical injury. (RX 1, p. 39). He found that Petitioner was at maximum medical improvement, required no further treatment for her cervical spine, and could return to work without restrictions. (RX 1, p. 39).

On physical examination, Petitioner indicated that she could not wear her bra strap on her right trapezial area, as it was so sensitive. (RX 1, p. 40). However, she was wearing her purse directly

on that same area, with the purse strap going across her chest and the purse being on the left hip. (RX 1, p. 40). She was also able to remove her purse without difficulty. (RX 1, p. 40).

Dr. Mather was unable to review the February 4, 2020, MRI as the DVD with the MRI was cracked. (RX 1, p. 43).

Dr. Mather found that Petitioner continued to exhibit several Waddell findings, including diffuse tenderness, complaints of sensitivity with wearing her bra strap over the right trapezial, yet chooses to wear her purse strap over the same area, diffuse cogwheeling of the right upper extremity, pain with axial compression applied to the top of the skull, and vacillating areas of numbness. (RX 1, p. 42). She told Dr. Salehi she had numbness and tingling in the first three (3) digits of her right hand, but told Dr. Mather, it was the third, fourth, and fifth fingers of the right upper extremity. (RX 1, p. 42).

Dr. Mather found that the EMG was an inconclusive test, noting polyphasia was a nonspecific finding and should not be confused with documentation that it was cervical radiculopathy. (RX 1, p. 42). He also reiterated that it was medically unlikely she injured her neck when a co-worker hit her right elbow with the corner of a box. (RX 1, p. 42). There was a not a causal relationship between her complaints of neck pain and right upper extremity pain, and what she said happened at work. (RX 1, p. 43).

Dr. Mather noted that it was clinically inadvisable to proceed with surgery. (RX 1, p. 44). There was no validated cervical radiculopathy, several positive Waddell findings, and she did not respond to the nerve block, making the basis for the recommendation for surgery illogical. (RX 1, p. 44).

On October 26, 2020, Dr. Mather issued an addendum to his reports after reviewing additional records. (RX 1, p. 45). He noted in response to Dr. Salehi's critique, that while Dr. Mather was unaware of the selective nerve block by Dr. Vargas, there are further things to consider. (RX 1, p. 45).

First, you cannot make a diagnosis by selective nerve root block alone, that the mechanism does not even make sense with a cervical injury. (RX 1, p. 45). He elaborated that when Petitioner was examined by him, she complained of numbness and tingling down the right arm into the third, fourth, and fifth fingers of the right hand, which would not correlate with C6 but rather 2 nerves down to C8. (RX 1, p. 45).

Dr. Mather also stated that though Petitioner reported 60% relief from the nerve block, 70% or higher is what is generally acceptable. (RX 1, p. 45).

Additionally, when he saw Petitioner, she did not have any reduced bicep reflexes, but symmetric reflexes objectively. (RX 1, p. 45). Dr. Salehi indicated that Petitioner had a reduced bicep reflex, but Dr. Mather did not find that on the exam. (RX 1, p. 46). Furthermore, Dr. Mather indicated that when Petitioner saw Dr. Salehi on January 28, 2020, her reflexes were normal and symmetric, not depressed along the right biceps. (RX 1, p. 46).

Petitioner also had several positive Waddell findings that were confirmed by Dr. Davison at Concentra on July 31, 2018, when he noted that she had "pain out of proportion of her findings". (RX 1, p. 46). There were also complaints of numbness over the entire right hand, nonanatomic, in physical therapy. (RX 1, p. 46).

Ultimately, Dr. Mather reiterated that there were many findings inconsistent with C6 radiculopathy and that it would be improper to recommend any surgery to Petitioner. (RX 1, p. 46). He did not find Dr. Salehi's argument compelling. (RX 1, p. 46).

Dr. Mather testified via an evidence deposition on February 10, 2022. (RX 1, p. 1). He testified that when examining patients for an independent medical examination, the majority of the examination is actually the history of the injury and treatment, with the whole examination taking 45 minutes. (RX 1, p. 3). He noted that when he was taking the history from Petitioner, she was providing the history through an interpreter, and he would dictate in front of her, so that both she and the interpreter could hear that she was correctly reflecting the accurate history. (RX 1, p. 4).

Dr. Mather testified that on physical examination, Petitioner had negative Spurling's maneuver, which is supposed to aggravate cervical stenosis and reproduce symptoms down the arm. (RX 1, p. 4). He also noted that Petitioner had cogwheeling, which indicated that she was feigning loss of strength. (RX 1, p. 5). Her reflexes were also completely normal, which would go against organic loss of sensation, and there was no atrophy. (RX 1, p. 5). He indicated that her Hoffman's test, which is a test of spinal cord dysfunction, was normal. (RX 1, p. 5). He felt she had a normal neurologic examination objectively, but multiple positive Waddell findings. (RX 1, p. 5).

Dr. Mather testified that the MRI report of Dr. Safvi noted broad-based disc protrusions at C5-6, C6-7 and that a protrusion is anything other than a completely 100 percent normal disc. (RX 1, p. 7). Further, that disc herniation is like a bubble on a tire, it's something very focal. (RX 1, p. 7). Regarding the February 4, 2020, MRI, Dr. Mather indicated that in explaining the findings he noted from the prior MRI, it is possible that something else happened to cause the herniations noted by Dr. Kurtiza, the radiologist, or they really were not herniations as some radiologist tend to overcall protrusions. (RX 1, p. 10).

Dr. Mather testified that after taking a history from the patient, performing a physical examination, and reviewing the records, he diagnosed Petitioner with a right elbow contusion, with symptoms that were psychogenic in nature, or nonorganic. (RX 1, p. 7). He did not see how the accident involved the cervical spine as her elbow sustained trauma from a box. (RX 1, p. 7). Dr. Mather testified that she did not have valid radiculopathy, which is necessary to offer a patient an epidural, and that she was at maximum medical improvement and could return to full duty work. (RX 1, p. 8).

Dr. Mather testified that Dr. Salehi's March 4, 2020, report noted loss of sensation in a nondermatomal pattern, which would be a Waddell finding, meaning that too many nerves are involved to explain the case on an organic basis, meaning so many nerves were involved it is not possible for the numbness to be real. (RX 1, p. 10). He testified that the surgical procedure recommended by Dr. Salehi, a foraminotomy, involved opening up the nerve canal, making the tunnel, for example, on the C6 nerve root bigger by doing a C6 foraminotomy. (RX 1, p. 10). He testified that the C6 nerve root innervates the thumb and index finger, and does not give any

branches to the third, fourth, and fifth fingers. (RX 1, p. 10). Furthermore, that Dr. Salehi noted tingling in the right first four digits, which was not the C6 dermatome. (RX 1, p. 10).

Petitioner testified that she feels a lot of pain in her arm that goes numb sometimes and hurts all the way up to her neck region, below her ear. (Tr. 28). She also testified that she does not have enough strength to open a can. (Tr. 29, 33). She testified that she gets a lot of numbness, pain, and weakness in her right arm. (Tr. 33). She testified that she is not taking any prescription medication, only Ibuprofen. (Tr. 50).

II. CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to (C), whether the accident arose out of and in the course, of Petitioner's employment, the Arbitrator finds the following:

The Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries to the cervical spine arising out of and in the course of her employment with Respondent on July 7, 2018. However, she did sustain accidental injuries to the right elbow. The description of the alleged accident provided by Petitioner, both at trial and to the examining and treating physicians, indicate that she was struck on the right elbow with a box. There is no indication that she was struck on the neck, or that the incident caused her to fall or impact her neck in any way.

It is well-established that a Petitioner carries the burden of proving her case beyond a preponderance of the evidence. "Preponderance of the evidence is evidence, which is of greater weight, or more convincing than the evidence offered in opposition of it; it is evidence which as-a-whole shows that the fact to be proved is more probable than not." Houck v. Nationwide Rail Service, 11 IWCC 249, citing, Jones v. J. Rubin, 02 IIC 142; [Note, the compensability holding in Houck was overturned at the Circuit Court on other grounds] Parro v. Industrial Commission, 630 N.E.2d 860 (1st Dist. 1993); Central Rug & Carpet v. Industrial Commission, 838 N.E.2d 39 (1st Dist. 2005).

Among the factors to be considered in determining whether a claimant has sufficiently carried her burden, is the credibility of declarant. See, Houck, supra. Credibility is the quality of a witness, which renders their evidence worthy of belief. The Arbitrator, whose province it is to evaluate witness credibility, evaluates the witness's demeanor and any external inconsistencies with testimony and/or medical evidence.

A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course, of the employment. 820 ILCS 305/2. Both elements must be present in order, to justify compensation. Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill. 2d 478 (1989).

The phrase "in-the course of" refers to the time, place, and circumstances under which an incident occurred. Orsini v. Industrial Commission, 117 Ill. 2d 38 (1987). The words "arising out of" refer to the origin or cause of the incident and presuppose a causal connection between the employment and the accidental injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52 (1989).

Petitioner testified and the records reflect that on July 7, 2018, she was working the line, placing labels on product and putting the product in a box, when a coworker struck her with a box on the right elbow. There was no contact of the box with Petitioner's neck, nor was Petitioner knocked to the ground.

The Arbitrator finds the opinions of Dr. Mather to be the most credible here. It was Dr. Mather's opinion that Petitioner could not have had a significant cervical strain by having her elbow hit by a box, especially given the fact that she continued to work for a week after the incident. According to Dr. Mather, it was medically unlikely that Petitioner injured her neck when a co-worker hit her right elbow with the corner of a box. Petitioner did not sustain a cervical injury.

Applying the applicable case law to the above-captioned matter, based on the totality of the circumstances and weighing the credibility of the witnesses; the Arbitrator concludes that the Petitioner failed to sustain her burden of proof by a preponderance of evidence that she sustained

accidental injuries to the cervical spine arising out of and occurring in the course of employment with the Respondent.

Decision on remaining issues is moot.

In support of the Arbitrator's Decision relating to (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator has separately decided on the issue of accident as it relates to the cervical spine. However, causal connection as it relates to Petitioner's alleged condition of ill-being in the right elbow and cervical spine were placed in dispute and is important for discussion, particularly as related to the issue of "accident". Petitioner carries the burden of proving her case by a preponderance of the evidence and Petitioner's subjective pain complaints are inconsistent with the objective medical records and completely unreliable. Petitioner has failed to establish that her claimed current condition of ill-being regarding her cervical spine and right elbow is causally connected to the alleged July 7, 2018, incident.

Petitioner's treating physician, Dr. Salehi, diagnosed Petitioner with a herniated disc at C7-T1 and cervical spondylosis, indicating that her imaging showed moderate stenosis but there was no significant pathology to recommend surgical intervention. He eventually indicated that Petitioner's arm symptoms were likely due to C5-6 foraminal stenosis and later recommended surgical intervention in the form of a right C5-6 posterior foraminotomy.

Petitioner also underwent an independent medical examination with Dr. Mather, whose opinions the Arbitrator finds most instructive and most credible here, especially in regard to the mechanism of injury, Petitioner's subjective complaints and the objective findings noted on her physical examination and diagnostic studies. According to Dr. Mather, Petitioner suffered a right elbow contusion with psychogenic pain/functional overlay. It was Dr. Mather's opinion that Petitioner could not have had a significant cervical strain by having her elbow hit by a box. Furthermore, he opined that Petitioner's complaints of neck pain, right arm pain, and paresthesias, were inconsistent with the work injury of July 7, 2018.

Dr. Mather also noted several positive Waddell findings including diffuse anesthesia of the left upper extremity and tenderness, nondermatomal pain of the right upper extremity with any movement of the right arm, pain with axial compression applied to the top of the skull, vacillating areas of numbness, and cogwheeling of the right upper extremity. The Waddell findings were also confirmed by Dr. Davison at Concentra, who found Petitioner's pain to be out of proportion to her objective findings. Additionally, Petitioner reported that she could not wear her bra strap on her right trapezial area, as it was too sensitive, however, Dr. Mather noted that she was wearing her purse on the same area and was able to remove her purse without difficulty.

Regarding the MRI imaging of the cervical spine from October 10, 2018, Dr. Mather noted that there was some mild cervical spondylosis at C7-T1 but no cord or root compression. Dr. Salehi also indicated that there was no nerve root compression. With respect to the EMG test, Dr. Mather stated that it was inconclusive, noting polyphasia was a nonspecific finding and should not be confused with cervical radiculopathy.

After considering all medical opinions, the Arbitrator concludes that Petitioner's claimed current condition of ill-being is not causally related to the work incident of July 7, 2018. The Arbitrator finds the opinion of Dr. Mather to be the most credible here. Petitioner suffered an elbow contusion on July 7, 2018, which had resolved. Petitioner's cervical spine condition is not causally related to the July 7, 2018, work incident.

Decision on remaining issues is moot.

In support of the Arbitrator's Decision relating to (J), whether claimed, unpaid medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds the following:

The Arbitrator has separately decided on accident and causal connection. Petitioner has not proven, by a preponderance of the evidence, entitlement to medical services not otherwise

provided by Respondent or through group health insurance. Accordingly, the Arbitrator concludes Respondent is not ordered to pay any of the disputed medical charges.

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

The Arbitrator has rendered a Decision, separately, on accident and casual connection. Petitioner has not proven by a preponderance of the evidence that the alleged current condition of ill-being arose out of and in the course, of her employment with Respondent. She has failed to prove that the condition of ill-being that may be present in the cervical spine and/or right elbow is *causally related* to the work accident.

Notwithstanding, regarding the necessity for prospective medical treatment proposed by Dr. Salehi, the Arbitrator finds that Petitioner has not established her required burden of proof that the necessity of obtaining the requested surgery is causally connected to any work-related injury. The Arbitrator also finds the recommended surgery is neither medically reasonable nor necessary here. Surgery is not indicated in this case.

Though initially indicating that there was no significant pathology to recommend any surgical intervention, Dr. Salehi ultimately recommended that Petitioner proceed with a right C5-6 posterior foraminotomy.

The Arbitrator takes into consideration the testimony of Dr. Mather, whom he finds most credible here. Dr. Mather found that Petitioner required no further treatment relative to the cervical spine, and she could return to work without restrictions.

Both Dr. Mather and Dr. Salehi indicated that there was no nerve root compression noted on the MRIs. According to Dr. Mather, Petitioner did not have cervical pathology and did not sustain a cervical injury. There were many findings inconsistent with C6 radiculopathy and per Dr. Mather, it would be improper to recommend any surgery to Petitioner.

Dr. Mather testified that the surgical procedure recommended by Dr. Salehi, a foraminotomy, involved opening up the nerve canal, making the tunnel, for example, on the C6 nerve root bigger by doing a C6 foraminotomy. (RX 1, p. 10). Dr. Mather noted that the C6 nerve root innervates the thumb and index finger, and does not give any branches to the third, fourth, and fifth fingers. (RX 1, p. 10). However, Dr. Salehi noted tingling in the right first four digits, which was not the C6 dermatome. (RX 1, p. 10). Petitioner did not have valid radiculopathy.

The Arbitrator concludes that Petitioner has not established her required burden of proof that the necessity of obtaining the requested surgery is causally connected to any work-related injury. Furthermore, the Arbitrator finds the recommended surgery is neither medically reasonable nor necessary here.

In support of the Arbitrator's Decision relating to (L), whether Petitioner is entitled temporary total disability, the Arbitrator finds the following:

Petitioner claims she is entitled to temporary total disability covering June 30, 2019, through present. The Arbitrator notes that the parties stipulated that Respondent paid $11,214.41 in temporary disability benefits for the period from October 14, 2018, to June 29, 2019.

For an employee to be entitled to temporary total disability benefits under the Illinois Workers' Compensation Act ("Act"), she must prove she is "totally incapacitated for work by reason, of the illness attending the injury." Mt. Olive Coal Co. v. Industrial Commission, 129 N.E. 103, 104 (Ill. 1920).

The Arbitrator has rendered a Decision, separately, on the issues of accident and casual connection. Petitioner has not proven by a preponderance of the evidence that the alleged condition of ill-being about the cervical spine arose out of and in the course, of her employment with Respondent. She has failed to prove that any current condition of ill being that may be present in the cervical spine and right elbow is *causally related* to the alleged work accident.

Thus, the Arbitrator finds that, Petitioner has failed to prove she was totally incapacitated for work from June 30, 2019, through present *by reason of the illness attending the injury*.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC009662
Case Name	King Gaston v. State of Illinois
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0244
Number of Pages of Decision	11
Decision Issued By	Amylee Simonovich, Commissioner

Petitioner Attorney	Michael D. Block, Bryan Shell
Respondent Attorney	Drew Dierkes

DATE FILED: 5/24/2024

/s/Amylee Simonovich, Commissioner

Signature

24IWCC0244

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

King Gaston,

Petitioner,

vs. NO: 17 WC 9662

State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent, and being advised of the facts and law, partially modifies the Section 8.1b analysis in 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.

The Commission seeks only to modify the Arbitrator's analysis of Petitioner's age pursuant to Section 8.1b(b)(iii) of the Act. The Commission agrees with the Arbitrator's analysis of this factor. However, the Commission disagrees with the Arbitrator's conclusion that Petitioner's age should receive no weight when determining the nature and extent of Petitioner's injury. Instead, the Commission assigns some weight to this factor.

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 November 21, 2023, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Orland Park Orthopedics any medical expenses that remain outstanding included in Petitioner's Exhibit 11, as provided in Sections 8(a) and 8.2 of the Act. However, Respondent's liability for any such expenses shall not exceed $937.20.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week for 8.8 weeks, because the injuries sustained caused the 40% loss of the left fifth finger, as provided in Section 8(e) of the Act.

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

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

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.

May 24, 2024

d: 5/21/24

AHS/jds

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/s/ *Amylee H. Simonovich*

Amylee H. Simonovich

/s/ *Maria E. Portela*

Maria E. Portela

/s/ *Kathryn A. Doerries*

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC009662
Case Name	King Gaston v. State of Illinois
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Michael D. Block
Respondent Attorney	Drew Dierkes

DATE FILED: 11/21/2023

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

/s/ Frank Soto, Arbitrator

Signature

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

November 21, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

King Gaston
Employee/Petitioner

v.

State of Illinois
Employer/Respondent

Case # **17** WC 009662

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **September 6 and 7, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 12, 2017** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**86,604.00**; the average weekly wage was $**1,665.46**.

On the date of accident, Petitioner was **47** years of age, **single** with **0** dependent children.

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

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

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

ORDER

Respondent to pay to the provider, Orland Park Orthopedics, the remaining outstanding medical services as set forth in Petitioner's Exhibit 11, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act if still due and owing and not to exceed $937.20, pursuant to Sections 8.2 and 8(a) of the Act, and subject to the fee schedule, as set forth in the Conclusions of Law attached hereto and incorporated herein;

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 40% of the left fifth finger, pursuant to §8(e) of the Act which corresponds to 8.8 weeks of permanent partial disability benefits at a weekly rate of $775.18, as set forth in the Conclusions of Law attached hereto and incorporated herein;

Respondent shall pay Petitioner compensation that has accrued from February 12, 2017 through September 7, 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* **NOVEMBER 21, 2023**

Arbitrator

PROCEDURAL HISTORY

This matter proceeded to hearing on September 6, 2023. The case was bifurcated and proofs were closed the following day, on September 7, 2023. The disputed issues were causation, medical bills and the nature and extent of Petitioner's injury. (Arb. Ex. #1).

FINDINGS OF FACT

King Gaston (hereinafter referred to as "Petitioner) testified he was employed with The State of Illinois (hereinafter referred to as "Respondent") at IYC Joliet as a Youth Specialist. On February 12, 2017 Petitioner was involved in an altercation with a resident of the facility. In 2019 Petitioner was transferred to IYC Chicago and in 2022 he was promoted to Major at IDOC. Petitioner retired on March 1, 2023.

Petitioner's job duties as a shift supervisor included supervising up to 60 employees, overseeing hundreds of youths, assisting mass movements as well as the safety and sanitation checks. Petitioner also had to respond to fights and riots and would need to use force to prevent escapes, bodily harm, self-harm, or damage to property.

Accident

On February 12, 2017, Petitioner responded to a situation involving 10-12 youths who were damaging property. While Petitioner was instructing youths to go to their rooms a youth punched Petitioner in the face. An altercation occurred caused Petitioner to restrain the youth. After the incident, Petitioner noticed his left little finger of his left hand was hanging.

Petitioner was diagnosed as sustaining a contusion of the jaw and left small mallet finger. Petitioner is right-handed. (Px. 4). On September 25, 2017 Petitioner underwent extension pinning of the DIP joint. (Px8). On November 20, 2020, Petitioner underwent another procedure to remove the hardware used to secure the DIP joint. (Px.5). Petitioner was eventually released from care without work restrictions.

As to his current condition Petitioner testified to experiencing cramping and pain while playing basketball, lifting dumb bells, and driving. Petitioner testified to loss of strength and that he takes over-the-counter medication 2-3 times a week.

Medical Records and Testimony

Initially, Petitioner went to the nurse on the grounds at IYC St. Charles who directed Petitioner to go to the emergency room. Petitioner went to Delnor Hospital.

At Delnor Petitioner was diagnosed with a jaw contusion and mallet finger. (Px. 1). Petitioner was unable to extend the left 5th digit of the left hand at the DIP. X-rays of the left 5th finger showed no evidence of acute fracture or dislocation. *Id* at 14-15. Petitioner was diagnosed with mallet finger and he was referred to an orthopedic physician. *Id.*

On February 15, 2017, he saw Mark Bordick[1], P.A. of Orlando Park Orthopedics. (Px3). Petitioner reported left hand pain and an inability to extend the left pinky all the way. *Id.* at that time, Petitioner was taken off work. *Id.* Petitioner returned on March 3, 2017 with continued left hand pain. *Id.* at 30-31. On March 24, 2017, Petitioner was prescribed physical therapy but his pain worsened so he was referred to a hand surgeon. *Id.*

Petitioner testified on July 12, 2017, he presented to Dr. Elliot Nacke, of Hinsdale Orthopedics, who recommended surgery. On September 25, 2017, Petitioner underwent surgery consisting of an extension pinning of the left small finger DIP joint. (Px5, pgs. 16-17). On November 20, 2017, Dr. Nacke removed the hardware from the left small finger. *Id.* at 22-25.

On December 6, 2017, Petitioner saw Dr. Nacke who noted no recurrence of extensor lag and, at that visit, Petitioner rated his pain level as 1/10. (Px5, pgs. 26-27). On January 4, 2018, returned to Hinsdale Orthopedics reporting that his pinky began to lag again and, at that time, the pinky was placed in a silver ring splint. *Id.* at 28-29. At that time, Dr. Nacke allowed Petitioner to return to full duty work. *Id.* On January 25, 2018, Petition was discharged from occupational therapy. (Px6, pgs. 17-44). At his last visit, Petitioner's left grip strength was measured at 107 pounds and he was given a home exercise program to increase his grip strength. *Id.* at 17-18.

On February 15, 2018, Petitioner returned to Dr. Nacke reporting pain in his pinky with heavy use but that he was doing well. (Px5, pgs. 30-31). Dr. Nacke recommended continued use of the ring splint. *Id.* On April 20, 2018, Petitioner followed up with Dr. Nacke reporting he was doing well and had stopped wearing the splint but that he still experiences pain and loss of range of motion. At that time, Dr. Nacke found Petitioner reached maximum medical improvement and he released him from care without restrictions. *Id.*

On August 17, 2023, Petitioner underwent a functional capacity examination (FCE) at Orland Park Orthopedics which found decreased left grip strength. (Px28, p. 2). Petitioner testified he pursued an FCE because he was having issues while playing basketball, lifting weights, and driving for prolonged periods of time. The Arbitrator notes the FCE doesn't indicate whether the

[1] Petitioner incorrectly testified that he saw Dr. Blair Rhode.

loss of grip strength involves solely the left fifth digit of the hand or involves the entire hand. The Arbitrator further notes Dr. Nacke offered no opinions as to the existence of loss of strength in the left hand due to this injury or whether the cause of the loss of strength in the hand, if any, or whether the loss of strength involves solely the left firth digit.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law 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 the injury, the Arbitrator finds as follows:

The Arbitrator finds Petitioner has proven by a preponderance of the evidence that Petitioner's left hand condition is causally related to the injuries he sustained on February 12, 2017. All medical evidence shows Petitioner injured his left hand at work on February 12, 2017. Petitioner testified to sustain an injury to his left hand at work on February 12, 2017. No evidence was presented which conflicts with the medical records and Petitioner's testimony.

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

The Arbitrator finds Petitioner's treatment to be reasonable and necessary. Petitioner submitted balances of $2,746.10 for Northwestern Medicine (Px10), $3,224.57 for Orland Park Orthopedics (Px11), and $111.00 for Hinsdale Orthopaedic Associates (Px12). Based on the information set forth in Respondent's Exhibits 2 and 3, the Arbitrator finds that the balances of Northwestern Medicine and Hinsdale Orthopaedic Associates were paid. Based on Respondent's Exhibit 1, the Arbitrator finds that payments were made for the following dates of service April 13, 2017, April 27, 2017, and May 5, 2017 to Orland Park Orthopedics. Based on Petitioner's Exhibit 11, there are two remaining unpaid dates of service for treatment at Orland Park Orthopedics, March 3, 2017 ($468.60) and May 5, 2017 ($468.60). As such, the Arbitrator orders Respondent to pay to the provider, Orland Park Orthopedics, the remaining outstanding medical

services as set forth in Petitioner's Exhibit 11, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act if still due and owing and not to exceed $937.20. Respondent shall indemnify and hold Petitioner harmless from any claims for reimbursement for those bills that were paid by Respondent's health plan.

With respect to issue "L", the nature and extent of the injury, the Arbitrator finds as follows:

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

(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.

Under Section 8.1b(b)II), no AMA impairment rating was submitted into evidence so the Arbitrator gives this factor no weight in determining permanent partial disability.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes Petitioner worked as a Shift Supervisor for Respondent. As part of his job duties, Petitioner could be exposed to altercations such as the one which caused his injury. As such, the Arbitrator gives this factor some weight in determining permanent partial disability.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Generally, individuals nearing

the end of their work life expectance tend to experience greater difficulty recovering from the effects of their injuries and are more prone for reinjury.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes Petitioner was able to return to work in their prior capacity for Respondent and later received a promotion and higher salary. As such, the Arbitrator gives this factor some weight in determining permanent partial disability.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner underwent a pinning procedure and removal of said pin and occupational therapy. Petitioner was released to full duty work without restrictions but continued to report loss of strength, pain, and issues returning to sports. Petitioner underwent an FCE because of the issues he was experiencing. The FCE noted decreased strength consistent with his trial testimony. 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 a loss of use of 40% of the left fifth finger, pursuant to §8(e) of the Act which corresponds to 8.8 weeks of permanent partial disability benefits at a weekly rate of $775.18.

By: */o/ Frank J. Soto* November 20, 2023
Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC001338
Case Name	Rusty Jester v. FedEx
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0245
Number of Pages of Decision	5
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Jennetten
Respondent Attorney	Timothy Alberts

DATE FILED: 5/28/2024

/s/Marc Parker, Commissioner
Signature

DISSENT: /s/Marc Parker, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rusty Jester,

Petitioner,

vs. No. 22 WC 1338

FedEx ,

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 jurisdiction, accident, causal connection, permanent disability, penalties and attorney's fees, and any and all issues and objections raised by Respondent at arbitration, and being advised of the facts and law, reverses the Decision of the Arbitrator.

STATEMENT OF FACTS:

Petitioner, a 39 y/o package handler at the Morton FedEx facility, testified he brought bottled water to work every day to prevent dehydration. His duties included taking parcels coming down a conveyor line and placing them into vehicles. On December 24, 2021, while he was rushing to do his work, Petitioner grabbed what he thought was his water bottle in his work space. He took a drink from it but did not swallow, and immediately spat it out when he realized it wasn't water. He felt an instant burning sensation in his mouth. Petitioner's supervisor sent him to the hospital where his mouth was rinsed and he was given pain medication. His discharge diagnosis was corrosion of the mouth and pharynx.

On December 29, 2021, Petitioner followed up with Dr. Thomas Luft, his primary physician. Dr. Luft diagnosed Petitioner with chemical burns to the mouth, and recommended an anesthetic-containing mouthwash. and referred Petitioner to a specialist. On January 6, 2022, Petitioner saw an otolaryngologist Dr. Cynthia Go, whom Dr. Luft had referred. Petitioner informed Dr. Go that his tongue and mouth pain had improved, although he still had some burns and inflammation under his tongue. Dr. Go noted that most of Petitioner's oral mucosa had completely healed, except for some ulceration in the floor of his mouth. She recommended Petitioner avoid spicy foods and carbonated drinks, but otherwise eat a normal diet and use Peridex rinse to help heal his mouth. After that visit, Petitioner sought no further treatment for his mouth injuries. At arbitration, Petitioner admitted he no longer had any pain in his mouth, although it felt scarred and he still experienced altered taste and sensitivity to temperature.

Petitioner also testified that the facility in which he worked was secure and not open to the public. After the incident, he spoke with several of the truck drivers, but none knew what was in the bottle or how it came to be in the area. Craig Testa, one of Respondent's managers, testified that although package handlers are free to eat or drink during their shifts, Respondent does not monitor that. He also testified that Petitioner's job requirements did not explicitly or incidentally require him to drink anything as part of his duties. Mr. Testa believed the bottle came off of one of the contractor's trucks, but none of the drivers knew what was in the bottle or why it had been in the area.

The Arbitrator found Petitioner proved accident and that his injuries arose out of and in the course of his employment. The Arbitrator believed Petitioner's workplace conditions significantly contributed to his injuries, because he was exposed to a hazardous chemical in a secure workplace area, and because it was "foreseeable" that Petitioner could pick up and drink from that bottle.

CONCLUSIONS OF LAW:

The Commission views the evidence differently than the Arbitrator, and finds Petitioner failed to prove accident. While there is no dispute that Petitioner's injuries occurred *during the course of* his employment, we find Petitioner failed to prove his injuries *arose out of* his employment.

For an injury to arise out of one's employment, it's origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52 (1989). To determine whether a claimant's injury arose out of their employment, the risk to which they were exposed must first be categorized. Illinois courts have categorized the risks to which employees may be exposed into three general groups: (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. *First Cash Financial Services v. Industrial Comm'n,* 367 Ill. App. 3d 102

(2006); *Illinois Institute of Technology Research Institute v. Industrial Comm'n,* 314 Ill. App. 3d 149 (1st Dist., 2000).

Employment risks are inherent in one's employment and include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. *Illinois Institute of Technology Research Institute,* 314 Ill. App. 3d at 162. A risk is incidental to one's employment when it is connected to what the employee has to do in fulfilling his duties. *Autumn Accolade v. Illinois Workers' Compensation Comm'n,* 2013 IL App (3d) 120588WC.

We find that Petitioner's injuries were not caused by an employment risk – a risk distinctly associated with his employment, which was to handle packages and load them onto trucks. No work related task contributed to Petitioner's risk of injury. Craig Testa testified that Petitioner's job requirements did not explicitly or incidentally require him to bring water to work or drink it as part of his duties; doing so was solely Petitioner's own choice. We find there was no evidence that the injuries Petitioner sustained were distinctly associated with his employment as a package handler. As such, Petitioner has not proved his injuries were the result of an employment risk.

Personal risks include exposure to elements that cause nonoccupational diseases and personal defects or weaknesses. Examples include falls due to a bad knee or an episode of dizziness. *Illinois Consolidated Telephone Co. v. Industrial Comm'n,* 314 Ill. App. 3d 347 (5th Dist., 2000, Rakowski, J., specially concurring); *Illinois Institute of Technology Research Institute,* 314 Ill. App. 3d, at 162-163). In the present case, no evidence was presented which would suggest that any nonoccupational disease, personal defect, or weakness contributed to Petitioner's injuries. We therefore find this case does not involve a personal risk.

The Commission thus finds the appropriate analysis of Petitioner's injury falls under the purview of neutral risk. Injuries from neutral risks generally do not arise out of the employment, and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n,* 407 Ill. App. 3d 1010 (1st Dist., 2011). The increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Potenzo v. Illinois Workers' Compensation Comm'n,* 378 Ill. App. 3d 113 (1st Dist., 2007).

We find that Petitioner's risk of picking up and drinking from a bottle left by an unknown individual, which was similar in appearance to one Petitioner brought to work, and which contained an unknown toxic chemical, was not a qualitative or quantitative greater risk than would be faced by member of the general public. Although Petitioner's injuries occurred in a facility with limited access, evidence showed that other individuals, including truck drivers and contractors, also had access to the facility. However, there is no evidence to show who placed the water bottle in the area and the liquid in the bottle was never identified or shown to be something which Respondent might or would utilize I the course of its business of receiving and shipping

packages. Petitioner's "guess" – that the liquid was a toxic chemical used to remove corrosion from the battery terminals of the trucks and thus likely brought into the area by a truck driver – was speculative and unsupported by any evidence of record. We therefore find that the neutral risk to which Petitioner was exposed was not compensable under the Act.

For these reasons, the Commission finds Petitioner failed to prove that his accident arose out of his employment. The decision of the Arbitrator is reversed, as are all benefits awarded to Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2023, is reversed.

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.

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

May 28, 2024
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o-05/09/24
068

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

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

DISSENT

I respectfully dissent from the Decision of the majority. I would have affirmed and adopted the Arbitrator's decision in its entirety, for the reasons stated therein.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC015418
Case Name	Robert Burke v. Johnson Controls, Inc.
Consolidated Cases	21WC015421;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0246
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Ashley Campbell, Rory McCann

DATE FILED: 5/29/2024

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Burke,

Petitioner,

vs. No. 21 WC 15418

Johnson Controls, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects the Arbitrator's Decision to cite to the deposition testimony of Dr. Garrigues as Respondent's Exhibit 6. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 8, 2023, is hereby corrected, affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed in the consolidated case No. 21 WC 15421. 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.

May 29, 2024
SJM/sk
o-5/8/2024
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	21WC015418
Case Name	Robert Burke v. Johnson Controls, Inc.
Consolidated Cases	21WC015421;
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Lauren Witkowski, Robert Maciorowski

DATE FILED: 5/8/2023

/s/Gerald Napleton, Arbitrator

Signature

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MCHENRY)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Burke
Employee/Petitioner

Case # 21 wc 015418

v.
Johnson Controls, 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 W. Napleton, Arbitrator of the Commission, in the city of Woodstock, on 12/7/22. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, 1/15/2021, Respondent was operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $112,223.28 ; the average weekly wage was $2,158.14.

On the date of accident, Petitioner was 48 years of age, married with one child under 18.

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

Respondent is entitled to a credit for all medical paid under Section 8(j) of the Act.

ORDER

See Order in Companion Case – 21WC015421

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 *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 of 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

May 8, 2023

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT BURKE,	)	
Petitioner,	)	
	)	**NO. 21 WC 015418**
v.	)	**21 WC 015421**
	)	
JOHNSON CONTROLS, INC.,	)	
Respondent,	)	

DECISION OF ARBITRATOR
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Robert Burke, had three consolidated claims pending against Respondent, Johnson Controls: 21WC015418 and 21WC015421involve the right shoulder; and 22WC5709 involves the left shoulder. Upon Respondent's unopposed motion, claim 22WC5709 was severed from this proceeding. This decision involves claims 21WC015418 and 21WC015421 only.

FINDINGS OF FACT

Testimony of Petitioner and Medical Treatment

Petitioner testified that he has worked as a sprinkler fitter for 24 years as a member of Sprinkler Fitters' Local Union 281. (Tr. P. 7). For the past five years, Petitioner has been employed as a foreman with Respondent, Johnson Controls. (Tr. P. 7-8). As a sprinkler fitter, Petitioner install overhead fire protection systems, using wrenches and drills to install pipes, valves, sprinkler heads, and fire pumps. (Tr. P. 8-22). Photographs received into evidence depict the size and type of materials used by Petitioner as a sprinkler fitter. (Tr. P. 9, PX8). The material and equipment weigh from several pounds to more than one hundred pounds. (Tr. P. 12-20, 28-29, PX8). When installing pipe, sprinkler fitters will bend over and pick up a piece of pipe, which vary in lengths up to twelve feet, and hold the pipe overhead while attaching it to a fitting. (Tr. P. 27-29, PX8). A hanger is attached to the ceiling using a Hilti drill and a pipe wrench is used to tighten the pipe sufficiently to hold 200 psi of water pressure. (Tr. P. 29, PX8). This process is repeated 80-125 times in an average workday. (Tr. P. 30, PX8). Petitioner spends 30% of his time walking and standing and 70% of his time on ladders or scaffolds. (Tr. P. 25).

Petitioner testified concerning the January 15, 2021 work incident (21WC015418). (Tr. P. 38). Petitioner was working at the Albion Highland Park project on January 15, 2021 for Respondent, connecting a fire pump with co-workers Jim Kay and Ernie. (Tr. P. 39-40). Petitioner tripped on a piece of conduit and hit his right shoulder on a valve. (Tr. P. 40, 61).

After the incident, Petitioner notified his superintendent, Rick Nelson, that he fell in the pump room, hurt his shoulder and was sore. (Tr. P. 40, 61, 66). Petitioner did not go to a doctor or seek any medical treatment. (Tr. P. 40-41). He continued working in a full duty capacity for Respondent until the ladder incident on May 5, 2021. (Tr. P. 40-42).

Petitioner testified that he was unaware if Mr. Nelson filled out an accident report for the January 2021 incident. During cross-examination, Petitioner acknowledged his employer has a call-in number to report injuries and "request treatment." (Tr. P. 61-62). Petitioner did not call this

number reporting the injury nor requesting treatment. (Tr. P. 61, 66, 112). Petitioner further acknowledged that he was in a lot of pain after this incident and had difficulty lifting his shoulder (Tr. P. 62). Petitioner testified that his pain in his right shoulder subsided but was "a little cumbersome still." (Tr. P. 62). Petitioner acknowledged that he filled out an accident report for his May 5, 2021 injury and, concerning the January 2021 injury, elaborated (Tr. P 66) that he was "in a little pain, and I figured it was going to be okay. So I didn't report it. I did report it to Rick [Nelson], but it wasn't like through the, you know, safety number that we have, you know, on our company phones." (Tr. P. 68-69, 70, 114-115, RX2).

Petitioner testified that he is left-handed, and that prior May 5, 2021, he did not have a history of medical treatment, nor did he miss any time from work, due to his right shoulder. (Tr. P. 31, 55).

Concerning 21WC015421: On May 5, 2021, Petitioner was working at Woodfield Mall installing a sprinkler system for a new tenant. (Tr. P. 30-31). On that particular day, Petitioner was unloading pipe and materials including a 16-foot ladder and threading machine with his Superintendent, Rick Nelson. (Tr. P. 30-33). While moving the ladder alone and attempting to avoid light fixtures in the ceiling, Petitioner felt a pop in his right shoulder that hurt. (Tr. P. 34-36, 109).

Petitioner testified he notified his Superintendent, Rick Nelson, the following day. (Tr. P. 36, 111). He was then directed to an occupational clinic by his employer. (Tr. P. 36). Petitioner was originally seen on May 11, 2021 at Concentra and provided a history recorded as, "Injury date is 1/15/2021 sometime in mid-January, pain after falling onto right shoulder, reports pain waxing and waning, go somewhat better, pain got immediately worse when he was lifting a ladder with two hands and stumbled with the ladder and as he caught the ladder he got a lot of pain in his right shoulder, which he then reported the incident on 5/6/21 and the incident in mid-January to the employer." Tr. P. 76. The Chief complaint states "patient presents today with right shoulder injury moving a ladder – previous fall on same shoulder in January," with a May 6, 2021 self-reported date of injury listed. (PX1, P. 76). Intake forms indicate that Petitioner stated, "I was moving a heavy ladder and hurt my right shoulder. Had prior injury in right shoulder in January." (PX1, P. 67). Petitioner relayed that the injury occurred at work and that he had not received any prior treatment and did not take any medications. (PX1, P. 66-67).

The occupational osteopath at Concentra spoke to Petitioner's employer, specifically Brien Nuelk and Christine Drapper, concerning Petitioner's report of injury. (PX1, P. 58). An additional history was obtained and the occupational clinic amended its notes to reflect Petitioner injured his right shoulder "sometime in mid-January," with "pain after falling onto right shoulder, reports pain waxing and waning, got somewhat better, pain got immediately worse when he was lifting a ladder with two hands and stumbled with the ladder and as he caught the ladder he got a lot of pain in his right shoulder which he then reported the incident on 5/6/2021". (PX1, P. 76). A drug and alcohol screen were completed, which was negative. (PX1, P. 53). X-rays revealed no fracture and no evidence of inflammatory or erosive arthritis. (PX1, P. 57). An examination of the right shoulder demonstrated limited range of motion and the empty can test was positive. (PX1, P. 75). Petitioner was diagnosed with a sprain/contusion of his right shoulder, prescribed physical therapy and medication, and instructed to return to work light duty with no reaching above shoulder height, no lifting greater than 10 lbs., no ladder climbing, and no use of vibratory/power/impact tools. (Tr. P. 72, PX1, P. 56, 60, 72).

Respondent accommodated Petitioner's restrictions and he returned to work in a light duty capacity. (Tr. P. 42-43). Petitioner also began physical therapy at Concentra. (Tr. P. 44, 45, 72-73, PX1). Petitioner returned to Concentra as directed on May 13, 2021. (Tr. P. 44, PX1, P. 31). The history contained in the notes indicate Petitioner was "injured on 01/2021, 5/6/2021

reaggravated it." (PX1, P. 36). Petitioner was instructed to continue light duty and physical therapy, as well as prescribed Tramadol for pain. (PX1, P. 34, 37-38). An MRI was discussed. (PX1, P. 43).

On May 20, 2021, Petitioner was again evaluated at Concentra. (PX1, P. 8). Notes from that visit indicate Petitioner was working modified duty, was participating in physical therapy and Petitioner was instructed to continue with both. (PX1, P. 8-11).

On May 26, 2021, Petitioner sought care with his primary care physician, Dr. Jay Virchow, complaining of shoulder pain from work with numbness and tingling. (Tr. P. 46, PX2, P. 6). Petitioner testified he told Dr. Virchow of the fall in January and the May ladder-related incident. (Tr. P. 46). Dr. Virchow noted Petitioner fell on a valve in mid-January and injured his right shoulder and that it was initially sore, but he did not report it or seek medical care. (Tr. P. 46, PX2, P. 8). Petitioner told Dr. Virchow that "it continues to hurt him on the job," as "he almost dropped a ladder last week." (PX2, P. 8). Petitioner testified that he was taken off work from June 8, 2021 until he was seen by an orthopedic surgery

Dr. Virchow ordered an MRI that was completed May 26, 2021. (Tr. P. 46-47, PX2, P. 10). The MRI revealed a full thickness tear of the rotator cuff along with a suspected partial tear of the bicep tendon and subscapularis tendon along with hypertrophy of the AC joint and degenerative cystic change in the humeral head. (PX2 P. 10).

Petitioner returned to Concentra on June 1, 2021 and informed the Clinic he was evaluated by his primary care doctor and had an MRI. (Tr. P. 47, PX1, P. 102). Notes from that visit indicate Petitioner was working modified duty and had physical therapy and was "approximately 50% of the way toward meeting the physical requirements of his job." (PX1, P. 108-109). Petitioner was instructed to follow up with his primary care doctor for work status and his case was closed with the occupational clinic. (Tr. P. 47, PX1, P. 102-104).

Petitioner returned to Dr. Virchow on June 8, 2021 and was placed on light duty restrictions and referred to an orthopedic surgeon, Dr. Gregory Drake. (Tr. P. 47, 51, PX11).). PX11, a note from Dr. Virchow, states "Mr. Burke has sustained a significant injury to his right shoulder resulting in muscular and tendon damage. He will require work limitations/light duty until he is seen by an orthopedic surgeon and a treatment plan is devised."

On July 23, 2021, Petitioner was evaluated by Dr. Drake from Core Orthopedics & Sports Medicine. (Tr. P. 51, PX3, P. 5). The chief complaint was listed as right shoulder pain. (Tr. P. 46, PX3, P. 5). The history noted was Petitioner was trying to hold a ladder from falling and as he tried to stabilize it, he felt a pull at his right shoulder. (PX3, P. 5). The date of injury was noted as May 5, 2021. (PX3, P. 31). Dr. Drake reviewed the May 26, 2021 MRI results and recommended physical therapy, a cortisone injection and, if conservative treatment failed, a reverse total shoulder arthroplasty. The doctor's impression was complete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, with a full thickness rotator cuff tear with significant tendon retraction and muscle atrophy. (Tr. P. 51-52, PX3, P. 8

Petitioner came under the care of Dr. Anthony Romeo on August 25, 2021. Office notes from that visit indicate Petitioner reported shoulder pain in January when he tripped and fell at work, then increased pain on May 6, 2021 when trying to move a heavy ladder at work. (PX4, P. 23). Dr. Romeo reviewed the MRI. Petitioner and Dr. Romeo discussed a potential plan of care. Dr. Romeo noted the severity of the tear and the potential unpredictability of successful surgical repair in his case. PX4.

Petitioner testified that he advised Dr. Romeo that as a result of his January incident that he noticed some weakness and soreness but that it was starting to get better but that the later incident was "the straw that broke the camel's back type of thing. I'm not sure. But, yes, I told him that I was sore then, yes, I hurt it again, and you know, I definitely threw in the towel and decided to go

get it looked at that point." (Tr. P. 80). Petitioner was diagnosed with a full thickness rotator cuff tear and a tear of the biceps tendon. (PX4 P. 25). A reverse total shoulder arthroplasty was prescribed along with light duty restrictions. (PX4, P. 25, 27).

Petitioner was seen by Dr. Grant Garrigues at request of Respondent pursuant to Section 12 of the Act. Petitioner saw Dr. Garrigues on August 25, 2021. On cross-examination, Petitioner read the history of Dr. Garrigues' report into the record. Tr. P. 84-85. Petitioner testified that after his January incident that when doing heavy lifting at work he would feel a little bit of pain or soreness. Tr. P. 85. Petitioner testified that after his January incident and prior to his May incident he was getting better but his shoulder would be sore at times with overexertion or would "act up." Tr. 85.

Petitioner testified Respondent has not authorized the right shoulder surgery recommended by Dr. Romeo, and Petitioner remains off work and under the care of Dr. Romeo for his left shoulder injury that is the subject of claim 22WC5709. (Tr. P. 54, 89-90). At the time of hearing, Petitioner testified his right shoulder is weaker and he still experiences irritation and soreness in his right shoulder. (Tr. P. 54).

Testimony of Brien Nuelk, Respondent's Workers' Compensation Manager

Brian Nuelk testified on behalf of the Respondent. Mr. Nuelk has worked for Respondent as its workers' compensation manager for 25 years. Tr. P. 119. He testified that on May 11, 2021 he had a conversation with Petitioner which was memorialized in email (Tr. P. 119, RX3). The conversation involved Petitioner stating he had fallen and injured his right shoulder in January of 2021, did not report the incident to anyone or the injury reporting line and has lived with discomfort and continued to work while nursing it. (Tr. P. 120). Mr. Nuelk then stated that Petitioner advised him of a May 6th injury at the Woodfield Mall while moving a ladder, denied past medical treatment, and requested to see a physician. Tr. P. 120. Mr. Nuelk testified that he was advised to see an orthopedic physician by his mother to which Mr. Nuelk suggested an occupational clinic. He continued to testify that Petitioner wished to avoid "a cut-happy physician" and that he believed all he needed was some therapy. Id. Mr. Nuelk acknowledged that he was called by Petitioner on his cell phone and not the injury reporting line and that Petitioner needed a new company phone with the injury reporting numbers in it, so Petitioner was given Mr. Nuelk' s cell phone number by Superintendent Rick Nelson. Tr. P. 121. No further conversations with Petitioner happened after May 11, 2021. Mr. Nuelk testified that RX2 is a copy of the incident report filled out by Petitioner which notes that Petitioner did not report the injury to his shoulder in January when he fell. Tr. P. 122.

On cross-examination, Mr. Nuelk read the bottom of RX3 but seemingly denied that RX3 stated that Petitioner was working at the Woodfield mall on Thursday 5/6/21 and moved a large ladder and almost dropped it. Tr. P. 125. Mr. Nuelk acknowledged that Rick Nelson is Petitioner's superintendent and oversees the foremen and journeymen that work for Respondent. Tr. P. 127-128. Mr. Nuelk acknowledged that he did not speak with Rick Nelson about Petitioner and was unable to advise if anyone at Respondent did so. Tr. P. 128. Mr. Nuelk was provided with a copy of the collective bargaining agreement between Respondent and Petitioner's labor union which stated that contractors must notify the union of any injuries that occur on the job. Tr. P. 131. Mr. Nuelk testified that he was unaware of any evidence that Respondent notified the union. Tr. P. 133.

Testimony of Dr. Anthony Romeo, Petitioner's Treating Surgeon

Petitioner presented the testimony of Dr. Romeo, a Board-Certified Orthopedic Surgeon. (PX9, P. 4). Petitioner first saw Dr. Romeo on August 25, 2021 where Petitioner gave a history of a

right shoulder work-related injury on January 15, 2021 when he fell but continued working until a second event on May 6, 2021 moving a ladder which caused increased pain. PX9, p. 6. After his second incident, Petitioner complained of persistent shoulder pain and sought orthopedic evaluation. Id. In August of 2021 Petitioner was complaining of discomfort, inability to play sports, and difficulty reaching, lifting, and sleeping. Id. Dr. Romeo's initial exam revealed weakness in all different planes of motion and a number of positive findings. RX9 at 7. Strength level was noted as 2 out of 5. RX9 at 8.

Dr. Romeo noted a lack of improvement with conservative treatment, significant weakness with three of his tendons, and, considering Petitioner's occupation, recommended surgical intervention to determine if his tendons are repairable or not. RX9 at 9. If repairable, a complex rotator cuff repair would be performed but noted a potential 50% failure rate at two years post-surgery. Id. Otherwise, a reverse shoulder replacement would be recommended.

Dr. Romeo testified that, based on the examination findings and history provided, and due to Petitioner being able to return back to work after his January incident without missing work, that the May 6, 2021 incident led to his disability and impairment that prevents him from returning back to work. He noted Petitioner works a very heavy-duty job requiring lifting in excess of 100lbs which can lead to degenerative changes. RX9. At 16. He repeated that the event of May 2021 led to Petitioner not being able to perform the essential responsibilities of his job. RX9. At 17. He remains unable to work in a full duty capacity as a sprinkler fitter. Id. Dr. Romeo did not at any time notice any malingering or secondary gain issues. RX9. At 21.

On cross-examination, Dr. Romeo acknowledged that he has not reviewed any prior treating records. Tr. At 23. He acknowledged that the job description of a sprinkler fitter provided to him was viewed for the first time at his deposition. RX9. At 23. Dr. Romeo was unable to ascertain what specific duties Petitioner performed in the job description letter. RX9. At 26. Dr. Romeo testified that the MRI films demonstrated substantial retraction but that the rotator cuff tear did not predate May 6th. RX9 at 33. Dr. Romeo stated that the MRI findings suggest preexisting rotator cuff problems with muscle atrophy, which takes three or more months to occur, with evidence of an injury of May 2021 that led to the impairment and dysfunction he presented with. RX9 at 33-34. The injury was described as "acute-on-chronic." Id. He continued to state that based on the MRI findings, it is more likely true than not that he had a preexisting tear of his rotator cuff even before January 2021 but despite that was able to work full duty. RX9 at 36. Dr. Romeo acknowledged that it would be appropriate to label Petitioner's January 2021 incident as "acute-on-chronic" if Petitioner was unable to work full duty after his January 2021 incident. RX9 37-38.

On re-direct Dr. Romeo testified that joint effusion is indicative of an acute injury. RX9 at 59. He further noted that the MRI report noting small to moderate joint effusion and fluid in the subacromial bursa is indicative of an acute injury. Id. Dr. Romeo acknowledged on re-cross that it is possible to have joint effusion on a chronic condition (RX9 at 60) but that if there was no effusion at all it would definitely be a chronic condition. RX9 at 61.

Testimony of Dr. Grant Garrigues, Section 12 Examiner

Respondent presented the evidence testimony of Dr. Grant Garrigues, a board-certified orthopedist. Dr. Garrigues testified that Petitioner gave a history noting no prior shoulder issues prior to January 2021 and tripped and fell on a control valve impacting his right shoulder which was very painful. Dr. Garrigues testified that Petitioner stated it was very pain painful and caused difficulty moving his arm with more pain the next day and had to use his left arm to move his right arm for a few days, but he slowly got better but was sore while doing heavy lifting . RX5 at 10-11. The history from Petitioner further mentioned on May 6, 2021 Petitioner injured himself moving a

16-foot reinforced ladder that was quite heavy which caused increased pain. RX5 at 11. Petitioner attempted to continue to work but was unable and notified his supervisor. Id.

Dr. Garrigues testified that the May 26, 2021 showed a massive rotator cuff tear with retraction to the glenoid and fatty infiltration, hypertrophy of the teres minor, and tears of the subscapularis and biceps tendon. RX5 at 19. Dr. Garrigues summarized his review of the medical records from Occupational Health and the MRI. RX5 at 17-18. Dr. Garrigues performed a physical exam which revealed atrophy of the supraspinatus and infraspinatus on the right side, a Popeye sign, excellent range of motion, diminished strength, abnormal belly press, and positive Hawkins and O'Brien's test. RX5 at 18-19. Imagine done at the time showed mild osteoarthritis and a little calcium deposit. RX5 at 19. Since the May 2021 ladder accident, Petitioner has not worked full duty, but is working modified duty for Respondent. (RX6, P. 10-12).

Dr. Garrigues assessed Petitioner with a right shoulder chronic rotator cuff tear along with osteoarthritis of the glenohumeral and acromioclavicular joints on the right side. RX5 at 20. Dr. Garrigues opined that the fatty infiltration of the rotator cuff, severe atrophy of the muscle, and hypertrophy of teres minor indicate a long-standing tear that he was accommodating to allow him to work in an overhead job. RX5 at 20-21. Dr. Garrigues recommended a course of treatment consisting of nicotine cessation, strength exercises, and self-directed compensation. RX5 at 21. He did not recommend a course of physical therapy, further diagnostics or other treatment as Petitioner is already compensating well. Id.

Dr. Garrigues further stated that fatty infiltration takes at least six months to occur and that there is no way Petitioner's May 6, 2021 injury could have caused the changes shown on the May 26th 2021 MRI. RX5 at 22. He noted significant atrophy and hypertrophy and opined that these issued predated May 26, 2021 but at least a year. Id. Dr. Garrigues denied that Petitioner could have aggravated or furthered his condition. Id. Dr. Garrigues does not believe Petitioner's rotator cuff is repairable to a functional level. RX5 at 23.

Dr. Garrigues opined that Petitioner does not require work restrictions as he is high functioning as of the date of his exam and he is not in danger to himself or others if he performs full duty work. RX5 at 25.

On cross-examination, Dr. Garrigues acknowledged that he could, hypothetically, change his opinion if he was not provided with relevant records. RX5 at 26. He stated that his opinion that Petitioner's smoking was "the most likely cause" of his rotator cuff tear despite smoking not appearing in the report he previously authored as the cause. RX5 at 27-28. Dr. Garrigues testified that overhead lifting and overhead repetitive motions are a very rare cause of the development of rotator cuff tears. RX5 at 28.

Dr. Garrigues acknowledged he was not provided any records evidencing rotator cuff complaints prior to 2021 and that he has not received evidence that Petitioner had any symptomatic degenerative changes prior to 2021. RX5 at 28, 31. Dr. Garrigues acknowledged that an accident can cause asymptomatic degenerative changes to become symptomatic. RX5 at 31. Dr. Garrigues acknowledged that Petitioner got better after his January 2021 incident and before the May 6 2021 incident. RX5 at 36. Dr. Garrigues testified that the May 6 2021 incident caused a temporary aggravation of his pain symptoms (RX5 at 37) but acknowledges that he did not use the word "temporary" in his report but that the entire report suggests temporary exacerbation of a chronic issue. RX5 at 40.

Dr. Garrigues admitted that he was not provided with Petitioner's job duties but stated that pipefitters typically do frequent overhead work. RX5 at 44. Dr. Garrigues acknowledged that he was unaware of Petitioner's treatment with Dr. Romeo but testified that it would be unlikely that Dr. Romeo's evaluation would have changed his opinion. RX5 at 48. Dr. Garrigues further acknowledged that he was unaware of Petitioner's treatment with Dr. Drake at Core Orthopedics

but stated it would not have changed his opinion. RX5 at 49. Dr. Garrigues did not note any malingering or secondary gain issues with Petitioner. RX5 at 64.

Dr. Garrigues testified that, "This is a very clear case, a chronic pathology that has absolutely nothing to do with the alleged work-related incident. This is the most clearcut workers' compensation case that's not work-related that I've ever seen. It's hilarious to me that we're spending all this time talking about it. It has absolutely nothing to do with any of the records that I didn't have or your cover letter. It's absolutely clear cut from the MRI and physical exam and history. There's really no question marks there." RX5 at 64-65.

CONCLUSIONS OF LAW

As a threshold matter, several evidentiary objections were made at hearing with the Arbitrator's ruling reserved. Further, the Arbitrator wishes to clarify a previous ruling on Petitioner's Exhibit 10, a copy of the Collective Bargaining Agreement between Respondent and Petitioner's Union. The exhibit itself remains rejected but the Arbitrator allowed its use during the cross-examination of Brian Nuelk. PX10's use during the cross-examination of Brian Nuelk remains relevant, germane, and admissible to the issue of notice and Mr. Nuelk' s credibility.

Petitioner's counsel objected to RX5, Dr. Garrigues' Section 12 report, on the basis of hearsay. The Arbitrator sustains Petitioner's hearsay objection and RX5 is excluded.

Petitioner's counsel moved to strike the testimony of Dr. Garrigues (RX6) based on an allegation that Respondent's counsel did not provide the IME cover letter with a medical summary before his deposition under Wilson v. Clark 84 Ill.2d 186 (1981). The deposition transcript (RX6) notes a conversation between Respondent's counsel and Petitioner's counsel which discusses pre-deposition correspondent between their respective offices asking for the questions asked in the Section 12 cover letter. At hearing, Respondent's counsel stated that he asked counsel if he wanted to continue the deposition, but Petitioner's counsel declined. Tr. P. 151. That does not appear in the RX6 deposition record, however. Respondent's counsel continued that the medical records are the medical records and the Section 12 examining doctor identified what he reviewed. Respondent's counsel said his office advised Petitioner's office of the four questions he asked in his cover letter.

The Illinois Supreme Court has adopted Federal Rule of Evidence 703 which permits an expert witness to give opinion on the basis of facts which have not been admitted into evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. Id. Further, Federal Rule of Evidence 705 was adopted which allows an expert to give his opinion without initially disclosing the facts underlying it unless the court requires otherwise. Id. The expert may be required to disclose the underlying facts or data on cross-examination. Id.

The Arbitrator believes Dr. Garrigues' testimony is clear in terms of what records he used to come to his conclusions. There is not enough evidence in the record to suggest that Dr. Garrigues relied on any undisclosed evidence that would cause his testimony to be inadmissible under Rules 703 or 705 and Wilson v. Clark. Petitioner's motion to strike Dr. Garrigues' testimony is overruled.

Petitioner objected to RX7, a medical payment history, on the grounds of hearsay and foundation. Without the benefit of a witness laying the proper foundation and without a hearsay exception argued, the Arbitrator sustains the objection and RX7 is excluded

Regarding Issue (C,) whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, Issue (F) whether Petitioner's present condition of ill-being is causally related to the injury, and Issue (O) regarding prospective medical treatment, the Arbitrator finds as follows:

Regarding case 21WC015418 concerning the January 15, 2021 accident date, the Arbitrator notes that AX2, the signed and completed request for hearing sheet, does not dispute the occurrence of an accident that arose out of and in the course of employment. Case 21WC015421 concerning the May 5, 2021 date of accident disputes an accident occurring based on Petitioner's pre-existing condition with similar symptoms as evidenced in AX1. This is more of a causation dispute than a dispute that an accident occurred. There's no evidence in the record that suggests that Petitioner did not lift the ladder which resulted in allegedly increased symptoms and subsequent reporting of injury. Petitioner was on the clock, at his job site, and engaged in his job duties when he experienced pain after moving the ladder. He then sought prompt medical treatment. The Arbitrator finds that Petitioner sustained an accident that arose out of an in the course of his duties.

Turning to the issue of causation, the record contains evidence that Petitioner potentially suffered from a long-standing but arguably asymptomatic issue in his right shoulder prior to both dates of accident alleged. When an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. Sisbro v. Industrial Comm'n 207 Ill. 2d 193, 215 (2003). The Commission must decide whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. Id. in pertinent part. If there is an adequate basis for finding that an occupational activity aggravated or accelerated a preexisting condition, and, thereby, caused the disability, the Commission's award of compensation must be confirmed. Id.

Proof of good health prior to an accidental injury and a subsequent condition of ill-being which develops immediately after the accident creates an issue of fact as to the causal relationship between the injury and the condition of ill-being. Board of Education v. Industrial Comm'n, 96 Ill.2d 239 (1983). If the injury is a contributing factor, compensation will be allowed even if natural degenerative changes or other factors, such as smoking, contributed to claimant's disability. Id. citing Azzarelli Construction Co. v. Industrial Comm'n 84 Ill.2d 262 (1981).

The Arbitrator finds that Petitioner's right shoulder injury is causally connected to his work activities with Respondent. Specifically, the Arbitrator finds that Petitioner was in good health prior to January 15, 2021 and had not sought any medical treatment for his right shoulder. He then suffered an injury to his right shoulder on January 15, 2021 and again on May 5, 2021 where he sustained an injury resulting in a rotator cuff tear or aggravation to a pre-existing tear as a result of his moving a heavy ladder. The Arbitrator finds that Petitioner's right shoulder injury and need for surgery is causally connected to his May 5, 2021 accident

The Arbitrator basis this decision on the credible evidence adduced at trial. Petitioner testified that after the January 15, 2021 fall, he did not need to seek medical care and was able to continue working in a full duty capacity with Respondent doing heavy duty work. Petitioner acknowledged some functional deficits, especially the next day after his accident, but testified to believing his shoulder was improving. It is only after the May 5, 2021 ladder accident that Petitioner sought prompt medical care and was placed on light duty. This was confirmed by the medical records submitted into evidence. The Arbitrator further finds Petitioner's testimony to be credible. Petitioner's testimony is consistent with and corroborated by the medical records submitted into evidence.

The Arbitrator is persuaded by the testimony of Dr. Romeo and finds the testimony of Dr. Garrigues to lack credibility. Dr. Romeo testified credibly to Petitioner's work activities as a cause of his current right shoulder condition and related the start of those increased and continuing complaints to the May 5th ladder incident. Further, Dr. Romeo confirmed that Petitioner's job duties

contributed to cause his right shoulder condition and it was the May 5, 2021 ladder incident that caused the present need for surgery.

The Arbitrator finds that Dr. Garrigues understanding of Petitioner's job duties was vague. Dr. Garrigues testified that he noted that Petitioner was a pipefitter but was not provided with a job description and was unable to produce a job description that he used to base his testimony on. He testified as to knowing Petitioner worked overhead and used a wrench but was unable to elaborate or provide any specifics beyond ambiguous descriptions.

Further, Dr. Garrigues testified that the May 6 2021 incident caused a temporary aggravation of his pain symptoms (despite testifying to not using the word "temporary" in his reports) but then as the deposition nears the end, he goes on to criticize Petitioner's claim being "the most clearcut workers' compensation case that's not work-related" that he's ever seen and, paraphrasing, that it does matter that he has not reviewed potentially relevant documents. RX6 at 64-65.

Lastly, the Arbitrator is puzzled by Dr. Garrigues opinion that Petitioner could work full duty as a sprinkler fitter despite acknowledging that Petitioner has a "massive" rotator cuff tear. Dr. Garrigues notes that Petitioner has been successfully "self-compensating" at work and should continue to do so as surgery may not be helpful. A full duty return to work with an admonishment that Petitioner should continue to self-compensate or avoid tasks that cause pain or support his physical activities with his better arm seems to be at odds.

For these above-mentioned reasons, the Arbitrator finds Dr. Romeo's opinions more credible than those of Dr. Garrigues. Having found the Petitioner to have testified credibly and that Dr. Romeo's opinion was credible and conclusive, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his accident on May 5, 2021.

Based on the above findings, Respondent is ordered to authorize and pay for the recommended surgical repair of Petitioner's right shoulder, along with any reasonable and necessary treatment related thereto.

Regarding issue (E) whether timely notice was given to Respondent, the Arbitrator finds as follows:

Section 6(c) of the Act requires an injured employee to provide notice to his employer within 45 days of an accident. (820 ILCS 305/6c). 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. (820 ILCS 305/6c).

Petitioner credibly testified that he reported both the January 15, 2021 and the May 5, 2021 work accidents to his superintendent, Rick Nelson. Neither party presented the testimony of Rick Nelson to confirm or dispute this testimony. Respondent's witness, Mr. Nuelk, acknowledged that Rick Nelson is Petitioner's superintendent and oversees the foremen and journeymen that work for Respondent. Further, Mr. Nuelk acknowledged that he did not speak with Rick Nelson about Petitioner and was unable to advise if anyone at Respondent did so. Lastly, Respondent did not present any evidence that it was prejudiced by any alleged improper notice. Accordingly, the Arbitrator finds that timely notice of the accident was given to Respondent.

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

The Arbitrator notes Petitioner's submission of the following medical expenses without objection:

Exhibit 5 – AMITA Health Alexian Brothers Medical Group: $392.00
Exhibit 6 – Core Orthopedics: $997.00
Exhibit 7 – Duly Health and Care: $115.00

Having found in favor of the Petitioner on issues of accident and causal connection, and based on the above exhibits, the Arbitrator finds Respondent responsible for medical expenses by the above providers pursuant to Section 8(a) and the Medical fee schedule. Respondent is entitled to a credit for reasonable and necessary bills paid to date.

Regarding issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. Jacobo v. Illinois Workers' Compensation Comm'n, 2011 IL App (3d) 100807WC. When an employer acts in reliance upon responsible medical opinion or where there are conflicting medical opinions, penalties are not normally imposed. O'Neal Bros. Constr. Co. v. Industrial Comm'n 93 Ill.2d 30, 41 (1982). The test is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under the circumstances presented. Consolidated Freightways v. Industrial Comm'n 136 Ill.App. 3d 630, 633 (1985).

Petitioner alleges that the failure of Respondent to provide Dr. Garrigues with all relevant treating records, work status information, and a job description prevents the Arbitrator from finding that Respondent acted reasonably and did not have a good faith basis to rely on the doctor's opinions. The Arbitrator has already discussed the various reasons why the credibility of Dr. Garrigues was deficient. The fact that an Arbitrator may find a doctor's opinion or testimony less credible than that of opposing doctors doesn't make Respondent's reliance on that opinion or testimony unreasonable.

Dr. Garrigues was insistent, perhaps excessively so, that Petitioner's condition is one that was long-standing and not work-related. His explanation regarding the physiology of long-standing, chronic tears and their similarity to Petitioner's MRI did not appear unreasonable on its face. Again, despite the previously mentioned reasons why the Arbitrator ultimately does not find the testimony of Dr. Garrigues to be very credible, the Arbitrator does not find Respondent's reliance on his opinions based on his report and deposition to be unreasonable. Dr. Garrigues even stated that his opinion wouldn't change if provided relevant treating records and further information. While that doesn't help his credibility, at least as far as this Arbitrator is concerned, it is not unreasonable for a Respondent to rely on an imperfect Section 12 report and subsequent deposition.

Penalties are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC015421
Case Name	Robert Burke v. Johnson Controls, Inc.
Consolidated Cases	21WC015418;
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0247
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Ashley Campbell, Rory McCann

DATE FILED: 5/29/2024

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Burke,

Petitioner,

vs. No. 21 WC 15421

Johnson Controls, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects the Arbitrator's Decision to cite to the deposition testimony of Dr. Garrigues as Respondent's Exhibit 6. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 8, 2023, is hereby corrected, affirmed and adopted.

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

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

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

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

May 29, 2024
SJM/sk
o-5/8/2024
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	21WC015421
Case Name	Robert Burke v. Johnson Controls, Inc.
Consolidated Cases	21WC015418;
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Robert Maciorowski

DATE FILED: 5/8/2023

/s/Gerald Napleton, Arbitrator

Signature

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MCHENRY)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Burke
Employee/Petitioner

Case # 21 wc 015421

v.
Johnson Controls, 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 W. Napleton, Arbitrator of the Commission, in the city of Woodstock, on 12/07/22. 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, 05/05/21, Respondent **was** operating under and subject to the provisions of the Act.

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

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

Timely notice of this alleged 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 $112,223.28; the average weekly wage was $2,158.14.

On the date of accident, Petitioner was 48 years of age, married with one child under 18.

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

Respondent is entitled to a credit for all medical paid under Section 8(j) of the Act.

ORDER

Respondent shall pay for the reasonable and necessary medical and services due and owing to AMITA Alexian Brothers Medical Group (PX5), Core Orthopedics (PX6), and Duly Health and Care (PX7) 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 the shoulder surgery prescribed by Dr. Anthony Romeo along with any medical treatment that is required and related thereto pursuant to Sections 8(a) and 8.2 of the Act.

Petitioner's Petition for Penalties is denied.

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

RULES REGARDING APPEALS Unless a *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 of 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

May 8, 2023

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT BURKE,	)	
Petitioner,	)	
	)	**NO. 21 WC 015418**
v.	)	**21 WC 015421**
	)	
JOHNSON CONTROLS, INC.,	)	
Respondent,	)	

DECISION OF ARBITRATOR
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Robert Burke, had three consolidated claims pending against Respondent, Johnson Controls: 21WC015418 and 21WC015421involve the right shoulder; and 22WC5709 involves the left shoulder. Upon Respondent's unopposed motion, claim 22WC5709 was severed from this proceeding. This decision involves claims 21WC015418 and 21WC015421 only.

FINDINGS OF FACT

Testimony of Petitioner and Medical Treatment

Petitioner testified that he has worked as a sprinkler fitter for 24 years as a member of Sprinkler Fitters' Local Union 281. (Tr. P. 7). For the past five years, Petitioner has been employed as a foreman with Respondent, Johnson Controls. (Tr. P. 7-8). As a sprinkler fitter, Petitioner install overhead fire protection systems, using wrenches and drills to install pipes, valves, sprinkler heads, and fire pumps. (Tr. P. 8-22). Photographs received into evidence depict the size and type of materials used by Petitioner as a sprinkler fitter. (Tr. P. 9, PX8). The material and equipment weigh from several pounds to more than one hundred pounds. (Tr. P. 12-20, 28-29, PX8). When installing pipe, sprinkler fitters will bend over and pick up a piece of pipe, which vary in lengths up to twelve feet, and hold the pipe overhead while attaching it to a fitting. (Tr. P. 27-29, PX8). A hanger is attached to the ceiling using a Hilti drill and a pipe wrench is used to tighten the pipe sufficiently to hold 200 psi of water pressure. (Tr. P. 29, PX8). This process is repeated 80-125 times in an average workday. (Tr. P. 30, PX8). Petitioner spends 30% of his time walking and standing and 70% of his time on ladders or scaffolds. (Tr. P. 25).

Petitioner testified concerning the January 15, 2021 work incident (21WC015418). (Tr. P. 38). Petitioner was working at the Albion Highland Park project on January 15, 2021 for Respondent, connecting a fire pump with co-workers Jim Kay and Ernie. (Tr. P. 39-40). Petitioner tripped on a piece of conduit and hit his right shoulder on a valve. (Tr. P. 40, 61).

After the incident, Petitioner notified his superintendent, Rick Nelson, that he fell in the pump room, hurt his shoulder and was sore. (Tr. P. 40, 61, 66). Petitioner did not go to a doctor or seek any medical treatment. (Tr. P. 40-41). He continued working in a full duty capacity for Respondent until the ladder incident on May 5, 2021. (Tr. P. 40-42).

Petitioner testified that he was unaware if Mr. Nelson filled out an accident report for the January 2021 incident. During cross-examination, Petitioner acknowledged his employer has a call-in number to report injuries and "request treatment." (Tr. P. 61-62). Petitioner did not call this

number reporting the injury nor requesting treatment. (Tr. P. 61, 66, 112). Petitioner further acknowledged that he was in a lot of pain after this incident and had difficulty lifting his shoulder (Tr. P. 62). Petitioner testified that his pain in his right shoulder subsided but was "a little cumbersome still." (Tr. P. 62). Petitioner acknowledged that he filled out an accident report for his May 5, 2021 injury and, concerning the January 2021 injury, elaborated (Tr. P 66) that he was "in a little pain, and I figured it was going to be okay. So I didn't report it. I did report it to Rick [Nelson], but it wasn't like through the, you know, safety number that we have, you know, on our company phones." (Tr. P. 68-69, 70, 114-115, RX2).

Petitioner testified that he is left-handed, and that prior May 5, 2021, he did not have a history of medical treatment, nor did he miss any time from work, due to his right shoulder. (Tr. P. 31, 55).

Concerning 21WC015421: On May 5, 2021, Petitioner was working at Woodfield Mall installing a sprinkler system for a new tenant. (Tr. P. 30-31). On that particular day, Petitioner was unloading pipe and materials including a 16-foot ladder and threading machine with his Superintendent, Rick Nelson. (Tr. P. 30-33). While moving the ladder alone and attempting to avoid light fixtures in the ceiling, Petitioner felt a pop in his right shoulder that hurt. (Tr. P. 34-36, 109).

Petitioner testified he notified his Superintendent, Rick Nelson, the following day. (Tr. P. 36, 111). He was then directed to an occupational clinic by his employer. (Tr. P. 36). Petitioner was originally seen on May 11, 2021 at Concentra and provided a history recorded as, "Injury date is 1/15/2021 sometime in mid-January, pain after falling onto right shoulder, reports pain waxing and waning, go somewhat better, pain got immediately worse when he was lifting a ladder with two hands and stumbled with the ladder and as he caught the ladder he got a lot of pain in his right shoulder, which he then reported the incident on 5/6/21 and the incident in mid-January to the employer." Tr. P. 76. The Chief complaint states "patient presents today with right shoulder injury moving a ladder – previous fall on same shoulder in January," with a May 6, 2021 self-reported date of injury listed. (PX1, P. 76). Intake forms indicate that Petitioner stated, "I was moving a heavy ladder and hurt my right shoulder. Had prior injury in right shoulder in January." (PX1, P. 67). Petitioner relayed that the injury occurred at work and that he had not received any prior treatment and did not take any medications. (PX1, P. 66-67).

The occupational osteopath at Concentra spoke to Petitioner's employer, specifically Brien Nuelk and Christine Drapper, concerning Petitioner's report of injury. (PX1, P. 58). An additional history was obtained and the occupational clinic amended its notes to reflect Petitioner injured his right shoulder "sometime in mid-January," with "pain after falling onto right shoulder, reports pain waxing and waning, got somewhat better, pain got immediately worse when he was lifting a ladder with two hands and stumbled with the ladder and as he caught the ladder he got a lot of pain in his right shoulder which he then reported the incident on 5/6/2021". (PX1, P. 76). A drug and alcohol screen were completed, which was negative. (PX1, P. 53). X-rays revealed no fracture and no evidence of inflammatory or erosive arthritis. (PX1, P. 57). An examination of the right shoulder demonstrated limited range of motion and the empty can test was positive. (PX1, P. 75). Petitioner was diagnosed with a sprain/contusion of his right shoulder, prescribed physical therapy and medication, and instructed to return to work light duty with no reaching above shoulder height, no lifting greater than 10 lbs., no ladder climbing, and no use of vibratory/power/impact tools. (Tr. P. 72, PX1, P. 56, 60, 72).

Respondent accommodated Petitioner's restrictions and he returned to work in a light duty capacity. (Tr. P. 42-43). Petitioner also began physical therapy at Concentra. (Tr. P. 44, 45, 72-73, PX1). Petitioner returned to Concentra as directed on May 13, 2021. (Tr. P. 44, PX1, P. 31). The history contained in the notes indicate Petitioner was "injured on 01/2021, 5/6/2021

reaggravated it." (PX1, P. 36). Petitioner was instructed to continue light duty and physical therapy, as well as prescribed Tramadol for pain. (PX1, P. 34, 37-38). An MRI was discussed. (PX1, P. 43).

On May 20, 2021, Petitioner was again evaluated at Concentra. (PX1, P. 8). Notes from that visit indicate Petitioner was working modified duty, was participating in physical therapy and Petitioner was instructed to continue with both. (PX1, P. 8-11).

On May 26, 2021, Petitioner sought care with his primary care physician, Dr. Jay Virchow, complaining of shoulder pain from work with numbness and tingling. (Tr. P. 46, PX2, P. 6). Petitioner testified he told Dr. Virchow of the fall in January and the May ladder-related incident. (Tr. P. 46). Dr. Virchow noted Petitioner fell on a valve in mid-January and injured his right shoulder and that it was initially sore, but he did not report it or seek medical care. (Tr. P. 46, PX2, P. 8). Petitioner told Dr. Virchow that "it continues to hurt him on the job," as "he almost dropped a ladder last week." (PX2, P. 8). Petitioner testified that he was taken off work from June 8, 2021 until he was seen by an orthopedic surgery

Dr. Virchow ordered an MRI that was completed May 26, 2021. (Tr. P. 46-47, PX2, P. 10). The MRI revealed a full thickness tear of the rotator cuff along with a suspected partial tear of the bicep tendon and subscapularis tendon along with hypertrophy of the AC joint and degenerative cystic change in the humeral head. (PX2 P. 10).

Petitioner returned to Concentra on June 1, 2021 and informed the Clinic he was evaluated by his primary care doctor and had an MRI. (Tr. P. 47, PX1, P. 102). Notes from that visit indicate Petitioner was working modified duty and had physical therapy and was "approximately 50% of the way toward meeting the physical requirements of his job." (PX1, P. 108-109). Petitioner was instructed to follow up with his primary care doctor for work status and his case was closed with the occupational clinic. (Tr. P. 47, PX1, P. 102-104).

Petitioner returned to Dr. Virchow on June 8, 2021 and was placed on light duty restrictions and referred to an orthopedic surgeon, Dr. Gregory Drake. (Tr. P. 47, 51, PX11).). PX11, a note from Dr. Virchow, states "Mr. Burke has sustained a significant injury to his right shoulder resulting in muscular and tendon damage. He will require work limitations/light duty until he is seen by an orthopedic surgeon and a treatment plan is devised."

On July 23, 2021, Petitioner was evaluated by Dr. Drake from Core Orthopedics & Sports Medicine. (Tr. P. 51, PX3, P. 5). The chief complaint was listed as right shoulder pain. (Tr. P. 46, PX3, P. 5). The history noted was Petitioner was trying to hold a ladder from falling and as he tried to stabilize it, he felt a pull at his right shoulder. (PX3, P. 5). The date of injury was noted as May 5, 2021. (PX3, P. 31). Dr. Drake reviewed the May 26, 2021 MRI results and recommended physical therapy, a cortisone injection and, if conservative treatment failed, a reverse total shoulder arthroplasty. The doctor's impression was complete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, with a full thickness rotator cuff tear with significant tendon retraction and muscle atrophy. (Tr. P. 51-52, PX3, P. 8

Petitioner came under the care of Dr. Anthony Romeo on August 25, 2021. Office notes from that visit indicate Petitioner reported shoulder pain in January when he tripped and fell at work, then increased pain on May 6, 2021 when trying to move a heavy ladder at work. (PX4, P. 23). Dr. Romeo reviewed the MRI. Petitioner and Dr. Romeo discussed a potential plan of care. Dr. Romeo noted the severity of the tear and the potential unpredictability of successful surgical repair in his case. PX4.

Petitioner testified that he advised Dr. Romeo that as a result of his January incident that he noticed some weakness and soreness but that it was starting to get better but that the later incident was "the straw that broke the camel's back type of thing. I'm not sure. But, yes, I told him that I was sore then, yes, I hurt it again, and you know, I definitely threw in the towel and decided to go

get it looked at that point." (Tr. P. 80). Petitioner was diagnosed with a full thickness rotator cuff tear and a tear of the biceps tendon. (PX4 P. 25). A reverse total shoulder arthroplasty was prescribed along with light duty restrictions. (PX4, P. 25, 27).

Petitioner was seen by Dr. Grant Garrigues at request of Respondent pursuant to Section 12 of the Act. Petitioner saw Dr. Garrigues on August 25, 2021. On cross-examination, Petitioner read the history of Dr. Garrigues' report into the record. Tr. P. 84-85. Petitioner testified that after his January incident that when doing heavy lifting at work he would feel a little bit of pain or soreness. Tr. P. 85. Petitioner testified that after his January incident and prior to his May incident he was getting better but his shoulder would be sore at times with overexertion or would "act up." Tr. 85.

Petitioner testified Respondent has not authorized the right shoulder surgery recommended by Dr. Romeo, and Petitioner remains off work and under the care of Dr. Romeo for his left shoulder injury that is the subject of claim 22WC5709. (Tr. P. 54, 89-90). At the time of hearing, Petitioner testified his right shoulder is weaker and he still experiences irritation and soreness in his right shoulder. (Tr. P. 54).

Testimony of Brien Nuelk, Respondent's Workers' Compensation Manager

Brian Nuelk testified on behalf of the Respondent. Mr. Nuelk has worked for Respondent as its workers' compensation manager for 25 years. Tr. P. 119. He testified that on May 11, 2021 he had a conversation with Petitioner which was memorialized in email (Tr. P. 119, RX3). The conversation involved Petitioner stating he had fallen and injured his right shoulder in January of 2021, did not report the incident to anyone or the injury reporting line and has lived with discomfort and continued to work while nursing it. (Tr. P. 120). Mr. Nuelk then stated that Petitioner advised him of a May 6th injury at the Woodfield Mall while moving a ladder, denied past medical treatment, and requested to see a physician. Tr. P. 120. Mr. Nuelk testified that he was advised to see an orthopedic physician by his mother to which Mr. Nuelk suggested an occupational clinic. He continued to testify that Petitioner wished to avoid "a cut-happy physician" and that he believed all he needed was some therapy. Id. Mr. Nuelk acknowledged that he was called by Petitioner on his cell phone and not the injury reporting line and that Petitioner needed a new company phone with the injury reporting numbers in it, so Petitioner was given Mr. Nuelk' s cell phone number by Superintendent Rick Nelson. Tr. P. 121. No further conversations with Petitioner happened after May 11, 2021. Mr. Nuelk testified that RX2 is a copy of the incident report filled out by Petitioner which notes that Petitioner did not report the injury to his shoulder in January when he fell. Tr. P. 122.

On cross-examination, Mr. Nuelk read the bottom of RX3 but seemingly denied that RX3 stated that Petitioner was working at the Woodfield mall on Thursday 5/6/21 and moved a large ladder and almost dropped it. Tr. P. 125. Mr. Nuelk acknowledged that Rick Nelson is Petitioner's superintendent and oversees the foremen and journeymen that work for Respondent. Tr. P. 127-128. Mr. Nuelk acknowledged that he did not speak with Rick Nelson about Petitioner and was unable to advise if anyone at Respondent did so. Tr. P. 128. Mr. Nuelk was provided with a copy of the collective bargaining agreement between Respondent and Petitioner's labor union which stated that contractors must notify the union of any injuries that occur on the job. Tr. P. 131. Mr. Nuelk testified that he was unaware of any evidence that Respondent notified the union. Tr. P. 133.

Testimony of Dr. Anthony Romeo, Petitioner's Treating Surgeon

Petitioner presented the testimony of Dr. Romeo, a Board-Certified Orthopedic Surgeon. (PX9, P. 4). Petitioner first saw Dr. Romeo on August 25, 2021 where Petitioner gave a history of a

right shoulder work-related injury on January 15, 2021 when he fell but continued working until a second event on May 6, 2021 moving a ladder which caused increased pain. PX9, p. 6. After his second incident, Petitioner complained of persistent shoulder pain and sought orthopedic evaluation. Id. In August of 2021 Petitioner was complaining of discomfort, inability to play sports, and difficulty reaching, lifting, and sleeping. Id. Dr. Romeo's initial exam revealed weakness in all different planes of motion and a number of positive findings. RX9 at 7. Strength level was noted as 2 out of 5. RX9 at 8.

Dr. Romeo noted a lack of improvement with conservative treatment, significant weakness with three of his tendons, and, considering Petitioner's occupation, recommended surgical intervention to determine if his tendons are repairable or not. RX9 at 9. If repairable, a complex rotator cuff repair would be performed but noted a potential 50% failure rate at two years post-surgery. Id. Otherwise, a reverse shoulder replacement would be recommended.

Dr. Romeo testified that, based on the examination findings and history provided, and due to Petitioner being able to return back to work after his January incident without missing work, that the May 6, 2021 incident led to his disability and impairment that prevents him from returning back to work. He noted Petitioner works a very heavy-duty job requiring lifting in excess of 100lbs which can lead to degenerative changes. RX9. At 16. He repeated that the event of May 2021 led to Petitioner not being able to perform the essential responsibilities of his job. RX9. At 17. He remains unable to work in a full duty capacity as a sprinkler fitter. Id. Dr. Romeo did not at any time notice any malingering or secondary gain issues. RX9. At 21.

On cross-examination, Dr. Romeo acknowledged that he has not reviewed any prior treating records. Tr. At 23. He acknowledged that the job description of a sprinkler fitter provided to him was viewed for the first time at his deposition. RX9. At 23. Dr. Romeo was unable to ascertain what specific duties Petitioner performed in the job description letter. RX9. At 26. Dr. Romeo testified that the MRI films demonstrated substantial retraction but that the rotator cuff tear did not predate May 6th. RX9 at 33. Dr. Romeo stated that the MRI findings suggest preexisting rotator cuff problems with muscle atrophy, which takes three or more months to occur, with evidence of an injury of May 2021 that led to the impairment and dysfunction he presented with. RX9 at 33-34. The injury was described as "acute-on-chronic." Id. He continued to state that based on the MRI findings, it is more likely true than not that he had a preexisting tear of his rotator cuff even before January 2021 but despite that was able to work full duty. RX9 at 36. Dr. Romeo acknowledged that it would be appropriate to label Petitioner's January 2021 incident as "acute-on-chronic" if Petitioner was unable to work full duty after his January 2021 incident. RX9 37-38.

On re-direct Dr. Romeo testified that joint effusion is indicative of an acute injury. RX9 at 59. He further noted that the MRI report noting small to moderate joint effusion and fluid in the subacromial bursa is indicative of an acute injury. Id. Dr. Romeo acknowledged on re-cross that it is possible to have joint effusion on a chronic condition (RX9 at 60) but that if there was no effusion at all it would definitely be a chronic condition. RX9 at 61.

Testimony of Dr. Grant Garrigues, Section 12 Examiner

Respondent presented the evidence testimony of Dr. Grant Garrigues, a board-certified orthopedist. Dr. Garrigues testified that Petitioner gave a history noting no prior shoulder issues prior to January 2021 and tripped and fell on a control valve impacting his right shoulder which was very painful. Dr. Garrigues testified that Petitioner stated it was very pain painful and caused difficulty moving his arm with more pain the next day and had to use his left arm to move his right arm for a few days, but he slowly got better but was sore while doing heavy lifting . RX5 at 10-11. The history from Petitioner further mentioned on May 6, 2021 Petitioner injured himself moving a

16-foot reinforced ladder that was quite heavy which caused increased pain. RX5 at 11. Petitioner attempted to continue to work but was unable and notified his supervisor. Id.

Dr. Garrigues testified that the May 26, 2021 showed a massive rotator cuff tear with retraction to the glenoid and fatty infiltration, hypertrophy of the teres minor, and tears of the subscapularis and biceps tendon. RX5 at 19. Dr. Garrigues summarized his review of the medical records from Occupational Health and the MRI. RX5 at 17-18. Dr. Garrigues performed a physical exam which revealed atrophy of the supraspinatus and infraspinatus on the right side, a Popeye sign, excellent range of motion, diminished strength, abnormal belly press, and positive Hawkins and O'Brien's test. RX5 at 18-19. Imagine done at the time showed mild osteoarthritis and a little calcium deposit. RX5 at 19. Since the May 2021 ladder accident, Petitioner has not worked full duty, but is working modified duty for Respondent. (RX6, P. 10-12).

Dr. Garrigues assessed Petitioner with a right shoulder chronic rotator cuff tear along with osteoarthritis of the glenohumeral and acromioclavicular joints on the right side. RX5 at 20. Dr. Garrigues opined that the fatty infiltration of the rotator cuff, severe atrophy of the muscle, and hypertrophy of teres minor indicate a long-standing tear that he was accommodating to allow him to work in an overhead job. RX5 at 20-21. Dr. Garrigues recommended a course of treatment consisting of nicotine cessation, strength exercises, and self-directed compensation. RX5 at 21. He did not recommend a course of physical therapy, further diagnostics or other treatment as Petitioner is already compensating well. Id.

Dr. Garrigues further stated that fatty infiltration takes at least six months to occur and that there is no way Petitioner's May 6, 2021 injury could have caused the changes shown on the May 26th 2021 MRI. RX5 at 22. He noted significant atrophy and hypertrophy and opined that these issued predated May 26, 2021 but at least a year. Id. Dr. Garrigues denied that Petitioner could have aggravated or furthered his condition. Id. Dr. Garrigues does not believe Petitioner's rotator cuff is repairable to a functional level. RX5 at 23.

Dr. Garrigues opined that Petitioner does not require work restrictions as he is high functioning as of the date of his exam and he is not in danger to himself or others if he performs full duty work. RX5 at 25.

On cross-examination, Dr. Garrigues acknowledged that he could, hypothetically, change his opinion if he was not provided with relevant records. RX5 at 26. He stated that his opinion that Petitioner's smoking was "the most likely cause" of his rotator cuff tear despite smoking not appearing in the report he previously authored as the cause. RX5 at 27-28. Dr. Garrigues testified that overhead lifting and overhead repetitive motions are a very rare cause of the development of rotator cuff tears. RX5 at 28.

Dr. Garrigues acknowledged he was not provided any records evidencing rotator cuff complaints prior to 2021 and that he has not received evidence that Petitioner had any symptomatic degenerative changes prior to 2021. RX5 at 28, 31. Dr. Garrigues acknowledged that an accident can cause asymptomatic degenerative changes to become symptomatic. RX5 at 31. Dr. Garrigues acknowledged that Petitioner got better after his January 2021 incident and before the May 6 2021 incident. RX5 at 36. Dr. Garrigues testified that the May 6 2021 incident caused a temporary aggravation of his pain symptoms (RX5 at 37) but acknowledges that he did not use the word "temporary" in his report but that the entire report suggests temporary exacerbation of a chronic issue. RX5 at 40.

Dr. Garrigues admitted that he was not provided with Petitioner's job duties but stated that pipefitters typically do frequent overhead work. RX5 at 44. Dr. Garrigues acknowledged that he was unaware of Petitioner's treatment with Dr. Romeo but testified that it would be unlikely that Dr. Romeo's evaluation would have changed his opinion. RX5 at 48. Dr. Garrigues further acknowledged that he was unaware of Petitioner's treatment with Dr. Drake at Core Orthopedics

but stated it would not have changed his opinion. RX5 at 49. Dr. Garrigues did not note any malingering or secondary gain issues with Petitioner. RX5 at 64.

Dr. Garrigues testified that, "This is a very clear case, a chronic pathology that has absolutely nothing to do with the alleged work-related incident. This is the most clearcut workers' compensation case that's not work-related that I've ever seen. It's hilarious to me that we're spending all this time talking about it. It has absolutely nothing to do with any of the records that I didn't have or your cover letter. It's absolutely clear cut from the MRI and physical exam and history. There's really no question marks there." RX5 at 64-65.

CONCLUSIONS OF LAW

As a threshold matter, several evidentiary objections were made at hearing with the Arbitrator's ruling reserved. Further, the Arbitrator wishes to clarify a previous ruling on Petitioner's Exhibit 10, a copy of the Collective Bargaining Agreement between Respondent and Petitioner's Union. The exhibit itself remains rejected but the Arbitrator allowed its use during the cross-examination of Brian Nuelk. PX10's use during the cross-examination of Brian Nuelk remains relevant, germane, and admissible to the issue of notice and Mr. Nuelk' s credibility.

Petitioner's counsel objected to RX5, Dr. Garrigues' Section 12 report, on the basis of hearsay. The Arbitrator sustains Petitioner's hearsay objection and RX5 is excluded.

Petitioner's counsel moved to strike the testimony of Dr. Garrigues (RX6) based on an allegation that Respondent's counsel did not provide the IME cover letter with a medical summary before his deposition under Wilson v. Clark 84 Ill.2d 186 (1981). The deposition transcript (RX6) notes a conversation between Respondent's counsel and Petitioner's counsel which discusses pre-deposition correspondent between their respective offices asking for the questions asked in the Section 12 cover letter. At hearing, Respondent's counsel stated that he asked counsel if he wanted to continue the deposition, but Petitioner's counsel declined. Tr. P. 151. That does not appear in the RX6 deposition record, however. Respondent's counsel continued that the medical records are the medical records and the Section 12 examining doctor identified what he reviewed. Respondent's counsel said his office advised Petitioner's office of the four questions he asked in his cover letter.

The Illinois Supreme Court has adopted Federal Rule of Evidence 703 which permits an expert witness to give opinion on the basis of facts which have not been admitted into evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. Id. Further, Federal Rule of Evidence 705 was adopted which allows an expert to give his opinion without initially disclosing the facts underlying it unless the court requires otherwise. Id. The expert may be required to disclose the underlying facts or data on cross-examination. Id.

The Arbitrator believes Dr. Garrigues' testimony is clear in terms of what records he used to come to his conclusions. There is not enough evidence in the record to suggest that Dr. Garrigues relied on any undisclosed evidence that would cause his testimony to be inadmissible under Rules 703 or 705 and Wilson v. Clark. Petitioner's motion to strike Dr. Garrigues' testimony is overruled.

Petitioner objected to RX7, a medical payment history, on the grounds of hearsay and foundation. Without the benefit of a witness laying the proper foundation and without a hearsay exception argued, the Arbitrator sustains the objection and RX7 is excluded

Regarding Issue (C,) whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, Issue (F) whether Petitioner's present condition of ill-being is causally related to the injury, and Issue (O) regarding prospective medical treatment, the Arbitrator finds as follows:

Regarding case 21WC015418 concerning the January 15, 2021 accident date, the Arbitrator notes that AX2, the signed and completed request for hearing sheet, does not dispute the occurrence of an accident that arose out of and in the course of employment. Case 21WC015421 concerning the May 5, 2021 date of accident disputes an accident occurring based on Petitioner's pre-existing condition with similar symptoms as evidenced in AX1. This is more of a causation dispute than a dispute that an accident occurred. There's no evidence in the record that suggests that Petitioner did not lift the ladder which resulted in allegedly increased symptoms and subsequent reporting of injury. Petitioner was on the clock, at his job site, and engaged in his job duties when he experienced pain after moving the ladder. He then sought prompt medical treatment. The Arbitrator finds that Petitioner sustained an accident that arose out of an in the course of his duties.

Turning to the issue of causation, the record contains evidence that Petitioner potentially suffered from a long-standing but arguably asymptomatic issue in his right shoulder prior to both dates of accident alleged. When an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. Sisbro v. Industrial Comm'n 207 Ill. 2d 193, 215 (2003). The Commission must decide whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. Id. in pertinent part. If there is an adequate basis for finding that an occupational activity aggravated or accelerated a preexisting condition, and, thereby, caused the disability, the Commission's award of compensation must be confirmed. Id.

Proof of good health prior to an accidental injury and a subsequent condition of ill-being which develops immediately after the accident creates an issue of fact as to the causal relationship between the injury and the condition of ill-being. Board of Education v. Industrial Comm'n, 96 Ill.2d 239 (1983). If the injury is a contributing factor, compensation will be allowed even if natural degenerative changes or other factors, such as smoking, contributed to claimant's disability. Id. citing Azzarelli Construction Co. v. Industrial Comm'n 84 Ill.2d 262 (1981).

The Arbitrator finds that Petitioner's right shoulder injury is causally connected to his work activities with Respondent. Specifically, the Arbitrator finds that Petitioner was in good health prior to January 15, 2021 and had not sought any medical treatment for his right shoulder. He then suffered an injury to his right shoulder on January 15, 2021 and again on May 5, 2021 where he sustained an injury resulting in a rotator cuff tear or aggravation to a pre-existing tear as a result of his moving a heavy ladder. The Arbitrator finds that Petitioner's right shoulder injury and need for surgery is causally connected to his May 5, 2021 accident

The Arbitrator basis this decision on the credible evidence adduced at trial. Petitioner testified that after the January 15, 2021 fall, he did not need to seek medical care and was able to continue working in a full duty capacity with Respondent doing heavy duty work. Petitioner acknowledged some functional deficits, especially the next day after his accident, but testified to believing his shoulder was improving. It is only after the May 5, 2021 ladder accident that Petitioner sought prompt medical care and was placed on light duty. This was confirmed by the medical records submitted into evidence. The Arbitrator further finds Petitioner's testimony to be credible. Petitioner's testimony is consistent with and corroborated by the medical records submitted into evidence.

The Arbitrator is persuaded by the testimony of Dr. Romeo and finds the testimony of Dr. Garrigues to lack credibility. Dr. Romeo testified credibly to Petitioner's work activities as a cause of his current right shoulder condition and related the start of those increased and continuing complaints to the May 5th ladder incident. Further, Dr. Romeo confirmed that Petitioner's job duties

contributed to cause his right shoulder condition and it was the May 5, 2021 ladder incident that caused the present need for surgery.

The Arbitrator finds that Dr. Garrigues understanding of Petitioner's job duties was vague. Dr. Garrigues testified that he noted that Petitioner was a pipefitter but was not provided with a job description and was unable to produce a job description that he used to base his testimony on. He testified as to knowing Petitioner worked overhead and used a wrench but was unable to elaborate or provide any specifics beyond ambiguous descriptions.

Further, Dr. Garrigues testified that the May 6 2021 incident caused a temporary aggravation of his pain symptoms (despite testifying to not using the word "temporary" in his reports) but then as the deposition nears the end, he goes on to criticize Petitioner's claim being "the most clearcut workers' compensation case that's not work-related" that he's ever seen and, paraphrasing, that it does matter that he has not reviewed potentially relevant documents. RX6 at 64-65.

Lastly, the Arbitrator is puzzled by Dr. Garrigues opinion that Petitioner could work full duty as a sprinkler fitter despite acknowledging that Petitioner has a "massive" rotator cuff tear. Dr. Garrigues notes that Petitioner has been successfully "self-compensating" at work and should continue to do so as surgery may not be helpful. A full duty return to work with an admonishment that Petitioner should continue to self-compensate or avoid tasks that cause pain or support his physical activities with his better arm seems to be at odds.

For these above-mentioned reasons, the Arbitrator finds Dr. Romeo's opinions more credible than those of Dr. Garrigues. Having found the Petitioner to have testified credibly and that Dr. Romeo's opinion was credible and conclusive, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his accident on May 5, 2021.

Based on the above findings, Respondent is ordered to authorize and pay for the recommended surgical repair of Petitioner's right shoulder, along with any reasonable and necessary treatment related thereto.

Regarding issue (E) whether timely notice was given to Respondent, the Arbitrator finds as follows:

Section 6(c) of the Act requires an injured employee to provide notice to his employer within 45 days of an accident. (820 ILCS 305/6c). 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. (820 ILCS 305/6c).

Petitioner credibly testified that he reported both the January 15, 2021 and the May 5, 2021 work accidents to his superintendent, Rick Nelson. Neither party presented the testimony of Rick Nelson to confirm or dispute this testimony. Respondent's witness, Mr. Nuelk, acknowledged that Rick Nelson is Petitioner's superintendent and oversees the foremen and journeymen that work for Respondent. Further, Mr. Nuelk acknowledged that he did not speak with Rick Nelson about Petitioner and was unable to advise if anyone at Respondent did so. Lastly, Respondent did not present any evidence that it was prejudiced by any alleged improper notice. Accordingly, the Arbitrator finds that timely notice of the accident was given to Respondent.

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

The Arbitrator notes Petitioner's submission of the following medical expenses without objection:

Exhibit 5 – AMITA Health Alexian Brothers Medical Group: $392.00
Exhibit 6 – Core Orthopedics: $997.00
Exhibit 7 – Duly Health and Care: $115.00

Having found in favor of the Petitioner on issues of accident and causal connection, and based on the above exhibits, the Arbitrator finds Respondent responsible for medical expenses by the above providers pursuant to Section 8(a) and the Medical fee schedule. Respondent is entitled to a credit for reasonable and necessary bills paid to date.

Regarding issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. Jacobo v. Illinois Workers' Compensation Comm'n, 2011 IL App (3d) 100807WC. When an employer acts in reliance upon responsible medical opinion or where there are conflicting medical opinions, penalties are not normally imposed. O'Neal Bros. Constr. Co. v. Industrial Comm'n 93 Ill.2d 30, 41 (1982). The test is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under the circumstances presented. Consolidated Freightways v. Industrial Comm'n 136 Ill.App. 3d 630, 633 (1985).

Petitioner alleges that the failure of Respondent to provide Dr. Garrigues with all relevant treating records, work status information, and a job description prevents the Arbitrator from finding that Respondent acted reasonably and did not have a good faith basis to rely on the doctor's opinions. The Arbitrator has already discussed the various reasons why the credibility of Dr. Garrigues was deficient. The fact that an Arbitrator may find a doctor's opinion or testimony less credible than that of opposing doctors doesn't make Respondent's reliance on that opinion or testimony unreasonable.

Dr. Garrigues was insistent, perhaps excessively so, that Petitioner's condition is one that was long-standing and not work-related. His explanation regarding the physiology of long-standing, chronic tears and their similarity to Petitioner's MRI did not appear unreasonable on its face. Again, despite the previously mentioned reasons why the Arbitrator ultimately does not find the testimony of Dr. Garrigues to be very credible, the Arbitrator does not find Respondent's reliance on his opinions based on his report and deposition to be unreasonable. Dr. Garrigues even stated that his opinion wouldn't change if provided relevant treating records and further information. While that doesn't help his credibility, at least as far as this Arbitrator is concerned, it is not unreasonable for a Respondent to rely on an imperfect Section 12 report and subsequent deposition.

Penalties are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC002370
Case Name	Reginald Willams Sr v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0248
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Pro Se
Respondent Attorney	Donald Chittick, Meghan Knapp

DATE FILED: 5/29/2024

/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

REGINALD WILLIAMS,

Petitioner,

vs. NO: 13WC002370

CITY OF CHICAGO,

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

We initially note that Petitioner's Petition for Review also lists accident, notice, jurisdiction, employment, statute of limitations, and medical expenses as issues. However, these were not issues at the arbitration hearing.

Regarding permanency, we affirm the Arbitrator's award but make modifications to the five-factor analysis pursuant to §8.1b(b) of the Act. We modify factor (iii) to clarify that Petitioner's current lumbar condition was previously found to be unrelated to his work injury and, therefore, give this factor little weight. For factor (v), we note that Petitioner visited the SLH Emergency Department on May 10, 2017 and was diagnosed with "chronic right-sided low back pain without sciatica." *Px10, T.116*. However, the Commission reiterates that Petitioner's lumbar condition of ill-being, as of December 16, 2014, was not casually related to his work accident pursuant to the Commission's 2018 decision and the "law of the case" doctrine. This factor is given some weight.

We also correct the following scrivener's errors:

- Findings section: Clarify that Respondent's total credit is $97,120.57, not $0.

- Page 4, paragraph 2: Strike "8.1b(b)(iv)" and replace with "8.1b(b)(v)."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 23, 2022 is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(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.

May 29, 2024

SE/
O: 5/21/24
49

/s/ *Maria E. Portela*

/s/ *Amylee H. Simonovich*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC002370
Case Name	Reginald Willams v. City of Chicago
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Rachael Sinnen, Arbitrator

Petitioner Attorney	
Respondent Attorney	Donald Chittick

DATE FILED: 9/23/2022

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 20, 2022 3.78%

/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

Reginald Williams
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **2370**

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 **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago**, on **8/24/22**. 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 **Overpayment of TTD**

FINDINGS

On **1/7/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**70,324.80**; the average weekly wage was $**1,352.40**.

On the date of accident, Petitioner was **52** 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 $**97,120.57** 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

Per the 2018 Commission Decision (18IWCC0240), Petitioner reached MMI on December 16, 2014.

Per the 2018 Commission Decision, Petitioner was previously awarded TTD benefits at a rate of $901.59 per week for a period of 101 and 1/7 weeks (January 8, 2013 through December 16, 2014). Any requests for additional TTD benefits are denied.

Per the 2018 Commission Decision. Respondent was previously given a credit of $97,120.57 for TTD paid. Respondent is entitled to apply the overpayment of TTD in the amount of $5,931.23 to the award on permanency.

The Arbitrator makes an award of 2% loss of use of the person as a whole pursuant to Section 8(d)(2), which corresponds to 10 weeks of permanent partial disability benefits at a weekly rate of $712.55. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) of the Act.

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

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

Signature of Arbitrator

September 23, 2022

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Reginald Williams,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 13WC2370
City of Chicago,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

Procedural Posture

On August 8, 2016, Arbitrator Andros rendered a decision on Petitioner's Petition pursuant to Sections 8(a) and 19(b) of the Illinois Workers' Compensation Act (hereinafter "Act"). Arbitrator Andros awarded Petitioner temporary total disability (hereinafter "TTD") benefits, payment of past due medical bills, and awarded prospective medical (a L4-5 discectomy with posterior lumbar interbody fusion recommended by Dr. Slack). Respondent was given a credit of $97,120.57. Respondent's Exhibit "RX" 1.

The Arbitrator's decision was reviewed by the Commission who modified the decision on April 18, 2018. The Commission reversed the Arbitrator's decision on causation and found that Petitioner reached maximum medical improvement (hereinafter "MMI") on December 16, 2014. The Commission further found that Petitioner's treatment with Drs. Slack and Fisher exceeded the number of permissible providers under the Act. As such, the Commission Decision modified the following benefits awarded to Petitioner:

- TTD benefits of $901.59 per week for a period of 101 1/7 weeks, commencing January 8, 2013 through December 16, 2014; and
- Payment of medical bills from Washington University ($195.00), Professional Imaging ($22,623.00), St. Louis Ortho ($1,655.00), and Town & Country Ortho ($2,067.00).

RX 2.

The Commission decision was confirmed in circuit court on December 4, 2018. Petitioner appealed the circuit court decision, but the appeal was dismissed for want of jurisdiction on August 16, 2019. RX 3-4.

On December 19, 2020, the parties appeared before Arbitrator Kay to discuss their position of proceeding to hearing on the nature and extent of Petitioner's alleged injury. An evidentiary

hearing was not held yet Arbitrator Kay rendered an Order on August 19, 2020 finding that Petitioner was not entitled to a permanency award based on the principle of the "law of the case doctrine." RX 5.

On July 2, 2021, the Commission vacated Arbitrator Kay's Order and remanded the matter back to the arbitrator to hold an evidentiary hearing on the issue of permanency. RX 6.

This matter proceeded to hearing on August 24, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. The crux of the case was the nature and extent of the injury although Petitioner re-alleged and extended his claim for TTD benefits from January 8, 2013 through the date of hearing, August 24, 2022. Respondent disputed the extension of TTD benefits maintaining that the Commission already found that Petitioner reached MMI on December 16, 2014. Respondent alleges an overpayment of TTD as Respondent had been previously awarded a credit of $97,120.57 for TTD already paid. Arbitrator's Exhibit "Ax" 1.

Summary of Exhibits

Petitioner placed into evidence a variety of documents including an alcohol testing form from the date of accident (Petitioner's Exhibit "PX" 2), loan information (PX 7), an application for adjustment of claim for a duplicate workers' compensation case that had been dismissed (PX4), IME notices (PX 9), photographs (PX 8), a pharmacy ledger (PX 15), and various snippets of medical records from treatment rendered prior to the 19b hearing (PX 1, 3, 5, 6, 10, 14).

Respondent submitted into evidence Dr. Levin's IME reports from December 3, 2014, December 16, 2014, and February 18, 2016, which have been previously submitted into evidence at the prior 19(b) hearing. RX 7-9.

Petitioner's Current Condition

Petitioner stated that he still has low back pain that significant restricts his activities of daily living. Petitioner continues to take prescription pain medication. PX 15. He would like ongoing medical care. He states that his shoulder is fine and claimed that he would be able to lift the Arbitrator if he wanted to.

CONCLUSIONS OF LAW

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

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

The 2018 Commission decision, as affirmed by Judge McGing, is the decision by which the parties are bound. The 2018 Commission decision concludes that "[t]he Petitioner failed to prove that his *current* condition of ill-being is causally connected to the work accident of January 7, 2013" (*emphasis added*) and found that Petitioner reached MMI on December 16, 2014 based on the

opinions of Respondent's Section 12 examiner, Dr. Levin. Dr. Levin diagnosed Petitioner with a contusion/lumbar myofascial strain from the January 7, 2013 occurrence and opined that Petitioner did not injure his shoulder or neck. RX8, p. 16; RX 1.

As such, the Arbitrator finds Petitioner's *current* condition of ill-being is not casually related to the injury pursuant to the Commission's 2018 decision and the "law of the case" doctrine.

Issue K, whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Petitioner claims entitlement to TTD from January 8, 2013, through the date of hearing, August 24, 2022. Respondent contends that Petitioner is due TTD only from January 8, 2013, through December 16, 2014 (as awarded in the 2018 Commission decision) and is entitled to no further benefits beyond that date.

The 2018 Commission decision, as affirmed by Judge McGing, is the decision by which the parties are bound pursuant to the "law of the case" doctrine. The 2018 Commission decision finds that Petitioner reached MMI at the time he saw Dr. Levin on December 16, 2014.

As a result, the Arbitrator finds that Petitioner is not entitled to any additional TTD pursuant to the Commission's 2018 decision and the "law of the case" doctrine.

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

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), this Arbitrator notes that at the 19(b) hearing Respondent submitted an AMA impairment rating prepared by Dr. Levin, which opined that Petitioner had sustained a 2% loss of use of the person-as-a-whole. (See RX 7-9). The Arbitrator places moderate weight on this factor.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was employed as a Lamp Maintenance Worker for the Department of Transportation. However, Petitioner is no longer working despite his full duty release by Dr. Levin on December 16, 2014. The Arbitrator places little weight on 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 52 years old at the time of the accident and, while toward the end of his working career, likely had several years before him to work. The Arbitrator gives moderate weight to this factor.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner is no longer working for Respondent however Dr. Levin released Petitioner to full duty work on December 16, 2014 and the Commission has already determined that Petitioner reached MMI on that date. The Arbitrator gives little weight to this factor.

Under Section 8.1b(b)(iv), evidence of disability corroborated by the treating medical records, the Arbitrator gives great weight to this factor. Petitioner's initial March 14, 2013 lumbar MRI showed spondylosis at L4-5 with mild central stenosis and contact with the L4 ganglia; bulging on the left at L5-S1 in contact with the left L5 ganglion; and bulging disk at T11-12 that flattens the anterior surface of clonus. RX 8, p. 2; RX 1. Dr. Levin diagnosed Petitioner with a contusion/lumbar myofascial strain from the January 7, 2013 occurrence and opined that Petitioner did not injury his shoulder or neck. RX8, p. 16; RX 1. Dr. LaBore's impression included radicular low back pain. RX8, p. 5; RX 1. Petitioner's treatment included physical therapy, work hardening, a right intraarticular hip injection, a right L4-5 transforaminal epidural steroid injection and a right L5-S1 injection. RX8, pp. 6-7; RX 1. Petitioner continues to complain of low back pain and takes prescription medication for pain relief. PX 15.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 2% loss of use of the person as a whole pursuant to §8d2 of the Act which corresponds to 10 weeks of permanent partial disability benefits at a weekly rate of $712.55.

Issue O, whether Respondent overpaid Petitioner TTD benefits, Arbitrator finds as follows:

At the initial 19(b) hearing, the parties stipulated to Respondent's credit of $97,120.57 for TTD benefits paid. This credit is reflected in the 19(b) Arbitration Decision and was not modified by the Commission nor the circuit court. The same credit was, once again, stipulated to by the parties at the hearing on August 24, 2022.

The 2018 Commission Decision awarded Petitioner TTD benefits of $901.59 per week for a period of 101 1/7 weeks, commencing January 8, 2013 through December 16, 2014 which amounts to a total of $91,189.34. No additional TTD benefits will be awarded.

As a result, the Arbitrator finds that there was an overpayment of TTD in the amount of $5,931.23, which may be applied to the award on permanency as discussed above. See Messamore v. Industrial Commission (706 N.E.2d 44, 4th Dist. 1999.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC009403
Case Name	Anthony Bigger v. State of Illinois - Illinois Dept of Corrections
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0249
Number of Pages of Decision	14
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Patrick Jennetten
Respondent Attorney	Bradley Defreitas

DATE FILED: 5/29/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY BIGGER,

Petitioner,

vs. NO: 21 WC 9403

ILLINOIS DEPARTMENT
OF CORRECTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner testified that he was a correctional lieutenant for Respondent at the Lincoln Correctional Center and was employed there for 23 years. Petitioner was 50 years old. He stated that on August 10, 2020, his shift ran from 7:00 a.m. to 3:00 p.m. He testified that on this date, the facility operated under lockdown procedures adopted in March 2020 due to the COVID-19 pandemic. Petitioner explained that pandemic procedures included having employees entering the facility through the reception area and exiting through the sally port, so that the entering and exiting employees did not directly pass each other in the hallway. He stated that the sally port was at the far end of the facility, perhaps 300 or 400 yards away.

Petitioner also testified that on August 10, 2020, his vehicle was parked in the facility's employee-designated parking lot, as directed by Respondent. Referring to Petitioner's Exhibit 2, Petitioner identified an aerial view of the facility, marking his usual exit, the staff parking lot, and the sally port. Petitioner testified that at this time, his entrance and exit from work was

highly controlled, as was his parking location. He explained that upon exiting from the sally port, employees would walk along a drive and then cross a grassy area to reach the sidewalk to the parking lot. A review of the aerial photograph suggests that the parking lot is in front of the main entrance to the facility and the sally port is in the rear of the facility, causing employees to circle back to the front of the facility to reach the parking lot. Petitioner testified that employees generally were walking southward to reach the sidewalk which led to the parking lot. Petitioner also identified a second photograph depicting the area near the sidewalk to the parking lot. Petitioner explained that the path to the sidewalk was blocked by vans parked in a row of spaces cut in from the drive, and that as such, employees had to walk behind the vans and cut across the grass to reach the sidewalk leading to the parking lot. He estimated that when the shift changed, between 40 and 50 people would be walking in this general area. Petitioner testified that on August 10, 2020, it was impossible to reach the employee parking lot without either walking in the roadway with busy traffic, or by crossing the grassy area.

Petitioner further testified that while crossing the grassy area, he tripped and fell pretty hard. Petitioner marked the approximate spot of his fall on the aerial photograph in Petitioner's Exhibit 2 with a star. He stated that a friend assisted him up from the ground. He testified that he told his friend that he thought he was "okay,' but he had "messed up" his arm. Petitioner testified that he fell because the ground was rutted and the grounds were poorly maintained. He stated that the ground was not even. He stated that he could not see the rut, or he would have avoided it. He identified other photographs in Petitioner's Exhibit 2 depicting the sidewalk being blocked by vans and picnic tables. Petitioner stated that he took these photographs shortly after he returned to work.

On cross-examination, Petitioner agreed that the warden did not dictate the specific route from the sally port to the parking lot. He further described tripping on "[s]ome type of rut [or] shallow depression." He again described the ground as uneven.

On August 24, 2020, Petitioner completed an Employee's Report of Injury stating that he twisted his ankle in a "chuck hole," fell to the ground and landed hard on his right arm and shoulder in a grassy area just to the south of Tower 5. On the same date, Major Christina Calhoun completed a Supervisor's Report of Injury, stating that Petitioner was walking in the grass as opposed to walking on the established road and sidewalk.

B. Medical Treatment

On August 24, 2020, Petitioner was seen by Nurse Lindsay Spangler at OSF Prompt Care. Petitioner reported worsening right elbow pain and swelling after tripping and falling on his arm two weeks earlier. Full range of motion of the right elbow was noted. Nurse Spangler also noted significant ecchymosis and swelling to the right elbow. X-rays were positive for a right olecranon fracture with a concern for a possible radial head fracture. Petitioner was placed in a long arm splint, provided a work note and referred for orthopedic care.

On August 25, 2020, Petitioner presented to Dr. Mary Rashid of OSF Orthopedics. Petitioner reported injuring his right elbow when he stepped in a hole while leaving work. Petitioner reported removing his splint due to an inability to use his right hand. Dr. Rashid found

significant swelling and ecchymosis in the right elbow along the posterior aspect. The doctor interpreted the X-rays as showing chronic appearing ossifications about the elbow without definite acute displaced fracture identified, as well as subcutaneous edema and soft tissue swelling. Dr. Rashid noted that Petitioner sustained a significant injury to the right elbow and ordered an MRI for a more thorough evaluation. Dr. Rashid also noted that Petitioner was off work.

On September 11, 2020, Petitioner followed up with Dr. Rashid, whose impressions of an August 28, 2020 right elbow MRI were of: (1) no evidence of triceps tendon injury; (2) diffuse subcutaneous edema posterior right elbow with 5.0 cm subcutaneous hematoma; (3) mild tendinopathy of the common extensor origin; (4) degeneration/low-grade sprain of the ulnar collateral ligament. Dr. Rashid diagnosed a small traumatic right elbow hematoma which appeared to be resolving. The doctor noted that Petitioner could use the arm as needed and found that he had reached maximum medical improvement and could return to regular duty.

Petitioner testified that his condition improved, but his arm would start hurting around the elbow when he sat for any length of time and did not improve.

On August 20, 2021, Petitioner was evaluated at a Veterans' Administration (VA) clinic in Peoria, Illinois by Dr. Shinymol Chacko and Nurse Rhonda Christian. Petitioner reported elbow pain that started on the outer elbow and radiated around the inner to outer arm. Petitioner reported the fall at work and rated his pain at 2-3/10. The record does not reflect any examination or diagnosis.

On September 9, 2021, Petitioner returned to the VA clinic, continuing to complain of right elbow pain. Petitioner received a physical therapy evaluation. A physical therapist performed infrared/laser therapy and ultrasound to the right elbow and biceps, as well as massage and myofascial release of the right biceps.

On October 6, 2021, Petitioner underwent a second right elbow MRI, apparently through the VA clinic. The impressions of the MRI were listed as: (1) interval development of distal biceps tendinopathy with radiobicipital bursitis; (2) tendinopathy of the common extensor origin, with increasing edema and cystic changes at the lateral humeral epicondyle; (3) similar-appearing degeneration/low-grade sprain of the ulnar collateral ligament; and (4) degenerative arthritis. Dr. Chacko recommended an orthopedic consult with OSF Orthopedics.

On November 5, 2021, Petitioner returned to Dr. Rashid on referral by Dr. Chacko. Dr. Rashid noted that Petitioner started having pain in August 2020 after his fall, located in the biceps as well as laterally. Following an examination, Dr. Rashid diagnosed lateral epicondylitis of the right elbow and biceps tendinopathy of the right upper extremity. Dr. Rashid prescribed Meloxicam and recommended limited repetitive gripping and lifting, with a return in two months where a cortisone injection would be considered if there was no improvement in symptoms.

On January 7, 2022, Petitioner followed up with Dr. Rashid, who noted that Petitioner had residual distal biceps tendinopathy, but was doing well overall. An examination disclosed mild tenderness on palpation about the distal biceps tendon, but no tenderness about the lateral

aspect of the elbow. Dr. Rashid discussed a steroid injection as a possible next step if he continued to have difficulties.

C. Additional Information

Regarding his current condition of ill-being, Petitioner testified that his pain has never gone away completely. He stated that he does not lift as much weight as he would like when he goes to the gym. He described his right elbow pain as dull, like a moderate toothache, but it would become a shooting pain if he lifted too much weight. He also stated that he had no current plans for additional treatment.

On cross-examination, Petitioner agreed that he worked full-duty without restrictions after August 10, 2020 through August 24, 2020. He testified that the last day he missed was September 11, 2020. He agreed that he was currently working full duty without restrictions. He testified that he had no negative employee reviews in the prior two years.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found Petitioner failed to prove by a preponderance of evidence that he sustained an accident that arose out of and in the course of his employment. 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 his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" the employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" the employment refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). However, such an injury must also "arise out of" the employment. See *id*. at 58. Accordingly, the issue is whether the injury originated from a risk incidental to the employment and involved a causal connection between the employment and the accidental injury. *Baggett*, 201 Ill. 2d at 194. The risks to which a claimant may be exposed fall within one of three categories: (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. *E.g*., *Steak 'n Shake v. Illinois Workers' Compensation Co*mm'n, 2016 IL App (3d) 150500WC, ¶ 34. "Examples of employment-related risks which are generally compensated include 'tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling.'" *Id*. ¶ 40 (quoting *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006)). Where the employer directs the employee to use a particular route and the employee encounters special risks or hazards, the employee's

injury may be considered as arising out of the employment. See *Bommarito v. Industrial Comm'n*, 82 Ill. 2d 191, 196-97 (1980).

Petitioner testified that due to the COVID-19 pandemic, Respondent had instituted procedures for entering and exiting the prison at the start and end of shifts. Petitioner acknowledged that the warden did not dictate the specific route from the sally port to the parking lot. Nevertheless, Respondent's pandemic policy required employees to exit from the sally port at the north end of the facility and travel southward along a road to the front of the facility to access the sidewalk leading to the employee parking lot. Petitioner's testimony that access to this sidewalk at the earliest point was blocked by vans and a picnic table was corroborated by the photographs submitted into evidence. As in *Bommarito*, Respondent directed employees to take a route where they were bound to encounter either the grassy area or busy vehicle traffic associated with the shift change. See *Bommarito*, 82 Ill. 2d at 196-97; *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 491 (2004). Given this record, the Commission concludes that Petitioner did not voluntarily choose to expose himself to an increased risk, but instead was exposed to hazards and risks on Respondent's property due to Respondent's direction of its employees. Accordingly, the Commission finds that Petitioner's accidental injury arose out of and was in the course of his employment.

The Arbitrator concluded that Petitioner presented no evidence that he was exposed to a danger more than the general public and his photographs did not demonstrate that the ground had a rut, depression, or appreciable unevenness. The Commission disagrees. Petitioner submitted a Report of Injury stating that he tripped due to a "chuck hole" and testified that he tripped due to a rut or shallow depression in the grassy area west of the sidewalk to the employee parking lot. After reviewing the photographs in Petitioner's Exhibit 2, the Commission concludes that they do not depict the area in which Petitioner fell, as marked by Petitioner on the aerial photograph of the facility. Instead, the other photographs in the exhibit depict the blockage of access to the sidewalk by vans parked in spaces cut into the east side of the road running along the south side of the prison, and blocked again by a picnic table a short distance south of the vans, in an area north of the area where Petitioner fell. In finding accident, the Commission concludes that Petitioner's testimony regarding the cause of his fall was not rebutted by his photographs.

B. Causal Connection

The Commission next considers whether Petitioner proved a causal connection to his current condition of ill-being. On August 24, 2020, Petitioner sought treatment for worsening right elbow pain and swelling, reporting that he tripped and fell on his arm two weeks earlier. The nurse noted significant ecchymosis and swelling to the right elbow. The next day, Dr. Rashid noted that Petitioner sustained a significant injury to the right elbow and ordered a right elbow MRI, from which Dr. Rashid diagnosed in part a traumatic hematoma which was resolving. Although Dr. Rashid found that Petitioner had reached MMI as of September 11, 2020, Petitioner testified that his arm would start hurting around the elbow when he sat for any length of time and did not improve. Petitioner eventually followed up with the VA clinic on August 21, 2021 and ultimately was referred back to Dr. Rashid, who diagnosed lateral epicondylitis of the right elbow and biceps tendinopathy of the right upper extremity. Dr.

Rashid's November 5, 2021 note relates Petitioner's continued right elbow pain to his work injury and there is no evidence of any intervening event that would break the causal chain. Given this record, the Commission finds that Petitioner proved a causal connection between the accident and his current condition of ill-being.

C. Medical Expenses

The Commission also considers Petitioner's claimed medical expenses. Having reviewed the bills collected in Petitioner's Exhibit 3, the Commission orders Respondent to pay Petitioner the reasonable and causally related medical expenses incurred pursuant to Sections 8(a) and 8.2 of the Act and the statutory fee schedule. Respondent shall have credit for all amounts paid.

D. Temporary Total Disability

The Commission further considers Petitioner's claim for temporary total disability (TTD) benefits. Petitioner claimed TTD for the period from August 24, 2020, through September 11, 2020, a period of 2 and 5/7ths weeks. The record in this case indicates that Petitioner was issued an unspecified work note on initial treatment on August 24, 2020 and certainly was taken off work the next day by Dr. Rashid, who found that Petitioner reached MMI on September 11, 2020. Petitioner further testified that the last day he missed work was September 11, 2020 and that he is currently working without restrictions. The Commission therefore orders Respondent pay to Petitioner the sum of $1,001.41 per week (based on the parties' stipulated average weekly wage of $1,502.12) commencing August 24, 2020 through September 11, 2020, a period of 2 and 5/7ths weeks.

E. Permanent Partial Disability

Lastly, the Commission considers Petitioner's claim for permanent partial disability (PPD) benefits. Petitioner requests a PPD award representing an 8% loss of use of the right arm. 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), no permanent partial disability impairment report or opinion was submitted. Petitioner correctly concludes that no weight should be given to this factor.

Regarding factor (ii), Petitioner was employed as a corrections officer at the time of the accident and was able to return to work in his prior capacity. The Commission observes that Petitioner is working a demanding job with residual symptoms and therefore places slight weight on this factor.

Regarding factor (iii), Petitioner was 50 years old at the time of the accident. Given the ongoing pain in Petitioner's arm and Petitioner's expected continued work life, the Commission

finds that greater weight should be given to this factor.

Regarding factor (iv), Petitioner's future earnings capacity, no evidence was presented of any loss of future earnings. The Commission therefore places no weight on this factor.

Regarding factor (v), the evidence of disability corroborated by the treating medical records, Petitioner testified without rebuttal regarding the ongoing pain and loss of strength in his right arm. Petitioner testified that his pain has never gone away completely. He stated that he does not lift as much weight as he would like when he goes to the gym. He described his right elbow pain as dull, like a moderate toothache, but it would become a shooting pain if he lifted too much weight. He also stated that he had no current plans for additional treatment. Petitioner's most recent treatment record from Dr. Rashid notes complaints of residual distal biceps tendinopathy, and the examination disclosed mild tenderness on palpation about the distal biceps tendon. The Commission assigns greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Commission concludes that Petitioner sustained permanent partial disability to the extent of an 8% loss of use of the right arm pursuant to Section 8(e)10 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on October 30, 2023, is reversed for the reasons stated above.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident on August 10, 2020 that arose out of and occurred in the course of employment.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current condition of ill-being is causally related to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary unpaid medical expenses incurred pursuant to Sections 8(a) and 8.2 of the Act and the statutory fee schedule. Respondent shall have credit for all amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,001.41 per week commencing August 24, 2020 through September 11, 2020, a period of 2 and 5/7ths weeks, 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 the sum of $901.27 per week for a period of 20.24 weeks, as provided in Section 8(e)10 of the Act, for the reason that the injuries sustained caused an 8% loss of use of the right arm.

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.

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.

May 29, 2024

o: 05/09/24
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	21WC009403
Case Name	Anthony Bigger v. Illinois Department of Corrections
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	5
Decision Issued By	Kurt Carlson, Arbitrator

Petitioner Attorney	Patrick Jennetten
Respondent Attorney	Bradley Defreitas

DATE FILED: 10/30/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 24, 2023 5.32%

/s/ Kurt Carlson, Arbitrator
Signature

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

October 30, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Anthony Bigger
Employee/Petitioner

v.

Illinois Department of Corrections
Employer/Respondent

Case # **21** WC **009403**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Bloomington**, on F**ebruary 27, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 10, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**78,110.49**; the average weekly wage was $**1,502.12**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **1** dependent children.

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

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

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

Respondent is entitled to a credit of $**All Claimed Bills Paid** under Section 8(j) of the Act.

ORDER

PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT ON August 10, 2020. ALL BENEFITS ARE DENIED.

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

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

Kurt A. Carlson

Signature of Arbitrator

OCTOBER 30, 2023

Anthony Bigger v IDOC
21-WC-009403

Findings of Fact

Petitioner, Anthony Bigger, was the only witness at trial. He testified as to his injury, treatment, and current complaints. The issues in dispute are accident, causal connection, unpaid medical bills, TTD, and the nature and extent of Petitioner's injury. Petitioner claimed a right elbow injury from falling while walking to his car at the end of his work shift.

Petitioner's Testimony

Petitioner testified that he is currently a Lieutenant with the Illinois Department of Corrections and is assigned to Lincoln Correctional Center. On the date of injury, he testified that he worked the 7 am to 3 pm shift and at the end of it, he was required to leave through a certain door due to COVID-19 procedures. (TX 9-10) He further testified that they exited through the sally port which was about "3- to 400 yards away" from the employee designated lot. (TX at 11)

Petitioner marked on Petitioner's exhibit 2 the route he took from the sally port to his car. He agreed with the Arbitrator that his entrance and exit was highly controlled by the employer during this time. The warden, Emily Ruskin, of the facility was the one who gave the order on where they could exit. (Id. at 15) He further testified that facility vans blocked some of the sidewalk that could take employees from the sally port to the employee parking lot.

When asked to describe the fall, Petitioner stated, "I tripped, fell…then my buddy next to me helped me up and asked…if I was okay." (Id. at 21-22) When asked what caused him to fall Petitioner stated that "the ground is rutted." (Id.) He denied that there was a hole that he stepped in and simply said the ground was not even.

Petitioner testified that he first sought treatment on August 24, 2020 after the pain had not gone away for a couple weeks. (Id. at 24) He underwent an MRI that diagnosed a traumatic hematoma and to return as needed. He returned later in 2021 and was recommended an injection but declined to get it done. Regarding his current complaints, Petitioner noted that he cannot lift as much at the gym as he used to. (Id. at 29)

On cross-examination, Petitioner agreed that the warden did not give him or his co-workers a specific route that they had to take from the sally port to the employee parking lot. When asked what he tripped on, Petitioner testified again that it was a rut in the ground. (Id. at 30) He indicated that he has had no negative work evaluations since returning at full duty.

Conclusions of Law

As an initial matter the Arbitrator notes Petitioner has the burden of proving all of his case by a preponderance of the evidence. Chicago Rotoprint v. Industrial Comm'n, 157 Ill.App.3d 996, 1000, 509 N.E.2d 1330, 1331(1st Dist. 1987).

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

For an injury to "arise[] out of" one's employment its origin must be in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the injury. The Petitioner must show that the risk of injury is specific to his employment or show that he was exposed to a greater degree than the general public. *Orsini v. Industial Comm'n*, 117 Ill.2d 38, 45 (1987). That analysis allows for three categories of risk that an employee may be exposed to: (1) risks distinctly associated with the job; (2) risk that are personal to the employee; and (3) neutral risks that have no personal or job related characteristics. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162 (1st Dist. 2000).

Here, Petitioner tripped while walking through the grass. Respondent has argued that the risk was personal.

"Illinois courts have consistently held that where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable." *Orsini*, 117 Ill.2d at 47. "Employer acquiescence alone cannot convert a personal risk into an employment risk." *Dodson v. Industrial Comm'n (Meadow Woods Country Club)*, 308 Ill.App3d 572.

Petitioner presented no evidence to support that he was exposed to a danger more than the general public. Petitioner also testified that there was no defect in the grass that caused him to fall. Instead, he stated that "a rut" in the ground caused his fall, but the photographic evidence that Petitioner provided does not demonstrate any such a rut or depression. (PX #2) In fact, there is no appreciable unevenness of the pitch. It is a small wonder how the Petitioner managed to fall on such a surface. The Arbitrator notes that Petitioner's own photos contradict his testimony. Even the oft cited *McAllister* decision requires the Petitioner to be at some added or increased risk, which is absent here. *McAllister v. Illinois Workers' Comp. Comm'n.* 181 NE3d 656, 667. With all due respect to Petitioner, everyone has clumsy moments from time-to-time and that appears to be the case here.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove that his August 10, 2020 accident arose out of and in the course of his employment with Respondent. All other issues are rendered moot. All benefits are denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC039381
Case Name	Debra Wilson-Stanslawski v. Nippersink School District #2
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0250
Number of Pages of Decision	14
Decision Issued By	Raychel Wesley, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Amy Bilton

DATE FILED: 5/29/2024

/s/ Raychel Wesley, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBRA WILSON-STANISLAWSKI,

Petitioner,

vs. NO: 14 WC 39381

Nippersink School District #2,

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, occupational disease, §1(e) and §1(f) of the Workers' Occupational Diseases Act, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 23, 2023 is hereby affirmed and adopted.

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

Under §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.

May 29, 2024

/s/ *Raychel A. Wesley*

RAW/wde

D: 4/15/24

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC039381
Case Name	Debra Wilson-Stanslawski v. Nippersink School District #2
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Jason Esmond
Respondent Attorney	Amy Bilton

DATE FILED: 3/23/2023

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

/s/Gerald Napleton, Arbitrator

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DEBRA WILSON-STANISLAWSKI,
Employee/Petitioner

Case # **14 WC 39381**

v.

Consolidated cases:

NIPPERSINK SCHOOL DISTRICT #2,
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 **March 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **5/24/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**114,400.00**; the average weekly wage was $**2,200.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **1** dependent children.

ORDER

All claims for compensation are denied under both the Workers' Compensation and Occupational Diseases Acts. Petitioner failed to prove that she sustained an accident or was exposed to an occupational disease arising out of and in the course of her employment. Further, Petitioner failed to prove that her condition of ill-being is related to any accident or exposure arisoug out of and in the course of her employment. All benefits are denied.

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

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

/s/ Gerald W. Napleton

Signature of Arbitrator

MARCH 23, 2023

ADDENDUM TO ARBITRATION DECISION
FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Petitioner was employed as a speech language pathologist for Respondent where she had worked since 2005. Her job duties required her to evaluate and treat children who exhibited language, communication, cognition, and swallowing disorders.

In 2007, Petitioner was transferred to Spring Grove Elementary School. She testified she either worked in classroom 103 or 104 which were located the basement of the building. She testified she started to experience repetitive, unidentified illnesses after moving to Spring Grove Elementary. Petitioner acknowledged on cross-examination that she sought treatment for respiratory illnesses including sinusitis, pneumonia, and possible meningitis before 2007.

Petitioner testified she noticed humidity and moisture in her classroom after 2007. She noticed her work materials were damp and moldy and that the ceiling tiles and carpeting were wet. She reported the conditions to Chris Pittman and was moved into a temporary space while the carpet was removed, tile was installed, and a humidifier and air conditioning unit were installed. She testified she bought a mold test from Home Depot to test for mold in her classroom, but the results of that test were not placed in evidence. Petitioner testified despite the remedial measures, she continued to notice dampness thereafter and her illnesses persisted.

Petitioner testified she felt progressively worse as time went on. She began noticing problems with concentration, migraines, and eye sensitivity to the point where she could no longer wear contact lenses. She also testified she developed ulcers in her eyes.

Petitioner last worked in the school building on June 30, 2012. She remained employed by the district until 2014 when her employment with Respondent ended. Between 2012 and 2014, she only entered the Spring Grove Elementary building to retrieve her personal materials. On November 24, 2014, Petitioner filed the present Application for Adjustment of Claim, alleging exposure to asbestos at work, not mold.

Petitioner testified her symptoms improved after June 30, 2012, but claimed she has persistent asthma, sinus problems and other symptoms. She testified she underwent two sinus-related surgeries and remains on two inhalers. She most recently underwent another surgery in June of 2022. Other than use of inhalers, she has not received any significant treatment since the surgery last year.

Petitioner testified she currently has all the same symptoms as in 2010, but to a lesser degree. She testified she needs to be careful around mold and remains inhaler dependent. She testified she can no longer wear her contact lenses. Petitioner acknowledged her recent unstable living conditions and acknowledged that she may have been exposed to inconsistent air quality since leaving the district. She testified that she was exposed to mold in an apartment where she lived for several months in 2016, which increased her symptoms.

At trial, Petitioner explained she initially filed her Application with allegations of asbestos exposure because she was not sure what was causing her respiratory problems. She did not testify to any specific exposure to mold on May 24, 2012, but instead testified to mold exposure over time.

Environmental Testing

Petitioner presented an Illinois Freedom of Information Act FOIA response from Nippersink School District, which included documentation of asbestos, pest management, air quality, water quality, boiler, and pressure inspections, as well as budgeting documentation. Air quality sampling from Spring Grove Elementary School during the time of Petitioner's employ, specifically from 2009, 2010 and 2011, each showed no unusual mold in any of the tested classrooms or mobile units. An April 20, 2012 mold test noted fungal growth in room 014 with small amounts of bacillus spores (7 CFU/M^3), though the final report generated on May 4, 2012 concluded there were no indoor air quality issues of any concern when comparing the results to outside air quality at the time. (PX1, P.376). After reviewing all the air quality testing results during Petitioner's employ at Spring Grove Elementary School, the Arbitrator notes none of the reports showed any elevated levels of mold while Petitioner worked in the building.

Medical Treatment

Petitioner's medical records show a history of sinus infections two to four times per year before working in the Spring Grove Elementary building. In 2004, she was diagnosed with bronchitis. On March 4, 2005, she treated for sinus pain. On August 10, 2005, she was seen for a pre-employment physical where she complained of a sore throat, swollen lymph nodes, sinus

drainage, right earache, and upper respiratory infection. She was also previously diagnosed with allergic rhinitis.

No medical records were admitted which show medical treatment of any sort from the date of her full-time employ in 2005 through her last date of employment on June 30, 2012. The medical records admitted show treatment from July 14, 2014 through June 22, 2022.

On September 18, 2015, Petitioner saw Dr. Dresden and reported chronic cough and bothersome symptoms, along with episodic chest tightness and asthma exacerbations three to four times per year. She complained she had many allergies. Dr. Dresden reviewed allergy tests from August 27, 2015, which were negative for all environmental allergens, including Aspergillus. Dr. Dresden found no evidence of active pulmonary disease and opined Petitioner did not have allergies related to mold exposure.

Petitioner was referred to a pulmonologist, Dr. Husnain, who she first saw on October 2, 2015. She gave a history of episodic chest tightness and asthma exacerbations three to four times per year. She reported being a former smoker for 25 years. Her lungs were clear and there was no evidence of active pulmonary disease. Dr. Husnain diagnosed mild intermittent asthma and chronic cough, which he attributed to a combination of allergic rhinitis, GERD, and asthma. He recommended IgE testing to determine whether she would be a candidate for a particular type of treatment.

On October 13, 2015, an MRI revealed chronic bilateral maxillary paranasal sinus disease. On October 19, 2015, pulmonary function tests were normal. On November 2, 2015, a CT scan of the chest was also normal. She returned to Dr. Husnain on December 7, 2015, when she reported no recent exacerbations. The diagnosis did not change.

On December 10, 2015, Petitioner sought treatment with a nurse practitioner and underwent a CT of the paranasal sinuses on May 10, 2016 which revealed bilateral maxillary sinusitis, which had progressed compared to a prior MRI. She then underwent nasal surgery, including correction of a deviated septum with removal of polyps and other sinus tissue on May 23, 2016. The pathology report revealed modest chronic inflammation.

On October 7, 2016, Petitioner followed up with the nurse practitioner with complaints of a cough with blood-tinged phlegm. At Petitioner's request, the nurse practitioner ordered a sputum culture that revealed both *Aspergillus Niger* mold spores and a rare form of yeast. The yeast was later identified as *Candida Albicans*. Petitioner also underwent further IgE testing specific to

Aspergillus on November 8, 2016. Her IgE was overall elevated, but she showed a negative allergy response to Aspergillus mold and her allergen specific IgE for Aspergillus was zero. A follow-up chest CT on November 15, 2016 was again normal.

No evidence was submitted showing medical treatment between 2016 and 2021. On June 20, 2021, she was sent to Dr. Shamsuddin for evaluation of a blood disorder. He recommended genetic testing and other studies.

On February 8, 2022, she saw Dr. Balgani for a pulmonology evaluation. Dr. Balgani recommended an allergy panel to address possible aspergillosis. Petitioner asked Dr. Balgani whether Aspergillus could be the cause of her multiple respiratory complaints. Dr. Balgani opined Aspergillus was not usually associated with pulmonary disease.

Petitioner followed up on February 24, 2022 with Dr. Yang and was treated with an antibiotic for an active sinus infection. On March 24, 2022, Dr. Yang reviewed an updated CT scan which he reported showed moderate mucosal thickening. Petitioner wished to proceed with revision sinus surgery, which ultimately occurred on June 28, 2022. The pathology report showed minimal chronic inflammation in the sinuses and was negative for neoplasm.

Deposition Testimony

Petitioner sought her own independent medical evaluation with Dr. Marder on September 27, 2017. Dr. Marder testified Petitioner experienced an aggravation of asthma due to a work-related exposure to mold. Dr. Marder testified exposure to Aspergillus can cause a mold-related breathing problem, such as the type Petitioner experienced. He opined that a causal connection exists between the mold exposure Petitioner reported in 2007 at Spring Grove Elementary School, and testified she was more susceptible to aggravations after that exposure.

Dr. Marder did not review any medical records prior to 2015 and was not aware Petitioner had respiratory symptoms prior to 2007. He admitted he relied solely on Petitioner's history in reaching his conclusions concerning mold exposure. He also testified Petitioner had a positive Aspergillus Niger allergy skin test by her history but admitted he never saw the actual medical reports from that allergy testing. He also admitted to other potential causes or aggravating factors, such as her smoking and potential mold exposure at home.

Dr. Marder further acknowledged that all the mold tests taken while Petitioner worked for the Respondent were essentially unremarkable and normal, with no greater mold concentrations in the building than outside. He acknowledged that Petitioner was exposed to mold in her home from February 2016 through September 2016 and admitted that such exposure could have caused the elevated IgE levels in 2016. Dr. Marder testified that the IgE study performed in 2016 showed a possible sensitivity to Aspergillus, but not a hypersensitivity. He testified Aspergillus did not produce any significant mycotoxins, in either home or a school setting, and testified that consistent humidity over 70% (similar to swamp conditions) would be required to form sufficient mold spores to be concerning from a medical toxicology perspective.

Respondent requested Dr. Jerrold Leikin perform a Section 12 records review. Dr. Leikin testified he reviewed approximately 5 inches of medical records, including Dr. Marder's September 2017 report. Dr. Leiken highlighted that the medical records showed no history of any inhalation injury to mold between 2007 and 2012 and that, according to all the air quality testing produced, no elevated mold was found at Spring Grove Elementary School while Petitioner worked in the school. Dr. Leikin opined there was no medical toxicology issue documented contemporaneously with Petitioner's employment that would require any specific treatment, ongoing treatment, or need for any treatment for that matter.

CONCLUSIONS OF LAW

Relative to issues (c), (d) and (f), whether Petitioner sustained an accident or exposure on May 24, 2012 that arose out of and in the course of her employment with Respondent, and whether Petitioner's current condition of ill-being is causally related to that alleged injury or exposure, the Arbitrator finds as follows:

The burden is on the petitioner seeking an award to prove by a preponderance of credible evidence all elements of her claim, including that the injury complained of arose out of and in the course of her employment. *Martin v. Industrial Comm'n*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v. Industrial Comm'n*, 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 testifies to an injury, no matter how much her testimony may be contradicted by the evidence or how evident it may be that her story is a fabricated afterthought. *U.S. Steel v. Industrial Comm'n*, 8 Ill.2d 407, 134 N.E.2d 307 (1956).

As a threshold matter, Petitioner initially claimed on her Application for Adjustment of Claim that she was exposed to asbestos, causing respiratory and other injuries. There is no evidence in the record supporting a claim for asbestos exposure. Even Petitioner's expert witness, Dr. Marder, testified there was no evidence Petitioner was exposed to asbestos (PX8, p. 1375) and acknowledged that asbestos exposure was not the cause of Petitioner's complaints (PX8, 1392). The Arbitrator finds no evidence to support Petitioner's claim of exposure to asbestos nor that her current condition of ill-being is causally related to any asbestos exposure.

At trial, Petitioner acknowledged the uncertainty of potential asbestos exposure despite her filing an application for adjustment of claim. She acknowledged that she changed her theory of liability under the Occupational Disease Act to reflect exposure to mold spores due to humid and wet conditions in her assigned classroom.

The Illinois Supreme Court has held a claimant's testimony standing alone may be accepted for purposes of determining whether an accident occurred, but that testimony must be proved credible. *Caterpillar Tractor v. Industrial Comm'n,* 83 Ill.2d 213, 413 N.E.2d 740 (1980). Uncorroborated testimony can only support an award for benefits if consideration of all the facts and circumstances support the decision. The Arbitrator finds the only evidence introduced to show exposure to any allergen was the testimony of Petitioner herself that the classroom to which she was assigned from 2007 through 2012 was damp and sometimes wet and that some of her materials were damp and "full of mold." Petitioner's testimony is uncorroborated by any tests showing elevated levels of Aspergillus or other mold.

Despite Petitioner's testimony that her materials were "full of mold," she was vague about when she noticed such conditions, other than testifying she noticed the conditions after 2007. She offered no evidence whatsoever to prove what type of mold, if any, was on her materials. While Petitioner testified she purchased a mold kit from Home Depot to test the presence of mold, she did not preserve the test results or admit the results into evidence.

The results of air sampling performed at Spring Grove Elementary School, the only evidence admitted which could potentially address whether mold was in the school building, demonstrated that the air quality was normal and that there was no evidence of any unusual presence or elevated levels of mold in the building. Dr. Marder's testimony referred to testing showing mold colonies in 2010, but a closer inspection of that document shows the testing was

performed at Nippersink Middle School, not Spring Grove Elementary School where Petitioner had already permanently been reassigned years earlier.

Dr. Marder testified that Aspergillus exposure could have aggravated Petitioner's asthma and made her more susceptible to further aggravations. This testimony is unsupported by the actual medical records and is not reliable. There is no evidence Petitioner sought any medical treatment for respiratory or asthmatic conditions while working at Spring Grove Elementary at all, despite her claims of recurrent and consistent exposure to damp conditions and moldy materials. The argument that Petitioner was sensitized to Aspergillus mold, which therefore aggravated her asthmatic and allergic conditions, has no basis in fact or law as there is no medical evidence in the record that Petitioner sought treatment for those conditions during the time she was employed by the school district.

In reaching his conclusions, Dr. Marder also relied on information contradicted by the medical records. Dr. Marder relied on Petitioner's testimony regarding her medical history which was contradicted by the medical records: Dr. Marder's asserted that Petitioner's issues started in 2007, which the medical records show they did not; the 2015 skin test was positive for Aspergillus allergy, which it was not; and that Petitioner's Aspergillus-specific IgE testing in 2016 was elevated, which it was not. Dr. Marder rendered his opinion without reviewing crucial and timely records from the allergy testing and relied on Petitioner's history alone. Dr. Marder reviewed no medical records for any care or treatment that correspond to the years Petitioner worked for Respondent, and seemingly discounted her 2016 mold exposure in her home along with a 25-year smoking history.

The Arbitrator places significant weight on the medical records and the opinions of treating physicians aside from Dr. Marder. Even in August 2015, years after Petitioner stopped working in the Spring Grove Elementary school building, she tested negative for an Aspergillus allergy, and any other environmental allergies. Dr. Balgani, Petitioner's treating pulmonologist, also opined Aspergillus is not usually associated with pulmonary disease. Dr. Dresden, another treating physician, opined in his September 18, 2015 office note Petitioner "(did) not appear to have any allergies related to mold exposure." (PX3, p. 1015).

Given the record as a whole, the Arbitrator finds Petitioner failed to prove by a preponderance of the credible evidence that she was exposed to mold, that she was allergic to any mold, or that she sustained any injury from exposure to mold at work.

The Arbitrator also notes that, under the Occupational Diseases Act, Petitioner failed to prove disablement within two years of her last date of exposure (which would have, at latest, been June 30, 2012). Petitioner did not seek any medical treatment for the condition until September 2015 and neither alleged nor proved any lost time from work from her condition. Accordingly, benefits under the Occupational Diseases Act are denied because Petitioner failed to prove any disablement on or before June 30, 2014.

Since the Arbitrator finds Petitioner failed to prove by a preponderance of the credible evidence that her condition of ill-being is causally connected to any exposure to mold or asbestos at work, all benefits are denied. As such, all remaining issues are moot and will not be addressed.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC015789
Case Name	James Aldridge v. Unistaff
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0251
Number of Pages of Decision	10
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Leandro A. Alhambra
Respondent Attorney	Michael Latz

DATE FILED: 5/30/2024

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WAUKEGAN)

☒ 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 ALDRIDGE,
Petitioner,

vs. NO: 17 WC 15789

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 25, 2023 is hereby affirmed and adopted.

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

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

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

May 30, 2024
O: 05/23/24
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC015789
Case Name	James Aldridge v. Unistaff
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	Leandro Alhambra
Respondent Attorney	Michael Latz

DATE FILED: 10/25/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 24, 2023 5.32%

/s/ Paul Seal, Arbitrator

Signature

STATE OF ILLINOIS)

)SS.

COUNTY OF WAUKEGAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Aldridge
Employee/Petitioner

v.

Unistaff
Employer/Respondent

Case # **17 WC 15789**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city **Waukegan**, on **08/16/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On, **12/29/16** Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 $**8572.60**; the average weekly wage was $**428.63**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**32,330.57** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**32,330.57**.

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 $285.75/week for 333-6/7 weeks, commencing 01/05/2017 through 5/30/2023, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $32,330.57 for TTD.

Respondent shall pay, pursuant to the fee schedule, the bills of American Hip Institute $7,345.90 and ADCO $44,458.68 (see Pet. Ex. 3 & 4) as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $257.18/week for 150 weeks, because the injuries sustained caused the 30% 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.

OCTOBER 25, 2023

Signature of Arbitrator

MEMORANDUM OF DECISION OF ARBITRATOR

PROCEDURAL

This matter was tried on 03/07/2019, before Arbitrator Doherty on Petitioner's 19(b)/8a motion. The Arbitrator decision was filed on 4/10/19 and made the following findings:

- Petitioner sustained an accident arising out of and in the course of his employment.
- Petitioner's current condition of ill-being was causally related to the accident.
- Petitioner was entitled to TTD benefits of 285.752/week for 113-1/7 weeks.
- Respondent was liable for reasonable and necessary medical expenses incurred for treatment of his causally related injuries.
- Respondent was liable for the right hip surgery recommended by Petitioner's treating physician, Dr. Domb.

Respondent filed timely appeal with the Commission. On 9/21/20, the Commission affirmed and adopted the Arbitrator's decision.

Respondent filed a timely appeal to the Circuit Court. On 4/23/21, the Circuit Court affirmed the Commission's decision.

Respondent filed a timely appeal to the Appellate Court. On 4/6/22, Appellate Court Second District affirmed the Circuit Court's order, which confirmed the Commission's decision.

FINDINGS OF FACTS

Following trial on 3/7/19, Petitioner continued to follow up with Dr. Domb on 12/31/20with complaints of sharp pain, grinding and popping of the left hip. Dr. Domb's exam left hip revealed + log roll test, +lateral impingement test, +anterior impingement and +Faber test. Dd. Domb's diagnoses were left hip labral tear and Cam type FAI. Dr Domb continued to recommend left hip arthroscopy and continued to keep Petitioner off work. Petitioner was to follow up within 6 weeks to plan for surgical treatment if approved by workers' comp.

Petitioner followed up with Dr. Domb on 2/11/21. At that time, he continued to have left hip, reporting pain 8 out of 10. There were no changes to the exam finding. Dr. Domb continued to keep Petitioner off work. Left surgery was pending workers' comp approval.

Petitioner continued to follow up with Dr. Domb's office throughout 2021. He was seen on 4/15/21, 5/26/21, 8/23/21, 10/28/21 and 12/22/21. Dr. Domb continued to keep Petitioner off work and continued to recommend left hip arthroscopy. On 5/26/21 visit, Petitioner was provided a wearable low intensity ultrasound device to reduce pain.

On 12/8/22, Petitioner followed up with Julie Jekli, APN, from Dr. Domb's office. At that time Petitioner continued to complain of 8/10 left hip pain. He also reported numbness and tingling in the lower extremity and snapping/popping. Petitioner was prescribed Pantoprazole 20 mg, Meloxicam 7.5 mg, Lidozen patch and Flexmid 7.5 mg. Petitioner's work restrictions were modified to no lifting, no prolonged sitting, allow to recline as needed, no prolonged standing,

limited walking, no bending, no squatting, no push/pull. Restrictions were permanent until surgery on his hip.

At the request of the Respondent, Petitioner submitted to a Section 12 Exam on 5/16/23, with Dr. Jay Levin. Dr. Levin's examination revealed left hip adduction 10 degrees with diffuse lateral pain, compared to 15 degrees on the right. Sitting straight leg raise on the left elicits left hip pain at 40 degrees. Left hip flexion 80 degrees with left lateral hip pain, compared to 90 degrees on the right. Petitioner was not able to walk in a toe/toe fashion, nor was he able to walk in a heel/heel fashion. Lateral lumbar bending 5 degrees to left gives left lateral hip pain.

Dr. Levin's diagnosed left hip tear of the acetabular labrum. Dr. Levin opined that this diagnosis was caused by the 12/29/16 accident. According to Dr. Levin's report Petitioner no longer wanted to pursue hip surgery and to live with his condition and therefore no further medical care is required and Petitioner is at MMI. Dr. Levin opined that Petitioner could return to sedentary position with the ability to change position as needed, limited walking, no bending, no squatting, and no pushing or pulling.

Dr. Levin opined that Petitioner's impairment rating for the left hip is 3% or 1% whole person impairment.

Petitioner testified that he no longer wanted to proceed with the left hip surgery due to the risks of surgery. Furthermore, he had learned to live with the pain over the years. Petitioner has not worked since the date of accident. Petitioner testified that Respondent has never offered a job within either Dr. Domb's or Dr. Levin's recommended work restrictions.

With respect to permanency, Petitioner testified that he has difficulty dressing himself and that his girlfriend helps him with dressing. He can no longer exercise and has gotten out of shape. Prior to the accident Petitioner used to work out every day. He is limited in walking. Petitioner testified that he hurts as soon as he gets up and stands on his leg. Petitioner experiences hip pain when he stands or sits too long. He lies flat on his back to relieve the pain. Petitioner testified that his sexual activity is limited due to pain. He has difficulties doing dishes, laundry and vacuuming the floor and any other activities that require prolonged standing. Petitioner takes Norco, Meloxicam and Flexmid to relieve the pain.

On cross examination, petitioner testified he sometimes uses a cane to walk. Petitioner testified that he was driven to court that morning and can only drive for a short period due to hip pain.

Patrick Barker (Barker) testified on behalf of Respondent. Barker is a private investigator, employed by All Investigations Group. Barker was assigned to surveil Petitioner at his residence. On direct examination, Barker testified that he observed Petitioner on 5/25/23, walk out of his residence carrying a small garbage bag, walk to the dumpster and walk back inside his apartment. Barker testified that Petitioner did not use a cane or walk with a limp.

Barker also testified that Petitioner observed Petitioner on 6/12/23 starting at 11:54 am. Petitioner entered the passenger side of the care and was driven by a female to a liquor store, a gas station and then back to his residence. Petitioner exited the vehicle and entered the stores at both stops. Barker testified that Petitioner did not walk with a limp or use a cane during this trip.

On cross-examination however, Barker admitted that he observed Petitioner on 5/16/22 in a parking lot of a doctor's office. Barker admitted that this time he observed Petitioner use a cane and walk slowly with a noticeable limp, as he entered and exited the building. He also observed Petitioner lowering himself slowly while entering the rear driver's side passenger's seat of the car.

With respect to 5/25/23 surveillance, Barker admitted that he did not know what was in the bag, nor did he know the weight of the bag that Petitioner carried to the dumpster. Barker also admitted that he did not know the weight of the small object that Petitioner was carrying from the car to his apartment on 6/12/23. Barker admitted that he is not trained to issue medical opinions on an individual's ambulation or gate.

Barker testified that video he took surveillance video of Petitioner on the days he was observed – 5/16/23, 5/25/23 and 6/12/23. Barker admitted that he is in possession of the surveillance video but was not asked by Respondent to bring the videos to trial.

Petitioner was recalled back to the stand as a rebuttal witness. Petitioner testified that the bag that he was observed carrying on 5/25/23 was small garbage bag for tissue and toilet paper. Petitioner testified that the bag did not weigh more than 5 pounds. Petitioner also testified that on the dates he was observed by Barker, he took his pain meds (Meloxicam & Flexmid), morning, afternoon and in the evening, as instructed by his doctor.

Conclusions of Law

1) With regard to the issue of whether Petitioner current condition of ill being is causally related to the accident, the Arbitrator finds that the Petitioner has met his burden of proof.

The Commission had previously found that Petitioner left hip labral tear was causally related to the 12/29/16 work accident. There have been no intervening accidents or injuries to the left hip to break said causation. All medical records following the date of trial (3/7/19) from Dr. Domb relate Petitioner's left hip condition to the 12/29/16 accident. Moreover, in the 5/30/23 IME addendum Dr. Jay Levin opined that Petitioner's labral tear was caused by the work accident.

2) Regarding the issue of medical expenses, the Arbitrator finds that treatment received for Petitioner's left hip was reasonable and necessary to address. Following 3/7/19 trial Petitioner continued to follow up with Dr. Domb for his left hip. Dr. Domb prescribed various pain medications and patches for Petitioner's left hip pain. Respondent shall pay, pursuant to the fee schedule, the bills of American Hip Institute $7,345.90 and ADCO $44,458.68 (see Pet. Ex. 3 & 4).

3) Regarding the issue of total temporary disability, the Arbitrator finds that Petitioner is entitled to TTD from 1/5/17 through 5/30/23. Petitioner was previously awarded and paid TTD benefits from 1/5/17 through 3/7/19. Following 3/7/19 trial, Dr. Domb continued to keep Petitioner off work, pending approval of left hip surgery. Petitioner was last examined by Dr. Domb on 12/8/22. At that time, Dr. Domb placed Petitioner on work restrictions of no lifting, no prolonged sitting, allow to recline as needed, no prolonged standing, limited walking, no bending, no squatting, no push/pull. Respondent did not accommodate these restrictions.

Petitioner later decided to forgo the recommended left hip surgery. On 5/30/23, Respondent's Section 12 examiner, Dr. Levin opined that Petitioner was at MMI could return to sedentary work with the ability to change position as needed, limited walking, no bending, no squatting and no pushing or pulling. Respondent has not offered a position within Dr. Levin's recommended restrictions.

Based on the forgoing, the Arbitrator is entitled to TTD benefits from 1/5/17 through 5/30/23.

4) Regarding the issue of nature and extent, the Arbitrators finds the following:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that Dr. Levin calculated a disability impairment rating of 3% of a leg and 1% person as whole. The Arbitrator gives moderate 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 forklift driver. Petitioner was not able to return to work as a forklift driver due to the permanent work restrictions recommended by both Dr. Domb and Dr. Levin. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 46 years old at the time of the accident. The Arbitrator therefore gives moderate weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator noes that Petitioner has not been able to return to work as a forklift driver. As of the date of trial, Petitioner is not working in any capacity. Petitioner testified that he was awarded Social Security Disability benefits. 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 there was evidence of disability which show that the Petitioner sustained ongoing, permanent limitations to his left hip. Petitioner was last treated Dr. Domb's office on 12/8/22. At that time Petitioner continued to complain of 8/10 left hip pain. He also reported numbness and tingling in the lower extremity and snapping/popping of the hip.

Dr. Levin on 5/16/23, examination revealed Levin's examination revealed left hip adduction 10 degrees with diffuse lateral pain, compared to 15 degrees on the right. Sitting straight leg raise on the left elicits left hip pain at 40 degrees. Left hip flexion 80 degrees with left lateral hip pain, compared to 90 degrees on the right. Petitioner was not able to walk in a toe/toe fashion, nor was he able to walk in a heel/heel fashion. Lateral lumbar bending 5 degrees to left gives left lateral hip pain. Dr. Levin opined that Petitioner's subjective complaints correlated with his exam findings.

Petitioner testified that he continues to have left hip pain that limits his ability to stand, walk and sit for prolonged periods of time. Petitioner lies flat on his back to relieve the hip pain. Petitioner continues to take prescription pain medication daily for his pain. Petitioner testified that he is unable to exercise and his difficulties with activities of daily living such as vacuuming, dishes and dressing, due to his hip pain. At times, Petitioner uses a cane to ambulate.

The Arbitrator gives less weight to the testimony of private investigator, Patrick Barker. Barker was hired to surveil Petitioner. Parker testified that he observed Petitioner on 5/25/23 and

6/12/23 walking without a noticeable limp and without a cane. However, on cross-examination Parker admitted that on 5/16/23 he also observed Petitioner walking with a cane was observed on with a noticeable limp. The Arbitrator notes that Parker took video surveillance of Petitioner. Respondent chose not to submit the surveillance video into evidence, but rather submitted pictures of Petitioner walking without a cane and allegedly walking "without a noticeable limp." (See Respondent's Ex. F). This is consistent with Petitioner's testimony that he does not always use a cane. Accordingly, the Arbitrator finds the pictures have no probative value with respect to the issue of permanency. Moreover, Petitioner was not performing any activities outside the restrictions recommended by either Dr. Domb or Dr. Levin.

Based on the above the Arbitrator finds that Petitioner sustained 30% loss of use of person as a whole.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010347
Case Name	Thomas Eiler v. State of Illinois - Alton Mental Health – Illinois Department of Human Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0252
Number of Pages of Decision	13
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Keith Short
Respondent Attorney	Caitlin Fiello

DATE FILED: 5/30/2024

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Eiler,

Petitioner,

vs. NO: 18 WC 10347

State of Illinois/Alton Mental Health-
Illinois Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

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

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

May 30, 2024

MP:yl
o 5/23/24
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/s/ *Marc Parker*
Marc Parker

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

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

DATED:

Elizabeth.Coppoletti

Elizabeth.Coppoletti

Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC010347
Case Name	Thomas Eiler v. State of Illinois/Alton Mental Health - Illinois Department of Human Services
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	Keith Short
Respondent Attorney	Caitlin Fiello

DATE FILED: 11/27/2023

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

/s/ Linda Cantrell, Arbitrator
Signature

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

November 27, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thomas Eiler
Employee/Petitioner

v.

State of Illinois/Alton Mental Health-Illinois Department of Human Services
Employer/Respondent

Case # **18** WC **010347**

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 **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **10/27/23**. 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?
O. ☐ Other _____

FINDINGS

On **1/19/18**, 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 $**58,712.77**; the average weekly wage was $**1,129.09**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **1** dependent children.

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

Respondent ***has or will pay*** all appropriate charges for all reasonable and necessary medical services, pursuant to the stipulation of the parties.

Respondent shall be given a credit of $**$11,634.22** for TTD, $**0** for TPD, $**0** for maintenance, and $**Any and all benefits paid by SERS**, for a total credit of $**11,634.22, plus any and all payments made by SERS,** pursuant to the stipulation of the parties.

Respondent is entitled to a credit of $**TBD and any and all amounts paid** under Section 8(j) of the Act, pursuant to the stipulation of the parties.

ORDER

The Arbitrator finds that Petitioner is not entitled to the inclusion of overtime in his weekly wage calculation. Therefore, the Arbitrator finds that Petitioner's average weekly wage is $1,129.09 based on regular earnings during the year preceding the injury of $58,712.77.

Respondent shall pay Petitioner permanent partial disability benefits of $**677.45**/week for **200** weeks because the injury sustained caused **40%** loss of use of his body as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 1/22/20, the date Dr. Fucetola testified that Petitioner did not require further treatment, through 10/27/23, 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.

NOVEMBER 27, 2023

Arbitrator Linda J. Cantrell

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

THOMAS EILER, Employee/Petitioner, v. STATE OF ILLINOIS-ALTON MENTAL HEALTH-ILLINOIS DEPARTMENT OF HUMAN SERVICES, Employer/Respondent.	)	Case No.: 18-WC-010347

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on October 27, 2023 on all issues. The parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on 1/19/18, and that Petitioner's current condition of ill-being is causally connected to the work injury. Respondent stipulated to liability for all reasonable and necessary medical bills contained in Petitioner's Group Exhibits 8 through 11. The parties stipulated that Respondent is entitled to a credit for any and all medical bills paid through its group medical plan under Section 8(j) of the Act.

Respondent stipulated to liability for temporary total disability benefits from 2/16/18 through 6/7/18, 1/4/19 through 3/31/19, 12/27/19 through 1/19/21, and 1/26/21 through 10/27/23. The parties stipulated that Respondent is entitled to a credit of $11,634.22 in TTD benefits paid, and a credit for any and all payments made by SERS.

The issues in dispute are average weekly wage and the nature and extent of Petitioner's injuries.

TESTIMONY

Petitioner was 32 years old, single, with one dependent child at the time of accident. Petitioner was hired by the State of Illinois in 2010 and began working at Respondent's facility in 2014. He was a Mental Health Tech III at the time of accident. His job duties included scheduling for other MHTs and reviewing treatment plans and risk assessments for clients. Petitioner testified that on 1/19/18 he was attacked from behind by a client who attempted to strangle him. Petitioner yelled for help and a coworker was able to throw the client off of him. Petitioner testified that they were short on staff and could not obtain a restraint order, so they

attempted to redirect and calm the client. The client attacked another employee by punching her repeatedly in the face. The client was very upset and threatened to strangle Petitioner with a radio cord. Petitioner testified that he did not want to go back on the grounds, but his supervisor told him that if he refused, he would be fired.

Petitioner testified that he was terrified following the incident. He received treatment through the employee assistance program. Petitioner testified that as he continued to work he was afraid of the clients which interfered with his job duties. Petitioner was placed off work on 2/16/18. He returned to a different position on 6/8/18 with no patient contact. He was placed off work again from 1/4/19 through 3/31/19 and returned to work with no patient contact. He was placed off work again from 12/27/19 through 1/19/21. He returned to work and was placed back off work on 1/26/21 through the date of arbitration. Petitioner testified that he worked for a gift shop Spencers for approximately six months during the COVID-19 pandemic. He treated with therapists and psychiatrists who recommended he not return to a job with patient contact.

On cross-examination, Petitioner testified that one of the jobs he performed for Respondent after the accident was cutting grass on the grounds crew. He agreed he could still perform that type of work. Petitioner testified that he had to interact with customers when he worked at Spencers and he believed he could still perform that job.

Tammy Jackson testified on behalf of Respondent. Mrs. Jackson was hired by Respondent on 7/16/20 and is the Leave Coordinator. She testified that she is familiar with Petitioner's worker's compensation claim. She created a timeline of Petitioner's file. (RX9) Mrs. Jackson testified that Petitioner worked light duty after his accident and then took a voluntary reduction from a Mental Health Tech to a Support Service Worker in April 2019. (RX3) She testified that Petitioner took a voluntary reduction in dietary in April 2019 and he requested a job change to grounds crew which took effect on 7/16/19. (RX4)

Mrs. Jackson testified that after Petitioner began working the grounds crew position Respondent received documentation from Petitioner's treating physician that he could not work his job at Respondent's facility. Mrs. Jackson sent a letter to Petitioner on 7/13/23 asking clarification on which job position he was unable to work. She stated that Petitioner did not respond. She sent another letter to Petitioner on 7/31/23 asking him to return to work. On 8/17/23, Mrs. Jackson participated in a pre-disciplinary telephone conversation with Petitioner regarding his return to work. She stated that Petitioner advised he would not be returning to work for Respondent.

On cross-examination, Mrs. Jackson testified that her timeline of Petitioner's workers' compensation file is titled, "Non-service Connected Leave Chronology" because that is the type of leave Petitioner was on when she was hired by Respondent. She testified that Petitioner's leave was never categorized as service-connected because his claim was denied. She did not know why Petitioner was paid temporary total disability benefits.

Mrs. Jackson testified that she never saw the letter dated 10/17/22 from Dr. Sarah Hartz to TriStar Risk Management. (RX5) She testified that she never received any documentation that linked Petitioner's accident to his inability to work. She did not know why Petitioner voluntarily

changed jobs from a Tech III to a Support Service Worker as she did not work for Respondent at the time. Mrs. Jackson testified that Respondent has never considered Petitioner to be on work comp or out for a work-related injury. She testified that the letters she sent to Petitioner in July 2023 would have been sent even if his leave was categorized as service-connected because they required medical documentation for his leave of absence. Mrs. Jackson was not aware if Petitioner was told that he could not return to work on the grounds crew unless he had no restrictions.

On re-direct examination, Mrs. Jackson testified that Petitioner's workers' compensation claim was initially denied so any leave of absence would have been categorized as non-service connected. She testified that in May 2023 she became aware that Respondent accepted Petitioner's claim as service-connected and began paying him TTD benefits. She testified that at that time she understood Petitioner's physician opined he could work on the grounds crew.

MEDICAL HISTORY

Dr. Robert Fucetola testified by way of deposition on 1/22/20. (PX1) Dr. Fucetola is a board-certified clinical neuropsychologist and professor of neurology at the Washington University School of Medicine. Dr. Fucetola examined Petitioner on 8/7/19 and authored an Independent Psychological Evaluation. (PX1, Ex. 2) He reviewed Petitioner's medical records and noted that Petitioner had a professional relationship as a caregiver with the client that attacked him, and the client had personal information about Petitioner that contributed to Petitioner's fears. Petitioner held fears that the attack was personal. Dr. Fucetola testified that at the time of his examination Petitioner continued to have post-traumatic symptoms caused by the accident, mainly nightmares that were controlled by Prazosin. Petitioner's intrusive thoughts had subsided with therapy prior to his examination.

Dr. Fucetola testified that Petitioner was taking antidepressant and antianxiety medications for a number of years prior to the accident, but he had not been diagnosed with post-traumatic stress disorder until after 1/19/18. He testified that Petitioner exhibited significant psychomotor agitation of continuously bouncing his leg and foot, and scattered thoughts during the 4-hour examination, which supported his diagnosis of anxiety and tension. Dr. Fucetola testified that Petitioner had mild evidence of PTSD using the PTSD Checklist Civilian Version. He tested Petitioner using the Minnesota Multiphasic Personality Inventory and suspected Petitioner was overreporting his symptoms; however, he felt Petitioner was unabashedly forthright during the examination.

Dr. Fucetola diagnosed Petitioner with Other Trauma/Stressor-Related Disorder that was causally connected to the work accident, which means there was exposure to a traumatic event followed by a difficult adjustment and persistent symptoms. He opined that Petitioner's PTSD resolved by the time he examined him. Dr. Fucetola opined that Petitioner's condition prevented him from returning to work on Respondent's forensic unit or any patient-care position where there is a high probability of exposure to volatile, disruptive, or physically aggressive people due to increased anxiety that it provokes for Petitioner. Dr. Fucetola opined that Petitioner would benefit from resuming Prazosin, but he did not recommend any additional ongoing treatment

modalities. Dr. Fucetola testified that he did not review a written job description of Petitioner's duties for Respondent.

On 8/16/22, Petitioner was examined by Dr. Sarah Hartz pursuant to Section 12 of the Act. (RX5) Dr. Hartz diagnosed Petitioner with Posttraumatic Stress Disorder and Gender Dysphoria, post-transition. She opined that Petitioner's work accident was the prevailing cause of his symptoms of posttraumatic stress disorder. Dr. Hartz opined that more aggressive medication management was appropriate to treat Petitioner's ongoing symptoms. She opined that if medication was not successful in treating Petitioner's symptoms, he should be evaluated and treated by a psychiatrist. She opined that Petitioner had not reached MMI and was unable to work at the time of her examination, and that Petitioner may not be able to return to his former position with Respondent.

CONCLUSIONS OF LAW

Issue (G): What were Petitioner's earnings?

Petitioner alleges an average weekly wage of $1,000 based on annual earnings of $52,000. Respondent alleges an average weekly wage of $870.95 based on annual earnings of $45,289.47.

Petitioner's wage records from 1/31/17 through 1/15/18 were admitted into evidence. (RX2) Petitioner was paid $58,712.77 in "regular" wages, and $13,423.30 in "overtime" wages in the 52-week period prior to the work accident. The Arbitrator notes that the Wage Statement indicates Petitioner was scheduled to work 40 hours per week; however, the wages classified as "regular wages" includes hours worked in excess of 40 hours per week with no indication such hours were considered "overtime" and the excess hours were not included in the "overtime wages" section of the statement.

Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. 820 ILCS 3G5/10; *Airborne Express v. Ill. Workers' Comp. Comm'n,* 372 Ill.App.3d 549, 554, 865 N.E.2d 979, 983, 310 Ill.Dec. 259 (2007). In *Airborne Express*, the court stated that overtime "includes those hours in excess of an employer'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." *Id.* at 554.

In *Freesen, Inc., v. Industrial Comm'n*, the court listed three bases on which to include overtime hours into the calculation of average weekly wage: that (1) he was required to work overtime as a condition of his employment, (2) he consistently worked a number of overtime hours each week, ***or*** (3) the overtime hours he worked was part of his regular hours of employment. *Freesen, Inc. v. Industrial Comm'n,* 348 Ill.App.3d, 1035, 811 N.E.2d at 322 (2004). (emphasis added). The Commission has interpreted the case law to require that only one of the bases must be proven in order for overtime hours to be included in the calculation of average weekly wage.

In *Holland v. Murray Developmental Center*, the Commission found where a petitioner submits no evidence to support her claim that overtime hours were mandated by her employer and there is no evidence that petitioner worked a set number of overtime hours per week, the petitioner is not entitled to the inclusion of the alleged overtime in her weekly wage calculation. *Holland v. Murray Developmental Center*, 17 IWCC 0078.

In the present case, Petitioner submitted no evidence that the overtime hours he worked were mandated by Respondent, that he consistently worked a number of overtime hours each week, or that the overtime hours he worked was part of his regular hours of employment. Petitioner worked overtime 34 out of 52 weeks prior to the work accident and such hours varied from 7.5 to 91 hours every two-week pay period.

Based on the above evidence, the Arbitrator finds that Petitioner is not entitled to the inclusion of overtime in his weekly wage calculation. Therefore, the Arbitrator finds that Petitioner's average weekly wage is $1,129.09 based on regular earnings during the year preceding the injury of $58,712.77.

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 places no weight on this factor.

(ii) **Occupation**: Dr. Fucetola opined that Petitioner's condition prevented him from returning to work on Respondent's forensic unit or any patient-care position where there is a high probability of exposure to volatile, disruptive, or physically aggressive people due to increased anxiety that it provoked for Petitioner. Likewise, Dr. Hartz opined on 8/16/22 that Petitioner may not be able to return to his former position with Respondent, although she opined Petitioner required further treatment and had not reached MMI. Petitioner attempted to return to work on several occasions performing jobs that did not involve patient contact. Petitioner changed job positions to a Support Service Worker in April 2019 and performed dietary and landscaping job duties. He testified that he could still perform this type of work, as well as clerk-type work in a gift shop. Petitioner never returned to a patient-contact position since the date of accident. The Arbitrator places significant weight on this factor.

(iii) **Age**: Petitioner was 32 years of age at the time of accident. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the

Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places significant weight on this factor.

(iv) **Earning Capacity**: Petitioner was not able to return to his pre-accident employment as a Mental Health Tech III or any patient-contact position that involves the high probability of an assault. Respondent's Leave Coordinator Tammy Jackson testified that Petitioner took a voluntary reduction from a Mental Health Tech to a Support Service Worker in April 2019 where he performed dietary duties, and then requested a job change to grounds crew which took effect on 7/16/19. (RX3, 4) The annual salary in dietary was between $32,400 and $43,692. (RX3) The annual salary in grounds was between $32,400 and $45,456. (RX4) Both positions yielded a salary less than Petitioner's annual earnings as a Mental Health Tech III. The Arbitrator places significant weight on this factor.

(v) **Disability**: As a result of the accident, Petitioner was diagnosed with posttraumatic stress disorder. In August 2019, Dr. Fucetola opined that Petitioner's PTSD symptoms had resolved with medication and therapy, but he continued to suffer nightmares, anxiety, and tension. Dr. Fucetola opined that Petitioner's condition prevented him from returning to work on Respondent's forensic unit or any patient-care position where there is a high probability of exposure to volatile, disruptive, or physically aggressive people. In August 2022, Dr. Hartz diagnosed Petitioner with Posttraumatic Stress Disorder and recommended that Petitioner undergo more aggressive medication management to treat his ongoing symptoms, and psychiatric treatment if medication did not improve his symptoms. Dr. Hartz opined that Petitioner may not be able to return to his former position with Respondent. The Arbitrator places significant weight on this factor.

The Arbitrator finds that the appropriate award is loss of an occupation/trade as provided in Section 8(d)2 of the Act. The Arbitrator finds that Petitioner is not able to return to his usual and customary duties as a Mental Health Tech or hold any patient-care position that involves a high probability of exposure to volatile, disruptive, or physically aggressive people. The Arbitrator is guided by the Commission's decision in *O'Leary v. City of Chicago*, 98-WC-8840, 07 IWCC 743 (2007), wherein the Commission affirmed the decision of the Arbitrator who awarded 40% loss to the person as a whole based upon Petitioner's loss of occupation as a result of a right ankle injury. The Commission Decision, which adopted the Arbitrator's award, discussed in detail a number of cases wherein an award under Section 8(d)2 was made for loss of occupation rather than Section 8(e). The *O'Leary* decision cited with approval *Barfell v. U.E. and C. Catalytic Inc*., 96 IIC 1299, wherein a 37 year old pipefitter who suffered a left torn meniscus that required surgery was placed on permanent work restrictions. The employer in *Barfell* provided Petitioner with fulltime work as a welder and earned union scale wages as a pipefitter. Nonetheless, the Commission concluded that a 40% loss of use under Section 8(d)2 rather than loss of use of a leg under Section 8(e) was appropriate. The commission cited *O'Leary, supra* with approval in *Ridgeway v. TLC*, 02 IWCC 65692, 11 IWCC 0920, 2011 WL 5014274.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 40% loss of his body as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 1/22/20, the date Dr. Fucetola testified that Petitioner did not require further treatment, through 10/27/23, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC015419
Case Name	Manuel Quizpi v. Chipotle Mexican Grill, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0253
Number of Pages of Decision	17
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Jill Kastner

DATE FILED: 5/30/2024

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MANUEL QUIZHPI,

Petitioner,

vs. NO: 19 WC 15419

CHIPOTLE MEXICAN GRILL,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision of the Arbitrator on the issue of permanent partial disability. The Arbitrator awarded Petitioner permanent partial disability benefits representing a 35% loss of a person for the surgically repaired cervical injury to his neck and sprains of the right shoulder and lumbar spine. However, in performing the five-factor statutory analysis, the Arbitrator referred to Petitioner having a fused cervical spine, whereas the operative note states that: "[a]rthroplasty was favored over fusion due to the degenerative changes at C6/7, to reduce the degree of adjacent level accelerated degeneration." Accordingly, the Commission reconsiders the statutory 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). "No single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

The Commission gives no weight to factor (i) because no impairment report was submitted.

The Commission gives some weight to factor (ii), Petitioner's occupation as an IT field technician. The Commission finds that Petitioner required surgery and has residual symptoms in his neck and arms. Based on Petitioner's testimony, the Commission concludes that Petitioner will be required to use his neck and arms in performing in hardware support and network maintenance, as well as in traveling to various restaurants across several states.

The Commission also gives some weight to factor (iii), Petitioner's age at the time of the injury. Petitioner was 44 years old, and therefore has decades of expected work life remaining with residual neck pain and limb numbness.

The Commission places little to no weight on factor (iv), Petitioner's future earnings capacity. Petitioner returned to his position as an IT field tech and Petitioner presented no specific evidence on the issue.

The Commission places great weight on factor (v), the evidence of disability corroborated by the treating medical records. Petitioner underwent an anterior cervical discectomy and disc arthroplasty of the C4-C5 and C5-C6 discs, producing a post-operative diagnosis of cervical disc herniation at C4-C5 and C5-C6, with myelopathy. Even the Section 12 examiner, Dr. Steven Mather, opined that the cervical discectomy would have been reasonable based on the appearance of Petitioner's MRI and the symptoms of neck pain and paresthesia in the arms. Post-surgical physical therapy was required. Petitioner testified that the surgery provided 50% relief of the numbness and tingling going down his arms and approximately 50% relief of his neck pain.

Based on the above factors, and the record taken as a whole, the Commission concludes that Petitioner sustained permanent partial disability to the extent of a 30% loss of use 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 3, 2023, is hereby modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $790.64 per week for 150 weeks, representing the loss of 30% person as a whole for the cervical spine injury 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.

May 30, 2024
o: 5/23/24
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	19WC015419
Case Name	Manuel Quizhpi v. Chipotle Mexican Grill, Inc.
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Jill Kastner

DATE FILED: 11/3/2023

THE INTEREST RATE FOR THE WEEK OF OCTOBER 31, 2023 5.32%

/s/ Raychel Wesley, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Manuel Quizhpi Case # **19** WC **015419**
Employee/Petitioner

v.

Chipotle Mexican Grill, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Raychel Wesley**, Arbitrator of the Commission, in the city of **Chicago**, on **September 12, 2023.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 18, 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 $***92,304.16*** the average weekly wage was $***1,775.08***

On the date of accident, Petitioner was ***44*** years of age, ***married*** with ***four*** 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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$1,183.38/week for 8 4/7 weeks ($10,143.25),** commencing **April 30, 2019 through June 27, 2019**, as provided in Section 8(b) of the Act.

Medical Benefits

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

Advocate Illinois Masonic Medical Center	$76,536.00
ATI Physical Therapy	$12,593.03
Midwest Sports Medicine & Ortho Surgical Specialists	$6,163.00

Permanent Partial Disability

The Arbitrator makes an award of 35% loss of use of the **Person as a Whole** under Section 8(d)(2) & 8(e)(3) of the Act, which corresponds to 175 weeks of permanent partial disability benefits at a weekly rate of $790.64. See Conclusions of Law for Arbitrator's considerations under §8.1b(b) of the Act.

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

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

/s/ Raychel A. Wesley
Signature of Arbitrator

NOVEMBER 3, 2023

FINDINGS OF FACT

This matter proceeded to hearing on September 12, 2023, in Chicago, Illinois before Arbitrator Raychel Wesley on Petitioner's Request for Hearing under the Illinois Workers' Compensation Act "Act." Issues in dispute include accident, causation, unpaid medical bills, temporary total disability benefits and the nature and extent of the injury. Arbitrator's Exhibit "Ax" 1.

Testimony/ Accident

It is undisputed that on May 18, 2018, Petitioner Manuel Quizhpi was an employee of the Respondent, employed as an information technology field service technician. Petitioner testified that as of the day of the accident, he was working for Respondent for approximately twelve (12) years. Petitioner testified that the position is a traveling position, that requires him to travel to Chipotle stores in Illinois, Wisconsin, and Minnesota. Petitioner testified that on that day, he was working at a store in Minnesota. Petitioner also testified that his position is a full-time position.

Petitioner testified that on May 18, 2018, he was injured while he was attempting to move some hanging wires that he saw in the store's network office area. He testified that while he was attempting to move the wires, a shelving unit containing various IT equipment collapsed and fell onto him. He testified that the materials that fell onto him struck his head behind his right ear, his neck and his right shoulder. He testified that he was unaware if there were any witnesses to the occurrence. He testified that there were other employees present in the Chipotle store, but he does not know whether any of them witnessed the occurrence. He testified that he was working in a closet office at the time, which contained the store's networking system. He testified that he was aware that the store had a video surveillance system at the time of the occurrence but was not aware of how it worked. He testified that maintenance and operation of the video surveillance was not one of his responsibilities and was handled by an outside company. He also testified that he was unaware of whether the surveillance cameras were operating at the time of the occurrence.

Petitioner testified that he was in immediate pain following the occurrence. He testified that he did not seek emergency medical attention following the occurrence because he did not want to risk missing his scheduled flight back to Chicago. He testified that the day of the occurrence was a Friday and his flight back to Chicago was scheduled for later that day. Petitioner testified that he injured his neck, his right shoulder, and his lower back in the occurrence. He testified that upon returning to Chicago, he scheduled a doctor's appointment with his primary care physician, William Otero, M.D. to be seen for the injuries that he sustained in the occurrence.

Petitioner testified that on the day of the occurrence, he was working his normal shift for Respondent. He also testified that on the day of the occurrence, he was working with no physical restrictions as it relates to his neck, right shoulder, or lower back. He testified that prior to the May 18, 2018 work occurrence he did have prior injuries to his neck, lower back, and right shoulder, from a previous work accident in 2012. He testified that on the day of the subject occurrence, he was a few months removed from lower back surgery and was in physical therapy for his lower back. He testified that on the day of the May 18, 2018 occurrence he was not undergoing any treatment for any neck pain or right shoulder pain. Further, he testified that he did not have any neck or right shoulder pain immediately prior to the May 18, 2018 occurrence.

Job Duties

Petitioner testified that he has many regular duties as an information technology field service technician. He testified that this is a traveling position, and that he has to travel to various Chipotle Mexican Grill stores

located in Illinois, Wisconsin, and Minnesota in order to perform various duties in the various store locations. He testified that he is responsible for servicing approximately two hundred and fifty (250) Chipotle Mexican Grill stores. Petitioner testified that his primary job duties include maintaining the POS system at each of the stores he services, maintaining the online order system at each store that he services, and also maintaining the internet connectivity for each store that he services. He testified that he visits each store one time per year for maintenance. He testified that part of his job duties involves on the road driving to the various store locations.

Prior Medical Condition(s)

Petitioner testified that he injured his lower back, neck, and right shoulder in approximately 2012, while working for Respondent. He testified that following that occurrence, he filed a workers compensation claim for his injuries and that the case went to trial. Respondent has submitted the transcript of proceedings on Arbitration, dated January 31, 2017, in evidence. (Respondent Ex. 1, hereinafter "Res. Ex. 1"). Petitioner testified that he injured his right shoulder, neck, and lower back in the 2012 occurrence. He testified that following that occurrence he required lower back surgery. He further testified that he also has had surgery on his right shoulder prior to the May 18, 2018 occurrence. Petitioner testified that he never had surgery on his neck prior to the May 18, 2018 occurrence. He further testified that surgery was never recommended for his neck prior to May 18, 2018. He testified that he did have steroid epidural injections for his neck pain following the 2012 work injury. He testified that his neck pain improved approximately six (6) months before the May 18, 2018 work injury.

On June 27, 2017, Petitioner underwent an MRI of the lumbar spine at OPEN MRI Imaging Specialists, LLC. (Res. Ex. 10, p. 151). The MRI of the lumbar spine revealed a small disc protrusion/herniation at L4-L5, a disc bulge at L2-L3, and a disc herniation at T12-L1 that indents on the spinal cord at that level. *Id*.

On August 30, 2017, Petitioner underwent an MRI of the cervical spine at OPEN MRI Imaging Specialists, LLC. (Res. Ex. 10, p. 145-146). The MRI of the cervical spine revealed a herniated disc at C4-5 with associated stenosis and neuroforaminal narrowing, a herniated disc at C5-6 with some stenosis and bilateral neuroforaminal narrowing, and a small disc bulge at C6-C7, without stenosis or neuroforaminal narrowing. (Res. Ex. 10, p. 14).

On September 15, 2017, Petitioner treated with Bruce Montella, M.D. complaining of lower back pain, right shoulder pain and neck pain. (Res. Ex. 10, p. 32). On examination of the cervical spine, cervical alignment was normal, sensation was intact in all dermatomal distributions in the right and left upper extremities, and Hoffman's sign was negative bilaterally. (Res. Ex. 10, p. 33-34). The Assessment & Plan section of the record indicates that surgery for his lower back was ordered at this visit. (Res. Ex. 10, p. 34). There was no recommendation for neck surgery made by Dr. Montella at this visit. (Res. Ex. 10, p. 34-35). Dr. Montella also ordered an EMG for the upper extremities. (Res. Ex. 35). Petitioner testified that he never got the EMG following this visit, because his neck pain began to gradually improve. There are no other treatment dates with Dr. Montella following the September 15, 2017, until after the lower back surgery took place in March of 2018. (Res. Ex. 10).

On March 5, 2018, Petitioner treated with Bruce Montella, M.D. complaining of pain in his lower back and right shoulder. (Res. Ex. 10, p. 27). Dr. Montella recommended lower back lumbar discography followed by decompression surgery during this visit. (Res. Ex. 10 p. 29). Petitioner did not complain of any neck pain or cervical radicular symptoms during the visit. (Res. Ex. 10, p. 27-29). Petitioner testified that he underwent the lower back surgery recommended by Dr. Montella in early April of 2018. He testified that following surgery his lower back symptoms were improved. He also testified that he did not have any complaints of neck pain during this time period.

On April 16, 2018, Petitioner treated with Bruce Montella, M.D., a week and five (5) days following surgery on his lower back. (Res. Ex. 10, p. 21). Petitioner reported 50% improvement of his right leg numbness following back surgery. *Id*. Petitioner did not complain of any right shoulder pain during the visit nor did he complain of any neck pain during the visit. (Rex. Ex. 10, p. 21-22).

Summary of Medical Records/ Section 12 Reports

On May 21, 2018, Petitioner presented to his primary care physician William Otero, M.D., following the May 18, 2018 work accident. (Petitioner Exhibit 3, p. 18-20 of 20, hereinafter "Pet. Ex. 3, p. 18-20 of 20). Petitioner reported that while working, a shelf with IT equipment fell on him. (Pet. Ex. 3, p. 18 of 20). The record indicates Petitioner complained of right shoulder pain and neck pain. *Id*. Petitioner was prescribed medication at this time and was told to return for follow-up in four (4) weeks if his symptoms persist. (Pet. Ex. 3, p. 19 of 20).

On May 29, 2018, Petitioner presented to Bruce Montella, M.D. for an initial consultation following the May 18, 2018 work accident. (Pet. Ex. 3, p. 8-11). The record notes that Petitioner complained of neck pain with burning symptoms down the right arm, right shoulder pain, and lower back pain with numbness and tingling both legs. (Pet. Ex. 4, p. 8). The record notes that Petitioner reported that a shelf containing computer equipment fell onto his right shoulder. *Id*. The record also notes that he attempted to catch the shelf when it fell causing him to twist his right arm and arch his back and experience pain in his right arm, neck and back. *Id*. Dr. Montella notes that this is a work injury where patient injured his neck and re-injured his back and right shoulder. (Pet. Ex. 4, p. 11). Dr. Montella ordered an MRI of his cervical spine, lumbar spine and right shoulder at this time. *Id*. Further, he was instructed to attend physical therapy as well. *Id*.

On June 15, 2018, Petitioner underwent an MRI of his cervical spine at OPEN MRI Imaging Specialists, LLC. (Pet. Ex. 4, p. 5). The MRI report reflects that this MRI was compared to the previous examination of 8/30/17. *Id*. The MRI report notes at the C4-5 level there is worsening of the disc herniation measuring approximately 7 x 12 with significant stenosis and rostral migration. *Id.* The report also notes at the C5-6 level there is a worsening disc herniation with central canal stenosis and bilateral neuroforaminal narrowing. *Id*. The report also notes at the C6-7 level, a worsening of the disc herniation measuring 3-4 mm with central stenosis noted. *Id*.

On June 15, 2018, Petitioner underwent an MRI of the lumbar spine at OPEN MRI Imaging Specialists, LLC. (Pet. Ex. 4, p. 3). The MRI report reflects that this MRI was compared to the previous MRI examination of the lumbar spine. *Id*. The MRI report notes that the MRI findings of the disc herniations at T12-L1, L2-L3, and L4-L5 appear unchanged, when compared to the previous study. *Id*.

On June 15, 2018, Petitioner underwent an MRI of the right shoulder at OPEN MRI Imaging Specialists, LLC. (Pet. Ex. 4, p. 4). The MRI report notes post-surgical changes presumably of a previous rotator cuff repair and mild bursitis surrounding the distal supraspinatus tendon, without obvious tears. *Id*.

On July 24, 2018, Petitioner returned to see Dr. Otero, his primary care physician, for review of the MRI findings. (Pet. Ex. 3, p. 15-17 of 20). The record notes that Petitioner complained of neck pain with tingling sensation down his arms into both hands, worse on the right side. (Pet. Ex. 3, p. 15 of 20). The record notes that patient reported that symptoms started following his work accident on May 18, 2018. *Id.* Petitioner testified that during that visit, Dr. Otero reviewed the MRI results with him and referred him to a neurosurgeon, Kenji Muro, M.D., for further evaluation regarding his neck, due to the severe worsening of his cervical herniated discs, following the May 18, 2018, work accident. (Pet. Ex. 3, p. 16 of 20). Petitioner testified that

he was unable to see Dr. Muro following the referral for several months due to the Respondent failing to authorize the referral. The records indicate that he did continue physical therapy following the July 24, 2018 visit with Dr. Otero. (Pet. Ex. 5).

On December 20, 2018, he was sent to Steven Mather, M.D. for a Section 12 examination. (Res. Ex. 7). The history noted in the report states that on May 18, 2018, a shelf collapsed onto Petitioner that was stacked with a modem and some other equipment, weighing approximately 80 pounds. (Res. Ex. 7, p. 1-2). Further, he attempted to catch the shelf and in doing so he arched his back, but the shelf fell onto his right shoulder. (Res. Ex. 7, p. 2). The records indicate that on the day of the Section 12 examination, Petitioner reported right sided neck pain with numbness going down both arms and into the fingers of both hands. (Rex. Ex. 7, p. 3). The physical examination section notes that the Spurling sign was negative. *Id*. However, Petitioner testified that Dr. Mather did not tilt his head up during the exam and turn it to the left or the right and press down on his head. Dr. Mather's report notes that he reviewed the cervical MRI from June 18, 2018, which showed central disc herniations at C4-C5 and C5-C6 and degermation of the C6-C7 disc. (Res. Ex. 7, p.4). Dr. Mather did not review the previous MRI study of the cervical spine that was performed on August 30, 2017, prior to the May 18, 2018 work injury. *Id*. Dr. Mather opined that Petitioner suffered a sprain of the thoracic spine in the May 18, 2018 work accident. (Res. Ex. 7, p. 6). Dr. Mather did not provide any opinion regarding causal connection and the right shoulder. (Res. Ex. 7).

On January 14, 2019 he presented to Kenji Muro, M.D., for an initial evaluation on referral from his primary care physician. (Pet. Ex. 2, p. 4-6). The record notes that Petitioner reported neck pain with numbness and tingling down his upper extremities to the 2nd and 3rd fingers of both hands. (Pet. Ex. 2, p. 4). Dr. Muro notes review of the cervical spine MRI done June 15, 2018, with findings of C4-C5 and C5-C6 disc herniations with compression on the spinal cord at both levels. (Pet. Ex. 2, p. 5). He also opines that the current condition of his neck is a "new problem since May 2018" as his symptom distribution neck and bilateral arm is fitting with myelopathy (spinal cord compression). *Id*. Dr. Muro notes that the only good solution for the current cervical pathology is anterior cervical discectomy and fusion surgery. (Pet. Ex. 2, p. 5-6).

On April 30, 2019, Petitioner underwent Anterior Discectomy and Arthroplasty (Fusion) surgery of the C4-C5 and C5-C6 discs at Advocate Illinois Masonic Medical Center. (Pet. Ex. 1, p. 57-58 of 269). Following the procedure, on May 1, 2019, Dr. Muro noted no issues overnight other than surgical discomfort. (Pet. Ex. 1, p. 59 of 269). He was kept off work following surgery and was discharged the following day. *Id*. On June 10, 2019, Petitioner had a post-surgical x-ray performed at Illinois Masonic, which showed the post-surgical changes, no prevertebral soft tissue swelling, and no excessive motion on flexion or extension imaging. (Pet. Ex. 2, p. 3).

On September 19, 2019, Respondent's Section 12 examiner Dr. Mather, authored an addendum report, after being sent additional records to review. (Res. Ex. 8). Dr. Mather did not review the MRI that was done in 2017 to compare to the post occurrence MRI from June of 2018. (Res. Ex. 8). Dr. Mather's opinion regarding injuries to the cervical spine remained the same as his previous report that he suffered a cervical sprain. (Res. Ex. 8, p. 2).

On February 17, 2020, Petitioner was seen again by Dr. Mather for a Section 12 examination following a November 13, 2019 subsequent work accident. (Res. Ex. 9). The report indicates that Petitioner returned to work in his normal position two (2) months following his cervical surgery. (Res. Ex. 9, p. 2). The report notes that Dr. Mather reviewed imaging studies of the cervical spine that were taken on November 22, 2019, following the November 13, 2019 subsequent work accident. (Res. Ex. 9, p. 3). He notes that upon review of the imaging, there was no positive pathology other than some metal artifact from the previous cervical surgery performed and was otherwise unremarkable with no acute changes. (Res. Ex. 9, p. 4). He opined that

following the subsequent work accident from November 13, 2019, Petitioner sustained a cervical and lumbar sprain at was at MMI for both injuries at the time of his February 17, 2020 Section 12 examination. (Res. Ex. 9, p. 4-6).

Petitioner's Current Condition

Petitioner testified that he returned to work (2) two months following the cervical fusion surgery to his normal position for Respondent. Petitioner testified that his symptoms improved following surgery, but that he continues to have residual pain and radicular symptoms. The Arbitrator notes that Petitioner was involved in another work accident on November 13, 2019, when he was involved in a motor vehicle collision while in the course of his employment. The Arbitrator also notes that following the subsequent event, he was sent back to Dr. Mather for another Section 12 examination on February 17, 2020. Dr. Mather opined that following the subsequent work accident from November 13, 2019, Petitioner sustained a cervical and lumbar sprain and was at MMI for both injuries at the time of his February 17, 2020 Section 12 examination. (Res. Ex. 9, p. 4-6). Further he opined that Petitioner did not require any treatment for either injury and that the sprains would have resolved themselves within six (6) weeks of the November 13, 2019 subsequent accident.

CONCLUSIONS OF LAW

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

The Arbitrator finds the Petitioner's testimony to be credible. The Arbitrator notes that Petitioner's testimony was consistent with the medical records as it relates to his symptoms and progress with treatment. The Arbitrator notes that Petitioner's description of the occurrence was consistent with the subjective history portions of the medical records submitted in evidence as well as the subjective history reported to the Section 12 examiner. The Arbitrator also notes that Petitioner was truthful about his medical history as it relates to his neck, lower back and right shoulder. Petitioner did credibly testify that he had a previous low back, right shoulder and neck injury. Petitioner testified credibly that he was approximately two (2) months post-operative from lumbar surgery when the May 18, 2018 work accident occurred. Petitioner testified credibly that he had a long history of neck pain but that it improved in late 2017. This was corroborated by the medical records. Petitioner saw Dr. Bruce Montella on March 5, 2018 and there were no complaints of any neck pain made to Dr. Montella during the visit. (Res. Ex. 10, p. 27-29). Petitioner saw Dr. Bruce Montella again on April 16, 2018, and there were no complaints of any neck pain made to Dr. Montella during the visit. (Res. Ex. 10, p. 21-22). Following the April 16, 2018 visit there were no medical visits where Petitioner complained of any neck pain until after the May 18, 2018 subject work accident. Petitioner was also truthful regarding his prior right shoulder injury and previous surgery. Petitioner did not attempt to mislead the Court as it relates to any of his prior injuries. Further, on cross examination, Petitioner was truthful with respect to his prior complaints of neck, lower back and right shoulder injuries.

With respect to Paragraph "C", whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

An employee's injury is compensable under the Act only if it arises out of and in the course of his employment. 820 ILCS 305/2. "In the course of" employment refers to the time, place and circumstances under which the accident occurred. *Lee v. Industrial Comm'n,* 167 Ill.2d 77, 81 (1995). For an injury to 'arise out of' the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 58 (1989). If an employee is exposed to a risk common to the regular public to a greater degree than other persons, the accident is also said to arise out of his(her) employment. *Id* at 58-59. Further, an

injury arises out of an employment related risk when the claimant is engaged in an activity that she might reasonably be expected to perform incident to her duties. *Accolade v. Illinois Worker Compensation Comm'n*, 371 Ill. Dec. 713 (App. Ct. 3d Dist. 2013), *Young v. Illinois Workers Compensation Comm'n*, 383 Ill. Dec. 131. (App. Ct. 4d Dist. 2014).

Petitioner was working as an information technology field service technician as evidenced by all of the testimony heard in this case and no evidence was submitted by Respondent to the contrary. Further, Petitioner was performing his essential job duties of servicing the information technology system at one of Respondent's restaurants. Based on these facts, the time, place and circumstances under which his injury occurred shows that the occurrence occurred within the course of his employment.

The Arbitrator finds that the occurrence also arose out of Petitioner's employment with Respondent, because his injury was incidental to the employment so as to create a causal connection between the employment and the accidental injury. Further, the Petitioner was engaged in an activity that he would reasonably be expected to perform incident to his duties. Finally, the risk for Petitioner was greater than that of the general public due to the nature of having to work on wires overhead in an information technology office space, which is not a task commonly performed by the general public. As such, the evidence supports a finding that the claimant's injury arose out of his employment.

The Arbitrator finds that the accident arose out of and in the course of Petitioner's employment by Respondent.

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

It is well settled that employers take their employees as they find them. Therefore, even though an employee may have a pre-existing condition which may make him more susceptible to an injury, compensation for the injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co., v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861 (1982). Furthermore, an accidental injury need not be the sole causative factor, or even the primary causative factor as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co., v. Industrial Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967). Although this is well settled law in the State of Illinois, the petitioner's work-related injury was the primary causative factor in the resulting condition of ill-being. If a pre-existing condition was asymptomatic prior to the injury and then became symptomatic as a result of the injury, aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Id* at 67-68.

The Arbitrator finds Petitioner's current condition of ill-being is causally related to his work injury of May 18, 2018. Accordingly, based on the credible testimony of the petitioner as well as the medical records and opinions of Dr. Muro, Dr. Otero, and Dr. Montella, including but not limited to the pre-accident and post-accident cervical, lumbar, and imaging studies, the Arbitrator finds that the petitioner has affirmatively demonstrated a causal relationship between his work-related injury on May 18, 2018 and his current condition of ill-being. Immediately prior to his injury, Petitioner did not have any significant issues with his neck and was working his normal job with Respondent, full duty and without physical restrictions. Immediately prior to his injury Petitioner did have right shoulder and lower back issues but the Arbitrator finds that he sustained a temporary exacerbation of those prior injuries, which resolved and returned Petitioner back to his baseline pain levels as it relates to only the right shoulder and lower back.

The Arbitrator notes that prior to the May 18, 2018 work injury, Petitioner did have a prior injury to his cervical spine, however his symptoms improved, and he returned to work without any physical restrictions. Further, there is no evidence of any complaints of cervical pain or cervical limitations for eight (8) months prior to the May 18, 2018. Following the September 15, 2017 visit, where Petitioner complained of neck pain, he was seen by Dr. Montella again on March 5, 2018, and April 16, 2018 and did not have any complaints with respect to neck pain or any issues with function of his neck. Clearly, based on the evidence, the May 18, 2018 work injury significantly aggravated his pre-existing cervical condition and is therefore compensable under Illinois law and The Act.

The Arbitrator notes that the most convincing evidence relied upon to show that Petitioner's pre-existing neck problems were aggravated by the May 18, 2018 was revealed in comparing the pathology shown in the August 30, 2017 cervical MRI and the June 15, 2018, cervical MRI. The Arbitrator notes that the herniated discs that were revealed in the August 30, 2017 cervical MRI were made worse following the May 18, 2018 work occurrence as evidenced by the June 15, 2018 cervical MRI findings. The herniated disc at C4-C5 noted in the August 30, 2017 cervical MRI report measured 10 mm with "generalized" stenosis. (Res. Ex. 10, p. 146). The herniated disc at C4-C5 noted in the June 15, 2018 MRI measured 7 x 12 mm with significant spinal stenosis and rostral migration and is noted to be worsened, when compared to the previous MRI, as documented by the radiologist. (Pet. Ex. 4, p. 5). The herniated disc at C5-C6 noted in the August 30, 2017 MRI measured 3-4 mm. (Res. Ex. 10 p. 146). The herniated disc at C5-C6 noted in the June 15, 2018 MRI measured 5-6 mm with central stenosis and is also noted to be worsened, when compared to the previous MRI, as documented by the radiologist. (Pet. Ex. 4, p. 5). Further, Petitioner's treating neurosurgeon Dr. Muro also notes that June 15, 2018 cervical MRI revealed that the herniated discs at C4-C5 and C5-C6 are compressing the spinal cord. (Pet. Ex. 2, p. 5). The Arbitrator notes that there was no evidence of spinal cord compression in the cervical MRI done in August of 2017. As such, there is objective evidence that the May 18, 2018, work accident worsened the pathology of his cervical discs at C4-C5 and C5-C6 and thus caused an aggravation of his pre-existing condition relating to the cervical spine.

The Arbitrator notes that Respondent sent Mr. Quizhpi for several Section 12 examinations with Dr. Mather. The Arbitrator points out that Dr. Mather does concede that the Petitioner suffered an injury related to the May 18, 2018 occurrence. The Arbitrator also points out that Dr. Mather does, however, disagree with the treating physicians as it relates to what injuries were caused by the May 18, 2018 occurrence. The Arbitrator does not place much weight on Dr. Mather's opinions for many reasons.

First, Dr. Mather's December 20, 2018 Section 12 report is inconsistent with his September 10, 2019 addendum report. In his first report he states that Petitioner suffered a thoracic sprain as a result of the May 18, 2018 occurrence. In his second report he states that Petitioner suffered a cervical sprain and a thoracic sprain. This inconsistency calls into question the credibility of this witness as he never re-examined Petitioner prior to issuing his addendum report. As such, his initial examination did reveal positive findings as it relates to the cervical spine, yet he dismisses them completely by only diagnosing a thoracic sprain. Then in his addendum report he states that he suffered both a cervical and a thoracic sprain, without even re-examining Petitioner. Dr. Maher does not give a basis for the change in his opinion or the inconsistency, in his addendum report.

Second, Dr. Mather's opinion regarding the objective pathology seen on the cervical MRI dated June 15, 2018 lacks merit. Dr. Mather states he reviewed the cervical MRI and noted a disc protrusion at C4-5, a smaller protrusion at C5-6 and mild degeneration of the C6-7 disc. The radiologist interpreting the MRI report notes that at the C4-5 level there is worsening of the disc herniation measuring approximately 7 x 12 with significant stenosis and rostral migration when compared to the previous MRI that was done prior to the May 18, 2018 work injury. The radiologist also notes at the C5-6 level there is a worsening disc herniation with central canal stenosis and bilateral neuroforaminal narrowing. Finally, the radiologist also notes at the C6-

7 level, a worsening of the disc herniation measuring 3-4 mm with central stenosis noted. The radiologist who interpreted the cervical MRI exclusively interprets diagnostic films for a living. As such, the radiologist's reading is more credible than Dr. Mather's reading, who only interprets diagnostic films ancillary to his sub-specialty as an orthopedic surgeon. For that reason alone, his opinion regarding the cervical pathology is not given as much weight as the interpreting radiologist. Further, Dr. Muro's interpretation of the cervical pathology following his review of the MRI is consistent with the radiologist's interpretation and is thus more credible. The Arbitrator would also like to point out that even if the MRI findings were chronic in nature, the Petitioner was either asymptomatic at the time of his work injury or mildly symptomatic and was working full duty. Under Illinois law an asymptomatic chronic or degenerative condition is compensable if it becomes symptomatic as a result of a work injury. Further, also under Illinois law a symptomatic pre-existing condition that is aggravated by a work injury causing a permanent acceleration of that condition is also compensable.

Third, Dr. Mather's opinion regarding his comparison of the objective pathology seen on the cervical MRIs from August 30, 2017 cervical MRI and the June 15, 2018, cervical MRI lacks credibility. Initially, in his December 20, 2018 Section 12 report, he was not provided the pre-accident MRI. However, he does comment about the two MRIs in his September 10, 2019 addendum report, without actually comparing the films or the reports. His opinion stated on Page 2 of that report in his response to Question 1 that was posed to him states "I am aware that the patient had an MRI in 2017, which showed the same pathology." It is of note that Dr. Mather made this statement when he never reviewed both films to compare. As stated previously the radiologist's MRI report notes at the C4-5 level there is worsening of the disc herniation measuring approximately 7 x 12 with significant stenosis and rostral migration. The report also notes at the C5-6 level there is a worsening disc herniation with central canal stenosis and bilateral neuroforaminal narrowing. The report also notes at the C6-7 level, a worsening of the disc herniation measuring 3-4 mm with central stenosis noted. As such there is objective evidence that the post-accident MRI shows more advanced pathology when compared to the pre-accident MRI.

Finally, the physical examination section contained in Dr. Mather's December 20, 2018 Section 12 report notes that the Spurling sign was negative. However, Petitioner testified that Dr. Mather did not tilt his head up during the exam and turn it to the left or the right and press down on his head. This examination is the Spurling's test. As such, the Arbitrator finds Dr. Mather's report questionable as he states that a test is negative that he apparently does not perform during the examination.

In conclusion, although evidence was presented that Petitioner suffered a pre-existing injury to his right shoulder, neck and lower back, the Arbitrator finds that the May 18, 2018 work accident aggravated Petitioner's cervical spine condition and temporarily exacerbated Petitioner's right shoulder and lower back condition. Evidence was submitted by Petitioner that the pathology of the C4-C5 and C5-C6 cervical discs was worsened by the May 18, 2018 work accident. This is evidenced by the comparison of the pre-occurrence cervical MRI and the post-occurrence cervical MRI. This is further evidenced by the eight (8) months preceding the occurrence where Petitioner made no complaints of neck pain, nor did he receive any treatment for neck pain during that time. Therefore, there is no evidence that would lead the Arbitrator to determine that the Petitioner's current condition of the Petitioner was caused by anything other than the work injury. Upon close examination of the medical records, this Arbitrator finds no inconsistent history with respect to the work accident and Petitioner's injuries. Further, the Arbitrator notes that although there was an intervening accident, that event merely caused minor sprains of the Petitioner's cervical and lumbar spine, which Respondent's own Section 12 examiner opined did not require any treatment and would have resolved on their own within weeks. Further, following the intervening accident, the objective findings on the imaging studies did not change when compared to the imaging studies that were done following the May 18, 2018 occurrence.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury. Further, the Arbitrator finds that the November 13, 2019 intervening work accident did not sever the chain of causation or permanency with respect to the surgically repaired surgical spine, as Respondent's own expert opined that he simply sustained a cervical sprain, did not require any treatment at all and that the sprain would resolve itself within six (6) weeks after that subsequent occurrence.

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

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

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them by reference as though fully set forth herein. Petitioner's medical bills that have been incurred are in dispute.

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 the medical fee schedule and Sections 8(a) and 8.2 of the Act:

Advocate Illinois Masonic Medical Center	$76,536.00
ATI Physical Therapy	$12,593.03
Midwest Sports & Ortho Surg Specialists	$6,163.00

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

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

The Arbitrator has found that Petitioner sustained an accident that arose out of an in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, therefore, the Arbitrator awards temporary total disability benefits to the Petitioner. The medical records show that Petitioner was taken off work following the surgery to his neck that occurred on April 30, 2019 and Petitioner testified that he was off work through June 27, 2019. The Arbitrator finds that Respondent shall pay Petitioner total disability benefits of $1,183.38/week for 8 4/7 weeks ($10,143.25), commencing April 30, 2019 through June 27, 2019, as provided in Section 8(b) of the Act.

With respect to Paragraph "L", The nature and extent of the injury, the Arbitrator finds as follows:

In determining PPD benefits, Section 8.1b(b) of the Act directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b); Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152576WC, ¶ 22, 67 N.E.3d 959. "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Under Section 8.1b(b)(i), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The statute does not require the claimant to submit an impairment rating. It only requires that the Commission consider such a report if in evidence and regardless of which party submitted it. See Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n, 2015 IL App (5th) 140445WC, ¶ 17, 43 N.E.3d 556. Therefore, this factor is irrelevant, and the Arbitrator gives it no weight.

Under Section 8.1b(b)(ii), the occupation of the injured employee, the Arbitrator notes that Petitioner was able to return to his position as an information technology field service technician. However, the Petitioner's position is a traveling position which requires him to drive across state lines and drive a vehicle for a considerable amount of his normal shift with a fused cervical spine. The Arbitrator therefore gives some weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iii), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 44 years old at the time of the accident. As such, given that the work life expectancy in Illinois is sixty-seven (67), Petitioner has twenty-three (23) more years of work life expectancy left, being forced to work with a fused cervical spine. The Arbitrator gives great weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(iv), the employee's future earning capacity, the Arbitrator notes that Petitioner did return to his normal position as an information technology field service technician, but with a fused cervical spine. Given the length of time that Petitioner has left until he reaches his work life expectancy working with a compromised neck, there is some impairment with respect to his future earning capacity. The Arbitrator gives little weight to this factor to the benefit of Petitioner.

Under Section 8.1b(b)(v), evidence of disability corroborated by the treating medical records is significant. Petitioner already had objective pathology of cervical herniated discs at the time of the work accident which were made even worse by the May 18, 2018 work accident, causing impingement on Petitioner's spinal cord. As such Petitioner required a very invasive surgical procedure by way of anterior cervical discectomy and arthroplasty. Given that two levels were fused in Petitioner's neck, there will be permanent impaired function with respect to rotation and extension of his neck. The Arbitrator gives great weight to this factor to the benefit of Petitioner.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of a person as a whole for the surgically repaired cervical injury to his neck and sprains of the right shoulder and lumbar spine, pursuant to §8(d)(2) and 8(e)(3) of the Act which corresponds to 175 weeks of permanent partial disability benefits at a weekly rate of $790.64 or $138,362.00.

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC016956
Case Name	Neal Warren v. Clean Right Car Wash
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	24IWCC0255
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Stephanie Seibold, Tracy Jones
Respondent Attorney	Peter Sink

DATE FILED: 5/30/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NEAL WARREN,

Petitioner,

vs.

NOS: 20 WC 016956
20 WC 023041
20 WC 023722

CLEAN RIGHT CAR WASH,

Respondent.

ORDER ON PETITIONER'S PETITION FOR PENALTIES UNDER IWCA §19(K) AND §(L) AND ATTORNEYS' FEES UNDER IWCA §16

This matter (one case, three duplicate filings and three identical Decisions issued) comes before Commissioner Kathryn A. Doerries pursuant to Petitioner's Petition for Penalties Under IWCA §19(k) and §(l) and Attorneys' Fees Under IWCA §16 filed on July 5, 2023. (PX1). Petitioner and Respondent were represented by counsel and the merits of the Petitioner's Petition were argued before Commissioner Doerries on January 26, 2024. Exhibits and a witness were presented by the parties at the Commission hearing, and a transcript of those proceedings was recorded with the parties' exhibits. After considering the parties' arguments and review of the evidence presented by the parties, the Commission denies Petitioner's Petition for Penalties Under Sections 19(k) and 19(l) and for Attorney's Fees Pursuant to Section 16 based upon the following analysis.

Background

This dispute arose after an Arbitration Hearing on January 5, 2023, and the Arbitrator's Decisions were issued on February 21, 2023. (T. 5) At the Commission Hearing, Petitioner's attorney noted that in the Decisions, the Arbitrator did not "write a credit for TTD paid by Respondent. Respondent had asserted a credit of $1,882.86 at trial, leaving Respondent's position

$1,546.42 owed." *Id.* On April 4, 2023, Respondent issued a check for $24,047.49 representing the indemnity portion of the award. (Px5; RX9)

The Arbitrator's Order in each Decision states as follows:

- The Respondent shall pay the Petitioner temporary total disability benefits of $**250.13**/week for **13 and 5/7** weeks, from **May 12, 2020 through August 17, 2020**, as provided in Section 8(b) of the Act.

- The Respondent shall pay $ **$185,418.78** 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 20% loss of use of the man as a whole in permanent partial disability benefits pursuant to section 8(d) (2) of the Act. (PX1, Exhibits 1-3Arb.Decisions)

In the Conclusions of Law section, the Arbitrator concluded Petitioner's average weekly wage rate was $375.00. *Id.* In the Findings, the Arbitrator noted that the Petitioner was married. *Id.* Thus, Petitioner would be entitled to the statutory minimum TTD and PPD rates. However, the Arbitrator's Conclusions of Law did not address the Petitioner's TTD and PPD rates in either pertinent section. There was no mention of the PPD rate in the Arbitrator's Order so a rate was never clarified in the Decision. The TTD rate in the Arbitrator's Order was $2.87 less than the statutory minimum wage rate. Further, neither the Arbitrator's Findings nor Order awarded the Respondent credit that was asserted at the Arbitration Hearing for TTD paid. Neither party filed a motion to correct the clerical errors pursuant to Section 19(f) before the Arbitrator, i.e. to address the TTD and PPD rates and to establish Respondent's entitlement to credit for TTD paid, nor did either file a timely review with the Commission. Thus the Decision became final on March 23, 2023.

The Respondent's witness testified that the Arbitrator's award had ambiguities with respect to the PPD rate based on the TTD rate assigned by the Arbitrator and the Arbitrator's failure to assign the minimum statutory TTD rate. Thus, Respondent initially paid an erroneous PPD rate of 60% of the average weekly wage rate established in the Arbitrator's Decision. (T. 29-30)

Neither party offered the transcript of the Arbitration Hearing into evidence at the Commission Hearing.

There is evidence that communications ensued between the attorneys between March 24, 2023, and January 11, 2024. (PX4) Petitioner's attorney initially demanded payment of the award on March 24, 2023, when the Arbitrator's Decision became final. Petitioner's attorney forwarded her calculations which included the full amount of TTD awarded without subtracting the Respondent's credit for TTD paid, the PPD award based on a statutory minimum PPD rate

of $253.00 and the full dollar amount awarded in medical expenses. *Id.* When Respondent's attorney replied to Petitioner's attorney on the same day, March 24, 2023, he advised her that his client was "running the bill through fee schedule." In response, still on the first day after the award was final, Petitioner's attorney demanded the full dollar amount for the medical bills. Respondent's attorney replied that the medical bills were "actually awarded pursuant to Sections 8(a) and 8.2 and consistent with the medical fee schedule." *Id.* There is no evidence that Petitioner's attorney submitted the documentation needed to run the bills through the medical fee schedule to Respondent's attorney at this time. The Commission infers that Respondent's attorney relied on the bills entered into evidence at trial to obtain reductions under the medical fee schedule and Section 8.2.

Eleven days later, Respondent's attorney asked Petitioner's attorney, via email, if she could call him regarding the subject matter. They agreed to talk on April 6, 2023. *Id.* On May 1, 2023, Petitioner's attorney wrote Respondent's attorney that she had not received counsel's fee schedule analysis relative to the medical bills and asked for it as soon as possible. On May 16, 2023, Petitioner's attorney sent another email to Respondent's attorney and asked for the "trial award" designating the following instructions:

> Please cancel the prior check sent as it was incorrect (amount: $24,047.49)
> shall pay TTD $250.13/wk x13 and 5/7 weeks =$3429.28 less TTD credit -1882.86
> = 1546.42
> shall pay 20% maaw- 253.00 min rate x 100 wks = $25,300.00

The Commission notes that the quoted demand, which totals $26,846.42, clearly represented the Petitioner's and Respondent's agreement to give Respondent the credit for TTD paid and to pay Petitioner the additional $2,800.00 for the PPD underpayment in the check she previously received, issued two weeks after the Arbitrator's Decision was final. (PX5) It is also evident to the Commission that Respondent went ahead and issued $2,800.00 on July 10, 2023, rather than cancel the check that was previously issued less than two weeks after the Arbitrator's Decision was final. (PX5) The Commission notes that the previous check issued, for $24,047.49 plus the $2,800.00 PPD underpayment totals $26,847.49, or $1.07 more than the May 16, 2023, email demand.

After Petitioner's attorney made the afore-refenced demand on May 16, 2023, the Respondent's attorney replied on May 17, 2023, and advised the "TTD + PPD award is being sent today or tomorrow." He also then advised that he attached an "EOB" (sic) explaining Respondent's fee schedule analysis for the medical award and advised counsel that there were issues outlined by his client. The first was that Crusader Community Health bills could not be reviewed because they refused to provide a W9. Second, there was no bill attached for the Rockford Associated Clinical Pathology $183.00 balance due listed on the spreadsheet. Respondent's attorney advised that in absence of the bill in the Arbitration record, he was not responsible for payment. (PX4)

Subsequent email exchanges on May 25, 2023, confirm that Respondent's attorney advised that the adjuster was going to issue a supplemental check to bring the award whole, but Respondent's attorney requested that the adjuster should "stop pay the first check and issue the full award on a second check." (PX4, T. 160). Respondent's attorney represented that the issue was resolved and his client would issue one check. *Id.* Therefore, the Commission infers the delay in issuing the PPD underpayment was due to conflicting communication regarding whether or not a "cancel and stop pay" could be accomplished versus issuing the supplemental $2,800.00. However, the last communication from Respondent's attorney on May 25, 2023 indicated that there would be a stop pay. The PPD underpayment was issued shortly after the Petitioner's attorney wrote in follow-up on July 3, 2023.

The Commission notes that Respondent issued five checks in total. (PX5, RX7, RX8, RX9, RX10) The first check Respondent issued on April 4, 2023, in the amount of $24,047.49, represented the combined TTD and PPD awards specified in the Arbitrator's Order. However, in light of the Arbitrator's TTD rate specified in the Order, the Respondent paid the PPD rate at 60% of the Arbitrator's average weekly wage rate which is $28.00 less than the weekly minimum statutory rate to which Petitioner was entitled. (PX5, RX9) Thus the PPD amount was underpaid by the aforereferenced $2,800.00 that was eventually paid on July 10, 2023. Petitioner's attorney argues that Respondent's original instructions were that the first check issued in April would be canceled and a stop payment applied, therefore, Petitioner's attorney did not deposit the check and the funds were not disbursed to Petitioner. (T. 6-7)

Further, at the subject hearing, Petitioner's attorney also noted that the indemnity payment for TTD and PPD issued on April 4, 2023, implicitly applied the credit of TTD paid "even though the Arbitrator did not award a credit at trial and Respondent did not file a 19(f) motion to correct the clerical errors." *Id.* The Commission notes that the email Petitioner's attorney sent to Respondent's attorney dated May 16, 2023, states, "[p]lease cancel the prior check sent as it was incorrect (amount $24,047.49)" In the next line Petitioner's attorney wrote, "shall pay TTD $250.13/wk x 13 and 5/7 weeks = 3429.28 less TTD credit -1882.86 = 1546.42" This email contradicts both the Petitioner's representation that it was Respondent's instruction to have the April check canceled and further confirms that by May 17, 2023, the attorneys had agreed to Respondent taking the TTD credit asserted at trial.

Thereafter, on July 10, 2023, the second check was issued in the amount of $2,800.00 for the underpaid PPD. (PX5) The Commission notes that this check would have fully satisfied the indemnity portion of the award, as agreed by the attorneys via the post-award email exchanges.

The third check was issued on July 11, 2023, for $64,403.84 representing the medical award less the implant costs. Petitioner's attorney maintains that the amount paid is an underpayment. That check was not cashed or deposited by year end as evidenced by the letter dated January 2, 2024, from the insurance carrier sent to Petitioner's attorney regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had

not cleared the insurance carrier's bank account. (PX,6 RX6) Respondent reissued that check (fourth check issued) in same amount on January 17, 2024. (RX7)

The fifth check issued was also dated January 17, 2024, made payable to Petitioner's attorney in the amount of $8,183.08, representing the payment owed for the Medtronic implant costs. (RX8, RX11)

Subsequent emails between the attorneys beginning September 6, 2023, indicate Petitioner's attorney filed a Motion (sic) for Penalties and Fees and the matter was initially set for hearing before Commissioner Doerries on September 7, 2023. (PX4, T. 159) Petitioner's attorney wrote opposing counsel that in her motion she indicated that "we disagree with the fee schedule calculations related to the medical portion of the trial award as the calculations were made in bad faith and consistent with the fee schedule. We have not cashed the check for the amount of $64,403.84. Petitioner's attorney further alleged that the bills admitted at trial for Swedish American already reflect adjustments for the workers' compensation fee schedule." *Id.* Counsel wrote it was her intention to discuss this with the Commissioner and likely obtain a trial date. *Id.* Respondent's attorney denied the allegation and demanded Petitioner's attorney show him where the bills admitted at trial reflected the adjustments consistent with the fee schedule. *Id.* Respondent's attorney re-attached the Explanation of Reviews (EORs) he sent to Petitioner's attorney in May and noted that the bill processing required invoices for the hardware from Swedish American and he specifically itemized five hardware bills that required the implant manufacturer's invoices. (PX4, 158)

Petitioner's attorney replied that, "the default would be to pay." *Id.* Petitioner's attorney followed that email with a quote from a Commission Decision, "[w]here the fee schedule does not set a specific fee for a procedure, the amount of reimbursement shall be at 53.2% of the actual charge." *(citation omitted)* (PX4, 157) The attorneys agreed to talk on the following Monday. (PX4, 156) It appears the parties communicated via telephone conference on September 11, 2023. On the same date, Respondent's attorney wrote an email to Petitioner's attorney providing his own fee schedule analysis which totaled $133,431.17. (PX4, 155) On November 9, 2023, Petitioner's attorney wrote Respondent's attorney that they would accept his fee schedule proposal of $133,431.17 after speaking with her client. (PX4, 156) On November 30, 2023, December 14, 2023, and January 3, 2024, Petitioner's attorney wrote Respondent's attorney in follow-up. (PX4, 153-154)

On January 11, 2024, Respondent's attorney responded and notified Petitioner's attorney via email that her emails were in his spam folder and that had occurred previously with emails from another firm. Further, counsel attached a copy of an EOR from his client confirming that the fee schedule amount owed is $70,106.02 and they had been missing invoices for the hardware which was recently obtained. Counsel asked Petitioner's attorney to forward it to the providers "maybe to confirm there is no issue?" (PX4, 153) Petitioner's attorney wrote back and advised she was confused because Respondent's attorney sent her an analysis for the amount of $133,431.17. Petitioner's attorney accused Respondent attorney's client of playing games and

indicated they needed a trial date. Respondent's attorney replied that his client put it through bill review twice and when the attorneys spoke he advised that the $133,431.17 figure was his own calculation and he wanted Petitioner's commitment before he presented it to EMC. He further asked Petitioner's attorney how she could dispute an EOR generated by bill review experts. (PX4, 152-153)

Teresa Walker Testimony

Teresa Walker ("Walker") was called by Respondent as a witness. Walker testified that she worked as a Workers' Compensation supervisor at EMC Insurance, overseeing four states, with four direct reports. Walker testified she supervises the claims, all areas of claims handling. (T. 15) Walker testified that she oversaw the Petitioner's claim. *Id.* Walker further testified that she has been in the workers' compensation industry for "probably three decades" working her way up since college. (T. 16) She performed the function of medical bill review in a private consulting firm, handling participating policies, self-insure retrospective policies with high deductibles and a self-insured pool, before the advent of the fee schedule. *Id.* At that company, she also audited insurance companies on behalf of those participating policies to determine if there were any damages because the insurance company may have mishandled the claims. *Id.*

Walker testified that very few of the claims that she oversees go to trial and she issues less than six award checks annually, emphasizing they need to "have a really good reason to take a case to trial." (T. 16-17) Walker testified that they send award checks to Petitioner's attorneys unless the Petitioner's attorney prefers that they pay providers direct. (T. 17) Walker then testified regarding how EMC processes a medical bill award. Walker testified that EMC has their own medical claims review department and that medical claims review department also uses Mitchell. Mitchell is one of the review companies listed on the IWCC website. *Id.* Walker testified Mitchell is utilized to ensure that the explanation of benefits EOB (sic), or the review of the medical bill, is correct. (T. 17-18) When the bill comes in, it will go through the medical claims review department for review for fee schedule reductions, for accuracy of the data on the invoice as required by the Act. If you are missing information, the EOB (sic) will note the missing data. Then if the missing information is returned, then they review the charge. (T. 18)

Walker testified that she reviews the charge. Illinois, a fee schedule state, uses the fee schedule but the Act also allows for PPO contracts. EMC has specific contracts for reductions with specific providers. *Id.* Once that process is complete and they have the final amount, the EOR is prepared and sent with the check so that the provider knows and understands what their payment is, much like group health when you get an EOB instead of an EOR. (T. 18-19) The Act allows for re-evaluation for missing information, wrong code or "whatever" and the department will look at the bill again. If the bill is updated and records are there, they will issue a new EOR and additional payment, if warranted, or advise if there is no change. Then EMC cuts the check and attaches the review and mails it out to the provider. If an attorney disagrees with the EOR they can send it back to get it reviewed again. (T. 19)

Walker testified that in this case, Petitioner never made a formal request to have the EOR re-reviewed. (T. 19) Walker further testified that she believed EMC requested bills from Petitioner so that EMC could process the bills quicker but EMC was never provided with the information needed. (T. 19-20) Walker testified the Illinois statute allows EMC to take medical contractual discounts when processing the medical bills. (T. 20) Walker further testified that in the Petitioner's case, EMC was missing the pathology bill and they tried to obtain it from Petitioner's attorney and the pathologist's company but could not get it. (T. 21)

Further, Walker testified regarding the implant devices invoice and billing for the hardware used in Petitioner's surgery. Walker testified that when a doctor at a hospital orders any type of hardware for surgery, the hardware is received with an original manufacturer's invoice. The Statute provides the payer does not pay the billed amount, but pays based on the manufacturer's invoice. The carrier, in this case, is required to pay only a certain percentage over cost. (T. 21) Walker testified it is necessary to have the hardware implant bills in order to process the payment. Based on the check that was issued, Walker thought they received the implant/hardware invoices within the last 30 days prior to the Commission hearing that took place on January 26, 2024. Walker testified that EMC obtained the invoices by contacting the hospital directly. (T. 22)

Walker further testified that she never received any medical bills from Petitioner's attorney. She also testified that the insurance company obtains the hardware invoices because it is easier and faster than getting them from Petitioners' attorneys. Walker testified that EMC tried to get as much information as they could as quickly as possible which, Walker explained, was the reason there were two checks issued for the medical. As soon as they had information to cut a check and produce an EOR, they sent that check out. Walker testified that Petitioner's attorney cashed the indemnity check and held the medical check, and held it so long that their accounting department had to send Petitioner's attorney an abandoned property letter notifying her the check was only good for so long and they either had to stop payment and void it, or reissue it. EMC never received a response from Petitioner's attorney. (T. 23)

Walker further testified that when she received the EOR for the implant hardware, they stopped payment on the check that Petitioner's attorney never cashed for the medical payments and they reissued it to Petitioner's attorney. (T. 24) The first medical award check was issued on July 11, 2023. (T. 25) That was the $64,403.84 check they sent in July 2023 but Petitioner's attorney never cashed. (T. 26) Once they received the implant and hardware invoices, they produced the EORs. *Id.* The majority of the award was paid in the July check. (T. 26-27) Walker testified that the first check had the majority of the invoices in it but not the implant invoices or the pathology bill. There were some challenges with those invoices but once they got all the information needed, they got the first check out rather than wait for the implant check. Walker testified that that was a good faith payment of the bills processed without the implant bill. Once those invoices were received, they processed them and sent a supplemental check for those and the pathology bill. The first medical award check went stale and they reissued it for the same amount of $64,403.84, on January 17, 2024. (T. 26-27)

Walker further testified that they sent the additional check in the amount of $8,183.00 on the same day, January 17, 2024, to cover the implant hardware and the pathology bill. Those checks were never cashed to the best of Walker's knowledge. Walker testified that she never received a competing fee schedule analysis from counsel. (T. 28) Walker testified that the Arbitrator's award had a number of ambiguities. The TTD rate was not the same as the carrier had calculated, but they paid on the amount of the award. (T. 29) Walker further testified the parties came to an agreement regarding the indemnity and the second check was issued because Respondent's and Petitioner's attorneys got together and discussed it, and they issued the second check. With the medical award, Walker further testified, "it's by fee schedule and there is nothing I can do. I have to follow the Act on how to pay the fee schedule." (T. 30) She explained that the Crusader bill, from Petitioner's family physician, had a duplicate bill. She also testified that the Petitioner's attorney put in, as an exhibit, the total amount of the bill, the amount that Medicaid had paid and the balance left on the bill. She explained she could not just pay the balance; she had to address the Medicaid lien. So they took the original bill and ran it through the fee schedule. She testified they overpaid on Crusader. Walker testified the first check issued in July was never "marked full and final" and Petitioner's attorney could have cashed that check and distributed it while they awaited the bills/invoices from the implants. Further, they never received the pathology bill. It was a $183.00 bill and the discount would be small, so they paid it. (T. 31) Walker testified putting the bills through a fee schedule bill review was a very elongated frustrating process because of the documents that were in the exhibit. (T. 32)

Walker also testified that the first time she tried to get the pathology or hardware bill was when they issued the first check in July. *Id.* They continued to try to get that bill and they had that bill and the implant bill left. Everything else had been taken care of, and they shipped the check out. *Id.* Walker testified that she has never received an explanation as to why Petitioner believes the bill review company's EOR is incorrect. (T. 33)

On cross-examination, Walker testified that she did not make the calculations that are on this explanation of review personally. The bills go through a medical claims review department that uses an independent department. (T. 34) EMC has a department that handles medical claims. The bills come to them, they review them and use Mitchell to confirm them. Beyond that Walker was not sure about Mitchell's process because she is not a supervisor of that department. Walker testified that EMC has issued "tens of hundreds of thousands of EORs from this national company." (T. 35) She further testified that EMC is a national insurance company that follows the rules of each state. *Id.* Walker confirmed that somebody from internal in her organization sent her the calculations that are on the explanations of review. She also testified she has done medical billing in the past, but that is not her current position. (T. 36) Walker has not sat for the Certified Professional Coder Exam offered by the American Academy of Professional Coders or the Certified Coding Associate Exam offered by the American Health Information Management Association or the Certified Billing and Coding Specialist Exam offered by the National Health Career Association. Walker testified that she did not believe the Health Care Career Association would be relevant to workers' compensation. (T. 37)

Walker further testified on cross examination that she sent the explanation with the letter to Respondent's attorney because when represented she will not contact Petitioner's attorney. She agreed with Petitioner's attorney that she had not contacted them directly. (T. 38) Walker clarified she had not written and asked for information but assumed her attorney's office is doing that. (T. 39) Petitioner's attorney showed Walker PX4, wherein Respondent's attorney did his own calculation of the fee schedule amount. Walker confirmed that she had no part in calculating the $133,431.17 number that Respondent's attorney first sent to Petitioner's attorney. (T. 39-40) Walker testified that she did not know how Respondent's attorney got to that number. Walker had discussed it with counsel and advised him that his number was incorrect based on EMC's review. Walker herself did not attempt to do calculations herself but the explanation of review is the result after someone in her company did the calculations. (T. 40)

Petitioner's attorney showed Walker the email from Respondent's attorney dated September 6, 2023, that states: "I am reattaching the EOR sent to you in May. The issue is the bill processing requires invoices for the hardware from Swedish American. I believe this is where our discrepancy arises from." (T. 41) Walker was then asked if she saw "any request from their counsel to our office requesting that we provide invoices for the hardware?" *Id.* Walker replied, "No" and noted counsel was pointing out "what the hardware is." *Id.* Walker confirmed when she testified on direct that she requested invoices from Petitioner's attorney's office that she was "going off of what" her attorney reported to her. *Id.* Walker confirmed that she testified about private contracts between EMC with providers but she did not have the documentation of those contracts with her. (T. 42) Walker denied that she made an assumption when her company made the calculations that they were using rates that were already contracted with the provider. Walker testified the EOR documents whether the allotted amount is based on the fee schedule or if it is based on PPO contract. The EOR documents at the bottom, explaining the reductions taken, and there would be no PPO contract involved with the hardware. Walker testified further, "[t]he hardware is the letter of the law, here is how it's calculated." *Id.* Walker was shown RX1, Respondent's EOR and, when asked, confirmed that she did not see any PPO contract reductions on the EOR. (T. 44)

On redirect examination, Walker testified the bill review company told her they required the invoices for the hardware/implant. Walker was again shown RX1 and identified a specific entry on page 12 where the EOR showed a PPO discount. (T. 45) Walker further testified the code is P24 where the bill review company takes a contractual medical discount or payment is adjusted based on preferred provider organization. Specifically, in this case, the provider that takes a contractual medical discount payment is the Rockford Spine Center. That entry and code indicates EMC has a contractual agreement with the Rockford Spine Center as provider. (T. 45-46)

On recross examination, Walker confirmed that she did not have the provider contracts, but that her medical review company keeps the contracts and uses the contracts for the explanation of benefits/review. (T. 47) Walker testified that the medical review calculations had not been submitted to the providers because Petitioner's attorney requested that EMC pay her directly and

not the providers. Therefore, they did not send the providers an explanation of review based upon the award. Walker testified that originally when the bills were denied, the providers would have received an EOR showing the reason the bill was disputed. After the award, unless Petitioner's attorney directs payment directly to the providers, the award goes to Petitioners attorney. (T. 47-48) Walker confirmed that the EOR was sent to Petitioner's attorney's firm, with the payment amounts, but they were not sent to the providers unless her attorney sent them. (T. 48)

Exhibits

Petitioner submitted the Petitioner's Penalty Petition which included the three Arbitrator's Decisions as Petitioner's Exhibit 1 ("PX1"). The bill review of medical bill balances that was submitted at the Arbitration Hearing was admitted as PX2. Further, Petitioner moved to admit PX3, a fee schedule calculation over Respondent's foundation objection. In rebuttal to Respondent's objection, Petitioner's attorney conceded that her calculated fee schedule was offered "not for necessarily the truth of the calculations, but in support of counsel's arguments." The Commissioner admitted it, with weight assigned based on her review of it. The Commission notes that PX3 calculations were not supported with codes reflecting whether the amount was figured as provider discount, fee schedule reduction per geozip or negotiated rate pursuant to Section 8.2. An email chain document reflecting communication between the two attorneys representing the respective parties as referenced above was admitted as PX4. The email exchanges in PX4 reflects, in pertinent part, that Respondent's attorney estimated the fee schedule amount owed on the medical bills which was more than the insurance companies review introduced as RX1. Further the email exchanges reflected that the day after the Arbitrator's Decision became final, on March 24, 2023, Petitioner's attorney made a demand for payment of the award including the full amount of TTD liability without the TTD credit Respondent had requested at trial and for the full amount of the medical award. There is no indication that Petitioner provided the medical bills to Respondent with the email. Respondent's attorney responded that his client was running the (medical) bill through the fee schedule, however, Petitioner's attorney replied the Arbitrator awarded the dollar amount for bills as stated in the Decision. In his reply, Respondent's attorney quoted the Arbitrator's Order which specifically awarded the total amount of medical bills "subject to Sections 8(a) and 8.2 of the Act and consistent with the medical fee schedule." (PX4)

PX5 and PX6 were admitted into evidence with no objections. PX5 are copies of the first two checks issued by Respondent, representing the indemnity award payment. PX6 is a copy of the January 2, 2024, letter Petitioner's attorney received and regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had not cleared the insurance carrier's bank account. Respondent's attorney objected to PX7, a letter addressed to him that he represented he had never seen. After agreeing that the medical award check was never cashed, Petitioner's attorney withdrew PX7.

Respondent's exhibits, numbers one through eleven, were admitted. Petitioner's attorney objected to RX1, the Explanation of Review (EOR) of the awarded Medical Bills. Respondent's attorney argued that the EOR is a business record of how bills are processed at an insurance

company therefore, it is admissible evidence. His witness had to testify to the background of how they are created and, he argued, testified that they are produced by one of the Illinois Worker's Compensation Commission's (IWCC) approved bill review companies. Petitioner's attorney argued the witness did not have knowledge as to what involvement the bill review company had, if any, and noted the exhibit specifically stated it was for internal use only. The Commissioner admitted RX1 over the objection, noting it would be given appropriate weight. Respondent's exhibits two through eleven were admitted with no objection including the approved bill review companies listed by the IWCC website (RX2); a letter from the IWCC Chairman regarding Section 8(a) and 8.2 contractual payment (RX3); an article on the IWCC website, "How are implants/carve-outs paid? (RX4); evidence regarding medical bill payment (RX5); the abandoned property letter (RX6) (duplicative of PX6); a copy of the medical bill payment reissued on January 17, 2024. (R7); the additional payment for the implant devices issued on January 17, 2024. (RX8); the April 4, 2023, initial check issued for the indemnity award. (RX9); the check dated July 10, 2023, for the PPD underpayment. (RX10); the Medtronic SD USA Spine Implant invoice. (RX11). RX12 was not admitted.

Analysis

In her Petition and consistent with her argument, Petitioner's attorney alleges "Respondent's calculations related to the medical portion of the trial award were made in bad faith and are not consistent with the fee schedule." Petitioner is seeking penalties under Sections 19(k) and 19(l) and attorney's fees under Section 16. Petitioner alleges that 50% of the entire award is owed and 20% of the Section 19(l) penalties. (PX1) In her Petition, Counsel recites the penalties prescribed in Section 19(l) of the Illinois Workers Compensation Act ("Act") noted below. The Commission notes that the Petitioner's Petition for Penalties and Fees relies upon the dollar amount of the medical award without any fee schedule reductions or Section 8.2 consideration. (PX1)

TTD

Since the Arbitrator's Order failed to reflect the statutory minimum TTD rate, and neither party filed a Section 19(f) motion to correct a clerical error or a timely review, the TTD rate issue is waived. The Respondent paid the TTD and PPD award, less a PPD underpayment, less than two weeks after the Arbitrator's Decision was final. (RX9)

Medical

A check for $64,403.84 was issued first on July 11, 2023, never cashed by Petitioner, and reissued on January 17, 2024, based upon the EOR of the medical bills submitted at trial and obtained by the insurance carrier EMC. Further, the Respondent paid bills for the implant devices in the amount of $8,183.08 on January 17, 2024, after obtaining the necessary invoices from the providers. The Medtronic SD USA invoice is in evidence marked as RX11.

PPD

Respondent argues that the initial timely PPD payment was based on an ambiguity in the Arbitrator's award. The PPD underpayment was issued on July 10, 2023, four months after the Decision was final. (RX10)

The pertinent sections of the Act state as follows:

Penalties under Section 19(k)

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. *820 ILCS 305/19(k).*

Penalties under Section 19(l)

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l).*

Attorneys' Fees under Section 16

> Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section

19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his insurance carrier. *820 ILCS 305/16.*

In Illinois, the courts have examined the imposition of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees in numerous cases. In *Jacobo v. Ill. Workers' Comp. Comm'n*, the court examined various histories of the application of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees as follows:

> Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828, 279 Ill. Dec. 531 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763, 800 N.E.2d at 829. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865, 66 Ill. Dec. 300 (1982). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121, 578 N.E.2d 140, 143, 161 Ill. Dec. 13 (1991).
>
> The standard for awarding penalties under section 19(k) is higher than the standard under 19(*l*). Section 19(k) of the Act provides, in pertinent part, as follows:
>
> "In case where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation *** then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphasis added.) *820 ILCS 305/19(k) (West 2006).*
>
> Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. *820 ILCS 305/16 (West 2006)*. "The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission." *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516, 784 N.E.2d 396, 399, 271 Ill. Dec. 178 (2003). *Jacobo v. Ill. Workers' Comp. Comm'n*, 355 Ill.Dec. 358, 363-364, 959 N.E.2d 772, 777-778.

Section 19(l) penalties are not appropriate except for late TTD and medical payments. (See *Theis v. Ill. Workers' Comp. Comm'n* 2017 IL App (1st) 161237WC, P20, 74 N.E.3d 468, 471) In this case, the Commission notes that the period between the Arbitrator's Decision and the subject hearing for non-payment of an award could put Section 19(l) penalties at issue, however, Respondent's counsel represented that Respondent had paid a total of $24,047.49 by April 4, 2023, representing the outstanding TTD award of $1,546.42 plus PPD less than two weeks after Arbitrator's Decision was final. The medical bills were paid on July 11, 2023, after being run through a medical bill review for fee schedule and contract provider discounts by the insurance carrier. Those payments mitigate penalty entitlement under Section 19(l).

The Appellate Court has addressed late payments made after an award became final and notes an award of §19(k) penalties and §16 attorney's fees is discretionary and not mandated by statute or triggered after a certain statutory amount of time for late payment. Although the late payment of an award runs in contravention of the spirit of the Act, there are some circumstances that do not arise to the level of unreasonable and vexatious delay. In *Armour Swift-Eckrich v. Indus. Comm'n (Williams*) the Court held as follows:

> The delay in this case was 78 days after the award became final. The briefs refer to *Roodhouse Envelope*, 276 Ill. App. 3d at 580, 658 N.E.2d at 840 (payment was made 87 days "after [employer] received notification of the award"), *Board of Education of the City of Chicago v. Industrial Comm'n*, 351 Ill. 128, 131, 184 N.E. 202, 203 (1932) (payment was 90 days late), *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 848, 767 N.E.2d 405, 408. (delay of one year unreasonably based on erroneous interpretation of the law), and *Sanchez v. Industrial Comm'n*, 53 Ill. 2d 514, 518, 292 N.E.2d 724, 726 (1973), where the Commission declined to issue a penalty though payment was not made until 52 days after the award became final, and the appellate court affirmed the denial on the basis that payment was delayed because there were negotiations to arrive at a lump-sum settlement.
>
> Sections 19(k) and 16 do not mandate that penalties be imposed after a certain period of delay. In contrast to other penalties under the Act which are mandatory, the awarding of substantial penalties under section 19(k) and attorney fees under section 16 is discretionary. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553, 234 Ill. Dec. 205 (1998) *Armour Swift-Eckrich v. Indus. Comm'n (Williams)*, 355 Ill. App. 3d 708, 711, 823 N.E.2d 1103, 1105.

In this case, the Respondent established that the payment of the TTD and PPD awards, albeit with a PPD underpayment, was made 13 days after the award became a final Decision. (PX5) The medical was paid after running the medical bills through an explanation of review pursuant to Section 8.2 and the medical fee schedule consistent with the Arbitrator's Order. The Supreme Court has held that in cases such as this, "when assessing the delay, the calculation does not start until after the award is final. The time for payment must, of course, be computed from the date of finality." *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 171, 233 N.E.2d 362, 365, 1968.

In a case where the Supreme Court reversed the lower court's award of penalties for a 90-day delay in payment of the award, the Supreme Court noted that both sides relied upon the same prior *Board of Education* case and held that in determining whether or not §19(k) penalties were warranted, the delay should be assessed as follows:

> In determining whether such delay has been unreasonable or vexatious, regard must be had to the circumstances attending the delay, the nature of the case and the relief demanded, and also to the question whether the rights of the claimant have been prejudiced by that delay. (351 Ill. 128, 132.) The court further said that in view of the failure to pay for about 90 days plus the lapse of nearly six years from the date of injury, it could not say that the Commission's finding was not justified.
>
> ***
>
> The time consumed from filing to final judgment was from our experience about the same as, or even shorter, than the usual contested compensation case. The time for payment must, of course, be computed from the date of finality. While we do not condone unnecessary delay in payment, we cannot say that the delay in these cases was such as to justify a finding of unreasonable or vexatious delay. It is impractical to set a definite time limitation for payment. As was said in the earlier *Board of Education* case: "* * * where all legal proceedings have been exhausted and a considerable time has been permitted to elapse thereafter during which the award is not paid, it is incumbent upon the one liable to pay the same to excuse the delay." (351 Ill. 128, 132.) *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 170, 233 N.E.2d 362, 364-365.

In another case where penalties were denied, the Appellate Court also held "several months" delay in payment of an award is not unreasonable, while cautioning employers not to withhold payment unless there are unusual circumstances. The facts of the *Chicago* case are similar in that the Arbitrator erred by not allowing a prior credit and the parties did not file a timely review and the Petitioner filed a penalties petition when Respondent did not pay the award. The *Chicago* Court held penalties were not warranted where there was ongoing communication between the parties regarding the prior credit, which the Petitioner would not allow:

> It is also clear that there were discussions between counsel for the parties regarding credit in some amount, in order to avoid a double payment by the City, although those discussions may well have commenced after expiration of the period in which a review of the arbitrator's decision was possible. Given the circumstances of this case, it is our opinion that the several months delay in payment was neither unreasonable nor vexatious and that the finding of the Industrial Commission to the contrary is against the manifest weight of the evidence. In so holding, however, we do not intend that this opinion be thought to indicate any disposition on our part to

countenance delay in payment of final awards in less unusual circumstances. *Chicago v. Industrial Comm'n*., 345 N.E.2d 477, 480, 63 Ill. 2d 99, 104-105.

In the case at bar, the Commission Decision became final after March 23, 2023. Similar to the circumstance in *Chicago*, communication between the parties began thereafter. Petitioner was aware that Respondent had claimed a credit at the Arbitration Hearing for TTD paid. In the May 16, 2023, email, Petitioner's attorney demanded Respondent cancel the April 4, 2023 check, and issue a check for the TTD award less the TTD credit despite the fact that the credit was not acknowledged in the Arbitrator's Decision. (PX4) While the Arbitrator's Decision fails to reflect the TTD credit, the parties agreed shortly thereafter that the Respondent did not owe for TTD paid. (PX4)

Petitioner did not cash the April 4, 2023, check and instead demanded the award in full including the full dollar amount of medical awarded. Respondent advised that the medical award was contingent upon the Section 8.2 reductions per the medical fee schedule or provider agreements and, as shown in Respondent's Exhibit 4, implant cost calculations. The medical payment was issued on July 11, 2023, four months after the Arbitrator's Decision was final and clearly after the EOR was obtained. The payment for the implants was issued later, on January 17, 2024, after the Respondent obtained the necessary documentation to calculate the reduced cost pursuant to Section 8.2. The Commission finds that the April 4, 2023, payment for indemnity and the July 11, 2023, medical bill payment mitigate penalty entitlement under Sections 19(k) and 19(l).

Petitioner maintains the medical was underpaid and is asking the Commission to find that Petitioner's medical fee schedule calculation submitted at the Commission hearing is evidence that the Respondent underpaid and seeks penalties on the whole award.

The Commission notes that there is no evidence that Petitioner submitted the requisite medical bills documentation after missing bills were identified by Respondent after the award issued. The *Theis* Court held that is Petitioner's obligation:

> The act of submitting medical bills into evidence during arbitration is not the same as tendering them to the employer for payment. In addition, claimant cites no authority, nor does our research reveal any, which stands for the proposition that an employer has a duty to actively seek out a claimant's medical bills either through the use of a subpoena or some other method in order to comply with the requirements of section 19(*l*). Although the Commission found that it was claimant's failure to tender the medical bills to the employer that caused the delay in the payment of the award, it nonetheless awarded claimant section 19(*l*) penalties due to the employer's failure to timely pay the award, which was error. *Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC, P23, 74 N.E.3d 468, 472.

Respondent alleges that some bills that were awarded by the Arbitrator were not in evidence yet Respondent volunteered payment. In the subject case, PX2 is a medical bill exhibit summary but the Commission cannot ascertain whether or not that exhibit is identical to the one introduced at the Arbitration Hearing.

The Commission finds that the attorneys communicated regarding the implementation of the payments but their communications could have, but did not, immediately resolve the issues, in part, because EMC had to run a medical bill review pursuant to the award under Section 8.2. The Commission notes there was no representation that either attorney used the telephone or the postal service. Further, Petitioner's attorney could have immediately deposited the indemnity check issued less than two weeks after the Arbitrator's Decision was final and then pursued the $2,800.00 PPD underpayment. On May 25, 2023, Respondent's attorney compounded the problem of Petitioner's attorney not depositing or cashing the indemnity check that was issued on April 4, 2023, by advising that although his client was resistant to the stop-pay and reissuance of the whole check, his client would reissue the entire indemnity payment. It would appear that Respondent's attorney was either mistaken or the stop payment was not feasible.

Respondent's attorney should have been more explicit with his demand for the implant invoices if they were not included in the medical bill exhibit from the Arbitration Hearing. The Commission finds, however, that when Respondent's attorney advised Petitioner's attorney on May 17, 2023, and September 6, 2023, that his client did not have certain bills from Crusader Community Health, the Rockford Associated Clinical Pathology and the implant/hardware invoices, Petitioner's attorney had an obligation to obtain and provide them.

The Commission finds that based upon the testimony of Teresa Walker, Respondent timely submitted the disputed medical bills to be reviewed, per the Arbitrator's award, subject to the fee schedule and Sections 8(a) and 8.2 of the Act. Respondent accomplished this apparently from the bills submitted at the Arbitration Hearing, not from medical bills submitted with a post-award demand. Walker testified that she received the medical implant invoice approximately 30 days before the Commission hearing and issued the check thereafter. (T. 22; RX8) The Commission further finds that the Petitioner's attorney's calculations in exhibit 3 are without foundation because the exhibit is erroneous on its face, i.e., the fee schedule amounts for multiple entries exceed the charge for the service. The Commission finds Respondent's medical fee schedule explanation of review was made in good faith. The Commission further finds that there is no indication that the Respondent's carrier deliberately, unreasonably or vexatiously withheld funds. In fact, Respondent's witness credibly testified that their intention was to pay the award and benefits in a timely manner. (T. 23) Therefore, the Commission finds this circumstance does not warrant Section 19(l) or Section 19(k) penalties. Without Section 19(k) penalties, no Section 16 fees are warranted. (See *Jacobo v. Ill. Workers' Comp. Comm'n,* 2011 Ill. App. LEXIS 1186, *10-11, 355 Ill. Dec. 358, 364.)

Conclusions of Law

The *Millennium Knickerbocker* Court reviewed all statutory authority under which the Commission retains jurisdiction after a final award, and specifically held that the Commission is authorized to assess penalties and attorney fees when a party fails to comply with the terms of a final settlement or final award, and in order to do so, the Commission must first interpret the terms of an ambiguous final settlement/award. *Millennium Knickerbocker Hotel v. Guzman*, 2017 IL App (1st) 161027WC, P29, 76 N.E.3d 825, 836-837.

In the subject case, the Arbitrator's Conclusions of Law section pertaining to the TTD award is not explicit. The Arbitrator awarded an erroneous statutory rate of the weekly TTD payment in the Order. Although the TTD amount payable in the Arbitrator's Order is incorrect, the Commission finds that the issue was waived when both parties failed to file a Motion pursuant to §19(f) to correct the error and neither party filed a review of the Arbitrator's award.

Similarly, since the Arbitrator did not specify a dollar rate of PPD owed in the Order or in the Conclusions of Law, the Commission relies upon the average weekly wage rate the Arbitrator awarded. In this case, the Arbitrator concluded that the Petitioner's average weekly wage (AWW) rate is $375.00. The Petitioner was married, thus, the Commission concludes that Petitioner's PPD rate is the statutory minimum rate of $253.00 per week. Walker testified the initial PPD was underpaid because the Arbitrator did not award the statutory minimum TTD rate, and did not acknowledge Petitioner had a dependent, thus EMC followed suit and the initial PPD payment was based on 60% of the AWW rate. Within three months, after some discussions, the parties worked it out and EMC rectified the underpayment. (T. 8-9)

Next, regarding Petitioner's argument that the award did not specify that the Respondent shall get credit for TTD paid, it appears that since the awards were issued and became final, the parties acknowledged that Respondent paid $1,882.86 in TTD benefits prior to trial and agreed that Respondent could take credit. (PX4, T. 162) Thus, the amount Respondent owed for TTD at the time of the hearing was $1,546.42. The record is clear that Respondent issued a check in the amount of $24,047.49 on April 4, 2023, which was the full indemnity owed less the PPD underpayment which was paid on July 10, 2023. The fact that Petitioner's attorney did not cash the first check appears to be a communication problem between the attorneys but not evidence of a vexatious or unreasonable delay on the part of the Respondent.

A finding of vexatious or unreasonable delay must be based on objective reasonableness. *Board of Education of City of Chicago v Industrial Commission*, *Bd. of Educ. v. Indus. Comm'n,* 93 Ill. 2d 1, 442 N.E.2d 861. Regarding the medical award, the Respondent was responsible for issuing the checks, however, not solely responsible for ensuring the Respondent had proper medical itemization. The evidence in this record is lacking, however, it appears that Petitioner's attorney could have provided the requisite medical bills to Respondent's attorney. Since certain medical bills were missing at the time of the fee schedule analysis, the parties should have communicated in a more timely manner to get the bills paid as fast as possible. Further, in this

circumstance, the Commission is not persuaded that Respondent is wholly, or even partially, to blame for the delay in payment of the medical bills. The Petitioner demanded payment but did not provide the missing medical bill documentation when notified.

Having considered the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorney Fees Under IWCA §16, interpretation of the Arbitrator's award, and review of the totality of evidence before the Commission including the arguments made by the parties, the testimony of the Respondent's witness, Teresa Walker, all the exhibits including copies of the checks issued by Respondent, (PX5, RX7, RX8, RX9, RX10), email exchanges between the attorneys (PX4), and pervading case law, the Commission declines to award penalties under §19(k), §19(l) or attorney's fees under §16 in this instance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorneys' Fees Under IWCA §16, is denied for all the afore-referenced reasons.

May 30, 2024

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KAD/bsd
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

/s/*Amylee H. Simonovich*
Amylee Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023041
Case Name	Neal Warren v. Clean Right Car Wash
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	24IWCC0256
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Peter Sink

DATE FILED: 5/31/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NEAL WARREN,

Petitioner,

vs.

NOS: 20 WC 023041
20 WC 023722
20 WC 016956

CLEAN RIGHT CAR WASH,

Respondent.

ORDER ON PETITIONER'S PETITION FOR PENALTIES UNDER IWCA §19(K) AND §(L) AND ATTORNEYS' FEES UNDER IWCA §16

This matter (one case, three duplicate filings and three identical Decisions issued) comes before Commissioner Kathryn A. Doerries pursuant to Petitioner's Petition for Penalties Under IWCA §19(k) and §(l) and Attorneys' Fees Under IWCA §16 filed on July 5, 2023. (PX1). Petitioner and Respondent were represented by counsel and the merits of the Petitioner's Petition were argued before Commissioner Doerries on January 26, 2024. Exhibits and a witness were presented by the parties at the Commission hearing, and a transcript of those proceedings was recorded with the parties' exhibits. After considering the parties' arguments and review of the evidence presented by the parties, the Commission denies Petitioner's Petition for Penalties Under Sections 19(k) and 19(l) and for Attorney's Fees Pursuant to Section 16 based upon the following analysis.

Background

This dispute arose after an Arbitration Hearing on January 5, 2023, and the Arbitrator's Decisions were issued on February 21, 2023. (T. 5) At the Commission Hearing, Petitioner's attorney noted that in the Decisions, the Arbitrator did not "write a credit for TTD paid by Respondent. Respondent had asserted a credit of $1,882.86 at trial, leaving Respondent's position

$1,546.42 owed." *Id.* On April 4, 2023, Respondent issued a check for $24,047.49 representing the indemnity portion of the award. (Px5; RX9)

The Arbitrator's Order in each Decision states as follows:

- The Respondent shall pay the Petitioner temporary total disability benefits of $**250.13**/week for **13 and 5/7** weeks, from **May 12, 2020 through August 17, 2020**, as provided in Section 8(b) of the Act.

- The Respondent shall pay $ **$185,418.78** 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 20% loss of use of the man as a whole in permanent partial disability benefits pursuant to section 8(d) (2) of the Act. (PX1, Exhibits 1-3Arb.Decisions)

In the Conclusions of Law section, the Arbitrator concluded Petitioner's average weekly wage rate was $375.00. *Id.* In the Findings, the Arbitrator noted that the Petitioner was married. *Id.* Thus, Petitioner would be entitled to the statutory minimum TTD and PPD rates. However, the Arbitrator's Conclusions of Law did not address the Petitioner's TTD and PPD rates in either pertinent section. There was no mention of the PPD rate in the Arbitrator's Order so a rate was never clarified in the Decision. The TTD rate in the Arbitrator's Order was $2.87 less than the statutory minimum wage rate. Further, neither the Arbitrator's Findings nor Order awarded the Respondent credit that was asserted at the Arbitration Hearing for TTD paid. Neither party filed a motion to correct the clerical errors pursuant to Section 19(f) before the Arbitrator, i.e. to address the TTD and PPD rates and to establish Respondent's entitlement to credit for TTD paid, nor did either file a timely review with the Commission. Thus the Decision became final on March 23, 2023.

The Respondent's witness testified that the Arbitrator's award had ambiguities with respect to the PPD rate based on the TTD rate assigned by the Arbitrator and the Arbitrator's failure to assign the minimum statutory TTD rate. Thus, Respondent initially paid an erroneous PPD rate of 60% of the average weekly wage rate established in the Arbitrator's Decision. (T. 29-30)

Neither party offered the transcript of the Arbitration Hearing into evidence at the Commission Hearing.

There is evidence that communications ensued between the attorneys between March 24, 2023, and January 11, 2024. (PX4) Petitioner's attorney initially demanded payment of the award on March 24, 2023, when the Arbitrator's Decision became final. Petitioner's attorney forwarded her calculations which included the full amount of TTD awarded without subtracting the Respondent's credit for TTD paid, the PPD award based on a statutory minimum PPD rate

of $253.00 and the full dollar amount awarded in medical expenses. *Id.* When Respondent's attorney replied to Petitioner's attorney on the same day, March 24, 2023, he advised her that his client was "running the bill through fee schedule." In response, still on the first day after the award was final, Petitioner's attorney demanded the full dollar amount for the medical bills. Respondent's attorney replied that the medical bills were "actually awarded pursuant to Sections 8(a) and 8.2 and consistent with the medical fee schedule." *Id.* There is no evidence that Petitioner's attorney submitted the documentation needed to run the bills through the medical fee schedule to Respondent's attorney at this time. The Commission infers that Respondent's attorney relied on the bills entered into evidence at trial to obtain reductions under the medical fee schedule and Section 8.2.

Eleven days later, Respondent's attorney asked Petitioner's attorney, via email, if she could call him regarding the subject matter. They agreed to talk on April 6, 2023. *Id.* On May 1, 2023, Petitioner's attorney wrote Respondent's attorney that she had not received counsel's fee schedule analysis relative to the medical bills and asked for it as soon as possible. On May 16, 2023, Petitioner's attorney sent another email to Respondent's attorney and asked for the "trial award" designating the following instructions:

> Please cancel the prior check sent as it was incorrect (amount: $24,047.49)
> shall pay TTD $250.13/wk x13 and 5/7 weeks =$3429.28 less TTD credit -1882.86
> = 1546.42
> shall pay 20% maaw- 253.00 min rate x 100 wks = $25,300.00

The Commission notes that the quoted demand, which totals $26,846.42, clearly represented the Petitioner's and Respondent's agreement to give Respondent the credit for TTD paid and to pay Petitioner the additional $2,800.00 for the PPD underpayment in the check she previously received, issued two weeks after the Arbitrator's Decision was final. (PX5) It is also evident to the Commission that Respondent went ahead and issued $2,800.00 on July 10, 2023, rather than cancel the check that was previously issued less than two weeks after the Arbitrator's Decision was final. (PX5) The Commission notes that the previous check issued, for $24,047.49 plus the $2,800.00 PPD underpayment totals $26,847.49, or $1.07 more than the May 16, 2023, email demand.

After Petitioner's attorney made the afore-refenced demand on May 16, 2023, the Respondent's attorney replied on May 17, 2023, and advised the "TTD + PPD award is being sent today or tomorrow." He also then advised that he attached an "EOB" (sic) explaining Respondent's fee schedule analysis for the medical award and advised counsel that there were issues outlined by his client. The first was that Crusader Community Health bills could not be reviewed because they refused to provide a W9. Second, there was no bill attached for the Rockford Associated Clinical Pathology $183.00 balance due listed on the spreadsheet. Respondent's attorney advised that in absence of the bill in the Arbitration record, he was not responsible for payment. (PX4)

Subsequent email exchanges on May 25, 2023, confirm that Respondent's attorney advised that the adjuster was going to issue a supplemental check to bring the award whole, but Respondent's attorney requested that the adjuster should "stop pay the first check and issue the full award on a second check." (PX4, T. 160). Respondent's attorney represented that the issue was resolved and his client would issue one check. *Id.* Therefore, the Commission infers the delay in issuing the PPD underpayment was due to conflicting communication regarding whether or not a "cancel and stop pay" could be accomplished versus issuing the supplemental $2,800.00. However, the last communication from Respondent's attorney on May 25, 2023 indicated that there would be a stop pay. The PPD underpayment was issued shortly after the Petitioner's attorney wrote in follow-up on July 3, 2023.

The Commission notes that Respondent issued five checks in total. (PX5, RX7, RX8, RX9, RX10) The first check Respondent issued on April 4, 2023, in the amount of $24,047.49, represented the combined TTD and PPD awards specified in the Arbitrator's Order. However, in light of the Arbitrator's TTD rate specified in the Order, the Respondent paid the PPD rate at 60% of the Arbitrator's average weekly wage rate which is $28.00 less than the weekly minimum statutory rate to which Petitioner was entitled. (PX5, RX9) Thus the PPD amount was underpaid by the aforereferenced $2,800.00 that was eventually paid on July 10, 2023. Petitioner's attorney argues that Respondent's original instructions were that the first check issued in April would be canceled and a stop payment applied, therefore, Petitioner's attorney did not deposit the check and the funds were not disbursed to Petitioner. (T. 6-7)

Further, at the subject hearing, Petitioner's attorney also noted that the indemnity payment for TTD and PPD issued on April 4, 2023, implicitly applied the credit of TTD paid "even though the Arbitrator did not award a credit at trial and Respondent did not file a 19(f) motion to correct the clerical errors." *Id.* The Commission notes that the email Petitioner's attorney sent to Respondent's attorney dated May 16, 2023, states, "[p]lease cancel the prior check sent as it was incorrect (amount $24,047.49)" In the next line Petitioner's attorney wrote, "shall pay TTD $250.13/wk x 13 and 5/7 weeks = 3429.28 less TTD credit -1882.86 = 1546.42" This email contradicts both the Petitioner's representation that it was Respondent's instruction to have the April check canceled and further confirms that by May 17, 2023, the attorneys had agreed to Respondent taking the TTD credit asserted at trial.

Thereafter, on July 10, 2023, the second check was issued in the amount of $2,800.00 for the underpaid PPD. (PX5) The Commission notes that this check would have fully satisfied the indemnity portion of the award, as agreed by the attorneys via the post-award email exchanges.

The third check was issued on July 11, 2023, for $64,403.84 representing the medical award less the implant costs. Petitioner's attorney maintains that the amount paid is an underpayment. That check was not cashed or deposited by year end as evidenced by the letter dated January 2, 2024, from the insurance carrier sent to Petitioner's attorney regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had

not cleared the insurance carrier's bank account. (PX,6 RX6) Respondent reissued that check (fourth check issued) in same amount on January 17, 2024. (RX7)

The fifth check issued was also dated January 17, 2024, made payable to Petitioner's attorney in the amount of $8,183.08, representing the payment owed for the Medtronic implant costs. (RX8, RX11)

Subsequent emails between the attorneys beginning September 6, 2023, indicate Petitioner's attorney filed a Motion (sic) for Penalties and Fees and the matter was initially set for hearing before Commissioner Doerries on September 7, 2023. (PX4, T. 159) Petitioner's attorney wrote opposing counsel that in her motion she indicated that "we disagree with the fee schedule calculations related to the medical portion of the trial award as the calculations were made in bad faith and consistent with the fee schedule. We have not cashed the check for the amount of $64,403.84. Petitioner's attorney further alleged that the bills admitted at trial for Swedish American already reflect adjustments for the workers' compensation fee schedule." *Id.* Counsel wrote it was her intention to discuss this with the Commissioner and likely obtain a trial date. *Id.* Respondent's attorney denied the allegation and demanded Petitioner's attorney show him where the bills admitted at trial reflected the adjustments consistent with the fee schedule. *Id.* Respondent's attorney re-attached the Explanation of Reviews (EORs) he sent to Petitioner's attorney in May and noted that the bill processing required invoices for the hardware from Swedish American and he specifically itemized five hardware bills that required the implant manufacturer's invoices. (PX4, 158)

Petitioner's attorney replied that, "the default would be to pay." *Id.* Petitioner's attorney followed that email with a quote from a Commission Decision, "[w]here the fee schedule does not set a specific fee for a procedure, the amount of reimbursement shall be at 53.2% of the actual charge." *(citation omitted)* (PX4, 157) The attorneys agreed to talk on the following Monday. (PX4, 156) It appears the parties communicated via telephone conference on September 11, 2023. On the same date, Respondent's attorney wrote an email to Petitioner's attorney providing his own fee schedule analysis which totaled $133,431.17. (PX4, 155) On November 9, 2023, Petitioner's attorney wrote Respondent's attorney that they would accept his fee schedule proposal of $133,431.17 after speaking with her client. (PX4, 156) On November 30, 2023, December 14, 2023, and January 3, 2024, Petitioner's attorney wrote Respondent's attorney in follow-up. (PX4, 153-154)

On January 11, 2024, Respondent's attorney responded and notified Petitioner's attorney via email that her emails were in his spam folder and that had occurred previously with emails from another firm. Further, counsel attached a copy of an EOR from his client confirming that the fee schedule amount owed is $70,106.02 and they had been missing invoices for the hardware which was recently obtained. Counsel asked Petitioner's attorney to forward it to the providers "maybe to confirm there is no issue?" (PX4, 153) Petitioner's attorney wrote back and advised she was confused because Respondent's attorney sent her an analysis for the amount of $133,431.17. Petitioner's attorney accused Respondent attorney's client of playing games and

indicated they needed a trial date. Respondent's attorney replied that his client put it through bill review twice and when the attorneys spoke he advised that the $133,431.17 figure was his own calculation and he wanted Petitioner's commitment before he presented it to EMC. He further asked Petitioner's attorney how she could dispute an EOR generated by bill review experts. (PX4, 152-153)

Teresa Walker Testimony

Teresa Walker ("Walker") was called by Respondent as a witness. Walker testified that she worked as a Workers' Compensation supervisor at EMC Insurance, overseeing four states, with four direct reports. Walker testified she supervises the claims, all areas of claims handling. (T. 15) Walker testified that she oversaw the Petitioner's claim. *Id.* Walker further testified that she has been in the workers' compensation industry for "probably three decades" working her way up since college. (T. 16) She performed the function of medical bill review in a private consulting firm, handling participating policies, self-insure retrospective policies with high deductibles and a self-insured pool, before the advent of the fee schedule. *Id.* At that company, she also audited insurance companies on behalf of those participating policies to determine if there were any damages because the insurance company may have mishandled the claims. *Id.*

Walker testified that very few of the claims that she oversees go to trial and she issues less than six award checks annually, emphasizing they need to "have a really good reason to take a case to trial." (T. 16-17) Walker testified that they send award checks to Petitioner's attorneys unless the Petitioner's attorney prefers that they pay providers direct. (T. 17) Walker then testified regarding how EMC processes a medical bill award. Walker testified that EMC has their own medical claims review department and that medical claims review department also uses Mitchell. Mitchell is one of the review companies listed on the IWCC website. *Id.* Walker testified Mitchell is utilized to ensure that the explanation of benefits EOB (sic), or the review of the medical bill, is correct. (T. 17-18) When the bill comes in, it will go through the medical claims review department for review for fee schedule reductions, for accuracy of the data on the invoice as required by the Act. If you are missing information, the EOB (sic) will note the missing data. Then if the missing information is returned, then they review the charge. (T. 18)

Walker testified that she reviews the charge. Illinois, a fee schedule state, uses the fee schedule but the Act also allows for PPO contracts. EMC has specific contracts for reductions with specific providers. *Id.* Once that process is complete and they have the final amount, the EOR is prepared and sent with the check so that the provider knows and understands what their payment is, much like group health when you get an EOB instead of an EOR. (T. 18-19) The Act allows for re-evaluation for missing information, wrong code or "whatever" and the department will look at the bill again. If the bill is updated and records are there, they will issue a new EOR and additional payment, if warranted, or advise if there is no change. Then EMC cuts the check and attaches the review and mails it out to the provider. If an attorney disagrees with the EOR they can send it back to get it reviewed again. (T. 19)

Walker testified that in this case, Petitioner never made a formal request to have the EOR re-reviewed. (T. 19) Walker further testified that she believed EMC requested bills from Petitioner so that EMC could process the bills quicker but EMC was never provided with the information needed. (T. 19-20) Walker testified the Illinois statute allows EMC to take medical contractual discounts when processing the medical bills. (T. 20) Walker further testified that in the Petitioner's case, EMC was missing the pathology bill and they tried to obtain it from Petitioner's attorney and the pathologist's company but could not get it. (T. 21)

Further, Walker testified regarding the implant devices invoice and billing for the hardware used in Petitioner's surgery. Walker testified that when a doctor at a hospital orders any type of hardware for surgery, the hardware is received with an original manufacturer's invoice. The Statute provides the payer does not pay the billed amount, but pays based on the manufacturer's invoice. The carrier, in this case, is required to pay only a certain percentage over cost. (T. 21) Walker testified it is necessary to have the hardware implant bills in order to process the payment. Based on the check that was issued, Walker thought they received the implant/hardware invoices within the last 30 days prior to the Commission hearing that took place on January 26, 2024. Walker testified that EMC obtained the invoices by contacting the hospital directly. (T. 22)

Walker further testified that she never received any medical bills from Petitioner's attorney. She also testified that the insurance company obtains the hardware invoices because it is easier and faster than getting them from Petitioners' attorneys. Walker testified that EMC tried to get as much information as they could as quickly as possible which, Walker explained, was the reason there were two checks issued for the medical. As soon as they had information to cut a check and produce an EOR, they sent that check out. Walker testified that Petitioner's attorney cashed the indemnity check and held the medical check, and held it so long that their accounting department had to send Petitioner's attorney an abandoned property letter notifying her the check was only good for so long and they either had to stop payment and void it, or reissue it. EMC never received a response from Petitioner's attorney. (T. 23)

Walker further testified that when she received the EOR for the implant hardware, they stopped payment on the check that Petitioner's attorney never cashed for the medical payments and they reissued it to Petitioner's attorney. (T. 24) The first medical award check was issued on July 11, 2023. (T. 25) That was the $64,403.84 check they sent in July 2023 but Petitioner's attorney never cashed. (T. 26) Once they received the implant and hardware invoices, they produced the EORs. *Id.* The majority of the award was paid in the July check. (T. 26-27) Walker testified that the first check had the majority of the invoices in it but not the implant invoices or the pathology bill. There were some challenges with those invoices but once they got all the information needed, they got the first check out rather than wait for the implant check. Walker testified that that was a good faith payment of the bills processed without the implant bill. Once those invoices were received, they processed them and sent a supplemental check for those and the pathology bill. The first medical award check went stale and they reissued it for the same amount of $64,403.84, on January 17, 2024. (T. 26-27)

Walker further testified that they sent the additional check in the amount of $8,183.00 on the same day, January 17, 2024, to cover the implant hardware and the pathology bill. Those checks were never cashed to the best of Walker's knowledge. Walker testified that she never received a competing fee schedule analysis from counsel. (T. 28) Walker testified that the Arbitrator's award had a number of ambiguities. The TTD rate was not the same as the carrier had calculated, but they paid on the amount of the award. (T. 29) Walker further testified the parties came to an agreement regarding the indemnity and the second check was issued because Respondent's and Petitioner's attorneys got together and discussed it, and they issued the second check. With the medical award, Walker further testified, "it's by fee schedule and there is nothing I can do. I have to follow the Act on how to pay the fee schedule." (T. 30) She explained that the Crusader bill, from Petitioner's family physician, had a duplicate bill. She also testified that the Petitioner's attorney put in, as an exhibit, the total amount of the bill, the amount that Medicaid had paid and the balance left on the bill. She explained she could not just pay the balance; she had to address the Medicaid lien. So they took the original bill and ran it through the fee schedule. She testified they overpaid on Crusader. Walker testified the first check issued in July was never "marked full and final" and Petitioner's attorney could have cashed that check and distributed it while they awaited the bills/invoices from the implants. Further, they never received the pathology bill. It was a $183.00 bill and the discount would be small, so they paid it. (T. 31) Walker testified putting the bills through a fee schedule bill review was a very elongated frustrating process because of the documents that were in the exhibit. (T. 32)

Walker also testified that the first time she tried to get the pathology or hardware bill was when they issued the first check in July. *Id.* They continued to try to get that bill and they had that bill and the implant bill left. Everything else had been taken care of, and they shipped the check out. *Id.* Walker testified that she has never received an explanation as to why Petitioner believes the bill review company's EOR is incorrect. (T. 33)

On cross-examination, Walker testified that she did not make the calculations that are on this explanation of review personally. The bills go through a medical claims review department that uses an independent department. (T. 34) EMC has a department that handles medical claims. The bills come to them, they review them and use Mitchell to confirm them. Beyond that Walker was not sure about Mitchell's process because she is not a supervisor of that department. Walker testified that EMC has issued "tens of hundreds of thousands of EORs from this national company." (T. 35) She further testified that EMC is a national insurance company that follows the rules of each state. *Id.* Walker confirmed that somebody from internal in her organization sent her the calculations that are on the explanations of review. She also testified she has done medical billing in the past, but that is not her current position. (T. 36) Walker has not sat for the Certified Professional Coder Exam offered by the American Academy of Professional Coders or the Certified Coding Associate Exam offered by the American Health Information Management Association or the Certified Billing and Coding Specialist Exam offered by the National Health Career Association. Walker testified that she did not believe the Health Care Career Association would be relevant to workers' compensation. (T. 37)

Walker further testified on cross examination that she sent the explanation with the letter to Respondent's attorney because when represented she will not contact Petitioner's attorney. She agreed with Petitioner's attorney that she had not contacted them directly. (T. 38) Walker clarified she had not written and asked for information but assumed her attorney's office is doing that. (T. 39) Petitioner's attorney showed Walker PX4, wherein Respondent's attorney did his own calculation of the fee schedule amount. Walker confirmed that she had no part in calculating the $133,431.17 number that Respondent's attorney first sent to Petitioner's attorney. (T. 39-40) Walker testified that she did not know how Respondent's attorney got to that number. Walker had discussed it with counsel and advised him that his number was incorrect based on EMC's review. Walker herself did not attempt to do calculations herself but the explanation of review is the result after someone in her company did the calculations. (T. 40)

Petitioner's attorney showed Walker the email from Respondent's attorney dated September 6, 2023, that states: "I am reattaching the EOR sent to you in May. The issue is the bill processing requires invoices for the hardware from Swedish American. I believe this is where our discrepancy arises from." (T. 41) Walker was then asked if she saw "any request from their counsel to our office requesting that we provide invoices for the hardware?" *Id.* Walker replied, "No" and noted counsel was pointing out "what the hardware is." *Id.* Walker confirmed when she testified on direct that she requested invoices from Petitioner's attorney's office that she was "going off of what" her attorney reported to her. *Id.* Walker confirmed that she testified about private contracts between EMC with providers but she did not have the documentation of those contracts with her. (T. 42) Walker denied that she made an assumption when her company made the calculations that they were using rates that were already contracted with the provider. Walker testified the EOR documents whether the allotted amount is based on the fee schedule or if it is based on PPO contract. The EOR documents at the bottom, explaining the reductions taken, and there would be no PPO contract involved with the hardware. Walker testified further, "[t]he hardware is the letter of the law, here is how it's calculated." *Id.* Walker was shown RX1, Respondent's EOR and, when asked, confirmed that she did not see any PPO contract reductions on the EOR. (T. 44)

On redirect examination, Walker testified the bill review company told her they required the invoices for the hardware/implant. Walker was again shown RX1 and identified a specific entry on page 12 where the EOR showed a PPO discount. (T. 45) Walker further testified the code is P24 where the bill review company takes a contractual medical discount or payment is adjusted based on preferred provider organization. Specifically, in this case, the provider that takes a contractual medical discount payment is the Rockford Spine Center. That entry and code indicates EMC has a contractual agreement with the Rockford Spine Center as provider. (T. 45-46)

On recross examination, Walker confirmed that she did not have the provider contracts, but that her medical review company keeps the contracts and uses the contracts for the explanation of benefits/review. (T. 47) Walker testified that the medical review calculations had not been submitted to the providers because Petitioner's attorney requested that EMC pay her directly and

not the providers. Therefore, they did not send the providers an explanation of review based upon the award. Walker testified that originally when the bills were denied, the providers would have received an EOR showing the reason the bill was disputed. After the award, unless Petitioner's attorney directs payment directly to the providers, the award goes to Petitioners attorney. (T. 47-48) Walker confirmed that the EOR was sent to Petitioner's attorney's firm, with the payment amounts, but they were not sent to the providers unless her attorney sent them. (T. 48)

Exhibits

Petitioner submitted the Petitioner's Penalty Petition which included the three Arbitrator's Decisions as Petitioner's Exhibit 1 ("PX1"). The bill review of medical bill balances that was submitted at the Arbitration Hearing was admitted as PX2. Further, Petitioner moved to admit PX3, a fee schedule calculation over Respondent's foundation objection. In rebuttal to Respondent's objection, Petitioner's attorney conceded that her calculated fee schedule was offered "not for necessarily the truth of the calculations, but in support of counsel's arguments." The Commissioner admitted it, with weight assigned based on her review of it. The Commission notes that PX3 calculations were not supported with codes reflecting whether the amount was figured as provider discount, fee schedule reduction per geozip or negotiated rate pursuant to Section 8.2. An email chain document reflecting communication between the two attorneys representing the respective parties as referenced above was admitted as PX4. The email exchanges in PX4 reflects, in pertinent part, that Respondent's attorney estimated the fee schedule amount owed on the medical bills which was more than the insurance companies review introduced as RX1. Further the email exchanges reflected that the day after the Arbitrator's Decision became final, on March 24, 2023, Petitioner's attorney made a demand for payment of the award including the full amount of TTD liability without the TTD credit Respondent had requested at trial and for the full amount of the medical award. There is no indication that Petitioner provided the medical bills to Respondent with the email. Respondent's attorney responded that his client was running the (medical) bill through the fee schedule, however, Petitioner's attorney replied the Arbitrator awarded the dollar amount for bills as stated in the Decision. In his reply, Respondent's attorney quoted the Arbitrator's Order which specifically awarded the total amount of medical bills "subject to Sections 8(a) and 8.2 of the Act and consistent with the medical fee schedule." (PX4)

PX5 and PX6 were admitted into evidence with no objections. PX5 are copies of the first two checks issued by Respondent, representing the indemnity award payment. PX6 is a copy of the January 2, 2024, letter Petitioner's attorney received and regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had not cleared the insurance carrier's bank account. Respondent's attorney objected to PX7, a letter addressed to him that he represented he had never seen. After agreeing that the medical award check was never cashed, Petitioner's attorney withdrew PX7.

Respondent's exhibits, numbers one through eleven, were admitted. Petitioner's attorney objected to RX1, the Explanation of Review (EOR) of the awarded Medical Bills. Respondent's attorney argued that the EOR is a business record of how bills are processed at an insurance

company therefore, it is admissible evidence. His witness had to testify to the background of how they are created and, he argued, testified that they are produced by one of the Illinois Worker's Compensation Commission's (IWCC) approved bill review companies. Petitioner's attorney argued the witness did not have knowledge as to what involvement the bill review company had, if any, and noted the exhibit specifically stated it was for internal use only. The Commissioner admitted RX1 over the objection, noting it would be given appropriate weight. Respondent's exhibits two through eleven were admitted with no objection including the approved bill review companies listed by the IWCC website (RX2); a letter from the IWCC Chairman regarding Section 8(a) and 8.2 contractual payment (RX3); an article on the IWCC website, "How are implants/carve-outs paid? (RX4); evidence regarding medical bill payment (RX5); the abandoned property letter (RX6) (duplicative of PX6); a copy of the medical bill payment reissued on January 17, 2024. (R7); the additional payment for the implant devices issued on January 17, 2024. (RX8); the April 4, 2023, initial check issued for the indemnity award. (RX9); the check dated July 10, 2023, for the PPD underpayment. (RX10); the Medtronic SD USA Spine Implant invoice. (RX11). RX12 was not admitted.

Analysis

In her Petition and consistent with her argument, Petitioner's attorney alleges "Respondent's calculations related to the medical portion of the trial award were made in bad faith and are not consistent with the fee schedule." Petitioner is seeking penalties under Sections 19(k) and 19(l) and attorney's fees under Section 16. Petitioner alleges that 50% of the entire award is owed and 20% of the Section 19(l) penalties. (PX1) In her Petition, Counsel recites the penalties prescribed in Section 19(l) of the Illinois Workers Compensation Act ("Act") noted below. The Commission notes that the Petitioner's Petition for Penalties and Fees relies upon the dollar amount of the medical award without any fee schedule reductions or Section 8.2 consideration. (PX1)

TTD

Since the Arbitrator's Order failed to reflect the statutory minimum TTD rate, and neither party filed a Section 19(f) motion to correct a clerical error or a timely review, the TTD rate issue is waived. The Respondent paid the TTD and PPD award, less a PPD underpayment, less than two weeks after the Arbitrator's Decision was final. (RX9)

Medical

A check for $64,403.84 was issued first on July 11, 2023, never cashed by Petitioner, and reissued on January 17, 2024, based upon the EOR of the medical bills submitted at trial and obtained by the insurance carrier EMC. Further, the Respondent paid bills for the implant devices in the amount of $8,183.08 on January 17, 2024, after obtaining the necessary invoices from the providers. The Medtronic SD USA invoice is in evidence marked as RX11.

PPD

Respondent argues that the initial timely PPD payment was based on an ambiguity in the Arbitrator's award. The PPD underpayment was issued on July 10, 2023, four months after the Decision was final. (RX10)

The pertinent sections of the Act state as follows:

Penalties under Section 19(k)

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. *820 ILCS 305/19(k).*

Penalties under Section 19(l)

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l).*

Attorneys' Fees under Section 16

> Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section

19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his insurance carrier. *820 ILCS 305/16.*

In Illinois, the courts have examined the imposition of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees in numerous cases. In *Jacobo v. Ill. Workers' Comp. Comm'n*, the court examined various histories of the application of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees as follows:

Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828, 279 Ill. Dec. 531 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763, 800 N.E.2d at 829. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865, 66 Ill. Dec. 300 (1982). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121, 578 N.E.2d 140, 143, 161 Ill. Dec. 13 (1991).

The standard for awarding penalties under section 19(k) is higher than the standard under 19(*l*). Section 19(k) of the Act provides, in pertinent part, as follows:

"In case where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation *** then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphasis added.) *820 ILCS 305/19(k) (West 2006).*

Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. *820 ILCS 305/16 (West 2006)*. "The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission." *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516, 784 N.E.2d 396, 399, 271 Ill. Dec. 178 (2003). *Jacobo v. Ill. Workers' Comp. Comm'n*, 355 Ill.Dec. 358, 363-364, 959 N.E.2d 772, 777-778.

Section 19(l) penalties are not appropriate except for late TTD and medical payments. (See *Theis v. Ill. Workers' Comp. Comm'n* 2017 IL App (1st) 161237WC, P20, 74 N.E.3d 468, 471) In this case, the Commission notes that the period between the Arbitrator's Decision and the subject hearing for non-payment of an award could put Section 19(l) penalties at issue, however, Respondent's counsel represented that Respondent had paid a total of $24,047.49 by April 4, 2023, representing the outstanding TTD award of $1,546.42 plus PPD less than two weeks after Arbitrator's Decision was final. The medical bills were paid on July 11, 2023, after being run through a medical bill review for fee schedule and contract provider discounts by the insurance carrier. Those payments mitigate penalty entitlement under Section 19(l).

The Appellate Court has addressed late payments made after an award became final and notes an award of §19(k) penalties and §16 attorney's fees is discretionary and not mandated by statute or triggered after a certain statutory amount of time for late payment. Although the late payment of an award runs in contravention of the spirit of the Act, there are some circumstances that do not arise to the level of unreasonable and vexatious delay. In *Armour Swift-Eckrich v. Indus. Comm'n (Williams*) the Court held as follows:

> The delay in this case was 78 days after the award became final. The briefs refer to *Roodhouse Envelope*, 276 Ill. App. 3d at 580, 658 N.E.2d at 840 (payment was made 87 days "after [employer] received notification of the award"), *Board of Education of the City of Chicago v. Industrial Comm'n*, 351 Ill. 128, 131, 184 N.E. 202, 203 (1932) (payment was 90 days late), *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 848, 767 N.E.2d 405, 408. (delay of one year unreasonably based on erroneous interpretation of the law), and *Sanchez v. Industrial Comm'n*, 53 Ill. 2d 514, 518, 292 N.E.2d 724, 726 (1973), where the Commission declined to issue a penalty though payment was not made until 52 days after the award became final, and the appellate court affirmed the denial on the basis that payment was delayed because there were negotiations to arrive at a lump-sum settlement.
>
> Sections 19(k) and 16 do not mandate that penalties be imposed after a certain period of delay. In contrast to other penalties under the Act which are mandatory, the awarding of substantial penalties under section 19(k) and attorney fees under section 16 is discretionary. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553, 234 Ill. Dec. 205 (1998) *Armour Swift-Eckrich v. Indus. Comm'n (Williams)*, 355 Ill. App. 3d 708, 711, 823 N.E.2d 1103, 1105.

In this case, the Respondent established that the payment of the TTD and PPD awards, albeit with a PPD underpayment, was made 13 days after the award became a final Decision. (PX5) The medical was paid after running the medical bills through an explanation of review pursuant to Section 8.2 and the medical fee schedule consistent with the Arbitrator's Order. The Supreme Court has held that in cases such as this, "when assessing the delay, the calculation does not start until after the award is final. The time for payment must, of course, be computed from the date of finality." *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 171, 233 N.E.2d 362, 365, 1968.

In a case where the Supreme Court reversed the lower court's award of penalties for a 90-day delay in payment of the award, the Supreme Court noted that both sides relied upon the same prior *Board of Education* case and held that in determining whether or not §19(k) penalties were warranted, the delay should be assessed as follows:

> In determining whether such delay has been unreasonable or vexatious, regard must be had to the circumstances attending the delay, the nature of the case and the relief demanded, and also to the question whether the rights of the claimant have been prejudiced by that delay. (351 Ill. 128, 132.) The court further said that in view of the failure to pay for about 90 days plus the lapse of nearly six years from the date of injury, it could not say that the Commission's finding was not justified.
>
> ***
>
> The time consumed from filing to final judgment was from our experience about the same as, or even shorter, than the usual contested compensation case. The time for payment must, of course, be computed from the date of finality. While we do not condone unnecessary delay in payment, we cannot say that the delay in these cases was such as to justify a finding of unreasonable or vexatious delay. It is impractical to set a definite time limitation for payment. As was said in the earlier *Board of Education* case: "* * * where all legal proceedings have been exhausted and a considerable time has been permitted to elapse thereafter during which the award is not paid, it is incumbent upon the one liable to pay the same to excuse the delay." (351 Ill. 128, 132.) *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 170, 233 N.E.2d 362, 364-365.

In another case where penalties were denied, the Appellate Court also held "several months" delay in payment of an award is not unreasonable, while cautioning employers not to withhold payment unless there are unusual circumstances. The facts of the *Chicago* case are similar in that the Arbitrator erred by not allowing a prior credit and the parties did not file a timely review and the Petitioner filed a penalties petition when Respondent did not pay the award. The *Chicago* Court held penalties were not warranted where there was ongoing communication between the parties regarding the prior credit, which the Petitioner would not allow:

> It is also clear that there were discussions between counsel for the parties regarding credit in some amount, in order to avoid a double payment by the City, although those discussions may well have commenced after expiration of the period in which a review of the arbitrator's decision was possible. Given the circumstances of this case, it is our opinion that the several months delay in payment was neither unreasonable nor vexatious and that the finding of the Industrial Commission to the contrary is against the manifest weight of the evidence. In so holding, however, we do not intend that this opinion be thought to indicate any disposition on our part to

countenance delay in payment of final awards in less unusual circumstances. *Chicago v. Industrial Comm'n*., 345 N.E.2d 477, 480, 63 Ill. 2d 99, 104-105.

In the case at bar, the Commission Decision became final after March 23, 2023. Similar to the circumstance in *Chicago*, communication between the parties began thereafter. Petitioner was aware that Respondent had claimed a credit at the Arbitration Hearing for TTD paid. In the May 16, 2023, email, Petitioner's attorney demanded Respondent cancel the April 4, 2023 check, and issue a check for the TTD award less the TTD credit despite the fact that the credit was not acknowledged in the Arbitrator's Decision. (PX4) While the Arbitrator's Decision fails to reflect the TTD credit, the parties agreed shortly thereafter that the Respondent did not owe for TTD paid. (PX4)

Petitioner did not cash the April 4, 2023, check and instead demanded the award in full including the full dollar amount of medical awarded. Respondent advised that the medical award was contingent upon the Section 8.2 reductions per the medical fee schedule or provider agreements and, as shown in Respondent's Exhibit 4, implant cost calculations. The medical payment was issued on July 11, 2023, four months after the Arbitrator's Decision was final and clearly after the EOR was obtained. The payment for the implants was issued later, on January 17, 2024, after the Respondent obtained the necessary documentation to calculate the reduced cost pursuant to Section 8.2. The Commission finds that the April 4, 2023, payment for indemnity and the July 11, 2023, medical bill payment mitigate penalty entitlement under Sections 19(k) and 19(l).

Petitioner maintains the medical was underpaid and is asking the Commission to find that Petitioner's medical fee schedule calculation submitted at the Commission hearing is evidence that the Respondent underpaid and seeks penalties on the whole award.

The Commission notes that there is no evidence that Petitioner submitted the requisite medical bills documentation after missing bills were identified by Respondent after the award issued. The *Theis* Court held that is Petitioner's obligation:

> The act of submitting medical bills into evidence during arbitration is not the same as tendering them to the employer for payment. In addition, claimant cites no authority, nor does our research reveal any, which stands for the proposition that an employer has a duty to actively seek out a claimant's medical bills either through the use of a subpoena or some other method in order to comply with the requirements of section 19(*l*). Although the Commission found that it was claimant's failure to tender the medical bills to the employer that caused the delay in the payment of the award, it nonetheless awarded claimant section 19(*l*) penalties due to the employer's failure to timely pay the award, which was error. *Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC, P23, 74 N.E.3d 468, 472.

Respondent alleges that some bills that were awarded by the Arbitrator were not in evidence yet Respondent volunteered payment. In the subject case, PX2 is a medical bill exhibit summary but the Commission cannot ascertain whether or not that exhibit is identical to the one introduced at the Arbitration Hearing.

The Commission finds that the attorneys communicated regarding the implementation of the payments but their communications could have, but did not, immediately resolve the issues, in part, because EMC had to run a medical bill review pursuant to the award under Section 8.2. The Commission notes there was no representation that either attorney used the telephone or the postal service. Further, Petitioner's attorney could have immediately deposited the indemnity check issued less than two weeks after the Arbitrator's Decision was final and then pursued the $2,800.00 PPD underpayment. On May 25, 2023, Respondent's attorney compounded the problem of Petitioner's attorney not depositing or cashing the indemnity check that was issued on April 4, 2023, by advising that although his client was resistant to the stop-pay and reissuance of the whole check, his client would reissue the entire indemnity payment. It would appear that Respondent's attorney was either mistaken or the stop payment was not feasible.

Respondent's attorney should have been more explicit with his demand for the implant invoices if they were not included in the medical bill exhibit from the Arbitration Hearing. The Commission finds, however, that when Respondent's attorney advised Petitioner's attorney on May 17, 2023, and September 6, 2023, that his client did not have certain bills from Crusader Community Health, the Rockford Associated Clinical Pathology and the implant/hardware invoices, Petitioner's attorney had an obligation to obtain and provide them.

The Commission finds that based upon the testimony of Teresa Walker, Respondent timely submitted the disputed medical bills to be reviewed, per the Arbitrator's award, subject to the fee schedule and Sections 8(a) and 8.2 of the Act. Respondent accomplished this apparently from the bills submitted at the Arbitration Hearing, not from medical bills submitted with a post-award demand. Walker testified that she received the medical implant invoice approximately 30 days before the Commission hearing and issued the check thereafter. (T. 22; RX8) The Commission further finds that the Petitioner's attorney's calculations in exhibit 3 are without foundation because the exhibit is erroneous on its face, i.e., the fee schedule amounts for multiple entries exceed the charge for the service. The Commission finds Respondent's medical fee schedule explanation of review was made in good faith. The Commission further finds that there is no indication that the Respondent's carrier deliberately, unreasonably or vexatiously withheld funds. In fact, Respondent's witness credibly testified that their intention was to pay the award and benefits in a timely manner. (T. 23) Therefore, the Commission finds this circumstance does not warrant Section 19(l) or Section 19(k) penalties. Without Section 19(k) penalties, no Section 16 fees are warranted. (See *Jacobo v. Ill. Workers' Comp. Comm'n,* 2011 Ill. App. LEXIS 1186, *10-11, 355 Ill. Dec. 358, 364.)

Conclusions of Law

The *Millennium Knickerbocker* Court reviewed all statutory authority under which the Commission retains jurisdiction after a final award, and specifically held that the Commission is authorized to assess penalties and attorney fees when a party fails to comply with the terms of a final settlement or final award, and in order to do so, the Commission must first interpret the terms of an ambiguous final settlement/award. *Millennium Knickerbocker Hotel v. Guzman*, 2017 IL App (1st) 161027WC, P29, 76 N.E.3d 825, 836-837.

In the subject case, the Arbitrator's Conclusions of Law section pertaining to the TTD award is not explicit. The Arbitrator awarded an erroneous statutory rate of the weekly TTD payment in the Order. Although the TTD amount payable in the Arbitrator's Order is incorrect, the Commission finds that the issue was waived when both parties failed to file a Motion pursuant to §19(f) to correct the error and neither party filed a review of the Arbitrator's award.

Similarly, since the Arbitrator did not specify a dollar rate of PPD owed in the Order or in the Conclusions of Law, the Commission relies upon the average weekly wage rate the Arbitrator awarded. In this case, the Arbitrator concluded that the Petitioner's average weekly wage (AWW) rate is $375.00. The Petitioner was married, thus, the Commission concludes that Petitioner's PPD rate is the statutory minimum rate of $253.00 per week. Walker testified the initial PPD was underpaid because the Arbitrator did not award the statutory minimum TTD rate, and did not acknowledge Petitioner had a dependent, thus EMC followed suit and the initial PPD payment was based on 60% of the AWW rate. Within three months, after some discussions, the parties worked it out and EMC rectified the underpayment. (T. 8-9)

Next, regarding Petitioner's argument that the award did not specify that the Respondent shall get credit for TTD paid, it appears that since the awards were issued and became final, the parties acknowledged that Respondent paid $1,882.86 in TTD benefits prior to trial and agreed that Respondent could take credit. (PX4, T. 162) Thus, the amount Respondent owed for TTD at the time of the hearing was $1,546.42. The record is clear that Respondent issued a check in the amount of $24,047.49 on April 4, 2023, which was the full indemnity owed less the PPD underpayment which was paid on July 10, 2023. The fact that Petitioner's attorney did not cash the first check appears to be a communication problem between the attorneys but not evidence of a vexatious or unreasonable delay on the part of the Respondent.

A finding of vexatious or unreasonable delay must be based on objective reasonableness. *Board of Education of City of Chicago v Industrial Commission*, *Bd. of Educ. v. Indus. Comm'n,* 93 Ill. 2d 1, 442 N.E.2d 861. Regarding the medical award, the Respondent was responsible for issuing the checks, however, not solely responsible for ensuring the Respondent had proper medical itemization. The evidence in this record is lacking, however, it appears that Petitioner's attorney could have provided the requisite medical bills to Respondent's attorney. Since certain medical bills were missing at the time of the fee schedule analysis, the parties should have communicated in a more timely manner to get the bills paid as fast as possible. Further, in this

circumstance, the Commission is not persuaded that Respondent is wholly, or even partially, to blame for the delay in payment of the medical bills. The Petitioner demanded payment but did not provide the missing medical bill documentation when notified.

Having considered the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorney Fees Under IWCA §16, interpretation of the Arbitrator's award, and review of the totality of evidence before the Commission including the arguments made by the parties, the testimony of the Respondent's witness, Teresa Walker, all the exhibits including copies of the checks issued by Respondent, (PX5, RX7, RX8, RX9, RX10), email exchanges between the attorneys (PX4), and pervading case law, the Commission declines to award penalties under §19(k), §19(l) or attorney's fees under §16 in this instance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorneys' Fees Under IWCA §16, is denied for all the afore-referenced reasons.

May 31, 2024

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

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

/s/*Amylee H. Simonovich*
Amylee Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC023722
Case Name	Neal Warren v. Clean Right Car Wash
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	24IWCC0257
Number of Pages of Decision	20
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Stephanie Seibold
Respondent Attorney	Peter Sink

DATE FILED: 5/31/2024

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NEAL WARREN,

Petitioner,

vs.

NOS: 20 WC 023722
20 WC 023041
20 WC 016956

CLEAN RIGHT CAR WASH,

Respondent.

ORDER ON PETITIONER'S PETITION FOR PENALTIES UNDER IWCA §19(K) AND §(L) AND ATTORNEYS' FEES UNDER IWCA §16

This matter (one case, three duplicate filings and three identical Decisions issued) comes before Commissioner Kathryn A. Doerries pursuant to Petitioner's Petition for Penalties Under IWCA §19(k) and §(l) and Attorneys' Fees Under IWCA §16 filed on July 5, 2023. (PX1). Petitioner and Respondent were represented by counsel and the merits of the Petitioner's Petition were argued before Commissioner Doerries on January 26, 2024. Exhibits and a witness were presented by the parties at the Commission hearing, and a transcript of those proceedings was recorded with the parties' exhibits. After considering the parties' arguments and review of the evidence presented by the parties, the Commission denies Petitioner's Petition for Penalties Under Sections 19(k) and 19(l) and for Attorney's Fees Pursuant to Section 16 based upon the following analysis.

Background

This dispute arose after an Arbitration Hearing on January 5, 2023, and the Arbitrator's Decisions were issued on February 21, 2023. (T. 5) At the Commission Hearing, Petitioner's attorney noted that in the Decisions, the Arbitrator did not "write a credit for TTD paid by Respondent. Respondent had asserted a credit of $1,882.86 at trial, leaving Respondent's position

$1,546.42 owed." *Id.* On April 4, 2023, Respondent issued a check for $24,047.49 representing the indemnity portion of the award. (Px5; RX9)

The Arbitrator's Order in each Decision states as follows:

- The Respondent shall pay the Petitioner temporary total disability benefits of $**250.13**/week for **13 and 5/7** weeks, from **May 12, 2020 through August 17, 2020**, as provided in Section 8(b) of the Act.

- The Respondent shall pay $ **$185,418.78** 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 20% loss of use of the man as a whole in permanent partial disability benefits pursuant to section 8(d) (2) of the Act. (PX1, Exhibits 1-3Arb.Decisions)

In the Conclusions of Law section, the Arbitrator concluded Petitioner's average weekly wage rate was $375.00. *Id.* In the Findings, the Arbitrator noted that the Petitioner was married. *Id.* Thus, Petitioner would be entitled to the statutory minimum TTD and PPD rates. However, the Arbitrator's Conclusions of Law did not address the Petitioner's TTD and PPD rates in either pertinent section. There was no mention of the PPD rate in the Arbitrator's Order so a rate was never clarified in the Decision. The TTD rate in the Arbitrator's Order was $2.87 less than the statutory minimum wage rate. Further, neither the Arbitrator's Findings nor Order awarded the Respondent credit that was asserted at the Arbitration Hearing for TTD paid. Neither party filed a motion to correct the clerical errors pursuant to Section 19(f) before the Arbitrator, i.e. to address the TTD and PPD rates and to establish Respondent's entitlement to credit for TTD paid, nor did either file a timely review with the Commission. Thus the Decision became final on March 23, 2023.

The Respondent's witness testified that the Arbitrator's award had ambiguities with respect to the PPD rate based on the TTD rate assigned by the Arbitrator and the Arbitrator's failure to assign the minimum statutory TTD rate. Thus, Respondent initially paid an erroneous PPD rate of 60% of the average weekly wage rate established in the Arbitrator's Decision. (T. 29-30)

Neither party offered the transcript of the Arbitration Hearing into evidence at the Commission Hearing.

There is evidence that communications ensued between the attorneys between March 24, 2023, and January 11, 2024. (PX4) Petitioner's attorney initially demanded payment of the award on March 24, 2023, when the Arbitrator's Decision became final. Petitioner's attorney forwarded her calculations which included the full amount of TTD awarded without subtracting the Respondent's credit for TTD paid, the PPD award based on a statutory minimum PPD rate

of $253.00 and the full dollar amount awarded in medical expenses. *Id.* When Respondent's attorney replied to Petitioner's attorney on the same day, March 24, 2023, he advised her that his client was "running the bill through fee schedule." In response, still on the first day after the award was final, Petitioner's attorney demanded the full dollar amount for the medical bills. Respondent's attorney replied that the medical bills were "actually awarded pursuant to Sections 8(a) and 8.2 and consistent with the medical fee schedule." *Id.* There is no evidence that Petitioner's attorney submitted the documentation needed to run the bills through the medical fee schedule to Respondent's attorney at this time. The Commission infers that Respondent's attorney relied on the bills entered into evidence at trial to obtain reductions under the medical fee schedule and Section 8.2.

Eleven days later, Respondent's attorney asked Petitioner's attorney, via email, if she could call him regarding the subject matter. They agreed to talk on April 6, 2023. *Id.* On May 1, 2023, Petitioner's attorney wrote Respondent's attorney that she had not received counsel's fee schedule analysis relative to the medical bills and asked for it as soon as possible. On May 16, 2023, Petitioner's attorney sent another email to Respondent's attorney and asked for the "trial award" designating the following instructions:

> Please cancel the prior check sent as it was incorrect (amount: $24,047.49)
> shall pay TTD $250.13/wk x13 and 5/7 weeks =$3429.28 less TTD credit -1882.86
> = 1546.42
> shall pay 20% maaw- 253.00 min rate x 100 wks = $25,300.00

The Commission notes that the quoted demand, which totals $26,846.42, clearly represented the Petitioner's and Respondent's agreement to give Respondent the credit for TTD paid and to pay Petitioner the additional $2,800.00 for the PPD underpayment in the check she previously received, issued two weeks after the Arbitrator's Decision was final. (PX5) It is also evident to the Commission that Respondent went ahead and issued $2,800.00 on July 10, 2023, rather than cancel the check that was previously issued less than two weeks after the Arbitrator's Decision was final. (PX5) The Commission notes that the previous check issued, for $24,047.49 plus the $2,800.00 PPD underpayment totals $26,847.49, or $1.07 more than the May 16, 2023, email demand.

After Petitioner's attorney made the afore-refenced demand on May 16, 2023, the Respondent's attorney replied on May 17, 2023, and advised the "TTD + PPD award is being sent today or tomorrow." He also then advised that he attached an "EOB" (sic) explaining Respondent's fee schedule analysis for the medical award and advised counsel that there were issues outlined by his client. The first was that Crusader Community Health bills could not be reviewed because they refused to provide a W9. Second, there was no bill attached for the Rockford Associated Clinical Pathology $183.00 balance due listed on the spreadsheet. Respondent's attorney advised that in absence of the bill in the Arbitration record, he was not responsible for payment. (PX4)

Subsequent email exchanges on May 25, 2023, confirm that Respondent's attorney advised that the adjuster was going to issue a supplemental check to bring the award whole, but Respondent's attorney requested that the adjuster should "stop pay the first check and issue the full award on a second check." (PX4, T. 160). Respondent's attorney represented that the issue was resolved and his client would issue one check. *Id.* Therefore, the Commission infers the delay in issuing the PPD underpayment was due to conflicting communication regarding whether or not a "cancel and stop pay" could be accomplished versus issuing the supplemental $2,800.00. However, the last communication from Respondent's attorney on May 25, 2023 indicated that there would be a stop pay. The PPD underpayment was issued shortly after the Petitioner's attorney wrote in follow-up on July 3, 2023.

The Commission notes that Respondent issued five checks in total. (PX5, RX7, RX8, RX9, RX10) The first check Respondent issued on April 4, 2023, in the amount of $24,047.49, represented the combined TTD and PPD awards specified in the Arbitrator's Order. However, in light of the Arbitrator's TTD rate specified in the Order, the Respondent paid the PPD rate at 60% of the Arbitrator's average weekly wage rate which is $28.00 less than the weekly minimum statutory rate to which Petitioner was entitled. (PX5, RX9) Thus the PPD amount was underpaid by the aforereferenced $2,800.00 that was eventually paid on July 10, 2023. Petitioner's attorney argues that Respondent's original instructions were that the first check issued in April would be canceled and a stop payment applied, therefore, Petitioner's attorney did not deposit the check and the funds were not disbursed to Petitioner. (T. 6-7)

Further, at the subject hearing, Petitioner's attorney also noted that the indemnity payment for TTD and PPD issued on April 4, 2023, implicitly applied the credit of TTD paid "even though the Arbitrator did not award a credit at trial and Respondent did not file a 19(f) motion to correct the clerical errors." *Id.* The Commission notes that the email Petitioner's attorney sent to Respondent's attorney dated May 16, 2023, states, "[p]lease cancel the prior check sent as it was incorrect (amount $24,047.49)" In the next line Petitioner's attorney wrote, "shall pay TTD $250.13/wk x 13 and 5/7 weeks = 3429.28 less TTD credit -1882.86 = 1546.42" This email contradicts both the Petitioner's representation that it was Respondent's instruction to have the April check canceled and further confirms that by May 17, 2023, the attorneys had agreed to Respondent taking the TTD credit asserted at trial.

Thereafter, on July 10, 2023, the second check was issued in the amount of $2,800.00 for the underpaid PPD. (PX5) The Commission notes that this check would have fully satisfied the indemnity portion of the award, as agreed by the attorneys via the post-award email exchanges.

The third check was issued on July 11, 2023, for $64,403.84 representing the medical award less the implant costs. Petitioner's attorney maintains that the amount paid is an underpayment. That check was not cashed or deposited by year end as evidenced by the letter dated January 2, 2024, from the insurance carrier sent to Petitioner's attorney regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had

not cleared the insurance carrier's bank account. (PX,6 RX6) Respondent reissued that check (fourth check issued) in same amount on January 17, 2024. (RX7)

The fifth check issued was also dated January 17, 2024, made payable to Petitioner's attorney in the amount of $8,183.08, representing the payment owed for the Medtronic implant costs. (RX8, RX11)

Subsequent emails between the attorneys beginning September 6, 2023, indicate Petitioner's attorney filed a Motion (sic) for Penalties and Fees and the matter was initially set for hearing before Commissioner Doerries on September 7, 2023. (PX4, T. 159) Petitioner's attorney wrote opposing counsel that in her motion she indicated that "we disagree with the fee schedule calculations related to the medical portion of the trial award as the calculations were made in bad faith and consistent with the fee schedule. We have not cashed the check for the amount of $64,403.84. Petitioner's attorney further alleged that the bills admitted at trial for Swedish American already reflect adjustments for the workers' compensation fee schedule." *Id.* Counsel wrote it was her intention to discuss this with the Commissioner and likely obtain a trial date. *Id.* Respondent's attorney denied the allegation and demanded Petitioner's attorney show him where the bills admitted at trial reflected the adjustments consistent with the fee schedule. *Id.* Respondent's attorney re-attached the Explanation of Reviews (EORs) he sent to Petitioner's attorney in May and noted that the bill processing required invoices for the hardware from Swedish American and he specifically itemized five hardware bills that required the implant manufacturer's invoices. (PX4, 158)

Petitioner's attorney replied that, "the default would be to pay." *Id.* Petitioner's attorney followed that email with a quote from a Commission Decision, "[w]here the fee schedule does not set a specific fee for a procedure, the amount of reimbursement shall be at 53.2% of the actual charge." *(citation omitted)* (PX4, 157) The attorneys agreed to talk on the following Monday. (PX4, 156) It appears the parties communicated via telephone conference on September 11, 2023. On the same date, Respondent's attorney wrote an email to Petitioner's attorney providing his own fee schedule analysis which totaled $133,431.17. (PX4, 155) On November 9, 2023, Petitioner's attorney wrote Respondent's attorney that they would accept his fee schedule proposal of $133,431.17 after speaking with her client. (PX4, 156) On November 30, 2023, December 14, 2023, and January 3, 2024, Petitioner's attorney wrote Respondent's attorney in follow-up. (PX4, 153-154)

On January 11, 2024, Respondent's attorney responded and notified Petitioner's attorney via email that her emails were in his spam folder and that had occurred previously with emails from another firm. Further, counsel attached a copy of an EOR from his client confirming that the fee schedule amount owed is $70,106.02 and they had been missing invoices for the hardware which was recently obtained. Counsel asked Petitioner's attorney to forward it to the providers "maybe to confirm there is no issue?" (PX4, 153) Petitioner's attorney wrote back and advised she was confused because Respondent's attorney sent her an analysis for the amount of $133,431.17. Petitioner's attorney accused Respondent attorney's client of playing games and

indicated they needed a trial date. Respondent's attorney replied that his client put it through bill review twice and when the attorneys spoke he advised that the $133,431.17 figure was his own calculation and he wanted Petitioner's commitment before he presented it to EMC. He further asked Petitioner's attorney how she could dispute an EOR generated by bill review experts. (PX4, 152-153)

Teresa Walker Testimony

Teresa Walker ("Walker") was called by Respondent as a witness. Walker testified that she worked as a Workers' Compensation supervisor at EMC Insurance, overseeing four states, with four direct reports. Walker testified she supervises the claims, all areas of claims handling. (T. 15) Walker testified that she oversaw the Petitioner's claim. *Id.* Walker further testified that she has been in the workers' compensation industry for "probably three decades" working her way up since college. (T. 16) She performed the function of medical bill review in a private consulting firm, handling participating policies, self-insure retrospective policies with high deductibles and a self-insured pool, before the advent of the fee schedule. *Id.* At that company, she also audited insurance companies on behalf of those participating policies to determine if there were any damages because the insurance company may have mishandled the claims. *Id.*

Walker testified that very few of the claims that she oversees go to trial and she issues less than six award checks annually, emphasizing they need to "have a really good reason to take a case to trial." (T. 16-17) Walker testified that they send award checks to Petitioner's attorneys unless the Petitioner's attorney prefers that they pay providers direct. (T. 17) Walker then testified regarding how EMC processes a medical bill award. Walker testified that EMC has their own medical claims review department and that medical claims review department also uses Mitchell. Mitchell is one of the review companies listed on the IWCC website. *Id.* Walker testified Mitchell is utilized to ensure that the explanation of benefits EOB (sic), or the review of the medical bill, is correct. (T. 17-18) When the bill comes in, it will go through the medical claims review department for review for fee schedule reductions, for accuracy of the data on the invoice as required by the Act. If you are missing information, the EOB (sic) will note the missing data. Then if the missing information is returned, then they review the charge. (T. 18)

Walker testified that she reviews the charge. Illinois, a fee schedule state, uses the fee schedule but the Act also allows for PPO contracts. EMC has specific contracts for reductions with specific providers. *Id.* Once that process is complete and they have the final amount, the EOR is prepared and sent with the check so that the provider knows and understands what their payment is, much like group health when you get an EOB instead of an EOR. (T. 18-19) The Act allows for re-evaluation for missing information, wrong code or "whatever" and the department will look at the bill again. If the bill is updated and records are there, they will issue a new EOR and additional payment, if warranted, or advise if there is no change. Then EMC cuts the check and attaches the review and mails it out to the provider. If an attorney disagrees with the EOR they can send it back to get it reviewed again. (T. 19)

Walker testified that in this case, Petitioner never made a formal request to have the EOR re-reviewed. (T. 19) Walker further testified that she believed EMC requested bills from Petitioner so that EMC could process the bills quicker but EMC was never provided with the information needed. (T. 19-20) Walker testified the Illinois statute allows EMC to take medical contractual discounts when processing the medical bills. (T. 20) Walker further testified that in the Petitioner's case, EMC was missing the pathology bill and they tried to obtain it from Petitioner's attorney and the pathologist's company but could not get it. (T. 21)

Further, Walker testified regarding the implant devices invoice and billing for the hardware used in Petitioner's surgery. Walker testified that when a doctor at a hospital orders any type of hardware for surgery, the hardware is received with an original manufacturer's invoice. The Statute provides the payer does not pay the billed amount, but pays based on the manufacturer's invoice. The carrier, in this case, is required to pay only a certain percentage over cost. (T. 21) Walker testified it is necessary to have the hardware implant bills in order to process the payment. Based on the check that was issued, Walker thought they received the implant/hardware invoices within the last 30 days prior to the Commission hearing that took place on January 26, 2024. Walker testified that EMC obtained the invoices by contacting the hospital directly. (T. 22)

Walker further testified that she never received any medical bills from Petitioner's attorney. She also testified that the insurance company obtains the hardware invoices because it is easier and faster than getting them from Petitioners' attorneys. Walker testified that EMC tried to get as much information as they could as quickly as possible which, Walker explained, was the reason there were two checks issued for the medical. As soon as they had information to cut a check and produce an EOR, they sent that check out. Walker testified that Petitioner's attorney cashed the indemnity check and held the medical check, and held it so long that their accounting department had to send Petitioner's attorney an abandoned property letter notifying her the check was only good for so long and they either had to stop payment and void it, or reissue it. EMC never received a response from Petitioner's attorney. (T. 23)

Walker further testified that when she received the EOR for the implant hardware, they stopped payment on the check that Petitioner's attorney never cashed for the medical payments and they reissued it to Petitioner's attorney. (T. 24) The first medical award check was issued on July 11, 2023. (T. 25) That was the $64,403.84 check they sent in July 2023 but Petitioner's attorney never cashed. (T. 26) Once they received the implant and hardware invoices, they produced the EORs. *Id.* The majority of the award was paid in the July check. (T. 26-27) Walker testified that the first check had the majority of the invoices in it but not the implant invoices or the pathology bill. There were some challenges with those invoices but once they got all the information needed, they got the first check out rather than wait for the implant check. Walker testified that that was a good faith payment of the bills processed without the implant bill. Once those invoices were received, they processed them and sent a supplemental check for those and the pathology bill. The first medical award check went stale and they reissued it for the same amount of $64,403.84, on January 17, 2024. (T. 26-27)

Walker further testified that they sent the additional check in the amount of $8,183.00 on the same day, January 17, 2024, to cover the implant hardware and the pathology bill. Those checks were never cashed to the best of Walker's knowledge. Walker testified that she never received a competing fee schedule analysis from counsel. (T. 28) Walker testified that the Arbitrator's award had a number of ambiguities. The TTD rate was not the same as the carrier had calculated, but they paid on the amount of the award. (T. 29) Walker further testified the parties came to an agreement regarding the indemnity and the second check was issued because Respondent's and Petitioner's attorneys got together and discussed it, and they issued the second check. With the medical award, Walker further testified, "it's by fee schedule and there is nothing I can do. I have to follow the Act on how to pay the fee schedule." (T. 30) She explained that the Crusader bill, from Petitioner's family physician, had a duplicate bill. She also testified that the Petitioner's attorney put in, as an exhibit, the total amount of the bill, the amount that Medicaid had paid and the balance left on the bill. She explained she could not just pay the balance; she had to address the Medicaid lien. So they took the original bill and ran it through the fee schedule. She testified they overpaid on Crusader. Walker testified the first check issued in July was never "marked full and final" and Petitioner's attorney could have cashed that check and distributed it while they awaited the bills/invoices from the implants. Further, they never received the pathology bill. It was a $183.00 bill and the discount would be small, so they paid it. (T. 31) Walker testified putting the bills through a fee schedule bill review was a very elongated frustrating process because of the documents that were in the exhibit. (T. 32)

Walker also testified that the first time she tried to get the pathology or hardware bill was when they issued the first check in July. *Id.* They continued to try to get that bill and they had that bill and the implant bill left. Everything else had been taken care of, and they shipped the check out. *Id.* Walker testified that she has never received an explanation as to why Petitioner believes the bill review company's EOR is incorrect. (T. 33)

On cross-examination, Walker testified that she did not make the calculations that are on this explanation of review personally. The bills go through a medical claims review department that uses an independent department. (T. 34) EMC has a department that handles medical claims. The bills come to them, they review them and use Mitchell to confirm them. Beyond that Walker was not sure about Mitchell's process because she is not a supervisor of that department. Walker testified that EMC has issued "tens of hundreds of thousands of EORs from this national company." (T. 35) She further testified that EMC is a national insurance company that follows the rules of each state. *Id.* Walker confirmed that somebody from internal in her organization sent her the calculations that are on the explanations of review. She also testified she has done medical billing in the past, but that is not her current position. (T. 36) Walker has not sat for the Certified Professional Coder Exam offered by the American Academy of Professional Coders or the Certified Coding Associate Exam offered by the American Health Information Management Association or the Certified Billing and Coding Specialist Exam offered by the National Health Career Association. Walker testified that she did not believe the Health Care Career Association would be relevant to workers' compensation. (T. 37)

Walker further testified on cross examination that she sent the explanation with the letter to Respondent's attorney because when represented she will not contact Petitioner's attorney. She agreed with Petitioner's attorney that she had not contacted them directly. (T. 38) Walker clarified she had not written and asked for information but assumed her attorney's office is doing that. (T. 39) Petitioner's attorney showed Walker PX4, wherein Respondent's attorney did his own calculation of the fee schedule amount. Walker confirmed that she had no part in calculating the $133,431.17 number that Respondent's attorney first sent to Petitioner's attorney. (T. 39-40) Walker testified that she did not know how Respondent's attorney got to that number. Walker had discussed it with counsel and advised him that his number was incorrect based on EMC's review. Walker herself did not attempt to do calculations herself but the explanation of review is the result after someone in her company did the calculations. (T. 40)

Petitioner's attorney showed Walker the email from Respondent's attorney dated September 6, 2023, that states: "I am reattaching the EOR sent to you in May. The issue is the bill processing requires invoices for the hardware from Swedish American. I believe this is where our discrepancy arises from." (T. 41) Walker was then asked if she saw "any request from their counsel to our office requesting that we provide invoices for the hardware?" *Id.* Walker replied, "No" and noted counsel was pointing out "what the hardware is." *Id.* Walker confirmed when she testified on direct that she requested invoices from Petitioner's attorney's office that she was "going off of what" her attorney reported to her. *Id.* Walker confirmed that she testified about private contracts between EMC with providers but she did not have the documentation of those contracts with her. (T. 42) Walker denied that she made an assumption when her company made the calculations that they were using rates that were already contracted with the provider. Walker testified the EOR documents whether the allotted amount is based on the fee schedule or if it is based on PPO contract. The EOR documents at the bottom, explaining the reductions taken, and there would be no PPO contract involved with the hardware. Walker testified further, "[t]he hardware is the letter of the law, here is how it's calculated." *Id.* Walker was shown RX1, Respondent's EOR and, when asked, confirmed that she did not see any PPO contract reductions on the EOR. (T. 44)

On redirect examination, Walker testified the bill review company told her they required the invoices for the hardware/implant. Walker was again shown RX1 and identified a specific entry on page 12 where the EOR showed a PPO discount. (T. 45) Walker further testified the code is P24 where the bill review company takes a contractual medical discount or payment is adjusted based on preferred provider organization. Specifically, in this case, the provider that takes a contractual medical discount payment is the Rockford Spine Center. That entry and code indicates EMC has a contractual agreement with the Rockford Spine Center as provider. (T. 45-46)

On recross examination, Walker confirmed that she did not have the provider contracts, but that her medical review company keeps the contracts and uses the contracts for the explanation of benefits/review. (T. 47) Walker testified that the medical review calculations had not been submitted to the providers because Petitioner's attorney requested that EMC pay her directly and

not the providers. Therefore, they did not send the providers an explanation of review based upon the award. Walker testified that originally when the bills were denied, the providers would have received an EOR showing the reason the bill was disputed. After the award, unless Petitioner's attorney directs payment directly to the providers, the award goes to Petitioners attorney. (T. 47-48) Walker confirmed that the EOR was sent to Petitioner's attorney's firm, with the payment amounts, but they were not sent to the providers unless her attorney sent them. (T. 48)

Exhibits

Petitioner submitted the Petitioner's Penalty Petition which included the three Arbitrator's Decisions as Petitioner's Exhibit 1 ("PX1"). The bill review of medical bill balances that was submitted at the Arbitration Hearing was admitted as PX2. Further, Petitioner moved to admit PX3, a fee schedule calculation over Respondent's foundation objection. In rebuttal to Respondent's objection, Petitioner's attorney conceded that her calculated fee schedule was offered "not for necessarily the truth of the calculations, but in support of counsel's arguments." The Commissioner admitted it, with weight assigned based on her review of it. The Commission notes that PX3 calculations were not supported with codes reflecting whether the amount was figured as provider discount, fee schedule reduction per geozip or negotiated rate pursuant to Section 8.2. An email chain document reflecting communication between the two attorneys representing the respective parties as referenced above was admitted as PX4. The email exchanges in PX4 reflects, in pertinent part, that Respondent's attorney estimated the fee schedule amount owed on the medical bills which was more than the insurance companies review introduced as RX1. Further the email exchanges reflected that the day after the Arbitrator's Decision became final, on March 24, 2023, Petitioner's attorney made a demand for payment of the award including the full amount of TTD liability without the TTD credit Respondent had requested at trial and for the full amount of the medical award. There is no indication that Petitioner provided the medical bills to Respondent with the email. Respondent's attorney responded that his client was running the (medical) bill through the fee schedule, however, Petitioner's attorney replied the Arbitrator awarded the dollar amount for bills as stated in the Decision. In his reply, Respondent's attorney quoted the Arbitrator's Order which specifically awarded the total amount of medical bills "subject to Sections 8(a) and 8.2 of the Act and consistent with the medical fee schedule." (PX4)

PX5 and PX6 were admitted into evidence with no objections. PX5 are copies of the first two checks issued by Respondent, representing the indemnity award payment. PX6 is a copy of the January 2, 2024, letter Petitioner's attorney received and regarding the fact that the medical payment of the award in the amount of $64,403.84, issued on July 11, 2023, had not cleared the insurance carrier's bank account. Respondent's attorney objected to PX7, a letter addressed to him that he represented he had never seen. After agreeing that the medical award check was never cashed, Petitioner's attorney withdrew PX7.

Respondent's exhibits, numbers one through eleven, were admitted. Petitioner's attorney objected to RX1, the Explanation of Review (EOR) of the awarded Medical Bills. Respondent's attorney argued that the EOR is a business record of how bills are processed at an insurance

company therefore, it is admissible evidence. His witness had to testify to the background of how they are created and, he argued, testified that they are produced by one of the Illinois Worker's Compensation Commission's (IWCC) approved bill review companies. Petitioner's attorney argued the witness did not have knowledge as to what involvement the bill review company had, if any, and noted the exhibit specifically stated it was for internal use only. The Commissioner admitted RX1 over the objection, noting it would be given appropriate weight. Respondent's exhibits two through eleven were admitted with no objection including the approved bill review companies listed by the IWCC website (RX2); a letter from the IWCC Chairman regarding Section 8(a) and 8.2 contractual payment (RX3); an article on the IWCC website, "How are implants/carve-outs paid? (RX4); evidence regarding medical bill payment (RX5); the abandoned property letter (RX6) (duplicative of PX6); a copy of the medical bill payment reissued on January 17, 2024. (R7); the additional payment for the implant devices issued on January 17, 2024. (RX8); the April 4, 2023, initial check issued for the indemnity award. (RX9); the check dated July 10, 2023, for the PPD underpayment. (RX10); the Medtronic SD USA Spine Implant invoice. (RX11). RX12 was not admitted.

Analysis

In her Petition and consistent with her argument, Petitioner's attorney alleges "Respondent's calculations related to the medical portion of the trial award were made in bad faith and are not consistent with the fee schedule." Petitioner is seeking penalties under Sections 19(k) and 19(l) and attorney's fees under Section 16. Petitioner alleges that 50% of the entire award is owed and 20% of the Section 19(l) penalties. (PX1) In her Petition, Counsel recites the penalties prescribed in Section 19(l) of the Illinois Workers Compensation Act ("Act") noted below. The Commission notes that the Petitioner's Petition for Penalties and Fees relies upon the dollar amount of the medical award without any fee schedule reductions or Section 8.2 consideration. (PX1)

TTD

Since the Arbitrator's Order failed to reflect the statutory minimum TTD rate, and neither party filed a Section 19(f) motion to correct a clerical error or a timely review, the TTD rate issue is waived. The Respondent paid the TTD and PPD award, less a PPD underpayment, less than two weeks after the Arbitrator's Decision was final. (RX9)

Medical

A check for $64,403.84 was issued first on July 11, 2023, never cashed by Petitioner, and reissued on January 17, 2024, based upon the EOR of the medical bills submitted at trial and obtained by the insurance carrier EMC. Further, the Respondent paid bills for the implant devices in the amount of $8,183.08 on January 17, 2024, after obtaining the necessary invoices from the providers. The Medtronic SD USA invoice is in evidence marked as RX11.

PPD

Respondent argues that the initial timely PPD payment was based on an ambiguity in the Arbitrator's award. The PPD underpayment was issued on July 10, 2023, four months after the Decision was final. (RX10)

The pertinent sections of the Act state as follows:

Penalties under Section 19(k)

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. *820 ILCS 305/19(k).*

Penalties under Section 19(l)

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l).*

Attorneys' Fees under Section 16

> Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section

19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his insurance carrier. *820 ILCS 305/16.*

In Illinois, the courts have examined the imposition of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees in numerous cases. In *Jacobo v. Ill. Workers' Comp. Comm'n*, the court examined various histories of the application of Sections 19(k) and 19(l) Penalties and Section 16 Attorneys' Fees as follows:

> Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828, 279 Ill. Dec. 531 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552, 234 Ill. Dec. 205 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763, 800 N.E.2d at 829. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865, 66 Ill. Dec. 300 (1982). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121, 578 N.E.2d 140, 143, 161 Ill. Dec. 13 (1991).
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> The standard for awarding penalties under section 19(k) is higher than the standard under 19(*l*). Section 19(k) of the Act provides, in pertinent part, as follows:
>
> "In case where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation *** then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphasis added.) *820 ILCS 305/19(k) (West 2006).*
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> Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. *820 ILCS 305/16 (West 2006)*. "The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission." *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516, 784 N.E.2d 396, 399, 271 Ill. Dec. 178 (2003). *Jacobo v. Ill. Workers' Comp. Comm'n*, 355 Ill.Dec. 358, 363-364, 959 N.E.2d 772, 777-778.

Section 19(l) penalties are not appropriate except for late TTD and medical payments. (See *Theis v. Ill. Workers' Comp. Comm'n* 2017 IL App (1st) 161237WC, P20, 74 N.E.3d 468, 471) In this case, the Commission notes that the period between the Arbitrator's Decision and the subject hearing for non-payment of an award could put Section 19(l) penalties at issue, however, Respondent's counsel represented that Respondent had paid a total of $24,047.49 by April 4, 2023, representing the outstanding TTD award of $1,546.42 plus PPD less than two weeks after Arbitrator's Decision was final. The medical bills were paid on July 11, 2023, after being run through a medical bill review for fee schedule and contract provider discounts by the insurance carrier. Those payments mitigate penalty entitlement under Section 19(l).

The Appellate Court has addressed late payments made after an award became final and notes an award of §19(k) penalties and §16 attorney's fees is discretionary and not mandated by statute or triggered after a certain statutory amount of time for late payment. Although the late payment of an award runs in contravention of the spirit of the Act, there are some circumstances that do not arise to the level of unreasonable and vexatious delay. In *Armour Swift-Eckrich v. Indus. Comm'n (Williams*) the Court held as follows:

> The delay in this case was 78 days after the award became final. The briefs refer to *Roodhouse Envelope*, 276 Ill. App. 3d at 580, 658 N.E.2d at 840 (payment was made 87 days "after [employer] received notification of the award"), *Board of Education of the City of Chicago v. Industrial Comm'n*, 351 Ill. 128, 131, 184 N.E. 202, 203 (1932) (payment was 90 days late), *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 848, 767 N.E.2d 405, 408. (delay of one year unreasonably based on erroneous interpretation of the law), and *Sanchez v. Industrial Comm'n*, 53 Ill. 2d 514, 518, 292 N.E.2d 724, 726 (1973), where the Commission declined to issue a penalty though payment was not made until 52 days after the award became final, and the appellate court affirmed the denial on the basis that payment was delayed because there were negotiations to arrive at a lump-sum settlement.
>
> Sections 19(k) and 16 do not mandate that penalties be imposed after a certain period of delay. In contrast to other penalties under the Act which are mandatory, the awarding of substantial penalties under section 19(k) and attorney fees under section 16 is discretionary. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 553, 234 Ill. Dec. 205 (1998) *Armour Swift-Eckrich v. Indus. Comm'n (Williams)*, 355 Ill. App. 3d 708, 711, 823 N.E.2d 1103, 1105.

In this case, the Respondent established that the payment of the TTD and PPD awards, albeit with a PPD underpayment, was made 13 days after the award became a final Decision. (PX5) The medical was paid after running the medical bills through an explanation of review pursuant to Section 8.2 and the medical fee schedule consistent with the Arbitrator's Order. The Supreme Court has held that in cases such as this, "when assessing the delay, the calculation does not start until after the award is final. The time for payment must, of course, be computed from the date of finality." *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 171, 233 N.E.2d 362, 365, 1968.

In a case where the Supreme Court reversed the lower court's award of penalties for a 90-day delay in payment of the award, the Supreme Court noted that both sides relied upon the same prior *Board of Education* case and held that in determining whether or not §19(k) penalties were warranted, the delay should be assessed as follows:

> In determining whether such delay has been unreasonable or vexatious, regard must be had to the circumstances attending the delay, the nature of the case and the relief demanded, and also to the question whether the rights of the claimant have been prejudiced by that delay. (351 Ill. 128, 132.) The court further said that in view of the failure to pay for about 90 days plus the lapse of nearly six years from the date of injury, it could not say that the Commission's finding was not justified.
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> ***
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> The time consumed from filing to final judgment was from our experience about the same as, or even shorter, than the usual contested compensation case. The time for payment must, of course, be computed from the date of finality. While we do not condone unnecessary delay in payment, we cannot say that the delay in these cases was such as to justify a finding of unreasonable or vexatious delay. It is impractical to set a definite time limitation for payment. As was said in the earlier *Board of Education* case: "* * * where all legal proceedings have been exhausted and a considerable time has been permitted to elapse thereafter during which the award is not paid, it is incumbent upon the one liable to pay the same to excuse the delay." (351 Ill. 128, 132.) *Bd. of Educ. v. Indus. Comm'n*, 39 Ill. 2d 167, 170, 233 N.E.2d 362, 364-365.

In another case where penalties were denied, the Appellate Court also held "several months" delay in payment of an award is not unreasonable, while cautioning employers not to withhold payment unless there are unusual circumstances. The facts of the *Chicago* case are similar in that the Arbitrator erred by not allowing a prior credit and the parties did not file a timely review and the Petitioner filed a penalties petition when Respondent did not pay the award. The *Chicago* Court held penalties were not warranted where there was ongoing communication between the parties regarding the prior credit, which the Petitioner would not allow:

> It is also clear that there were discussions between counsel for the parties regarding credit in some amount, in order to avoid a double payment by the City, although those discussions may well have commenced after expiration of the period in which a review of the arbitrator's decision was possible. Given the circumstances of this case, it is our opinion that the several months delay in payment was neither unreasonable nor vexatious and that the finding of the Industrial Commission to the contrary is against the manifest weight of the evidence. In so holding, however, we do not intend that this opinion be thought to indicate any disposition on our part to

> countenance delay in payment of final awards in less unusual circumstances. *Chicago v. Industrial Comm'n*., 345 N.E.2d 477, 480, 63 Ill. 2d 99, 104-105.

In the case at bar, the Commission Decision became final after March 23, 2023. Similar to the circumstance in *Chicago*, communication between the parties began thereafter. Petitioner was aware that Respondent had claimed a credit at the Arbitration Hearing for TTD paid. In the May 16, 2023, email, Petitioner's attorney demanded Respondent cancel the April 4, 2023 check, and issue a check for the TTD award less the TTD credit despite the fact that the credit was not acknowledged in the Arbitrator's Decision. (PX4) While the Arbitrator's Decision fails to reflect the TTD credit, the parties agreed shortly thereafter that the Respondent did not owe for TTD paid. (PX4)

Petitioner did not cash the April 4, 2023, check and instead demanded the award in full including the full dollar amount of medical awarded. Respondent advised that the medical award was contingent upon the Section 8.2 reductions per the medical fee schedule or provider agreements and, as shown in Respondent's Exhibit 4, implant cost calculations. The medical payment was issued on July 11, 2023, four months after the Arbitrator's Decision was final and clearly after the EOR was obtained. The payment for the implants was issued later, on January 17, 2024, after the Respondent obtained the necessary documentation to calculate the reduced cost pursuant to Section 8.2. The Commission finds that the April 4, 2023, payment for indemnity and the July 11, 2023, medical bill payment mitigate penalty entitlement under Sections 19(k) and 19(l).

Petitioner maintains the medical was underpaid and is asking the Commission to find that Petitioner's medical fee schedule calculation submitted at the Commission hearing is evidence that the Respondent underpaid and seeks penalties on the whole award.

The Commission notes that there is no evidence that Petitioner submitted the requisite medical bills documentation after missing bills were identified by Respondent after the award issued. The *Theis* Court held that is Petitioner's obligation:

> The act of submitting medical bills into evidence during arbitration is not the same as tendering them to the employer for payment. In addition, claimant cites no authority, nor does our research reveal any, which stands for the proposition that an employer has a duty to actively seek out a claimant's medical bills either through the use of a subpoena or some other method in order to comply with the requirements of section 19(*l*). Although the Commission found that it was claimant's failure to tender the medical bills to the employer that caused the delay in the payment of the award, it nonetheless awarded claimant section 19(*l*) penalties due to the employer's failure to timely pay the award, which was error. *Theis v. Ill. Workers' Comp. Comm'n*, 2017 IL App (1st) 161237WC, P23, 74 N.E.3d 468, 472.

Respondent alleges that some bills that were awarded by the Arbitrator were not in evidence yet Respondent volunteered payment. In the subject case, PX2 is a medical bill exhibit summary but the Commission cannot ascertain whether or not that exhibit is identical to the one introduced at the Arbitration Hearing.

The Commission finds that the attorneys communicated regarding the implementation of the payments but their communications could have, but did not, immediately resolve the issues, in part, because EMC had to run a medical bill review pursuant to the award under Section 8.2. The Commission notes there was no representation that either attorney used the telephone or the postal service. Further, Petitioner's attorney could have immediately deposited the indemnity check issued less than two weeks after the Arbitrator's Decision was final and then pursued the $2,800.00 PPD underpayment. On May 25, 2023, Respondent's attorney compounded the problem of Petitioner's attorney not depositing or cashing the indemnity check that was issued on April 4, 2023, by advising that although his client was resistant to the stop-pay and reissuance of the whole check, his client would reissue the entire indemnity payment. It would appear that Respondent's attorney was either mistaken or the stop payment was not feasible.

Respondent's attorney should have been more explicit with his demand for the implant invoices if they were not included in the medical bill exhibit from the Arbitration Hearing. The Commission finds, however, that when Respondent's attorney advised Petitioner's attorney on May 17, 2023, and September 6, 2023, that his client did not have certain bills from Crusader Community Health, the Rockford Associated Clinical Pathology and the implant/hardware invoices, Petitioner's attorney had an obligation to obtain and provide them.

The Commission finds that based upon the testimony of Teresa Walker, Respondent timely submitted the disputed medical bills to be reviewed, per the Arbitrator's award, subject to the fee schedule and Sections 8(a) and 8.2 of the Act. Respondent accomplished this apparently from the bills submitted at the Arbitration Hearing, not from medical bills submitted with a post-award demand. Walker testified that she received the medical implant invoice approximately 30 days before the Commission hearing and issued the check thereafter. (T. 22; RX8) The Commission further finds that the Petitioner's attorney's calculations in exhibit 3 are without foundation because the exhibit is erroneous on its face, i.e., the fee schedule amounts for multiple entries exceed the charge for the service. The Commission finds Respondent's medical fee schedule explanation of review was made in good faith. The Commission further finds that there is no indication that the Respondent's carrier deliberately, unreasonably or vexatiously withheld funds. In fact, Respondent's witness credibly testified that their intention was to pay the award and benefits in a timely manner. (T. 23) Therefore, the Commission finds this circumstance does not warrant Section 19(l) or Section 19(k) penalties. Without Section 19(k) penalties, no Section 16 fees are warranted. (See *Jacobo v. Ill. Workers' Comp. Comm'n,* 2011 Ill. App. LEXIS 1186, *10-11, 355 Ill. Dec. 358, 364.)

Conclusions of Law

The *Millennium Knickerbocker* Court reviewed all statutory authority under which the Commission retains jurisdiction after a final award, and specifically held that the Commission is authorized to assess penalties and attorney fees when a party fails to comply with the terms of a final settlement or final award, and in order to do so, the Commission must first interpret the terms of an ambiguous final settlement/award. *Millennium Knickerbocker Hotel v. Guzman*, 2017 IL App (1st) 161027WC, P29, 76 N.E.3d 825, 836-837.

In the subject case, the Arbitrator's Conclusions of Law section pertaining to the TTD award is not explicit. The Arbitrator awarded an erroneous statutory rate of the weekly TTD payment in the Order. Although the TTD amount payable in the Arbitrator's Order is incorrect, the Commission finds that the issue was waived when both parties failed to file a Motion pursuant to §19(f) to correct the error and neither party filed a review of the Arbitrator's award.

Similarly, since the Arbitrator did not specify a dollar rate of PPD owed in the Order or in the Conclusions of Law, the Commission relies upon the average weekly wage rate the Arbitrator awarded. In this case, the Arbitrator concluded that the Petitioner's average weekly wage (AWW) rate is $375.00. The Petitioner was married, thus, the Commission concludes that Petitioner's PPD rate is the statutory minimum rate of $253.00 per week. Walker testified the initial PPD was underpaid because the Arbitrator did not award the statutory minimum TTD rate, and did not acknowledge Petitioner had a dependent, thus EMC followed suit and the initial PPD payment was based on 60% of the AWW rate. Within three months, after some discussions, the parties worked it out and EMC rectified the underpayment. (T. 8-9)

Next, regarding Petitioner's argument that the award did not specify that the Respondent shall get credit for TTD paid, it appears that since the awards were issued and became final, the parties acknowledged that Respondent paid $1,882.86 in TTD benefits prior to trial and agreed that Respondent could take credit. (PX4, T. 162) Thus, the amount Respondent owed for TTD at the time of the hearing was $1,546.42. The record is clear that Respondent issued a check in the amount of $24,047.49 on April 4, 2023, which was the full indemnity owed less the PPD underpayment which was paid on July 10, 2023. The fact that Petitioner's attorney did not cash the first check appears to be a communication problem between the attorneys but not evidence of a vexatious or unreasonable delay on the part of the Respondent.

A finding of vexatious or unreasonable delay must be based on objective reasonableness. *Board of Education of City of Chicago v Industrial Commission*, *Bd. of Educ. v. Indus. Comm'n,* 93 Ill. 2d 1, 442 N.E.2d 861. Regarding the medical award, the Respondent was responsible for issuing the checks, however, not solely responsible for ensuring the Respondent had proper medical itemization. The evidence in this record is lacking, however, it appears that Petitioner's attorney could have provided the requisite medical bills to Respondent's attorney. Since certain medical bills were missing at the time of the fee schedule analysis, the parties should have communicated in a more timely manner to get the bills paid as fast as possible. Further, in this

circumstance, the Commission is not persuaded that Respondent is wholly, or even partially, to blame for the delay in payment of the medical bills. The Petitioner demanded payment but did not provide the missing medical bill documentation when notified.

Having considered the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorney Fees Under IWCA §16, interpretation of the Arbitrator's award, and review of the totality of evidence before the Commission including the arguments made by the parties, the testimony of the Respondent's witness, Teresa Walker, all the exhibits including copies of the checks issued by Respondent, (PX5, RX7, RX8, RX9, RX10), email exchanges between the attorneys (PX4), and pervading case law, the Commission declines to award penalties under §19(k), §19(l) or attorney's fees under §16 in this instance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's Petition for Penalties Under IWCA §19(k) and (l) and Attorneys' Fees Under IWCA §16, is denied for all the afore-referenced reasons.

May 31, 2024

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

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

/s/*Amylee H. Simonovich*
Amylee Simonovich

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC026994
Case Name	Christopher Kinkelaar v. Vandalia Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	24IWCC0258
Number of Pages of Decision	18
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Mary Massa, Todd Schroader
Respondent Attorney	Caitlin Fiello

DATE FILED: 5/31/2024

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Kinkelaar,

Petitioner,

vs. NO. 21WC 26994

Vandalia Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical care, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 7, 2023, is hereby affirmed and adopted.

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

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

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

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

May 31, 2024
SJM/sj
o-5/22/24
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC026994
Case Name	Christopher Kinkelaar v. Vandalia Correctional Center
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Nicole Werner

DATE FILED: 4/7/2023

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

/s/ Jeanne AuBuchon, Arbitrator

Signature

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

April 7, 2023

/s/ Michele Kowalski

Michele Kowalski, Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Christopher Kinkelaar
Employee/Petitioner

v.

Vandalia Correctional Center
Employer/Respondent

Case # **21** WC **026994**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **11/28/22**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **8/2/20**, 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 $**120,000.00**; the average weekly wage was $**$2,307.59**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as listed in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

Respondent shall authorize and pay for the prospective treatment recommended by Dr. Lee, including, but not limited to, surgery, 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.

Jeanne L. AuBuchon

Signature of Arbitrator

APRIL 7. 2023

PROCEDURAL HISTORY

This matter proceeded to trial on November 28, 2022, 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; 3) payment of medical bills; and 4) entitlement to prospective medical care to the Petitioner's left shoulder.

FINDINGS OF FACT

On August 2, 2020, the Petitioner was 58 years old and employed by the Respondent as a correctional lieutenant. (AX1, T. 9) He testified that he was qualifying at the shooting range when he was moving a wooden target that had been waterlogged from two weeks of rain and was heavier than normal. (T. 9-10) He said he was carrying it awkwardly with his arms out at shoulder height when he heard a pop and rip in his left shoulder and immediately dropped the target. (Id.) The Petitioner's injury report and the witness statements were consistent with the Petitioner's testimony. (RX1)

The Petitioner testified that he had previous treatment to his left shoulder. (T. 10-11) These records were not submitted at arbitration. The Petitioner had a history of multiple surgeries to his shoulder with labral repair and bicep relocation. (PX2) The Petitioner testified that after the accident, his left arm felt different with an immediate numbing sensation. (T. 11) He said that as the day went on, it was more painful. (Id.)

On the day of the accident, the Petitioner went to St. Anthony's Memorial Hospital and described the accident and his symptoms of pain and numbness. (PX1) An examination showed normal range of motion, tenderness to palpation of the left proximal humerus, painful flexion and

extension and decreased sensation of the left proximal shoulder. (Id.) X-rays showed no bony abnormalities. (Id.) He was diagnosed with left shoulder strain and prescribed pain killers. (Id.)

The next day, the Petitioner made an appointment with Dr. Frank Lee, an orthopedic surgeon at the Bonutti Clinic, whom he saw on August 5, 2020. (PX2) He described the accident and reported pain rated at 4/10 at rest but 7/10 with activities. (Id.) CHECK ON PAIN LOCATION A physical examination revealed a small bruise on the proximal bicep, no obvious deformity, mild proximal bicep tenderness to palpation and full active range of motion with discomfort. (Id.) He was diagnosed with left shoulder pain and possible proximal biceps sprain status post tenodesis (release or relocation of the biceps tendon), was encouraged to perform daily stretching to prevent stiffness and was given work restrictions. (Id.)

The Petitioner followed up with Dr. Lee on September 11, 2020, and denied having pain that day but said he was not doing much with his shoulder and arm due to a recent hospitalization for COVID and had been off work. (Id.) Dr. Lee ordered physical therapy. (Id.) The Petitioner attended physical therapy from September 21, 2020, through December 8, 2020, at Sarah Bush Lincoln. (PX5)

On October 9, 2020, the Petitioner returned to Dr. Lee and reported that physical therapy was going well, and he was about 75 percent improved since his last visit to Dr. Lee. (PX2) On November 6, 2020, the Petitioner reported he was not much better than he was at the prior visit. (Id.) Dr. Lee ordered more physical therapy and released him to work full duty. (Id.)

The Petitioner saw Dr. Lee on December 7, 2020, and said he was tolerating full duty work because he does more delegating. (Id.) However, he said he continued to have pain with reaching behind him and was unable to grab something off his nightstand with his left arm if he was lying down in bed. (Id.) Dr. Lee performed a Jobes test (for anterior shoulder instability) that was

positive. (Id.) He found resisted external was strong with pain and resisted internal and abduction was strong with no pain. (Id.) Dr. Lee diagnosed left shoulder pain and bicep sprain. (Id.) He stated that pain with resisted rotation suggested a cuff tear and requested an MRI arthrogram. (Id.)

At the Petitioners last physical therapy visit on December 8, 2020, the Petitioner appeared to be less strained with restricted exercises but had continued restriction and tenderness to palpation of the area corresponding to the left biceps. (PX5) He reported continued pain and difficulty with functional range of motion with his left shoulder and with reaching his back. (Id.) In the discharge summary from January 8, 2021, the physical therapist noted that the Petitioner had partially met his goals. (Id.)

The MRI arthrogram was performed on December 17, 2020, by Dr. David Downs at St. Anthony's Memorial Hospital and showed no evidence of rotator cuff tearing but a complete tear of the long head biceps tendon (tendon over the top of the humerus) versus prior biceps tenodesis. (PX4) There was an absence of the anterior and superior labrum on the images, which could have been related to labral tearing versus prior labral tearing with surgical debridement (removal of damaged tissue). (Id.)

Dr. Lee read the MRI arthrogram on January 4, 2021, and reported that there were no cuff tears. (Id.) The Petitioner reported to Dr. Lee that he had pain on the lateral and posterior aspects of the shoulder that he rated 1/10 at rest and 8/10 with use, as well as pain in the left biceps with use. (Id.) Dr. Lee diagnosed left shoulder bursitis (inflammation of the bursa – a fluid-filled sac located at the top of the humerus) and left biceps strain and administered a steroid injection. (Id.) At a follow-up on February 1, 2021, the Petitioner reported no relief from the injection and said he had pain he rated as 4/10 and described it as "achy numbness" in the lateral aspect of the shoulder that radiated down to the left ring and pinky fingers. (Id.) He complained of intermittent

numbness in those fingers. (Id.) Dr. Lee added a diagnosis of calcific tendinitis (calcium deposits in inflamed tendons) and recommended and sought approval for diagnostic arthroscopic surgery to shed light on why the Petitioner hurt despite having a favorable MRI. (Id.) On March 3, 2021, the Petitioner complained of the same pain and rated it at 5/10. (Id.) On April 7, 2021, he rated it at 9/10 and said he felt he was losing strength. (Id.) Dr. Lee prescribed an anti-inflammatory and reiterated his surgical recommendation. (Id.) On June 8, 2021, the Petitioner reported that he had pain with abduction of his arm but not in the anterior shoulder along the proximal biceps that day. (Id.) Dr. Lee said the symptom pattern was consistent with impingement tendinitis (inflammation of the tendons caused by the tendons being pinched) and changed his diagnosis to left shoulder pain and impingement tendinitis. (Id.) He continued to request authorization for surgery. (Id.)

The Petitioner underwent a Section 12 examination on August 9, 2021, by Dr. James Emanuel, an orthopedic surgeon at Parkcrest Orthopedics. (RX3, Deposition Exhibit 2) The Petitioner described the accident consistently with his testimony. (Id.) He informed Dr. Emanuel that he had a prior collarbone fracture that was surgically repaired, a repair of his glenoid labrum (fibrocartilaginous tissue at the top/head of the humerus) and a biceps tenodesis. (Id.) He reported that Dr. Lee had been providing cortisone injections into the front portion of his shoulder every two to three months prior to the work injury. (Id.) He said his anterior shoulder pain following the injections was better, but after the work accident, his pain was more lateral. (Id.) The prior records were not submitted at arbitration. As to his current pain, the Petitioner said he had pain at night, could not feel his arm sometimes, had difficulties lifting the arm up occasionally and had pain in the anterior subdeltoid region (between the acromion (top outer edge of the shoulder blade), the deltoid muscle at the top of the shoulder and the rotator cuff tendons). (Id.) He denied catching,

locking or grinding. (Id.) He said he babied his arm to avoid sharp severe pain in the shoulder with some movements but could not recollect what movements elicited pain. (Id.)

Dr. Emanuel reviewed medical records, took X-rays and examined the Petitioner. (Id.) Upon reviewing the MRI, Dr. Emanuel found: intact rotator cuff; biceps tendon not well-visualized within the bicipital groove; previous biceps tenodesis with thickening in the superior aspect extending inferiorly; and the glenoid labrum not well visualized due to the prior surgery. (Id.) He reiterated the radiologist's findings. (Id.) In the physical examination, Dr. Emanuel noted tenderness in the anterior lateral acromion and that the anterior lateral edge of the acromion was not particularly tender. (Id.) He noted no tenderness elsewhere. (Id.) Stability tests were negative. (Id.) Speeds test (for biceps pathology) was positive, but Yergason test (for labral and biceps pathology) was negative. (Id.) Hawkins test was positive, but Neer impingement test and O'Brien's test were negative. (Id.) He had normal range of motion, normal strength in external rotation with the arm at the side and diminished strength in external rotation with the arm abducted to 90 degrees. (Id.) There was no Popeye's muscle (biceps that tenses into a ball when the tendon ruptures). (Id.)

Dr. Emanuel diagnosed: 1) subacromial bursitis of the left shoulder joint; 2) tear of left biceps muscle, subsequent encounter; 3) superior glenoid labrum lesion of the left shoulder, subsequent encounter; and 4) history of arthroscopic surgery of the shoulder. (Id.) He opined that the Petitioner's current objective findings were not causally related to the work accident. (Id.) He stated that the diagnosis of bursitis did not fit the mechanism of injury, but said there was a causal relationship between the work accident and a partial tear of the musculotendinous junction (connection between the muscle and its tendon) of the left bicep. (Id.) He noted that the physical therapy records showed the Petitioner did well with conservative treatment and was much

improved with minimal complaints as of October 26, 2020. (Id.) He expressed confusion as to the Petitioner's reports to Dr. Lee 10 days later that he was not doing much better since his previous visit. (Id.) Dr. Emanuel further opined that the medical treatment incurred to date was reasonable and necessary, but no further treatment was necessary regarding the work injury. (Id.) He noted that the Petitioner had a significant amount of pre-existing shoulder injuries and complaints for which he was receiving injections and had indicated that he never really did get better following his last surgical procedure. (Id.) Dr. Emanuel said the Petitioner was capable of performing his current work activities without restrictions, but he recommended no inmate contact. (Id.)

On August 23, 2021, the Petitioner reported no change in his symptoms since his last visit to Dr. Lee and rated his pain as 1-2/10 at rest and 9-10/10 with activity. (PX2) Dr. Lee diagnosed left bicep sprain, bursitis and impingement tendinitis and continued his surgical request. (Id.) He had not yet seen Dr. Emanuel's report. (Id.)

Dr. Lee testified consistently with his records at a deposition on April 11, 2022. (PX6) He explained that the Petitioner had six surgeries to his left shoulder, with the last one being at least five years before the accident date. (Id.) His last visit to Dr. Lee was on February 24, 2020, at which time the Petitioner had pain in the front of his shoulder, which Dr. Lee diagnosed as subcoracoid impingement (impingement of the area between one of the rotator-cuff muscles and the shoulder blade). (Id.) He said the Petitioner had multiple injections in that area with ongoing success. (Id.) Dr. Lee stated that, based on his knowledge of the Petitioner's prior surgeries and the treatments he rendered leading up to the work injury, he thought the Petitioner's current pain was not the same pain for which he received the prior injections. (Id.)

Regarding treatment after the work accident for the initial biceps strain diagnosis, Dr. Lee testified that the Petitioner had improvement with physical therapy but never to the point of 100

percent pain relief. (Id.) He said it seemed like the biceps sprain or strain was improved but the Petitioner was still being plagued by something that was still going on with the shoulder itself, adding that part of that may have been hinted on the first visit when the Petitioner had pain with active range of motion. (Id.) He explained that if the Petitioner suffered more than one injury, he may have recovered from the one that was most obvious but continued to have symptoms due to the other part of the injury. (Id.)

Dr. Lee said he recommended arthroscopic surgery as a diagnostic tool to confirm whether there was any pathology in the shoulder for the Petitioner's impingement-type pain. (Id.) He explained because of the metallic distortion on an MRI due to the prior surgeries, there was a possibility that the MRI was not capable of providing a complete diagnosis. (Id.) He said that there was pathology found during the surgery, he would be able to intervene during that procedure. (Id.) If there was not, he would find the Petitioner to be at maximum medical improvement. (Id.)

Dr. Emanuel testified consistently with his report at a deposition on November 7, 2022. (RX3) He read the medical records as showing initial pain reports in the area of the biceps that converted to global shoulder pain. (Id.) He pointed out that Dr. Lee's various diagnoses were consistent with overall pain in the shoulder and noted that the Petitioner's pain complaints when he saw him were generalized shoulder pain not necessarily specific to the biceps. (Id.) Dr. Emanuel said his diagnosis of a partial biceps tear was consistent with Dr. Lee's initial diagnosis of biceps strain. (Id.) He said he considered the Petitioner at maximum medical improvement as of October 26, 2020, because that tear had healed. (Id.) He explained that he did not believe the bursitis he diagnosed was a result of the work accident because the initial pain was in the biceps, the accident did not involve repetitive overhead activity and the Petitioner had a long-standing history of bursitis evidenced by receiving cortisone injections in the bursal area. (Id.) He did not

believe the accident caused an aggravation of the bursitis because the mechanism of injury was not consistent with bursitis. (Id.)

On cross-examination, Dr. Emanuel acknowledged that he did not know how far the Petitioner's arms were raised when he was injured but said that based on the description of the incident, his arms would be below shoulder height. (Id.) He explained that acute subacromial bursitis typically is caused by an activity at shoulder height or above. (Id.) He also acknowledged that in December 2020 – after his proposed maximum medical improvement date for the biceps tear – the Petitioner was still undergoing physical therapy for the biceps. (Id.)

Regarding the surgical recommendation, Dr. Emanuel said he thought it would be related to the Petitioner's underlying pre-existing condition. (Id.) But he said he was not convinced that condition warranted surgery because the Petitioner had full range of motion, excellent rotator cuff strength and no impingement with the bursitis. (Id.)

The Petitioner testified that he has had pain in his shoulder continually since the accident. (T. 11-12) He said he wants to undergo the surgery recommended by Dr. Lee. (T. 11)

CONCLUSIONS OF LAW

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

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

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of the

claimant's employment and (2) that the injury arose out of the claimant's employment. *McAllister v. Ill. Workers' Comp. Com'n*, 2020 IL 12484, ¶ 32.

The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Id.* at ¶34. A compensable injury occurs in the course of employment when it is sustained while a clamant is at work or while he or she performs reasonable activities in conjunction with his or her employment. *Id.* In this case, the Petitioner consistently reported the accident, and witnesses confirmed it.

The "arising out of" component is primarily concerned with causal connection. *Id.* at ¶ 36. To satisfy this requirement, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* The three categories of risk are: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Id.* at ¶38.

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* at ¶46.

The Arbitrator finds that moving a target for firearms qualification was an act that he might reasonably be expected to perform incident to his duties and, therefore was a risk distinctly associated with his employment.

Next is the requirement that the risk created a causal connection between the employment and the accidental injuries. Drs. Lee and Emanuel agreed that the accident caused an injury – it is

the nature of that injury to which they disagreed – bursitis and biceps strain/tear of biceps strain/tear alone. That issue will be addressed below. For the issue of causal connection as it relates to whether an accident occurred in the course of and arose out of employment, the Arbitrator finds the evidence sufficient to prove by a preponderance of the evidence that at least the biceps injury had its origin in a risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

Therefore, the Arbitrator finds the Petitioner has proved by a preponderance of the evidence that he suffered an injury in the course of and arising out of his employment.

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

The doctors agreed that the Petitioner's biceps condition was causally related to the accident. However, Dr. Emanual determined that the tear had healed, based on the Petitioner having done well in physical therapy and his estimation as to how long it would take the injury to heal. Dr. Lee believed the biceps was not back to 100 percent and warranted further treatment.

Dr. Emanuel disagreed with the bursitis having been caused by the accident because of the mechanism of injury. However, his conclusion was based on the Petitioner not having lifted the target to shoulder level. The Petitioner testified that he did carry the target at shoulder height. The Arbitrator finds the Petitioner to be credible, as his reports to the Respondent and his doctors were consistent with his testimony.

As to whether the bursitis occurred at the time of the accident, Dr. Lee sufficiently explained that it was likely there the whole time but did not become apparent until after the Petitioner's biceps had improved. There was no evidence of any intervening incident that would explain the symptoms.

Regarding whether the Petitioner's current condition was merely part of ongoing pre-existing issues with his shoulder, Dr. Lee believed the pain the Petitioner had after the work accident was different than that for which he was being treated beforehand. As the Petitioner's treating physician, Dr. Lee was familiar with the Petitioner's condition before and after the accident, and his opinions deserve greater weight than those of Dr. Emanuel. In addition, the Petitioner apparently had no shoulder treatment in the five months before the accident – making the possibility of his current condition being part of his pre-existing condition more remote.

Therefore, the Arbitrator finds that the Petitioner's current left shoulder condition – bursitis and still-symptomatic biceps tendon tear – are causally related to the work accident.

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

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

Dr. Emanuel opined that the treatment through the date of his examination on August 9, 2021, was reasonable and necessary. After that time, the Petitioner had only one additional visit with Dr. Lee. Based on this and the findings above regarding causation, the Arbitrator finds that this treatment also was reasonable and necessary.

Therefore, the Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 7 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Dr. Emanuel did not believe any future treatment was necessary for the Petitioner's left biceps because it has healed. Dr. Lee believed the biceps had not gotten back to 100 percent and warranted further treatment. For the reasons stated above, the Arbitrator gives greater weight to Dr. Lee's opinions.

Regarding the bursitis, Dr. Emanuel did not believe further treatment was necessary as it related to the work accident. Based on the causation findings above, the Arbitrator finds that further treatment for this condition as well is required to diagnose, relieve or cure the effects of the Petitioner's injury.

Therefore, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically further evaluation and treatment for his left shoulder, including surgical intervention, physical therapy and follow-up care as recommended by Dr. Lee. The Respondent shall authorize and pay for such.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031046
Case Name	William George v. Branner Glass
Consolidated Cases	19WC031047;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0259
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	R Mark Cosimini

DATE FILED: 5/31/2024

/s/Stephen Mathis, 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

William George,

Petitioner,

vs. NO. 19WC031046

Branner Glass,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, causal connection, prospective medical care, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 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.

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.

May 31, 2024
o-5/22/2024
44
SJM/sj

/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	19WC031046
Case Name	William George v. Branner Glass
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	R. Mark Cosimini

DATE FILED: 2/24/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 22, 2023 4.91%

/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)

WILLIAM GEORGE
Employee/Petitioner

v.

BRANNER GLASS
Employer/Respondent

Case # **19** WC **031046**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **January 19, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 17, 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 the date of accident, Petitioner was **49** years of age, ***single*** with **no** dependent children.

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

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

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

ORDER

Petitioner has failed to prove that he suffered an accident on August 17, 2018 which arose out of and in the course of his employment by Respondent.

Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the right shoulder, are not causally related to the accident of August 17, 2018.

Based upon the Arbitrator's findings on the issues of accident and causal connection, all other disputes are deemed moot.

Claim for compensation is denied.

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

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

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

FEBRUARY 24, 2023

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified he is currently employed as an industrial glazier for Bacon & Van Buskirk Glass Company. He installs the framework in the glass. Petitioner testified his job duties require lifting, pushing and pulling. He said he typically has to lift up to 75 pounds. He described the physical requirements of the job duties as having to pick up the glass and having to put it straight into a commercial building. He then uses impacts to put a pressure plate on and then use bolts into the metal to hold the glass in. He further testified they hammer on a beauty cover to cover up the bolts. Petitioner testified he has been performing those duties for 30 years.

Petitioner testified he was working for Respondent in 2018. He indicated he worked for them for 25 years, but when they were slow, he would work for other glazing contractors. Petitioner acknowledged the owner Respondent's company was Dennis Branner who was Petitioner's father-in-law. Petitioner then testified Mr. Branner passed away in November of 2019.

Petitioner testified that August 17, 2018 was a Woodside Township community cleanup day. He testified that Respondent had a pool table to keep their shop drawings on, and he was asked to tear apart the pool table and throw it in a pile in front the shop. Petitioner testified the last piece of slate weighed about 150 pounds. He picked it up on his right shoulder, and as soon as he did he felt something pop. He further explained he did not feel any pain right away, but his shoulder felt like it was out of place. A couple hours later his shoulder became painful, and he noticed his bicep was "all balled up at the elbow."

When asked about prior shoulder complaints, Petitioner testified he was born with degenerative bone disease, and it affects all of his joints the older he gets. Petitioner testified he treats with Dr. McKay, his family physician, for the shoulder conditions. Petitioner said he also treated with Dr. Wottowa and Dr. Greatting. He testified he got anti-inflammatories from Dr. McKay, and he received injections from Dr. Wottowa and Dr. Greatting.

Petitioner said that his wages averaged about $1,360.00 per week, before taxes, $70,720.00 a year, though that might be "a little light."

Petitioner testified he provided notice of the alleged work accident to Dennis Branner, his father-in-law, and to his business agent, Mr. Bagwell. He said Mr. Bagwell was deceased as of the time of trial.

Following the alleged work accident, Petitioner saw Dr. Romanelli. Petitioner denied complaining about both of his shoulders at that time. He testified Dr. Romanelli wanted to repair the rotator cuff and right bicep.

Petitioner testified he saw Dr. Maender after seeing Dr. Romanelli. Petitioner testified Dr. Maender was the physician who actually performs surgery on rotator cuffs and biceps. Petitioner testified he told Dr. Maender he was lifting a pool table to get it out of his shop, not his house, and if the doctor's records said it was the house, they were inaccurate.

Petitioner testified he is still working, but he does not work a full eight-hour day, he is allowed to work half days or up to five or six hours at the most.

Petitioner testified he was working for Branner Glass on October 3, 2018. He indicated they have semi-trailers without the wheels that sit on the ground, and finished material is placed in the trailers. Petitioner testified he was removing the pressure plate and the cover from the trailer, and to do so they open the end of a 24 foot long box, and use a vice grip on the end of one of the covers to pull it out. He testified after getting the first three or four out, the rest were real easy. He said while pulling the first one out, he tore his left shoulder.

Petitioner said Respondent was no longer in operation, that Mr. Branner had died, and Petitioner did not want to take the company over and run it. They therefore sold everything and he went to work for Bacon and Van Buskirk, where he continues to work.

Petitioner denied getting any treatment for his left shoulder after that incident. He testified there was no reason to go to the doctor because he knew what he did. He said he wanted to get it repaired by Dr. Maender.

On cross examination Petitioner acknowledged getting treatment for his shoulders starting in 2006. He testified he received six or eight shots. He also acknowledged that before the two claimed accidents, he underwent x-rays and MRI studies of both shoulders. He also acknowledged having injections in both shoulders. Petitioner further acknowledged being told by Dr. Wottowa in 2018 that because of the arthritis in both of his shoulders, he was going to need shoulder replacements. Petitioner testified Dr. Watson also told him he was going to need shoulder replacements. He said he only saw Dr. Watson once in regard to his shoulders, for a second opinion on shoulder replacements.

Petitioner acknowledged Dr. Greatting also told him that he would need both shoulders replaced at some point. Each of those opinions were rendered to Petitioner prior to 2018.

Petitioner said he went to see Dr. Romanelli instead of one of the previous physicians as he really did not like Springfield Clinic, due to billing problems with his two insurance carriers and the amount of money he owes them.

Petitioner testified that when he saw Dr. Romanelli it was to have his right shoulder looked at, to see what he had done to it, as opposed to obtaining another opinion for both of his shoulders. Petitioner testified he told Dr. Romanelli what happened to the right shoulder.

Petitioner said he only saw Dr. Maender one time, and when asked about the procedure Dr. Maender recommended, Petitioner testified Dr. Maender wanted to go in and grind on his bones to see if they could smooth them off, but Dr. Maender said the insurance company might say no, because he needed a shoulder replacement. He said no surgery was ever scheduled.

Petitioner said he had not had any treatment for his shoulders since October 2018.

When asked about Chris Velton, being a supervisor at Branner, Petitioner testified he never heard of him in his life.

Petitioner performed his regular glazier duties between the first alleged accident date of August 17, 2018 and the second alleged accident date of October 3, 2018.

Petitioner testified to performing weight lifting activities for a long time, since high school. He said he would bench press perhaps 200 pounds. He would do overhead lifting of both 30 pound dumbbells and bars with 75 to 100 pounds.

Petitioner said it was about a week after the pool table incident that he went to the doctor, he had not gone to the emergency room. He said the only doctor he mentioned the October 3, 2018 incident to was Dr. McKay. He said he would have filled out an accident report for that accident with Mr. Branner.

When advised the Application for Adjustment of Claim indicates he was pulling curtain covers overhead at the time of the October 3, 2018 accident, Petitioner explained the items were called pressure plate covers. He further explained that to pull them out of the trailer, you have to have your arms over your head. Petitioner testified he had performed those activities for 30 years. He also testified that between August 17, 2018 and October 3, 2018, he performed those activities several hundred times.

Petitioner said his checks were directly deposited in 2018, but he thought he was paid $35.00 per hour, "give or take a couple dollars either way. I honestly do not remember."

On redirect examination Petitioner said he reported the October 3, 2018 accident on the day it happened. He said he saw Dr. Carlson at the request of Respondent, and he said he did not tell Dr. Carlson that he never had any prior shoulder complaints, he would have told him he had arthritis in his shoulders, and a bone disease.

Medical Evidence

Pre-August 17, 2018:

On February 20, 2006, Petitioner told his family physician, Dr. McKay, that his left shoulder "still hurt," especially when performing overhead press exercises, as well as when lifting things overhead at work. Petitioner range of motion was normal and there were no impingement signs. Dr. McKay referred Petitioner to Dr. Wottowa. (Rx 1)

Four months later, June 19, 2009, Petitioner reported to Dr. McKay that his right shoulder had been bothering him off and on, particularly when he was working out and doing overhead presses, describing a very sharp pain like someone was poking him with pliers in the front of the shoulder. He had not seen Dr. Wottowa for his left shoulder, which he said was doing fine at that point. His right shoulder had discomfort on internal rotation and flexion of the shoulder. His diagnosis was right shoulder joint pain. Dr. McKay again referred him to orthopedics (Rx 2)

Dr. Wottowa evaluated Petitioner on August 10, 2009. At that time Petitioner was complaining of bilateral shoulder pain which he had been experiencing for several years, left worse than right. Dr. Wottowa documented there was no injury or trauma. Petitioner said Dr. McKay had given him anti-inflammatory medicine and it had caused all of his pain to go away. He also noted Petitioner had mild

AC joint arthrosis. He recommended Petitioner wean off the anti-inflammatory medicine, and he should return if he had further problems. (Rx 3)

Petitioner treated with Dr. Wottowa in 2012, 2013 and 2014. On December 5, 2012 he advised the doctor that he was having worse problems with his bilateral shoulders, including mildly positive impingement signs, indicative of AC irritation. On August 21, 2013, when seen by Dr. Wottowa's Physician's Assistant (PA), Mr. Purves, he was still complaining of bilateral shoulder pain, right worse than left, Physical examination on that date showed pain through the impingement zone on the right and minimal discomfort in the impingement zone on the left, as well as additional pain with resisted strength testing in the plane of abduction and with isolation of the supraspinatus. It was felt the pain was mostly of a rotator cuff origin. An injection of the subacromial space on the right side was recommended, as was a home exercise program for rotator cuff strengthening, and the injection was performed at that time. Petitioner saw Dr. Wottowa on November 13, 2013, saying he wanted an injection of his left shoulder. He said the previous right shoulder injection had given him 3 weeks of complete relief. A left shoulder injection was performed on that date. Petitioner again saw Dr. Wottowa on January 8, 2014, telling him that the left shoulder injection had not helped him much, he had the same pain the next day. The left shoulder again had a positive impingement sign. Petitioner advised him both shoulder bothered him equally. Bilateral MRIs were ordered. (Rx 4; RX 5; RX 5; RX 6; RX 7)

An x-ray of the right shoulder performed January 18, 2014 revealed chronic deformity of the right humeral neck that was likely posttraumatic in origin. An MRI of the left shoulder of January 21, 2014 noted a history of left shoulder pain for 10 years. It was interpreted by the radiologist to show moderate to marked osteoarthritis at the glenohumeral joint, intrasubstance tear and tendinopathy of the supraspinatus tendon and tendinopathy of the infraspinatus tendon, as well as degenerative type tears and para labral cysts of the glenoid labrum. The MRI of the right shoulder on that same date showed marked osteoarthritis at the glenohumeral joint, a large partial-thickness articular surface tear of the supraspinatus tendon and tendinopathy and intrasubstance tear of the infraspinatus tendon, as well as degenerative type tearing of the glenoid labrum. (RX 8; RX 9; RX 10)

On February 5, 2014, Dr. Wottowa advised Petitioner he had osteoarthritis in both shoulders with the right worse than the left. He advised the doctor that his shoulders made him miserable when he worked hard. The doctor recommended activity modification. He told Petitioner he would eventually need total shoulder replacements. Petitioner advised Dr. Wottowa he needed to work for six more years before he retires. (Rx 11)

While seeing Dr. McKay on October 17, 2014 for other issues, Petitioner advised him that he was still lifting weights. (RX 13)

Dr. Michael Watson evaluated Petitioner on November 11, 2014. Petitioner complained of bilateral shoulder pain for the past five years with his symptoms being much worse over the previous two years. Petitioner attributed the worsening of his symptoms to his job duties as a union glazier. Petitioner told Dr. Watson he often lifts 300 pounds with assistance. Petitioner's physical findings reference the shoulders were identical bilaterally, with positive Hawkins sign with pain on elevation and internal rotation, as well as mild crepitus in both shoulders. Dr. Watson recommended cortisone injections. He

also advised Petitioner he would eventually need total shoulder replacements, but he was currently too young and too active for those surgeries. Petitioner at that time inquired about arthroscopic surgery, and Dr. Watson informed him that such surgery would not cure his problem, it might give him some decrease in pain, but even that outcome could not be guaranteed. Dr. Watson said he could continue doing his regular work despite his discomfort. (Rx 14)

Petitioner saw Dr. McKay on November 14, 2017, and he advised the doctor that both of his shoulders were really bothering him, that he was losing range of motion, and he requested another opinion from Dr. Watson. (RX 15)

Dr. Greatting evaluated Petitioner on December 12, 2017. He told Dr. Greatting of chronic bilateral shoulder pain which had been present for ten year, which was causing him difficulty with the use of his arms away from his body or above shoulder level. He said he liked to lift weights regularly and was noticing difficulty lifting the amounts he had lifted previously and while doing certain weightlifting activities such as bench press and overhead press. He said he had a grinding and popping sensation in his shoulders and sleeping on his side caused shoulder pain. He noted his pain was increasing and his range of motion was decreasing over time. Dr. Greatting found him to have pain and crepitation with range of motion of the shoulders and significant pain when resisting forward flexion and abduction. The x-rays taken by Dr. Greatting revealed severe arthritic changes in the glenohumeral joint of each shoulder. Based upon the x-rays and examination, Dr. Greatting diagnosed Petitioner with severe osteoarthritis in the glenohumeral joints. He administered cortisone injections to both shoulders. Dr. Greatting advised Petitioner the only surgical treatment for him would be total shoulder replacements, and he provided him with brochures explaining the surgeries. (Rx 16; RX 17; Rx 18)

On April 18, 2018 Petitioner presented to Springfield Clinic Prompt Care with left shoulder pain of two days, giving a history of getting out of a recliner and feeling a sharp pain in his left shoulder. X-rays of the left shoulder revealed moderate to severe glenohumeral joint osteoarthritis, which was stable. Petitioner advised that facility that shoulder replacements had been recommended, but he had been putting it off. (RX 19; RX 20)

Post-August 17, 2018:

The first alleged accident date is August 17, 2018. Five days later, on August 22, 2018, Petitioner saw Dr. Ronald Romanelli at Orthopedic Center of Illinois. Petitioner provided a history of bilateral shoulder pain, saying he was not happy at Springfield Clinic and he wanted a second opinion. Petitioner told Dr. Romanelli he was advised he needs shoulder replacements. Petitioner also reported he did not recall any specific injury. He advised Dr. Romanelli that he had been told he had bone on bone arthritis of both shoulders and needed to have the shoulders replaced. He said his shoulder had been popping out of place, they would pop and grind very often. He said he could not lift his arms above his head and his range of motion had become very restricted. He did indicate that three weeks earlier he had a pop in his right shoulder with a Popeye deformity. Dr. Romanelli's physical examination revealed limited range of motion bilaterally, with severe restriction in range of motion at the 90/90 position bilaterally. A Popeye deformity was present in the right shoulder, and apprehension tests were positive bilaterally. Dr.

Romanelli confirmed Petitioner had severe osteoarthritis in both shoulders and a torn right biceps tendon. He found Petitioner's shoulders to be extremely strong. He was of the opinion that Petitioner would eventually need to have both shoulders replaced, using a standard replacement rather than a reverse replacement. He noted he would have to lose weight and get his BMI below 40 before he could have the surgeries. Petitioner advised Dr. Romanelli he wished to have the surgeries. Dr. Romanelli ordered an MRI. (RX 21)

An MRI of the right shoulder was performed on September 6, 2018. The report indicates Petitioner sustained a lifting injury four weeks earlier. The MRI report documented a near complete partial thickness tear of the supraspinatus and biceps tendon tear. The biceps tendon tear was retracted. The MRI also revealed severe degenerative changes in the right glenohumeral joint, mild degenerative changes in the right AC joint, a small amount of joint effusion in the glenohumeral joint and a degenerative tear of the labrum with a moderate to large paralabral cyst. (PX 1)

Post-October 3, 2018:

Petitioner's final medical treatment was with Dr. Christopher Maender on October 3, 2019. Dr. Maender's note indicates Petitioner was seeking a second opinion from Dr. Romanelli for his bilateral shoulders. The note indicates Petitioner's right shoulder was more symptomatic than the left. The history indicates that in early August, Petitioner was lifting a pool table to get it out of his house, and he felt a pop in the anterior aspect of his right shoulder. Dr. Maender noted Petitioner had pain in his shoulders for over 12 years. There was no specific injury at the beginning, but Petitioner experienced a gradual increase in pain. Petitioner reported he works as a glazier and does a lot of heavy lifting. Dr. Maender interpreted the MRI of the right shoulder to show a full thickness rotator cuff tear with minimal retraction and degenerative pathology in the labrum. He also documented significant osteoarthritis with subchondral cysts, sclerosis and joint space narrowing. Following his exam, Dr. Maender discussed the various surgical options, the risks and benefits. Petitioner wanted the temporary fix of the right shoulder arthroscopic rotator cuff repair and joint debridement as he would be unable to do light duty at this point in his career, and that would allow him the opportunity to see if it would improve his rotator cuff symptoms and get him back to work for the time being. Dr. Maender made it clear to Petitioner that he would likely require further surgery in the future with shoulder replacements. Petitioner was advised by Dr. Maender that he was instructed to call Dr. Maender's office to schedule the surgery when Petitioner had a better understanding of his winter workload. (PX 1; RX 22)

Dr. Karlsson performed an independent medical examination at Respondent's request on August 20, 2021. Petitioner provided a history of Dr. Karlsson of sustaining two alleged accidents at work. He reported taking pieces of a pool table out of the shop, and when he lifted the third piece of slate, he had severe pain in his shoulder. Petitioner described the second accident as pulling an outside curtain wall cover which was 24 feet in length out of a long box. Petitioner indicated the piece only weighed five pounds but it would stick and he had pain in his left shoulder with doing that. Petitioner denied any treatment including injections for either shoulder. Petitioner also denied any prior history of problems with either shoulder. Dr. Karlsson asked Petitioner whether he had ever seen a doctor for either shoulder

in the past and Petitioner responded that he had not. Petitioner also denied ever having x-rays for the shoulders and denied ever having MRI studies for the shoulders prior to the claimed work accidents. Petitioner further reported he did not have any problems with either shoulder before 8/17/2018. Dr. Karlsson took x-rays of Petitioner's shoulders and interpreted the films to show nearly identical findings in both shoulders. His report indicates both shoulders were "bone-on-bone." He diagnosed Petitioner with severe chronic degenerative osteoarthritis to both shoulders. Based on his evaluation of Petitioner and review of the medical information, Dr. Karlsson rendered an opinion there is no causal relationship between the claimed work accidents and the condition of either shoulder. He explained Petitioner had degenerative tearing of the rotator cuff with a downward curving acromion, AC arthritis with impingement, and years of severe arthritis and treatment for shoulder pain. Dr. Karlsson commented Petitioner gave him a vastly different history than what is reflected in the medical notes. (RX 24)

Dr. Karlsson agreed with the previous medical opinions that Petitioner will eventually require total shoulder replacements. He did not agree with the recommendation from Dr. Maender to perform an arthroscopic rotator cuff repair. Finally, Dr. Karlsson indicated Petitioner was continuing to perform his regular job duties as a glazier, and he did not need any restrictions whatsoever. (RX 24)

Arbitrator Credibility Assessment

In contrast to Petitioner's testimony at trial, the medical records failed to support his claims. Petitioner sought medical treatment five days after the first claimed accident, telling the doctor at that time that he had a pop in his shoulder with a Popeye deformity. No mention of a work accident of any sort was recorded on that date, and the claimed accident occurred only five days prior to this visit with Dr. Romanelli, not three weeks earlier. He testified to providing a history of the claimed work accident to Dr. Romanelli, but again, the history in Dr. Romanelli's note does not include a history of the alleged work accident. Petitioner also saw Dr. Maender on the date of the second accident, but once again, he did not provide any history of the second claimed accident, instead saying he was there seeking a second opinion from Dr. Romanelli. He did provide the first actual history of the August 17, 2018 accident, but he reported he was moving a pool table out of his home as opposed to out of Respondent's shop.

No history was given to Dr. Maender in regard to the alleged accident of October 3, 2018, despite the fact Petitioner saw him that exact date. Petitioner mentioned the alleged accident of six or seven weeks earlier, but not the accident of that date. And he gave no explanation for that lack of history at the arbitration hearing.

The IME report of Dr. Karlsson reflects Petitioner advising that physician that he had no problems with his shoulders prior to the alleged work accidents, which is clearly contradicted by Respondent's exhibits showing a long history of problems and treatment of bilateral shoulder injuries.

Petitioner did not testify in a believable manner, downplaying his previous problems and stating that all records contradicting his testimony were in error. His testimony that he was carrying heavy parts of a pool table used for holding shop plans out of a commercial window business, on the orders of a boss who has died, and aided by a co-worker who has died, is simply unbelievable and convenient. The Arbitrator accepts the recorded history of Dr. Maender of October 3, 2018, which notes Petitioner at that time said he was carrying a pool table out of his house as far more likely and believable. The total lack of

history to Dr. Maender on the actual alleged date of accident of October 3, 2018 also calls Petitioner's testimony into question.

The Arbitrator finds Petitioner to not be 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 the Petitioner's employment by Respondent on August 17, 2018, the Arbitrator makes the following findings:

The findings of fact set forth above are incorporated herein.

The summaries of medical evidence set forth above are incorporated herein.

The Arbitrator's findings in regard to credibility set forth above are incorporated herein.

It is significant to note Petitioner saw a physician five days after the alleged August 17, 2018 accident, but he reported that he did not recall any specific injury. He did provide a history of three weeks earlier having a pop and a Popeye deformity, but the timing of the reported pop does not coincide with the alleged accident date. Additionally, the first history in the medical records documenting Petitioner carrying a pool table was on October 3, 2018, which was the date of the second alleged accident. However, the history contained in the October 3, 2018 note states that Petitioner was carrying a pool table out of his house, not out of Respondent's shop. Consequently, the treatment records do not include a medical history consistent with Petitioner's allegations. Petitioner did not give Dr. Maender any history of the October 3, 2018 accident despite the fact he actually saw that physician on the actual alleged date of accident, instead giving a history of a different accident, at home, six or seven weeks earlier.

When the above information is coupled with Petitioner's lack of credibility, it is clear the evidence does not support Petitioner's claim.

The Arbitrator finds that Petitioner has failed to prove that he suffered an accident on August 17, 2018 which arose out of and in the course of his employment by Respondent. This finding is based upon the pre-accident and post-accident medical records, Dr. Karlsson's opinions and Petitioner's lack of credibility.

In support of the Arbitrator's Decision relating to whether Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the right shoulder, are causally related to the claimed accident to of August 17, 2018, the Arbitrator makes the following findings:

The findings of fact set forth above are incorporated herein.

The summaries of medical evidence set forth above are incorporated herein.

The Arbitrator's findings in regard to credibility set forth above are incorporated herein.

The findings in regard to accident set forth above are incorporated herein.

Petitioner was seen by Dr. Romanelli five days after the alleged accident date. Petitioner did not provide a history of moving a pool table and his shoulder popping and experiencing pain to Dr. Romanelli. In contrast, Dr. Romanelli's note indicates Petitioner denied any known injury. The note also indicates Petitioner lifted something heavy and developed an injury to his biceps area, but he reported that incident occurred three weeks earlier and not less than one week earlier. Petitioner also testified his biceps balled up by the elbow which is not consistent with a shoulder injury.

The first medical note documenting anything close to Petitioner's alleged mechanism of injury was contained in Dr. Maender's note from October 3, 2018. The history indicates Petitioner was moving a pool table out of his house and injured his shoulder. On that date Petitioner did not give a history of accident having occurred on that date.

The treating records fail to document any opinions suggesting there is a causal relationship between Petitioner's long standing right shoulder condition and the alleged work accident on October 3, 2018.

The only medical opinion addressing causal connection is by Dr. Karlsson who performed an IME on behalf of Respondent. He rendered an opinion the pathology in Petitioner's right shoulder was chronic, and there was no causal relationship between the alleged work accident and Petitioner's right shoulder condition.

Petitioner testified to performing overhead work activities hundreds of times following the August 17, 2018 alleged accident date. These activities are inconsistent with a traumatic, acute right shoulder injury, but are consistent with the condition he had been treated for numerous years prior to this alleged date of accident.

The medial evidence included in Respondent's Exhibits 1 through 20 establish Petitioner had long-standing progressively worsening symptoms and pathology in his right shoulder prior to the alleged work accident. He had been advised by multiple doctors over the course of several years prior to the alleged work accident that he was going to need shoulder replacements. No evidence was presented to suggest any alleged work accident made the preexisting condition in the right shoulder worse. Indeed, while Petitioner had received regular medical care, including multiple injections, in the years prior to his alleged accidents, eight times in the five years prior to August 17, 2018, he had not sought medical care on any occasion in the four years between October 3, 2018 and the date of arbitration, a strong indication that the alleged accidents had not aggravated or exacerbated his long-standing, chronic shoulder conditions.

The Arbitrator finds that Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the right shoulder, are not causally related to the accident of August 17, 2018. This finding is based upon the pre-accident and post-accident medical records, Dr. Karlsson's opinions and Petitioner's lack of credibility.

The Arbitrator further finds that the chain-of-events also does not support a finding of causal connection. This finding is based upon Petitioner's having a pre-accident symptomatic state of poor health in the right shoulder, no believable accident on August 17, 2018, and only continuing complaints of pain consistent with his

earlier chronic condition. Such facts do not meet the criteria for a chain-of-events finding per Certi-Serve, Inc. vs. Industrial Commission, 101 Ill.2d 236,244 (1984).

Based upon the Arbitrator's Decisions on the issues of accident and causal connection, all other disputes are deemed moot.

Claim for compensation is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC031047
Case Name	William George v. Branner Glass
Consolidated Cases	19WC031046;
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0260
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	R Mark Cosimini

DATE FILED: 5/31/2024

/s/Stephen Mathis, 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

William George,

Petitioner,

vs. NO. 19WC 31047

Branner Glass,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, causal connection, prospective medical care, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 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.

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.

May 31, 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	19WC031047
Case Name	William George v. Branner Glass
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	R. Mark Cosimini

DATE FILED: 2/24/2023

THE INTEREST RATE FOR THE WEEK OF FEBRUARY 22, 2023 4.91%

/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)

WILLIAM GEORGE
Employee/Petitioner

v.

BRANNER GLASS
Employer/Respondent

Case # **19** WC **031047**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **January 19, 2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 3, 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.

In the year preceding the injury, Petitioner earned $**70,720.00**; the average weekly wage was $**1,360.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **no** dependent children.

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

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

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

ORDER

Petitioner has failed to prove that he suffered an accident on October 3, 2018 which arose out of and in the course of his employment by Respondent.

Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the left shoulder, are not causally related to the accident of October 3, 2018.

Based upon the Arbitrator's findings on the issues of accident and causal connection, all other disputes are deemed moot.

Claim for compensation is denied.

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

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

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

FEBRUARY 24, 2023

Signature of Arbitrator

ICArbDec19(b)

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified he is currently employed as an industrial glazier for Bacon & Van Buskirk Glass Company. He installs the framework in the glass. Petitioner testified his job duties require lifting, pushing and pulling. He said he typically has to lift up to 75 pounds. He described the physical requirements of the job duties as having to pick up the glass and having to put it straight into a commercial building. He then uses impacts to put a pressure plate on and then use bolts into the metal to hold the glass in. He further testified they hammer on a beauty cover to cover up the bolts. Petitioner testified he has been performing those duties for 30 years.

Petitioner testified he was working for Respondent in 2018. He indicated he worked for them for 25 years, but when they were slow, he would work for other glazing contractors. Petitioner acknowledged the owner Respondent's company was Dennis Branner who was Petitioner's father-in-law. Petitioner then testified Mr. Branner passed away in November of 2019.

Petitioner testified that August 17, 2018 was a Woodside Township community cleanup day. He testified that Respondent had a pool table to keep their shop drawings on, and he was asked to tear apart the pool table and throw it in a pile in front the shop. Petitioner testified the last piece of slate weighed about 150 pounds. He picked it up on his right shoulder, and as soon as he did he felt something pop. He further explained he did not feel any pain right away, but his shoulder felt like it was out of place. A couple hours later his shoulder became painful, and he noticed his bicep was "all balled up at the elbow."

When asked about prior shoulder complaints, Petitioner testified he was born with degenerative bone disease, and it affects all of his joints the older he gets. Petitioner testified he treats with Dr. McKay, his family physician, for the shoulder conditions. Petitioner said he also treated with Dr. Wottowa and Dr. Greatting. He testified he got anti-inflammatories from Dr. McKay, and he received injections from Dr. Wottowa and Dr. Greatting.

Petitioner said that his wages averaged about $1,360.00 per week, before taxes, $70,720.00 a year, though that might be "a little light."

Petitioner testified he provided notice of the alleged work accident to Dennis Branner, his father-in-law, and to his business agent, Mr. Bagwell. He said Mr. Bagwell was deceased as of the time of trial.

Following the alleged work accident, Petitioner saw Dr. Romanelli. Petitioner denied complaining about both of his shoulders at that time. He testified Dr. Romanelli wanted to repair the rotator cuff and right bicep.

Petitioner testified he saw Dr. Maender after seeing Dr. Romanelli. Petitioner testified Dr. Maender was the physician who actually performs surgery on rotator cuffs and biceps. Petitioner testified he told Dr. Maender he was lifting a pool table to get it out of his shop, not his house, and if the doctor's records said it was the house, they were inaccurate.

Petitioner testified he is still working, but he does not work a full eight-hour day, he is allowed to work half days or up to five or six hours at the most.

Petitioner testified he was working for Branner Glass on October 3, 2018. He indicated they have semi-trailers without the wheels that sit on the ground, and finished material is placed in the trailers. Petitioner testified he was removing the pressure plate and the cover from the trailer, and to do so they open the end of a 24 foot long box, and use a vice grip on the end of one of the covers to pull it out. He testified after getting the first three or four out, the rest were real easy. He said while pulling the first one out, he tore his left shoulder.

Petitioner said Respondent was no longer in operation, that Mr. Branner had died, and Petitioner did not want to take the company over and run it. They therefore sold everything and he went to work for Bacon and Van Buskirk, where he continues to work.

Petitioner denied getting any treatment for his left shoulder after that incident. He testified there was no reason to go to the doctor because he knew what he did. He said he wanted to get it repaired by Dr. Maender.

On cross examination Petitioner acknowledged getting treatment for his shoulders starting in 2006. He testified he received six or eight shots. He also acknowledged that before the two claimed accidents, he underwent x-rays and MRI studies of both shoulders. He also acknowledged having injections in both shoulders. Petitioner further acknowledged being told by Dr. Wottowa in 2018 that because of the arthritis in both of his shoulders, he was going to need shoulder replacements. Petitioner testified Dr. Watson also told him he was going to need shoulder replacements. He said he only saw Dr. Watson once in regard to his shoulders, for a second opinion on shoulder replacements.

Petitioner acknowledged Dr. Greatting also told him that he would need both shoulders replaced at some point. Each of those opinions were rendered to Petitioner prior to 2018.

Petitioner said he went to see Dr. Romanelli instead of one of the previous physicians as he really did not like Springfield Clinic, due to billing problems with his two insurance carriers and the amount of money he owes them.

Petitioner testified that when he saw Dr. Romanelli it was to have his right shoulder looked at, to see what he had done to it, as opposed to obtaining another opinion for both of his shoulders. Petitioner testified he told Dr. Romanelli what happened to the right shoulder.

Petitioner said he only saw Dr. Maender one time, and when asked about the procedure Dr. Maender recommended, Petitioner testified Dr. Maender wanted to go in and grind on his bones to see if they could smooth them off, but Dr. Maender said the insurance company might say no, because he needed a shoulder replacement. He said no surgery was ever scheduled.

Petitioner said he had not had any treatment for his shoulders since October 2018.

When asked about Chris Velton, being a supervisor at Branner, Petitioner testified he never heard of him in his life.

Petitioner performed his regular glazier duties between the first alleged accident date of August 17, 2018 and the second alleged accident date of October 3, 2018.

Petitioner testified to performing weight lifting activities for a long time, since high school. He said he would bench press perhaps 200 pounds. He would do overhead lifting of both 30 pound dumbbells and bars with 75 to 100 pounds.

Petitioner said it was about a week after the pool table incident that he went to the doctor, he had not gone to the emergency room. He said the only doctor he mentioned the October 3, 2018 incident to was Dr. McKay. He said he would have filled out an accident report for that accident with Mr. Branner.

When advised the Application for Adjustment of Claim indicates he was pulling curtain covers overhead at the time of the October 3, 2018 accident, Petitioner explained the items were called pressure plate covers. He further explained that to pull them out of the trailer, you have to have your arms over your head. Petitioner testified he had performed those activities for 30 years. He also testified that between August 17, 2018 and October 3, 2018, he performed those activities several hundred times.

Petitioner said his checks were directly deposited in 2018, but he thought he was paid $35.00 per hour, "give or take a couple dollars either way. I honestly do not remember."

On redirect examination Petitioner said he reported the October 3, 2018 accident on the day it happened. He said he saw Dr. Carlson at the request of Respondent, and he said he did not tell Dr. Carlson that he never had any prior shoulder complaints, he would have told him he had arthritis in his shoulders, and a bone disease.

Medical Evidence

Pre-August 17, 2018:

On February 20, 2006, Petitioner told his family physician, Dr. McKay, that his left shoulder "still hurt," especially when performing overhead press exercises, as well as when lifting things overhead at work. Petitioner range of motion was normal and there were no impingement signs. Dr. McKay referred Petitioner to Dr. Wottowa. (Rx 1)

Four months later, June 19, 2009, Petitioner reported to Dr. McKay that his right shoulder had been bothering him off and on, particularly when he was working out and doing overhead presses, describing a very sharp pain like someone was poking him with pliers in the front of the shoulder. He had not seen Dr. Wottowa for his left shoulder, which he said was doing fine at that point. His right shoulder had discomfort on internal rotation and flexion of the shoulder. His diagnosis was right shoulder joint pain. Dr. McKay again referred him to orthopedics (Rx 2)

Dr. Wottowa evaluated Petitioner on August 10, 2009. At that time Petitioner was complaining of bilateral shoulder pain which he had been experiencing for several years, left worse than right. Dr. Wottowa documented there was no injury or trauma. Petitioner said Dr. McKay had given him anti-inflammatory medicine and it had caused all of his pain to go away. He also noted Petitioner had mild

AC joint arthrosis. He recommended Petitioner wean off the anti-inflammatory medicine, and he should return if he had further problems. (Rx 3)

Petitioner treated with Dr. Wottowa in 2012, 2013 and 2014. On December 5, 2012 he advised the doctor that he was having worse problems with his bilateral shoulders, including mildly positive impingement signs, indicative of AC irritation. On August 21, 2013, when seen by Dr. Wottowa's Physician's Assistant (PA), Mr. Purves, he was still complaining of bilateral shoulder pain, right worse than left, Physical examination on that date showed pain through the impingement zone on the right and minimal discomfort in the impingement zone on the left, as well as additional pain with resisted strength testing in the plane of abduction and with isolation of the supraspinatus. It was felt the pain was mostly of a rotator cuff origin. An injection of the subacromial space on the right side was recommended, as was a home exercise program for rotator cuff strengthening, and the injection was performed at that time. Petitioner saw Dr. Wottowa on November 13, 2013, saying he wanted an injection of his left shoulder. He said the previous right shoulder injection had given him 3 weeks of complete relief. A left shoulder injection was performed on that date. Petitioner again saw Dr. Wottowa on January 8, 2014, telling him that the left shoulder injection had not helped him much, he had the same pain the next day. The left shoulder again had a positive impingement sign. Petitioner advised him both shoulder bothered him equally. Bilateral MRIs were ordered. (Rx 4; RX 5; RX 5; RX 6; RX 7)

An x-ray of the right shoulder performed January 18, 2014 revealed chronic deformity of the right humeral neck that was likely posttraumatic in origin. An MRI of the left shoulder of January 21, 2014 noted a history of left shoulder pain for 10 years. It was interpreted by the radiologist to show moderate to marked osteoarthritis at the glenohumeral joint, intrasubstance tear and tendinopathy of the supraspinatus tendon and tendinopathy of the infraspinatus tendon, as well as degenerative type tears and para labral cysts of the glenoid labrum. The MRI of the right shoulder on that same date showed marked osteoarthritis at the glenohumeral joint, a large partial-thickness articular surface tear of the supraspinatus tendon and tendinopathy and intrasubstance tear of the infraspinatus tendon, as well as degenerative type tearing of the glenoid labrum. (RX 8; RX 9; RX 10)

On February 5, 2014, Dr. Wottowa advised Petitioner he had osteoarthritis in both shoulders with the right worse than the left. He advised the doctor that his shoulders made him miserable when he worked hard. The doctor recommended activity modification. He told Petitioner he would eventually need total shoulder replacements. Petitioner advised Dr. Wottowa he needed to work for six more years before he retires. (Rx 11)

While seeing Dr. McKay on October 17, 2014 for other issues, Petitioner advised him that he was still lifting weights. (RX 13)

Dr. Michael Watson evaluated Petitioner on November 11, 2014. Petitioner complained of bilateral shoulder pain for the past five years with his symptoms being much worse over the previous two years. Petitioner attributed the worsening of his symptoms to his job duties as a union glazier. Petitioner told Dr. Watson he often lifts 300 pounds with assistance. Petitioner's physical findings reference the shoulders were identical bilaterally, with positive Hawkins sign with pain on elevation and internal rotation, as well as mild crepitus in both shoulders. Dr. Watson recommended cortisone injections. He

also advised Petitioner he would eventually need total shoulder replacements, but he was currently too young and too active for those surgeries. Petitioner at that time inquired about arthroscopic surgery, and Dr. Watson informed him that such surgery would not cure his problem, it might give him some decrease in pain, but even that outcome could not be guaranteed. Dr. Watson said he could continue doing his regular work despite his discomfort. (Rx 14)

Petitioner saw Dr. McKay on November 14, 2017, and he advised the doctor that both of his shoulders were really bothering him, that he was losing range of motion, and he requested another opinion from Dr. Watson. (RX 15)

Dr. Greatting evaluated Petitioner on December 12, 2017. He told Dr. Greatting of chronic bilateral shoulder pain which had been present for ten year, which was causing him difficulty with the use of his arms away from his body or above shoulder level. He said he liked to lift weights regularly and was noticing difficulty lifting the amounts he had lifted previously and while doing certain weightlifting activities such as bench press and overhead press. He said he had a grinding and popping sensation in his shoulders and sleeping on his side caused shoulder pain. He noted his pain was increasing and his range of motion was decreasing over time. Dr. Greatting found him to have pain and crepitation with range of motion of the shoulders and significant pain when resisting forward flexion and abduction. The x-rays taken by Dr. Greatting revealed severe arthritic changes in the glenohumeral joint of each shoulder. Based upon the x-rays and examination, Dr. Greatting diagnosed Petitioner with severe osteoarthritis in the glenohumeral joints. He administered cortisone injections to both shoulders. Dr. Greatting advised Petitioner the only surgical treatment for him would be total shoulder replacements, and he provided him with brochures explaining the surgeries. (Rx 16; RX 17; Rx 18)

On April 18, 2018 Petitioner presented to Springfield Clinic Prompt Care with left shoulder pain of two days, giving a history of getting out of a recliner and feeling a sharp pain in his left shoulder. X-rays of the left shoulder revealed moderate to severe glenohumeral joint osteoarthritis, which was stable. Petitioner advised that facility that shoulder replacements had been recommended, but he had been putting it off. (RX 19; RX 20)

Post-August 17, 2018:

The first alleged accident date is August 17, 2018. Five days later, on August 22, 2018, Petitioner saw Dr. Ronald Romanelli at Orthopedic Center of Illinois. Petitioner provided a history of bilateral shoulder pain, saying he was not happy at Springfield Clinic and he wanted a second opinion. Petitioner told Dr. Romanelli he was advised he needs shoulder replacements. Petitioner also reported he did not recall any specific injury. He advised Dr. Romanelli that he had been told he had bone on bone arthritis of both shoulders and needed to have the shoulders replaced. He said his shoulder had been popping out of place, they would pop and grind very often. He said he could not lift his arms above his head and his range of motion had become very restricted. He did indicate that three weeks earlier he had a pop in his right shoulder with a Popeye deformity. Dr. Romanelli's physical examination revealed limited range of motion bilaterally, with severe restriction in range of motion at the 90/90 position bilaterally. A Popeye deformity was present in the right shoulder, and apprehension tests were positive bilaterally. Dr.

Romanelli confirmed Petitioner had severe osteoarthritis in both shoulders and a torn right biceps tendon. He found Petitioner's shoulders to be extremely strong. He was of the opinion that Petitioner would eventually need to have both shoulders replaced, using a standard replacement rather than a reverse replacement. He noted he would have to lose weight and get his BMI below 40 before he could have the surgeries. Petitioner advised Dr. Romanelli he wished to have the surgeries. Dr. Romanelli ordered an MRI. (RX 21)

An MRI of the right shoulder was performed on September 6, 2018. The report indicates Petitioner sustained a lifting injury four weeks earlier. The MRI report documented a near complete partial thickness tear of the supraspinatus and biceps tendon tear. The biceps tendon tear was retracted. The MRI also revealed severe degenerative changes in the right glenohumeral joint, mild degenerative changes in the right AC joint, a small amount of joint effusion in the glenohumeral joint and a degenerative tear of the labrum with a moderate to large paralabral cyst. (PX 1)

Post-October 3, 2018:

Petitioner's final medical treatment was with Dr. Christopher Maender on October 3, 2019. Dr. Maender's note indicates Petitioner was seeking a second opinion from Dr. Romanelli for his bilateral shoulders. The note indicates Petitioner's right shoulder was more symptomatic than the left. The history indicates that in early August, Petitioner was lifting a pool table to get it out of his house, and he felt a pop in the anterior aspect of his right shoulder. Dr. Maender noted Petitioner had pain in his shoulders for over 12 years. There was no specific injury at the beginning, but Petitioner experienced a gradual increase in pain. Petitioner reported he works as a glazier and does a lot of heavy lifting. Dr. Maender interpreted the MRI of the right shoulder to show a full thickness rotator cuff tear with minimal retraction and degenerative pathology in the labrum. He also documented significant osteoarthritis with subchondral cysts, sclerosis and joint space narrowing. Following his exam, Dr. Maender discussed the various surgical options, the risks and benefits. Petitioner wanted the temporary fix of the right shoulder arthroscopic rotator cuff repair and joint debridement as he would be unable to do light duty at this point in his career, and that would allow him the opportunity to see if it would improve his rotator cuff symptoms and get him back to work for the time being. Dr. Maender made it clear to Petitioner that he would likely require further surgery in the future with shoulder replacements. Petitioner was advised by Dr. Maender that he was instructed to call Dr. Maender's office to schedule the surgery when Petitioner had a better understanding of his winter workload. (PX 1; RX 22)

Dr. Karlsson performed an independent medical examination at Respondent's request on August 20, 2021. Petitioner provided a history of Dr. Karlsson of sustaining two alleged accidents at work. He reported taking pieces of a pool table out of the shop, and when he lifted the third piece of slate, he had severe pain in his shoulder. Petitioner described the second accident as pulling an outside curtain wall cover which was 24 feet in length out of a long box. Petitioner indicated the piece only weighed five pounds but it would stick and he had pain in his left shoulder with doing that. Petitioner denied any treatment including injections for either shoulder. Petitioner also denied any prior history of problems with either shoulder. Dr. Karlsson asked Petitioner whether he had ever seen a doctor for either shoulder

in the past and Petitioner responded that he had not. Petitioner also denied ever having x-rays for the shoulders and denied ever having MRI studies for the shoulders prior to the claimed work accidents. Petitioner further reported he did not have any problems with either shoulder before 8/17/2018. Dr. Karlsson took x-rays of Petitioner's shoulders and interpreted the films to show nearly identical findings in both shoulders. His report indicates both shoulders were "bone-on-bone." He diagnosed Petitioner with severe chronic degenerative osteoarthritis to both shoulders. Based on his evaluation of Petitioner and review of the medical information, Dr. Karlsson rendered an opinion there is no causal relationship between the claimed work accidents and the condition of either shoulder. He explained Petitioner had degenerative tearing of the rotator cuff with a downward curving acromion, AC arthritis with impingement, and years of severe arthritis and treatment for shoulder pain. Dr. Karlsson commented Petitioner gave him a vastly different history than what is reflected in the medical notes. (RX 24)

Dr. Karlsson agreed with the previous medical opinions that Petitioner will eventually require total shoulder replacements. He did not agree with the recommendation from Dr. Maender to perform an arthroscopic rotator cuff repair. Finally, Dr. Karlsson indicated Petitioner was continuing to perform his regular job duties as a glazier, and he did not need any restrictions whatsoever. (RX 24)

Arbitrator Credibility Assessment

In contrast to Petitioner's testimony at trial, the medical records failed to support his claims. Petitioner sought medical treatment five days after the first claimed accident, telling the doctor at that time that he had a pop in his shoulder with a Popeye deformity. No mention of a work accident of any sort was recorded on that date, and the claimed accident occurred only five days prior to this visit with Dr. Romanelli, not three weeks earlier. He testified to providing a history of the claimed work accident to Dr. Romanelli, but again, the history in Dr. Romanelli's note does not include a history of the alleged work accident. Petitioner also saw Dr. Maender on the date of the second accident, but once again, he did not provide any history of the second claimed accident, instead saying he was there seeking a second opinion from Dr. Romanelli. He did provide the first actual history of the August 17, 2018 accident, but he reported he was moving a pool table out of his home as opposed to out of Respondent's shop.

No history was given to Dr. Maender in regard to the alleged accident of October 3, 2018, despite the fact Petitioner saw him that exact date. Petitioner mentioned the alleged accident of six or seven weeks earlier, but not the accident of that date. And he gave no explanation for that lack of history at the arbitration hearing.

The IME report of Dr. Karlsson reflects Petitioner advising that physician that he had no problems with his shoulders prior to the alleged work accidents, which is clearly contradicted by Respondent's exhibits showing a long history of problems and treatment of bilateral shoulder injuries.

Petitioner did not testify in a believable manner, downplaying his previous problems and stating that all records contradicting his testimony were in error. His testimony that he was carrying heavy parts of a pool table used for holding shop plans out of a commercial window business, on the orders of a boss who has died, and aided by a co-worker who has died, is simply unbelievable and convenient. The Arbitrator accepts the recorded history of Dr. Maender of October 3, 2018, which notes Petitioner at that time said he was carrying a pool table out of his house as far more likely and believable. The total lack of

history to Dr. Maender on the actual alleged date of accident of October 3, 2018 also calls Petitioner's testimony into question.

The Arbitrator finds Petitioner to not be 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 the Petitioner's employment by Respondent on October 3, 2018, the Arbitrator makes the following findings:

The findings of fact set forth above are incorporated herein.

The summaries of medical evidence set forth above are incorporated herein.

The Arbitrator's findings in regard to credibility set forth above are incorporated herein.

It is significant to note Petitioner saw a physician five days after the alleged August 17, 2018 accident, but he reported that he did not recall any specific injury. He did provide a history of three weeks earlier having a pop and a Popeye deformity, but the timing of the reported pop does not coincide with the alleged accident date. Additionally, the first history in the medical records documenting Petitioner carrying a pool table was on October 3, 2018, which was the date of the second alleged accident. However, the history contained in the October 3, 2018 note states that Petitioner was carrying a pool table out of his house, not out of Respondent's shop. Consequently, the treatment records do not include a medical history consistent with Petitioner's allegations. Petitioner did not give Dr. Maender any history of the October 3, 2018 accident despite the fact he actually saw that physician on the actual alleged date of accident, instead giving a history of a different accident, at home, six or seven weeks earlier.

When the above information is coupled with Petitioner's lack of credibility, it is clear the evidence does not support Petitioner's claim.

The Arbitrator finds that Petitioner has failed to prove that he suffered an accident on October 3, 2018 which arose out of and in the course of his employment by Respondent. This finding is based upon the pre-accident and post-accident medical records, Dr. Karlsson's opinions and Petitioner's lack of credibility. Indeed, while Petitioner had received regular medical care, including multiple injections, in the years prior to his alleged accidents, eight times in the five years prior to August 17, 2018, he had not sought medical care on any occasion in the four years between October 3, 2018 and the date of arbitration, a strong indication that the alleged accidents had not aggravated or exacerbated his long-standing, chronic shoulder conditions.

In support of the Arbitrator's Decision relating to whether Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the left shoulder, are causally related to the claimed accident to of October 3, 2018, the Arbitrator makes the following findings:

The findings of fact set forth above are incorporated herein.

The summaries of medical evidence set forth above are incorporated herein.

The Arbitrator's findings in regard to credibility set forth above are incorporated herein.

The findings in regard to accident set forth above are incorporated herein.

Petitioner was seen by Dr. Romanelli five days after the alleged accident date. Petitioner did not provide a history of moving a pool table and his shoulder popping and experiencing pain to Dr. Romanelli. In contrast, Dr. Romanelli's note indicates Petitioner denied any known injury. The note also indicates Petitioner lifted something heavy and developed an injury to his biceps area, but he reported that incident occurred three weeks earlier and not less than one week earlier. Petitioner also testified his biceps balled up by the elbow which is not consistent with a shoulder injury.

The first medical note documenting anything close to Petitioner's alleged mechanism of injury was contained in Dr. Maender's note from October 3, 2018. The history indicates Petitioner was moving a pool table out of his house and injured his shoulder. On that date Petitioner did not give a history of accident having occurred on that date.

The treating records fail to document any opinions suggesting there is a causal relationship between Petitioner's long standing right shoulder condition and the alleged work accident on October 3, 2018.

The only medical opinion addressing causal connection is by Dr. Karlsson who performed an IME on behalf of Respondent. He rendered an opinion the pathology in Petitioner's right shoulder was chronic, and there was no causal relationship between the alleged work accident and Petitioner's right shoulder condition.

Petitioner testified to performing overhead work activities hundreds of times following the August 17, 2018 alleged accident date. These activities are inconsistent with a traumatic, acute right shoulder injury, but are consistent with the condition he had been treated for numerous years prior to this alleged date of accident.

The medial evidence included in Respondent's Exhibits 1 through 20 establish Petitioner had long-standing progressively worsening symptoms and pathology in his right shoulder prior to the alleged work accident. He had been advised by multiple doctors over the course of several years prior to the alleged work accident that he was going to need shoulder replacements. No evidence was presented to suggest any alleged work accident made the preexisting condition in the right shoulder worse.

The Arbitrator finds that Petitioner's current conditions of ill-being, a rotator cuff tear, biceps tendon tear, and osteoarthritis in the left shoulder, are not causally related to the accident of October 3, 2018. This finding is based upon the pre-accident and post-accident medical records, Dr. Karlsson's opinions and Petitioner's lack of credibility. Indeed, while Petitioner had received regular medical care, including multiple injections, in the years prior to his alleged accidents, eight times in the five years prior to August 17, 2018, he had not sought medical care on any occasion in the four years between October 3, 2018 and the date of arbitration, a strong indication that the alleged accidents had not aggravated or exacerbated his long-standing, chronic shoulder conditions.

The Arbitrator further finds that the chain-of-events also does not support a finding of causal connection. This finding is based upon Petitioner's having a pre-accident symptomatic state of poor health in the right shoulder, no believable accident on October 3, 2018, and only continuing complaints of pain consistent with his earlier chronic condition. Such facts do not meet the criteria for a chain-of-events finding per Certi-Serve, Inc. vs. Industrial Commission, 101 Ill.2d 236,244 (1984).

Based upon the Arbitrator's Decisions on the issues of accident and causal connection, all other disputes are deemed moot.

Claim for compensation is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC010571
Case Name	Stanislawa Gondek v. Harvard Maintenance, Inc.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	24IWCC0261
Number of Pages of Decision	16
Decision Issued By	Christopher Harris, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Peter Bobber
Respondent Attorney	Ryan McCarthy

DATE FILED: 5/31/2024

/s/Christopher Harris, Commissioner

Signature

DISSENT: /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

STANISLAWA GONDEK,

Petitioner,

vs. NO: 22 WC 10571

HARVARD MAINTENANCE, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, the reasonableness and necessity of the medical treatment and charges, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 23, 2023 is hereby affirmed and adopted.

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

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

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

May 31, 2024

O: 5-23-24
CAH/tdm
052

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

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

DISSENT

I respectfully dissent from the Decision of the Majority. I find Petitioner's testimony that she slipped on construction dust to be credible. Construction was ongoing throughout the building at the time of Petitioner's fall. The construction workers were required to use the restroom located on the mezzanine level. Following Petitioner's fall, caution signs were placed in the area. Petitioner never had any issues with dizziness, vertigo or loss of balance. I do not believe Petitioner simply fell for no reason. Therefore, I respectfully dissent.

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	22WC010571
Case Name	Stanislawa Gondek v. Harvard Maintenance, Inc.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Nina Mariano, Arbitrator

Petitioner Attorney	Peter Bobber
Respondent Attorney	Ryan McCarthy

DATE FILED: 6/23/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 21, 2023 5.17%

/s/Nina Mariano, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Stanislawa Gondek
Employee/Petitioner

v.

Harvard Maintenance, Inc.
Employer/Respondent

Case # **22** WC **010571**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nina Mariano**, Arbitrator of the Commission, in the city of **Chicago**, on **1/25/2023**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/26/2022**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 $**39,936.00**; the average weekly wage was $**768.00**.

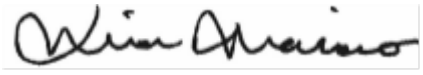
On the date of accident, Petitioner was **64** years of age, ***single*** with **0** dependent children.

ORDER

Because Petitioner did not sustain an accident that arose out of her employment, all benefits are denied.

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

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



Signature of Arbitrator

JUNE 23, 2023

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

STANISLAWA GONDEK,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 22WC010571
HARVARD MAINTENANCE, INC.,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on January 25, 2023 in Chicago, Illinois before Arbitrator Nina Mariano on Petitioner's Petition for 19(b) Hearing. Issues in dispute include accident, causal connection, unpaid medical bills, and TTD benefits. Arbitrator's Exhibit "Ax" 1.

Petitioner, a native Polish speaker, knows some English but has no formal education in the United States. (T.pp.56-57). She is a widow who is right hand dominant. (T.p.56). She has no prior workers' compensation claims and has no prior injury to, medical treatment for, or lost time from work due to any problem with her right shoulder. (T.pp.57-58).

Petitioner worked as a custodian, cleaning the office building at 200 West Madison Street in Chicago for over 37 years. (T.p.57). Her job duties include office cleaning, removing garbage, vacuuming, and bathroom cleaning. (T.p.58). She would have to clean two, 23,000 square foot floors of the building per shift, but the workload increased to four floors once the Covid pandemic occurred. (T.p.59).

On January 26, 2022, her work shift started at 4:50 p.m. At approximately 4:40 p.m. that day, she slipped and fell while walking to the employee changing area on the mezzanine level, a floor of the office building not accessible to the public or building tenants and only accessible by building cleaning staff, engineers and security personnel. (T.pp. 59-60). Petitioner did not experience any dizziness or headache which might have caused her to fall, and prior to this slip and fall, she never had any issues with dizziness, vertigo or loss of balance. (T.p.74).

Petitioner slipped and fell in the hallway, the flooring of which is a white, commercial vinyl-type of flooring. (T.p.61). At that time, Raul, a fellow custodian, would clean that hallway floor nightly at about 9:30 p.m. following the night cleaning crew's "lunch" break. (T.pp.61-62, 24-25).

When she fell, petitioner landed on her right side, and upon coming to rest on the floor, she noticed sudden, intense pain in her right shoulder, a pain she had never experienced before. (T.p.62). She was unable to move the arm and her pain was so great that she remained on the floor for approximately 15

minutes as she gathered herself. (T.p.63). After some time, with the help of co-workers she got to a seated position on the floor, but she was still unable to get up due to the pain in her right shoulder. (T.p.63). While she was still on the floor Raul put down a sign and rubbed the floor back and forth with his foot. (T.pp.63-65).

After finally adjusting from the prone to seated position on the floor, petitioner noticed white dust on her left hand from when she put that hand on the ground to assist herself in getting to a seated position. (T.p.66). She also noticed the same white dust on her pants at her knee and on her coat. (T.p.66). Since the dust was white, like drywall, she attributed it to the construction crews who were working in the building at the time of her fall. (T.pp.66-67). These crews were required to use the bathroom on the Mezzanine level and would often drag drywall dust wherever they traveled throughout the building. (T.pp.66-67).

After gathering herself on the floor for an extended time, co-workers helped petitioner onto an office-type chair which they brought from her supervisor's office, just down the hall from where she slipped and fell. (T.p.67). Petitioner sat in that chair for well over an hour as Maggie Rychtarczyk, her supervisor, made calls pertaining to how to handle petitioner's accident/injury. (T.pp.67-68).

Ultimately, building security called an ambulance, and coworkers assisted petitioner to the building lobby where Chicago Fire Department paramedics met petitioner there and took her to the hospital. (T.p.68-69).The CFD's Patient Care Report reflects that petitioner complained of right shoulder pain after slipping and falling. (PX1,p.3). She denied getting dizzy, passing out, hitting her head or use of blood thinners. (PX1,p.3). They transported petitioner by ambulance to Northwestern Memorial Hospital. (T.p.69). Construction dust was not mentioned in the CFD's report.

At Northwestern, she was diagnosed with a right shoulder dislocation of the humerous at the glenohumeral joint and traumatic complete "massive" tear of the right rotator cuff. (PX2,pp.5,8,10). The Northwestern emergency medicine notes contain different histories. One indicates petitioner was complaining of right shoulder pain "after falling at home." (PX2,p.21). That note went on to indicate that she fell after losing her balance landing on her right arm and has been unable to move it since. (PX2,p.21). Another history indicated that petitioner presented to the emergency department after a "mechanical fall on tile." (PX2,p.26). Regarding treatment, petitioner was sedated and the right shoulder was manually reduced. (PX2,p.25). Construction dust is not mentioned in this record.

Following the treatment at Northwestern, petitioner sought follow-up care through her primary care physician at Union Health Service on February 4, 2022 where a history of the January 26, 2022 fall at work was noted. She was advised to continue wearing a sling. (PX3,pp.4-5). Construction dust is not mentioned in this record. That provider referred petitioner for orthopedic consult with Dr. Petkovic.

On February 18, 2022, the Petitioner underwent an MRI at Northwestern Medicine Radiology which showed a massive rotator cuff tear involving the supraspinatus, subscapularis, and anterior infraspinatus fibers with attendance retracted to the level of the glenohumeral joint. There was moderate to advanced fatty atrophy of the supraspinatus and infraspinatus and moderate fatty atrophy of the subscapularis and teres minor. The longhead of the biceps tendon was dislocated medially into the anterior aspect of the glenohumeral joint. (PetEx. 2, p. 7-8)

Dr. Petkovic first examined petitioner on March 15, 2022, and noted a consistent history of the fall at work. (PX3,p.13). He diagnosed a massive tear of the right rotator cuff status post dislocation. (PX2,p.13). On April 1, 2022, Dr. Petkovic performed surgery to petitioner's right shoulder at Lutheran General Hospital. (T.pp.70-71). The surgery consisted of a right shoulder rotator cuff repair with an allograft augmentation, a subacromial decompression, shoulder manipulation under anesthesia, shoulder debridement and biceps tenotomy. (PX4,p.45). Dr. Petkovic's post-operative diagnosis was massive tears of the supraspinatus and infraspinatus, biceps with significant tenosynovitis and subluxation into the subscapularis tear, subscapularis with massive retracted full-thickness tear of the anterior labrum with significant tearing of the superior labrum with high-grade type II SLAP tear of the posterior labrum with significant fraying and anterolateral acromion bone spur. (P.X4, p.46).

Post-operatively, petitioner underwent extensive physical therapy at ATI Physical Therapy from May 16, 2022 through December 22, 2022, during which petitioner noted improvement in the functioning of the right shoulder. (T.p.71, PX5).

On January 3, 2023, the Petitioner was again seen by Dr. Petkovic having completed physical therapy. On physical examination, she had mild weakness with Jobe's empty can. Dr. Petkovic described her as "doing great" with recovery and was permitted to advance her activity as tolerated. She would follow up as needed if her symptoms worsened.

On January 18, 2023, Dr. Petkovic wrote a letter advising the Petitioner she could return to work on January 26, 2023 without restriction.

At trial, Petitioner testified that she is next scheduled to see Dr. Petkovic on February 7, 2023. (T.p.71).

Petitioner has not worked since the January 26, 2022 accident and her doctors have maintained her off work status through the January 25, 2023. (T.p.72). She has received no workers' compensation benefits, but her union provided some group disability benefits and most of the related medical bills were processed by her health insurance. (T.pp.72-73). The only bill with an outstanding balance of which petitioner is aware is from ATI Physical Therapy with an after-fee schedule balance of $7,794.42. (T.p.73, PX6).

On cross-examination, the Petitioner specified that while she had worked in the building for many years, she had only worked for the Respondent since January 3, 2022. (T.p.77). She had planned on working until she was 65 years old, and she turned 65 on April 26, 2022. (T.p.78).

The Petitioner admitted that she did not mention construction dust to the EMTs when she was taken away by ambulance. (T.p.79). The Petitioner testified that once she arrived to the emergency room, she told the ER staff that she had tripped or slipped. (T.pp.79 – 80). She admitted she did not tell the staff at Northwestern about construction dust. (T.p.81). When the Petitioner saw Dr. Petkovic for the first time on March 15, 2022, she had the opportunity to provide Dr. Petkovic with an accident history; she admitted she did not tell him about construction dust. (T.pp.81 – 82). Petitioner also had the opportunity to give an accident history to her physical therapist at ATI when she first attended therapy on May 16, 2022. However, she admitted she did not tell them about the construction dust. (T.p.82 – 83). Finally, the Petitioner confirmed that when she saw Dr. Karlsson for an independent medical examination on

August 2, 2022, she told him she did not notice anything on the floor at the time of her fall. (T.pp.83 – 84).

Testimony of Dorota Tomasik

Dorota Tomasik, a supervisor for respondent, worked with petitioner for 16 years. (T.pp.10-11). She referred to petitioner as a "very good worker." (T.p.22). At the time of petitioner's accident, Tomasik, who was in the nearby maintenance office with the door open, heard petitioner fall to the ground in the hallway just outside of the office. (T.pp.11-13). The hallway in question is located on the mezzanine level of the building, which is not accessible by the public or building tenants. (T.pp.12-13). Rather, it is only accessible to building staff and construction workers working in the building. (T.pp.12-13).

Tomasik saw petitioner the work day prior to the fall and petitioner appeared to be very healthy, and she is not aware of petitioner ever having any problem with dizziness or falling.(T.pp.13-14). Petitioner and the other 16 members of the cleaning crew were arriving for work at about the same time. (T.p.15). The shift would start at 4:50 p.m. and workers were permitted to clock in on the mezzanine level any time after 4:40 p.m. (T.p.15).

Following petitioner's fall, Tomasik came to petitioner's aid. She saw petitioner on the ground laying on her right side complaining of severe pain to her right arm. (T.p.16). Petitioner was on the floor for a long time, and then some other workers brought petitioner a chair from the office and they helped her from the floor to the chair. (T.p.16). Petitioner was then talking to the nurse on the phone and was complaining the entire time about the pain in her right shoulder. (T.p.16).

Tomasik did not notice any water or on the floor following petitioner's fall, but she did not check it thoroughly (T.p.17). Raul, who passed away in May of 2022, would mop that hallway floor nightly later during the night shift after 9:30 p.m. (T.pp.18-19,24-25).

Construction crews would be required to come to the mezzanine level to use the bathroom there as they were not allowed to use the public bathrooms on other floors. (T.p.19). At the time of petitioner's fall, there was construction going on in the building "everywhere." (T.p.19). Construction crews are not permitted to use the bathrooms on tenant floors because of dirty clothes and boots, and "everything is dirty on them." (T.p.20). Tomasik admitted to noticing construction debris/dust in areas throughout the building where there is carpet, but the floor where petitioner fell is a white/grayish vinyl floor and to see the construction dust on that floor would require her to really go down and look closely and touch it. (T.pp.20-21). The construction dust she has seen in the past is grayish just like the vinyl flooring where petitioner fell. (T.p.26). Following petitioner's fall, Tomasik was not paying close attention if the floor was dirty or something, but she was aware she did not notice any water on the floor. (T.p.21).

Tomasik ultimately assisted petitioner to the building's lobby to meet the ambulance, and petitioner continued to complain of horrible pain in her shoulder, something she never mentioned or complained about prior to her fall on January, 26, 2022. (T.p.21-22).

On cross-examination, Tomasik said that when she went to the Petitioner's aid, she asked the Petitioner what happened, and the Petitioner stated that she didn't know. The Petitioner did not say anything else about why she fell. (T.p.22).

Tomasik testified that when she responded to Petitioner's fall, she was near the area where the fall had taken place. When she was walking on the floor, she did not feel any dust or anything slippery underneath her feet. She was approximately four feet from where the Petitioner fell. (T.pp.26 – 27). Tomasik also testified that she had used the same floor the Petitioner fell on to get to work, and it was not slippery. (T.p.29).

Testimony of Maria Chorzepa

Maria Chorzepa has worked as a custodian at the 200 West Madison building with petitioner for 37 years. (T.p.32). When petitioner fell on January 26, 2022, Chorzepa was in the supply room about 10 feet from where petitioner fell. (T.pp.33-34). The day prior to the fall, petitioner did not have any problems with her right arm or shoulder and had no issues with dizziness or problems with her head. (T.p.34).

After hearing a commotion in the hallway, Chorzepa went to the hallway and saw petitioner laying on her right side completely on the ground. (T.p.35). Petitioner ultimately lifted her head and indicated she did not know what happened. (T.p.36). Petitioner was in pain and likely in shock. (T.p.36). Chorzepa wanted to help petitioner to stand up, but petitioner was in too much pain. (T.pp.36-37). She was around petitioner for about ten minutes following the fall, and then took the keys and proceeded to work. (T.p.37). She was not looking at the condition of the floor following petitioner's fall, and she never walked on the part of the floor where petitioner fell. (T.pp.38-40). Rather, Chorzepa was focusing on petitioner's well-being, but she did note that following the accident, guys form the custodial staff put signs in the hallway. (T.p.38).

Testimony of Grazyna Goldyn

Grazyna Golden has worked as a custodian at 200 West Madison for 15 years. (T.pp.43-44). She sees petitioner on a daily basis and had no memory of petitioner complaining of any problem with her right arm or shoulder or any other problems with dizziness or loss of balance prior to petitioner's slip and fall. (T.p.45). On January 26, 2022, she was sitting in the supply room when she heard a "boom" and someone indicated that petitioner fell. (T.p.46). She went to the hallway and saw petitioner laying on the floor on her right side and complaining of her right shoulder hurting. (T. P.47). She stayed in the vicinity of the fall until about 5:00 p.m. when she punched in to work. (T.p.47). While there, Goldyn looked to see if the floor was wet, and Raul put out a warning sign. (T.pp.48-49). She did not touch the floor where petitioner fell and she did not test to see whether it was slippery. (T.p.51). When she looked at the floor to see if it was wet, she did not see any construction dust with her "naked eye," but she did not touch the floor. (T.pp. 53-54).

On cross-examination, Goldyn stated that she thought Petitioner stated, “Oh my God. I don't know what happened." (T.p.53). Goldyn had walked in the corridor where the Petitioner fell. Goldyn did not know if it was slippery, but Goldyn herself did not slip. (T.p.54).

Testimony of Malgorzata Rychtarczyk

Malgorzata Rychtarczyk was petitioner’s supervisor at the time of petitioner’s January 26, 2022 slip and fall. (T.p.90). At that point, she had been working at the 200 West Madison building for six years, and she worked with petitioner that entire time. (T.p90).

On January 26, 2022 at approximately 4:30 p.m., Rychtarczyk was working on her computer in her office on the mezzanine level of 200 West Madison, a floor “only for” the janitorial and engineering staff. (T.p.92). She heard noises from the hallway, jumped up and found petitioner on the floor in the hallway. (T.pp.92-93). She asked petitioner what happened and petitioner indicated she did not know and she wanted to rest on the floor. (T.p.93). Petitioner did not know why she fell; she was confused. (T.p.94). Raul came and helped petitioner while Rychtarczyk returned to her office to make a call. (T.p.93). Fellow workers then assisted petitioner to a chair. (T.p.94).

Rychtarczyk had the opportunity to inspect the floor where the Petitioner fell as she needed to do a report. She took photos of the floor. Rychtarczyk did not touch the floor but bent down to see if there was anything there and found nothing. She did not see any liquid or construction dust on the floor. (T.pp. 94 – 95). This inspection occurred immediately after the fall. She also had the opportunity to walk on the floor where Petitioner had fallen, and it was not slippery. (T.pp.95 – 96). There had not been any reports of any substance being on the floor where the Petitioner fell prior to her fall. (T.p.98).

Rychtarczyk testified that there was construction occurring in the building when petitioner’s fall occurred, but not on the mezzanine floor. The floor nearest to where construction was occurring was on the 6th floor. (T.pp.96-97). Generally, construction in the building occurs from around 6:00 p.m. through 4:00 a.m. (T.pp.97-98). Rychtarczyk testified that she took pictures of the area where petitioner fell “right away.” She identified Respondent’s Exhibit 1 as a picture of the hallway where petitioner fell. (T.p.99). They found petitioner on the floor near the shoe mark in the middle of the picture. (T.pp.100-101). Rychtarczyk indicated that she took the picture right after petitioner was moved to the chair, and no one cleaned the floor between the time of petitioner’s fall and the time of this photograph. (T.p.101).

Rychtarczyk admitted she had no record or definite knowledge of when the last construction crew member may have been on the mezzanine level or left the building prior to petitioner’s fall. (T.p.104). She did confirm that construction crew members are required to use the bathroom on the mezzanine level when working in the building. (T.p.111). She also testified that construction crews are not permitted to access the building from the lobby, but rather, they are required to enter from the dock area. (T.p.112).

Upon responding to petitioner’s fall, Rychtarczyk first asked if petitioner was ok, and petitioner was clearly in distress, favoring her right arm and she was in pain. (T.p.105). The day prior to the fall, petitioner worked her full shift without any problem. (T.p.106). Petitioner was a good worker and

Rychtarczyk never had any problem with her, and she was not aware of petitioner having any prior problems with losing her balance or falling. (T.pp.106-107).

Rychtarczyk first took a picture of petitioner sitting on the floor to show how petitioner looked on the floor. (T.pp.106-107). She further testified that when she first saw petitioner following the fall, petitioner was not totally laying on the floor, but rather was on the floor in a seated position. (T.p.108). She is not aware of whether petitioner stumbled several steps while falling. (T.p.108). Rychtarczyk did not spend much time with petitioner in the hallway when she was on the floor as she wanted to get petitioner help so she went into her office and called the nurse line. (T.p.109).

Rychtarczyk was not aware that Raul put the sign out on the floor while petitioner was still on the floor. (T.p.110). She does recall Raul being present immediately after petitioner's fall and she recalls Raul assisting petitioner into the chair, outside her office. (T.pp.110-111). That office doorway is depicted in Respondent's Exhibit 1 in the upper right. (T.p.111).

IME of Dr. Karlsson

On August 2, 2022, Dr. Karlsson performed an independent medical examination at the Respondent's request. Dr. Karlsson took an accident history. The Petitioner was on her way to the work lockers when she slipped in the hall and fell onto her right arm and shoulder. The doctor asked if there was any water on the floor or anything that she tripped on. She stated that she did not notice anything on the floor. Subjectively, the Petitioner was still getting pain in her arm, but her main problem was with raising up her arm. She uses the other arm to assist it and cannot lift anything heavy. She originally had some numbness and tingling in the hand after the surgery, but that had since gone away. Dr. Karlsson had the opportunity to review the MRI from February 18, 2022, which showed a massive rotator cuff tear on the right side. There was fatty atrophy of all four muscle bellies. The biceps tendon was subluxed medially. There were no fractures, dislocations, or loose bodies noted. There were mild AC and glenohumeral degenerative changes. The diagnosis was status post repair of the massive rotator cuff tear. Dr. Karlsson felt that the accident was a causal factor in its development. She had a retracted tear with signs of muscle atrophy, and these were signs of a longstanding rotator cuff tear. She obviously had some pre-existing rotator cuff tearing with retraction though she claims to have been asymptomatic. The nature of her injury was dislocation of the shoulder which was enough of a trauma to make an asymptomatic or relatively asymptomatic cuff more symptomatic or possibly extend the tear and necessitate treatment. She had a pre-existing rotator cuff tear based on the level of retraction in the atrophy of the muscles. This takes years to develop this level of atrophy. This would be years after developing a tear. He believed the accident either caused an extension of the pre-existing tear or caused enough of an aggravation to necessitate further tear and surgical treatment. The Petitioner was capable of working light duty with primarily the left arm. She could not use the right arm overhead or lift more than 5 pounds with the right arm. These restrictions were temporary in nature. She required additional therapy for a total of up to six months of therapy post-operatively which started six weeks after the surgery. Typically, for a massive chronic rotator cuff tear, MMI and finishing therapy would not be until 6 to 9 months after surgery. He opined that all treatment received to date had been reasonable and necessary. (RespEx. 2)

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).

WITH RESPECT TO (C) THE ISSUE OF ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

As a threshold matter, the Arbitrator first finds that no defect played a part in the Petitioner's fall on the date of accident. The Petitioner admits that the floor where she fell was not wet. The Petitioner testified at trial that after she fell, while still on the floor, she discovered there was white dust on her clothing and felt it with her hand, that had previously been invisible to the naked eye. The Petitioner then speculated that the dust had been left by construction workers doing work in the building. The Arbitrator does not find the Petitioner credible with regard to her testimony that after her fall she discovered white dust on her clothes and then felt dust with her hand. "Liability for workers' compensation cannot rest on imagination, speculation or conjecture, but must be based solely upon the facts contained in the record." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 61, 541 N.E.2d 665, 668 (1989). The Arbitrator finds it highly suspect that despite having been presented with multiple opportunities to mention the construction dust to coworkers at the accident scene, all of her medical providers, and the Respondent's Section 12 examiner, the record is devoid of any mention of construction dust until the Petitioner testified at hearing. After the fall around 4:40pm, Petitioner laid on the floor for quite some time and then was helped to a chair just outside her supervisor's office where she sat until 6:30pm before she was taken by ambulance. The record indicates that at no time did she inform her supervisor that she slipped on construction dust or anyone else for that matter and further, no one testified that they saw construction dust on her clothing.

Ms. Rychtarczyk, Ms. Goldyn, and Ms. Tomasik each testified that when asked what happened, the Petitioner stated that she did not know. None of the four witnesses testified to seeing construction dust on the floor. Ms. Rychtarczyk and Ms. Tomasik testified that they had walked where the Petitioner fell and it was not slippery. Ms. Rychtarczyk closely inspected the floor

where the Petitioner fell to prepare her report and did not find any dust or any other issue with the floor. The photograph of the floor taken after the accident showed no evidence of dust on the floor.

Next, the Petitioner's medical records do not corroborate the presence of any defect on the floor, including construction dust, that would have caused the Petitioner to slip. The ambulance report, the ER records from Northwestern, Dr. Petkovic's records, and the physical therapy records all include accident histories; none of these histories make any mention of construction dust. The Petitioner admitted on cross examination that she did not tell any of her providers about the alleged construction dust and stated that she did not bring it up as no one had asked about it.

However, the Arbitrator notes that Dr. Karlsson, the Respondent's Section 12 expert, on August 2, 2022 explicitly asked the Petitioner if there was any water on the floor or anything she tripped on and she responded that she did not notice anything on the floor, which she confirmed at trial.

Petitioner relies on Raul putting out a warning sign out after Petitioner's fall and rubbing his foot on the floor to imply that the area was slippery, but that is not something the Arbitrator can infer without his testimony and unfortunately, he passed away prior to trial.

Accordingly, the Arbitrator specifically finds that no alleged defects on the floor contributed to the Petitioner's fall.

A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2004). Both elements must be present in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill.2d 478, 483, 137 Ill.Dec. 658, 546 N.E.2d 603 (1989). In the present case, only the "arising out of" prong is in dispute. The Petitioner fell at her place of employment a reasonable time just before she was to begin work for the day.

Arising out of the employment pertains to the origin or cause of a claimant's injury. *William G. Ceas & Co. v. Industrial Comm'n*, 261 Ill.App.3d 630, 636, 199 Ill. Dec. 198, 633 N.E.2d 994 (1994). In order to determine whether a claimant's injury arose out of her employment, the risk to which she was exposed must be categorized. Risks to which employees are exposed fall into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105, 304 Ill.Dec. 722, 853 N.E.2d 799 (2006).

The record reflects that, at the time of the Petitioner's fall on January 26, 2022, she had never experienced any problems with her right shoulder and she did not suffer from any medical condition that affected her balance or made her dizzy. Regardless, she slipped and fell as she was walking to her job. The Petitioner told her coworkers she did not know why she fell, and she told Dr. Karlsson she did not notice anything on the floor.

As to whether her fall stemmed from a risk associated with her employment, the Petitioner has speculated that she slipped on construction dust, but her testimony in this regard is speculative,

self-serving, and not credible. The Arbitrator declines to infer the Petitioner slipped on construction dust.

For an injury caused by an unexplained fall to arise out of the employment, a claimant must present evidence which supports a *reasonable* inference that the fall stemmed from a risk related to the employment. *Baldwin v. Illinois Workers' Comp. Comm'n*, 409 Ill. App. 3d 472, 477–79, 949 N.E.2d 1151, 1156–57 (4th Dist. 2011)(emphasis added). An injury resulting from a neutral risk to which the general public is equally exposed does not arise out of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 59, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public. *First Cash Fin. Services v. Indus. Comm'n*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 804 (1st Dist. 2006).

As the Petitioner did not present any credible evidence as to the cause of her fall, or that she was exposed to a risk greater than that faced by the general public, she failed to meet her burden regarding the element of accident.

WITH RESPECT TO (F) THE ARBITRATOR'S DECISION RELATING TO CAUSAL CONNECTION, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has determined that the accident did not arise out of the Petitioner's employment, the issue of causation is moot.

WITH RESPECT TO (J) THE ARBITRATOR'S DECISION REGARDING UNPAID MEDICAL BILLS, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has determined that the accident did not arise out of the Petitioner's employment, the Arbitrator declines to award payment of medical bills.

WITH RESPECT TO (L) THE ARBITRATOR'S DECISION REGARDING TTD, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has determined that the accident did not arise out of the Petitioner's employment, the Arbitrator declines to award TTD.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC009406
Case Name	Mary Harrell v. Walmart
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	24IWCC0262
Number of Pages of Decision	15
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matthew Jones, Brenton Schmitz
Respondent Attorney	Matthew Rokusek

DATE FILED: 5/31/2024

/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

MARY HARRELL,

Petitioner,

vs. NO: 19 WC 9406

WALMART,

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, medical benefits, temporary total disability (TTD) benefits 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 21, 2023 is hereby affirmed and adopted.

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

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

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

May 31, 2024

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

CAH/pm

O: 5/23/24
052

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC009406
Case Name	Mary Harrell v. Walmart
Consolidated Cases	
Proceeding Type	19(b)/8(a) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Julie Schum

DATE FILED: 6/21/2023

THE INTEREST RATE FOR THE WEEK OF JUNE 21, 2023 5.17%

/s/ Paul Cellini, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

MARY HARRELL
Employee/Petitioner
v.
WALMART
Employer/Respondent

Case # **19** WC **09406**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **July 19, 2019** and in the city of **Ottawa** on **April 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, **March 18, 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 not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**48,018.88**; the average weekly wage was $**923.44**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that the Petitioner has failed to prove that she sustained accidental injury arising out of her employment with the Respondent on March 18, 2019.

No benefits are awarded.

Petitioner has failed to prove that she is entitled to penalties or attorney fees as provided in Sections 16, 19(k) and 19(l) of the Act.

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

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

Signature of Arbitrator

JUNE 21, 2023

STATEMENT OF FACTS

This matter was initially heard by the Arbitrator in Chicago on 7/19/19. Petitioner's counsel filed a motion to reopen proofs for submission of a video. At the hearing, the Arbitrator proposed in the alternative a joint stipulation be achieved between the parties after a site viewing. The site viewing was scheduled but the Covid 19 pandemic then occurred before the site viewing could occur. The store remained under the control of Respondent, but pandemic protocols were put into effect which made the site viewing impossible. Both parties continued to work towards the site viewing but frequent resurgences of new variants of the pandemic interfered. During that time period, the software regarding the shelving units was upgraded as part of the normal course of business changing the operation of the system from what existed at the date of accident.

While the Respondent did object to reopening proofs, the parties have come to agreement that proofs would be reopened for the limited purpose of introducing a video as Petitioner's Exhibit 7, which took place on 4/24/23 in Ottawa. With regards to the foundation of the video submitted by Petitioner, the parties stipulate that it depicts the shelving unit in question in the case, that the video was taken by Petitioner's daughter, that the video was taken on 7/20/19, and that Petitioner's daughter would testify that she did not interfere with the operation of the unit. The Petitioner therefore did not testify on 4/24/23.

The parties agree to the modification of the Request for Hearing form (Arbx1) with regard to prospective medical. With regards to prospective medical, should the case be found compensable, Petitioner is seeking a return evaluation to her treating physician for update treatment recommendations.

Petitioner has worked at Respondent's Orland Hills location since November 1994. She had been working as a jewelry manager into September 2018, when she became manager of the electronics department. The job involves customer service, delegating assignments and making sure store shelves are stocked, including bringing in replacement items from the warehouse/back room to refill inventory on the sales floor. She testified that her job physically includes bending and physically lifting and moving heavy objects.

Petitioner's normal work shift was 7 a.m. to 4 p.m. On 3/18/19, sometime between 8 a.m. and noon, Petitioner testified she was in the old apparel warehouse in the back room to get merchandise to be brought onto the sales floor. This storage area contains movable steel shelves, where she would obtain electronics items, including TVs, to put on pallets to be brought out to the store. She testified she was using a straight 7 or 9 foot ladder to get items from the movable shelving. While going down the ladder with a 32" television, holding the handle of the box with one hand, she was trying to move the TV to her other side. She was in a small space and twisted her left knee trying to do this, hearing a pop. She said she missed or "slipped" a step.

Asked if she reported the injury to Respondent, Petitioner testified she used a walkie-talkie to ask for any available member of management to come see her, but that no one ever came, and she continued to work and complete her shift, though her left knee was sore. While she was aware there are cameras in the area, she indicates she was injured, Petitioner does not have access to them and had not seen any video of the incident prior to the hearing.

Petitioner testified that around 3:30 pm, just before the end of her shift (at 4:00 p.m.), she was asked by the assistant store manager, Hassana, to come to the office. When she arrived, Hassana and Petitioner's direct supervisor, Keisha Jackson, were there. She testified that Keisha "asked me to answer to some punches that I missed, some meal punches that I missed." Petitioner explained this was related to her either taking too long or too short of a lunch. The meeting lasted about 10 minutes. As to why she didn't report her injury then, Petitioner testified she felt uncomfortable because of the time violation that had been discussed and "there were

two of them." She said the meal violation had something to do with her being required to take a meal after five hours of work.

When she had difficulty getting out of bed on the morning of 3/19/19, Petitioner testified she emailed the store manager, Jonathan Bradley, to call off work. She identified Px6 as the mail she sent to Bradley at 11:26 a.m. at walmartorland@gmail.com, which she testified was Bradley's work email as she had communicated with him at that address in the past. It states: "I'm writing to report an injury that happened at work yesterday. While pulling TVs down from the top steel I slipped and reinjured my knee. I planned to report the injury to Assistant Manager Lakeisha but I forgot after I was called into the office unexpectedly. I requested today off for my knee and I will keep you posted." (Px6). Based on the time the email was sent per Px6, Petitioner acknowledged it was sent after she was already supposed to be at work, but testified she believed she also called in: "I either called or I went onto the website and reported it." She testified that Bradley never responded to her email.

As to her statement in the email about having "reinjured" the knee, Petitioner testified she had previously injured her left knee when she slipped on liquid that came out of a garbage bag on 11/28/18 or 11/29/18. She said she reported this to Respondent but didn't see a doctor, lose time from work, or pursue a workers' compensation claim. Her knee was sore for a couple hours after the incident and she testified it resolved "probably the next day." She reported it to Respondent because "it was an accident." She also hurt the left knee about 20 years ago while bending to stock juice. She went to the doctor at that time but had no treatment. She testified she had no residuals after either of these incidents and was having no knee problems on 3/18/19 until the incident on the ladder.

Petitioner testified she had been scheduled off work on 3/20/19 and that her left knee was "a little sore" under the kneecap and towards the sides of the knee when she returned to work on 3/21/19. She testified that around 8:30 a.m. on 3/21/19, she found an assistant manager and prepared an accident report. She initially sought treatment at the ER at Ingalls Family Care on 3/21/19 reporting knee pain. The history of present illness indicates that the injury had an onset of three days prior and was due to a fall at home. It does appear this was indicated in a "box checking" sort of manner. A more specific history states: "P presented to the UA with c/o left knee pain x 3 days. Pt states she twisted her knee and felt a 'pop'." It also states: "Pt reports a fall in 11/2018 on that knee." She rated her pain as 7 out of 10. There were no acute findings via x-ray, a knee sprain was diagnosed, and Petitioner was advised to return to work on 3/23/19 and was discharged to follow up with her primary provider within 2 days, noting also possible follow up with orthopedic surgeon Dr. Kusuma. (Px1). The Arbitrator did not see anything additional in these records with regard to whether the injury was related to work or not. Again, it does specifically state the injury occurred at home.

Petitioner testified she understood she was supposed to follow up with her primary provider or orthopedic physician, but that her primary provider was on a leave of absence and so she returned to work on 3/23/19 and continued to work, though her knee felt sore. As to the history of injury noted by Ingalls, Petitioner testified she had not reviewed what Ingalls wrote into her report.

Petitioner followed up with orthopedic surgeon Dr. Giannoulias on 4/2/19. At that time, Petitioner reported a work injury: "states that she was coming down a ladder with a TV in her hands. She turned around, missed a step and twisted her left knee." She reported pain, 6/10 at the time of the exam, clicking and swelling in the knee since that time. Also stated: "She states that she did have a couple of previous injuries in September and December of last year where she slipped and fell but she really didn't have any significant knee pain. She did not seek medical attention for it and had no residual knee pain afterwards." Dr. Giannoulias ordered a left knee MRI, off work and physical therapy. (Px2). Petitioner testified that Dr. Giannoulias held her off work through the date of hearing. The medications he prescribed were dispensed directly to the Petitioner by his office.

The 4/10/19 left knee MRI report impression was: 1) tear of the anterior and posterior horns of the lateral meniscus, ACL sprain, a 1 cm cystic area anterior to the horn of the lateral meniscus likely representing a parameniscal cyst, and mild anterior patellar edema and mild knee joint effusion. (Px2). The Arbitrator notes that an intake form in Px3 for the MRI states: "Pt c/o anterior, medial and lateral left knee pain after 2 injuries in the past 5 months. No surgery. No priors." Asked to answer yes or no if it was a worker's comp claim, it states "yes." (Px3).

Petitioner then saw orthopedic surgeon Dr. Koutsky on 5/3/19 and 6/14/19. It is unclear why Petitioner followed up with Koutsky instead of Giannoulias. On 5/3/19, the stated history was of a 3/18/19 injury at work when Petitioner was on a ladder with a TV in her hands, missed a step and twisted her left ankle and knee, and noticed significant pain, stiffness and swelling: "She did tell her supervisor about the injury." She went to urgent care a few days later. Following exam and his review of the MRI, Dr. Koutsky diagnosed a left lateral meniscal tear. He specified his review of the MRI noted age-related degenerative changes, evidence of strain of the ACL, and no clear evidence of medical meniscus or other cruciate ligament tears. Noting limited improvement after a month of therapy, the doctor recommended arthroscopic surgery with partial meniscectomy, which he opined was causally related to the reported work injury. The Petitioner wanted to have the surgery, and she was advised to continued therapy and to remain off work pending medical clearance. The medication prescription continued to be ibuprofen. On 6/14/19, Dr. Koutsky indicated the exam was unchanged and continued therapy, off work status and the surgical recommendation. (Px2).

The records of South Suburban PT indicates treatment from 4/4/19 through 7/1/19. The initial history on 4/4/19 states that she was injured at work coming down a ladder carrying a TV, missed a step and twisted her left knee: "On lunch she called Illinois Bone & Joint, emailed her store manager the next morning", then went to Urgent Care on Thursday. Through 5/6/19, she reported 5/10 to 7/10 left knee pain with little improvement, consistently noting stairs aggravated her pain. At the next 12 visits (through 6/7/19), she generally reports 4/10 to 5/10 pain. She also notes pain with rainy weather and with prolonged sitting or walking during these sessions. Her visits from 6/10/19 through 7/1/19 note ongoing 5/10 to 6/10 knee pain. The therapist noted that she had improved strength and near-normal range of motion, but that she remained limited by pain. The records note clicking with resisted extension, and intermittent edema. (Px4).

Petitioner was continuing to undergo therapy at South Suburban as of 7/19/19. She testified that ultrasound treatments were okay, but the movements performed with the knee are difficult. Petitioner testified that Dr. Koutsky has continued to keep her off work pending surgery, which she desires to have given the impact of her knee soreness on her life, such as stair use and driving. She takes ibuprofen daily, and uses a cream that was prescribed to her, which she testified helps. The prescribed medication leaves her tired and sleepy so she doesn't like to take it. As a longtime employee, Petitioner testified she wants to return to work there. She has had no new injuries to her left knee between 3/18/19 and 7/19/19. Again, she did not testify after the initial hearing, so the Arbitrator has no knowledge about her condition since 7/19/19.

On cross examination, Petitioner could not recall if she was holding the TV in her left or right hand as she descended the ladder on 3/18/19 or if she was turning to the left or right while on the ladder when she twisted her knee. She testified that the reference to her injuring her knee at home three days earlier in the 3/21/19 Ingalls note was not accurate. She agreed she had an incident where she slipped on ice in the parking lot at work but believed this was in December 2018, not February 2019. She agreed that an investigation later showed she fell out of the door of a truck getting into a personal vehicle. Petitioner acknowledged that she was called to Respondent's office for not punching out for lunch when she should have and that this had occurred multiple times and she agreed the discussion with management also involved editing her time to show she was present when she actually wasn't.

In Rx1, Petitioner identified, at the 8:34 mark in the video, the area to the right where there's an entryway to the storage shelves where she alleges she was injured. She agreed she was the person depicted walking into the video at that time. She did recall having a problem with a pallet later in the day on 3/18/19 after she hurt the knee and asked other associates to help her.

On redirect testimony, as to editing of timecards, Petitioner testified that Keisha Jackson, Co-Manager Ricky (on 4/8/18) and Assistant Manager Chanyell had advised her in the past that "if it involved the customers and you're going late for a meal, to adjust your time; and they showed me how to do it." Petitioner agreed she was advised that if she did not take her lunch break prior to being on the clock for five hours, this constituted a meal violation. If the delay was due to a customer, they showed her how to do an electronic time adjustment (ETA). As an example, if she left for lunch a minute late and returned a minute late, she would adjust the recorded time to 12:00 and 1:00 from 12:01 and 1:01. She agreed she did this multiple times and that this is the violation that was being addressed at the meeting on 3/18/19. As to the prior incident in the parking lot, Petitioner testified she was going with her husband to eat, the ground was icy, she stomped the slush off her boots and when she went to step into his truck, she slipped on the step and fell off the truck. She testified she fell onto her right side and did not injure her knee.

Erica Taylor, Respondent's asset protection manager, testified it was her job to investigate accidents involving workers and customers, and to control profit and "shrink." She is responsible for researching the video when she is informed about an accident. She must send a minimum of four hours of video from all applicable angles to the claim adjuster. She also will pull video of the customer or employee when they enter and exit the building to see what they looked like at those times. Ms. Taylor testified she was in charge of investigating the available video when Petitioner reported a work injury. She testified that the surveillance cameras were working properly, that the date/time stamp was functioning properly, and that the video exhibit is a correct and accurate copy of what she obtained with no editing or alteration.

Ms. Taylor was shown excerpts of the video (Rx1) as she testified. The video begins at 8 a.m. and runs through Noon on 3/18/19. She testified that the area where Petitioner alleged being injured has shelving units on both sides and that ladders are not stored in this area so employees must bring them into the area to use. Ms. Taylor agreed Petitioner was depicted wearing a WalMart vest in the lower left corner of the video working with TVs at the 8:34 mark. At the 8:47 mark, Petitioner is seen in the right corner of the video for about 12 minutes, and the area she was in is where there's a gap between the shelving units. She identified co-managers "Jeff", Ricky Paoletti and manager Johnathan Bradley walking through at 8:57. At 8:58, Petitioner is depicted climbing over boxes without any visible problems and moves a pallet that causes TVs to fall. She climbs over boxes and moves them using both legs. Petitioner then uses her walkie-talkie, apparently to request help, after which Anthony and Erin come in to help restack the boxes. Ms. Taylor testified that Petitioner remains in the video frame until 9:05, after which there is no further video of Petitioner. Taylor testified that between 9:00 and 9:05 there were no obvious problems seen with Petitioner's movement or walking. She testified that at no time in the four hours of video was the Petitioner or anyone else seen bringing a ladder into that area.

According to Ms. Taylor, Petitioner in February 2019 reported an incident where while walking to her husband's vehicle she slipped on ice and fell. After reviewing the video two days later, Ms. Taylor testified it actually showed Petitioner had both feet inside the vehicle and then appeared to fall out of the vehicle. Petitioner's supervisor was advised of this, but since no medical treatment was sought that was where it ended. Petitioner also was investigated between January and March 2019 for time theft based on changing her daily punches. Such investigation would involve reporting it to the direct assistant manager, who looks to payroll and gives it back to store with findings, after which Taylor assists with providing the video to compare. In this case, the investigation indicated Petitioner was editing her time "very often." She was seen coming into work late, Taylor believed at least 10 times, and coming back from lunch late, then editing her time. While Petitioner

indicated this occurred due for customer service reasons, the video indicated she was not helping customers "at all times" and was seen talking to other department managers and not clocking out timely. At least ten incidents involved being late for work and editing her time to show she was there. The information was provided to a supervisor for further action at what Taylor believed was the end of February 2019.

On cross-examination, Ms. Taylor testified the consequences for time theft can be up to and including termination, and to her knowledge, the Petitioner was still a Respondent employee on 7/19/19. She is aware of Petitioner having been held accountable for productivity issues and indicated that she was in the process of being held accountable for the time theft until "legal things started to happen."

As to the incident with the truck in the parking lot, to Ms. Taylor's knowledge, Petitioner did not seek medical treatment for this, and any discrepancies between an injury history and what is depicted on video is typically not discussed unless treatment is sought. Again, Petitioner's supervisor was advised of the video findings and Taylor agreed Petitioner did not file a personal injury or workers' compensation claim related to the parking lot incident.

Looking at the 11:59 mark of the video (Rx1), Ms. Taylor testified that the rolling racks Petitioner described are to the right in the scene and out of the scene. Electronics are in the foreground and toys in the back. The "hallways" or lines between the racks extend about 15'. Employees take items off the shelves and load them onto carts or pallets. She testified there are about 20 ladders hanging on walls in various places throughout the two warehouses, as well as movable stairs. After testifying that ladders should always be removed from these hallways, she reiterated that no one was seen bringing a ladder into the rolling racks between 8:00 and noon. Asked if she still couldn't say if a ladder was in the racks despite not seeing anyone bring one in the video, Ms. Taylor testified: "Well, those rolling racks were moved. So I know there was not a ladder in there, because you can't move the rolling racks if something is obstructing it." She testified the racks were being moved throughout the four hour video, via the use of a button. Moving a rack closes the area that is open in the video. There are sensors that stop the racks from moving if there are any obstructions. The racks move sideways. An example of the movement is depicted at the 10:48 mark. She testified that while there still is a small gap that remains when they're closed, it is not big enough for a person to go through. There is no camera view that would show what is to the right of what is depicted in the Rx1 video. As one pathway/line closes, another one opens. Ms. Taylor testified that if a ladder was in one of the pathway openings, none of the racks would move.

On rebuttal, Petitioner testified that the sensors for the moving shelves are near floor level. She testified she left things like TVs in the pathway/line all the time. On the alleged accident date, she denied bringing the ladder into the walkway, testifying it was already there. She couldn't recall exactly where she found the ladder or where she left it. Petitioner has used the moving shelves for years and works in the back room every day at work, so she had experience with them.

Petitioner wasn't certain what time she was injured, but that it was before she went to lunch shortly after noon, and that she believed it was between 8 and 9. She testified that when the store managers were depicted in the video they were on their way to a meeting, and that she was asked but declined to go because she had to hurry up and finish what she was doing. Asked if that was why she didn't report her injury to them, Petitioner testified: "Yes, because when – yeah. When the meeting was over, they just scatter and go where they're supposed to go."

Petitioner agreed she was not limping on the accident date, but that she contacted someone to help her with the pallet issue because she was having a hard time. She only limps now "when I move too much or when I like get up from a chair because it hurts to straighten my leg completely. She was feeling worse by the next morning.

She testified that ladders are often left by overnight workers in various places, and that they are never where they are supposed to be because people don't want to put them back.

Ms. Taylor countered that if there had been a ladder between the noted racks, they would not have been able to close completely. There would be no way to fold a 7' or 9' ladder that would change this. It would get smashed. She disputed Petitioner's claim that there were only sensors at the lower level of the racks, testifying they at low, mid and upper level sensors, and that they cannot be sidestepped.

As to her disciplinary issues, Petitioner testified that in November or December 2018, due to issues she was having with management, she filed a complaint with a Walmart program called "Global Ethics", which she described as an independent arbiter. After this, Petitioner testified that her relationship with her managers, including Erica, Keisha, Jonathan, and Ricky, worsened. She testified this complaint had nothing to do with the timecard issue and agreed there was some "bad blood" with management. She then also filed an EEOC claim on 3/14/19 or 3/15/19, indicating she didn't have any knowledge of any timecard issues at that time.

The Arbitrator reviewed both videos, Px7 and Rx1. In reviewing Rx1, the Petitioner was in one of the walkways pulling numerous items and stacking them on a cart. This includes attempting to pull the cart in what appeared to have involved reasonable effort on Petitioner's part. When the items collapse off of the cart, Petitioner is seen climbing over them and moving them around without any particular hesitancy or difficulty as to her knee. She does use a walkie talkie and soon thereafter another worker comes in to assist her, and another pulls the cart away. The Arbitrator notes that the Petitioner does not appear to be limping or moving awkwardly with regard ambulation. The three supervisors noted walk through the area and do not appear to communicate with Petitioner. While the shelves are depicted moving, the view is perpendicular to the walkways so only the opening of a few are visible. There are times when the Petitioner is not seen for several minutes while in the walkway. Until the completion of loading the cart, she was not visibly having obvious problems doing her job. An example of the movement of the racks, at 10:48 as noted and again at 10:51, indicates to the Arbitrator that it appears when one of the walkways is fully opened, no other walkways appear to be open. In other words, it appears that only one walkway can be open at a time, while the other shelves are then reasonably tight to one another.

In reviewing the videos in Px7, the Arbitrator's review notes the view is looking directly down a walkway while a ladder is positioned in it. One is a closed and leaning ladder and the other is an open ladder. Someone is pressing a button to operate the moving shelves. The shelves are seen moving essentially until it senses the ladder is there, and it stops just before starting to crush them. It shows just one walkway, so it is not clear what the adjacent walkways look like or if other walkways are usable by a worker without opening them further. It is clear to the Arbitrator that a ladder could be left in a walkway as the shelves will move until it senses it cannot move further, but again, it appears that this then impacts the other walkways in the system. It can close significantly more tightly when the ladder was folded.

As noted above, proofs in this matter were reopened on 4/24/23 by the agreement of the parties. The sole stipulated purpose of the reopening was for the submission of two videos (Px7) into evidence.

Following the initial receipt of this motion and a discussion of the basis for the request, the Arbitrator asked the parties to try to provide a joint stipulation following a site viewing as to whether a ladder could, in fact, be stored in the applicable walkway. A site viewing was scheduled but the Covid pandemic stopped the resulted in the inability to complete the on-site viewing, and thereafter frequent resurgences of the pandemic derailed other attempts at the viewing. Ultimately, in what Respondent indicated was part of the normal course of business, the shelving units were altered, resulting in the viewing being moot.

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner has failed to prove she sustained accidental injury arising out of her employment.

First, the Arbitrator notes that while Px7 clearly indicates a ladder can be placed within a walkway, the video shows that the racks would stop moving before closing on the ladder and breaking or crushing it. It also appears that the racks themselves are pressed together fairly closely other than the walkway that a worker is using. Thus, it looks like if a ladder were within one of the walkways, no other walkways could be used until the ladder was removed. If a worker were opening up another walkway, the process could not be completed if there was an item stuck in one of the other walkways. The Arbitrator acknowledges that it is difficult to see if the other racks are completely closed together when one walkway is open, but they certainly appear to be quite close to being completely closed. As testified to by Ms. Taylor, no one is seen moving a ladder in or out of the walkway the Petitioner was working in between 8 and 9 a.m., and at the 10:48 and 10:51 marks, the walkway she was working in had been closed up. Petitioner testified that the problem with the pallet, or cart, occurred after she was injured. As this was depicted on video just prior to 9:00 a.m., this would support the fact that the injury occurred between 8 a.m. and 9 a.m. As testified to by Ms. Taylor, there is no evidence in Rx1 that a ladder was ever removed from the walkway the Petitioner was working in at that time, and later in the video another worker closes the shelving where the walkway Petitioner was in had been. This infers there was no ladder in that walkway. It is unclear to the Arbitrator whether the other end of the walkway is open or against a wall, such that perhaps a ladder could have been moved in or out of the other end, as this was not testified to by Petitioner or Taylor.

While Petitioner testified that she leaves items like TVs between the shelving units all the time, it seems like this would be difficult unless the TV box was very thin, as it would prevent any other walkway from being fully opened if a sensor reacted to it.

As to the medical records in evidence, Petitioner's initial medical visit of 3/1/19 at Ingalls has a stated history referencing that she injured her knee at home three days prior. The records of South Suburban PT contain a 4/4/19 history of injuring her knee carrying a TV down a ladder at work, but also states that during lunch that day she called Illinois Bone & Joint, then emailed her store manager the next morning. Thus, her testimony is she believed her knee condition was significant enough to contact a medical facility yet did not believe it was important to report the injury the day it occurred. The Petitioner had an opportunity to report the injury when multiple supervisors passed through the warehouse as she was working there, as seen in the video. She had an additional opportunity to report the injury at the end of the day when she was called into the office due to allegations of altering her timecards. The Arbitrator notes the Petitioner stated that she was afraid to report it because two managers were present. However, one of them was her direct supervisor, which would have been the primary person to report it to.

The Petitioner testified she used a walkie-talkie to call a manager to come to her to report her injury, but no manager came. That she would then just continue working and not further pursue the reporting of the accident does not make logical sense to the Arbitrator. It is unclear why she would not have sought out her supervisor to report the injury, or why she couldn't have even reported the injury over the walkie talkie. As noted, she had at least two encounters with management that day and acknowledged she did not report the accident at the time of

those opportunities. It is suspect in the Arbitrator's view that she only did so after the timecard allegations were made.

As noted, the Petitioner did not report the injury prior to being notified there was a disciplinary action pending against her. The email produced by the Petitioner does look like it was addressed to her supervisor, if the email address she testified to as his was correct, with a date and time stamp from 3/18/19, but the document submitted into evidence also appears to have been sent from one of Petitioner's email addresses to another, and then to her attorney. If that is the case, there appears to be part of the email chain missing, i.e., the email that was sent from her one email to the other. This makes it difficult to know whether there are any other parts to the email chain that are missing. Again, while Petitioner testified that Bradley did not respond to her email, it seems unusual that a store manager would not communicate with a worker who reported an injury in writing.

The Petitioner also testified that there was "bad blood" between her and management in late 2018, which at some point involved separate legal filings. Thus, there had been tension between Petitioner and Respondent's management well prior to the alleged accident date.

In the Arbitrator's view as a layperson, the Petitioner does not appear to be obviously injured. When the cart with all the merchandise she had piled onto it fell, she was climbing over and around boxes and did not appear to be hampered in any way. She does not appear to be any different viewing her both before and after she filled the cart. There also is an indication in the email of "reinjuring" her knee, which obviously infers it was previously injured, as well as that she "forgot" to report it when she met with Hassana and her direct supervisor, Lakeisha. Petitioner testified she injured the knee when she slipped on a liquid that had come out of a garbage bag at the end of November 2018. She testified she reported this to Respondent but that she was probably fine by the next day. Again, it seems like an odd statement to indicate she "reinjured" her knee if she basically had one day of soreness from the previous incident.

There also was a prior incident discussed at trial involving an injury or accident to Petitioner in the parking lot in December 2018. When the Petitioner was asked about it, she was not clear on whether this occurred in December 2018 or February 2019, but she did testify that she slipped and fell on ice. Ms. Taylor, on the other hand, testified that in reviewing the video of this incident, the Petitioner instead appeared to have had both feet inside of a truck when she fell out. This was thus a prior incidence where it appears the Petitioner's recollection is different than what was noted on video.

Taking all of the evidence into account, the Arbitrator certainly acknowledges that it appears it is possible the Petitioner may have used a ladder in the walkway and may have injured herself as she testified to. However, her credibility is questionable in the Arbitrator's view. The Arbitrator finds that the preponderance of the evidence supports the finding that the Petitioner's history of accident is suspect and that it supports the finding that Petitioner failed to prove that it was more likely than not that an accident occurred as she testified to.

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

Based on the Arbitrator's findings regarding accident, this issue is moot.

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

Based on the Arbitrator's findings regarding accident, this issue is moot.

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

Based on the Arbitrator's findings regarding accident, this issue is moot.

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

Based on the Arbitrator's findings regarding accident, this issue is moot.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings regarding accident, the Arbitrator further finds that the Petitioner is not entitled to penalties or fees pursuant to Sections 19(k), 19(l) and 16.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC033337
Case Name	Scotty Grant v. Village of Rosemont
Consolidated Cases	
Proceeding Type	Remand from the Circuit Court of Cook County
Decision Type	Commission Decision Remand Arbitration
Commission Decision Number	24IWCC0263 [23IWCC0045]
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Michael Youkhana
Respondent Attorney	Anthony J. Casale, Robert Smith

DATE FILED: 5/31/2024

/s/Carolyn Doherty, Commissioner

Signature

24IWCC0263 [23IWCC0045]

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTTY GRANT,

Petitioner,

vs. NO: 18 WC 33337
23 IWCC 0045

VILLAGE OF ROSEMONT,

Respondent.

DECISION AND OPINION ON REMAND

This matter, initially arising under a Petition for Review filed under Section 19(b) of the Act, comes before the Commission on remand from the Circuit Court of Cook County. In accordance with the order of the circuit court filed on February 14, 2024, the Commission, having further considered the submissions of the parties, and being advised of the facts and law, calculates the average weekly wage, maintenance benefit rate, and temporary total disability benefit rate and awards benefits to Petitioner as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

I. PROCEDURAL BACKGROUND

Petitioner filed a claim under the Act for injuries he allegedly suffered as a Teamster working at a trade show for Respondent. Petitioner's claim was the subject of a Section 19(b) arbitration hearing held on August 24, 2021. In a decision filed on May, 2022, the Arbitrator concluded, in the body of the opinion, that Petitioner's average weekly wage was $387.02. However, in the "Findings" form, the Arbitrator's order awarded maintenance benefits at the rate of $871.16 per week based on an average weekly wage of $1,306.08.

Petitioner filed a Petition for Review principally challenging the inconsistent figures for the average weekly wage. Respondent filed a Motion to Correct the May 11, 2022 decision based

on the discrepancy between the ordered level of maintenance benefits and the average weekly wage determination. On August 16, 2022, the Arbitrator issued a Corrected Decision that consistently found an average weekly wage of $387.02, but failed to alter the ordered maintenance benefits of $871.16 per week. Rather than file a second 19(f) motion before the Arbitrator, Respondent filed a Petition for Review and moved to dismiss Petitioner's Petition for Review as having been prematurely filed.[1]

On January 25, 2023, following oral argument, the Commission issued a decision affirming and modifying the Arbitrator's decision. The Commission granted Respondent's Motion to Dismiss Petitioner's Petition for Review as Petitioner failed to file a PFR from the corrected Arbitration decision. The Commission affirmed the Arbitrator's award of maintenance benefits, correcting a clerical error to specify the maintenance period was 15 and 5/7ths weeks. When reviewing the maintenance rate, the Commission exercised its discretion to address the average weekly wage issue, having concluded that it was unable to determine the proper maintenance rate/award without also addressing the average weekly wage in this specific instance. The Commission concluded the average weekly wage was properly calculated at $2,135.15 per week and adjusted the award of maintenance benefits and temporary total disability benefits accordingly.

Respondent sought judicial review of the Commission's decision in the Circuit Court of Cook County. On February 14, 2024, the Circuit Court entered an order confirming the Commission's decision regarding the maintenance period, temporary total disability period, and Respondent's entitlement to a credit for temporary total disability benefits already paid. The Circuit Court also confirmed the Commission's determination to affirm and adopt the balance of the Corrected Decision of the Arbitrator, excepting the issue of the average weekly wage. Specifically, the Circuit Court further ruled that "the Commission acted properly within its discretion in choosing to address the average weekly wage issue – despite the fact that the issue was not raised in the Village of Rosemont's Petition for Review." Order, p. 2. However, the court concluded that Respondent did not have an opportunity to be heard on the issue, which the Circuit Court found amounted to a violation of procedural due process. *Id*.

Accordingly, the court set aside the Commission's decision as to the issue of the applicable average weekly wage ($2,135.15), and remanded the matter to the Commission "for further development of the record regarding the disputed issue of the applicable average weekly wage, permitting the Village of Rosemont an opportunity to be heard as to that issue." *Id*. at 3. The court directed the Commission to "decide the issue of the applicable average weekly wage in light of any arguments or evidence raised by the Village of Rosemont, including, but not limited to, whether applying the second method of calculation specified in 820 ILCS 305/10 instead of the default method would lead to a windfall recovery (see *Ricketts v. Indus. Comm'n*, 251 Ill. App. 3d 809, 811 (1993) (holding concern over a potential windfall to the employee 'remains a viable, although not determinative, consideration in calculating the average weekly wage' under Section 10's current formulation)), or whether the Arbitrator's exclusions of overtime pay and non-union earnings was appropriate." *Id*. The Commission was "authorized to order the submission of additional briefing from one or both parties, conduct further hearings, or employ whatever methods it deems necessary to comply with [the Circuit Court's] order." *Id*. The parties agreed to proceed

[1] Petitioner failed to file a Petition For Review from the Corrected Decision.

by the submission of supplemental briefs on the issue, which were submitted by both parties on April 22, 2024.

II. FINDINGS OF FACT

The Commission hereby incorporates by reference the "Findings of Facts" and findings included in the "Conclusions of Law" contained in the Arbitrator's Corrected Decision filed on August 16, 2022, attached hereto and made a part hereof, to the extent it does not conflict with the Commission's Decision and Opinion filed on January 25, 2023, which is attached hereto and made a part hereof, to the extent these decisions do not conflict with the Circuit Court of Cook County's order filed on February 14, 2024. The Commission also incorporates by reference the February 14, 2024, Circuit Court order, attached hereto and made a part hereof. Any additional findings of fact in this Decision and Order on Remand will be specifically identified in the discussion below.

III. CONCLUSIONS OF LAW

As our supreme court has noted, section 10 of the Act provides four different methods for calculating the average weekly wage:

> "(1) By default, average weekly wage is 'actual earnings' during the 52-week period preceding the date of injury, illness or disablement, divided by 52. (2) If the employee lost five or more calendar days during that 52-week period, 'whether or not in the same week,' then the employee's earnings are divided not by 52, but by 'the number of weeks and parts thereof remaining after the time so lost has been deducted.' (3) If the employee's employment began during the 52-week period, the earnings during employment are divided by 'the number of weeks and parts thereof during which the employee actually earned wages.' (4) Finally, if the employment has been of such short duration or the terms of the employment of such casual nature that it is 'impractical' to use one of the three above methods to calculate average weekly wage, 'regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.'" *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 230-31 (2001).

The Arbitrator found that in 52 weeks prior to the accident, Petitioner's earnings from Respondent were $20,125.00.[2] The Arbitrator then calculated an average weekly wage of $387.02 based on the default method of calculation specified by section 10 of the Act. (Corrected Decision, pp. 9-10.) The maintenance benefit shall not be less than the temporary total disability rate

[2] The Circuit Court order states that the Commission's review may extend to the questions of whether the Arbitrator's exclusions of overtime pay and non-union earnings were appropriate. Order, p. 3. The Commission's original decision in this matter noted that neither party objected to the Arbitrator's exclusion of these sums from the calculation of Petitioner's earnings. On remand, both parties have relied upon the Arbitrator's calculation of Petitioner's earnings. Respondent's Supplemental Brief, p. 2; Petitioner's Brief re Average Weekly Wage, p. 5. However, as the Circuit Court's order directs the Commission to consider these questions, the Commission affirms and adopts the findings of the Arbitrator excluding these sums for the reasons stated in the Corrected Decision of the Arbitrator.

determined for the employee. 820 ILCS 305/8(a) (West 2022). The Arbitrator's calculated maintenance rate of $258.01 per week in the body of the Corrected Decision, using an average weekly wage of $387.20, results in a maintenance rate that falls short of the minimum rate of $286.00 per week for a married claimant with a child, as Respondent recognized and asserted as the rate to be used by the Commission on initial review.

The Commission finds that given the nature of the special events work, Petitioner's average weekly wage is to be calculated in accordance with the second method of calculation specified in section 10 of the Act, as elaborated by the Illinois Supreme Court in *Sylvester*, as opposed method as urged by the Respondent. Section 10 expressly provides that "if the injured employee lost 5 or more calendar days during such [52-week] period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." 820 ILCS 305/10 (West 2020). The evidence in this case indicates that Petitioner lost more than five calendar days during the relevant period through no fault of his own. Based on the wage statement in Respondent's Exhibit 4, Petitioner worked 66 days in the 52 weeks prior to his accident and worked at least once on each of the days of the week, proving that he was available to work seven days per week. Applying the second method of calculation specified in section 10 of the Act results in an average weekly wage of $2,135.15 and a maintenance rate of $1,423.43 per week.

In support of the argument that the default method should apply, Respondent argues that *Sylvester* is distinguishable because the claimant there testified that he worked only for one company, that he was required to be on call all week, year-round, and that when work was available, he worked a 40-hour week. The claimant also testified that when he worked a full week, he worked eight hours per day, five days per week. See *Sylvester*, 197 Ill. 2d at 228. Respondent overlooks that in *Sylvester*, the claimant was a roofer foreman who usually signed up for unemployment in the winter because the weather prevented much work from being done. *Id*. Respondent also overlooks that in *Sylvester*, the claimant's wage records indicated that the number of hours he worked per week varied from 3 to 40, and his weekly pay ranged from $60.75 to $818.25. *Id*. The claimant merely estimated the days he worked based on the hours listed in the records. *Id*. The claimant in *Sylvester* only worked 131 days for the employer during the previous 52 weeks. *Id*. at 231. Given that record, the decision in *Sylvester* clearly did not depend on whether the claimant worked a typical 5-day, 40-hour week, as Respondent suggests on remand. In this case, Petitioner later testified that he was "on-call" for special events for multiple employers through the Teamsters' Union. The exhibits introduced by both parties establish which and how many days he worked and the hours worked each day, which varied, as in *Sylvester*. The evidence is sufficient to calculate the average weekly wage using the second method specified by Section 10 of the Act, just as the *Sylvester* court did.

The Circuit Court remanded this matter to consider whether using this second method of calculation instead of the default method would lead to a windfall recovery. In *Sylvester*, the Illinois Supreme Court considered whether use of the second method listed in Section 10 (and applied here) would result in a windfall which "makes it more financially advantageous to be injured than to be employed." See *Sylvester*, 197 Ill. 2d at 235. However, the *Sylvester* court also observed that while concern over a windfall to the employee is relevant in computing average weekly wage, it is not determinative. *Id*. at 236. The court further observed that the appellate

court had typically rejected the windfall argument in construing Section 10 to exclude lost time from the computation of average weekly wage. *Id*. The *Sylvester* court was satisfied with a calculation that led to the claimant receiving approximately 32% more in temporary total disability benefits than he would have earned as regular wages. See *id*. at 235. The court contrasted that result with a wage computation which would have resulted in a claimant being awarded a windfall amount almost six times greater than her actual earnings. *Id*. (discussing *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 52 (1983)).

Regarding the subject of windfall, Respondent argues on remand that the windfall results from Petitioner being paid an annual salary of $111,027.80 which results from the annualization of the actual earnings in this case of $20,125.00 and Petitioner is thus provided a "benefit" more than five times what he received in the year prior to his injury. (Supplemental Brief, p. 4.) However, in this case, under the Commission's calculation, Petitioner would be paid a maintenance benefit of $1,423.43 per week. On an annualized basis, the total benefit award using this figure is $74,018.36, considerably less than $111,027.80 figure advanced by Respondent. When considering whether, once calculated, this benefit award creates the sort of windfall which makes it more financially advantageous to be injured than to be employed, it is clear that it does not in this case.

In sum, given this record, the Commission concludes that calculating Petitioner's average weekly wage using the second method specified by Section 10 of the Act in this case does not result in an improper windfall of the sort discussed in *Hasler* and *Sylvester* and is more consistent with the purpose and intent of the Act than the statutory minimum award sought by Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator dated August 16, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the remainder of the Corrected Decision of the Arbitrator, as confirmed by the Circuit Court of Cook County.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's average weekly wage for this claim is $2,135.15.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,423.43 per week commencing from October 29, 2018, through May 14, 2021, a period of 132 and 5/7ths weeks, that being the period of temporary total incapacity for work under section 8(b) of the Act. Respondent is entitled to a $115,615.37 credit for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $1,423.43 per week for 15 and 5/7ths weeks, representing the period from May 5, 2021, through July 31, 2021, and from August 3, 2021, through August 24, 2021, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent 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.

May 31, 2024

d: 5/23/24
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	18WC033337
Case Name	Scott Grant v. Village of Rosemont
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision - Corrected
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Steven Fruth, Arbitrator

Petitioner Attorney	Michael Youkhana
Respondent Attorney	Robert Smith, Anthony J. Casale

DATE FILED: 8/16/2022

/s/Steven Fruth, Arbitrator

Signature

INTEREST RATE WEEK OF AUGUST 16, 2022 3.02%

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
***CORRECTED* ARBITRATION DECISION**
19(b)

Scotty Grant
Employee/Petitioner

v.

Village of Rosemont
Employer/Respondent

Case # **18 WC 33337**

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **August 24, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

N. ☐ Is Respondent due any credit?
O. ☒ Other **Vocational Rehabilitation**

FINDINGS

On **October 8, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**67,916.16**; the average weekly wage was $**387.02**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under §8(j) of the Act.

Petitioner failed to prove that he is entitled to penalties and attorney's fees.

Petitioner failed to prove that he was entitled to vocational rehabilitative services.

ORDER

Respondent shall pay Petitioner $**871.16**/week for **14 & 1/7** weeks for maintenance benefits from **5/5/2021** through **7/31/2021** and from **8/3/2021** through **8/24/2021**.

Petitioner's claim for penalties and attorney's fees is denied.

Petitioner's claim for vocational rehabilitative services denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

Augusst 16, 2022

SCOTTY GRANT v. VILLAGE OF ROSEMONT
18 WC 33337

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***K:*** What temporary benefits are in dispute? Maintenance; ***M:*** Should penalties be imposed upon Respondent?; **O:** Is Petitioner entitled to vocational rehabilitative services?

Petitioner claims an AWW of $1,306.09, which Respondent disputes. Respondent claims an AWW of $387.02.

FINDINGS OF FACT

It is undisputed that on October 8, 2018, Petitioner Scotty Grant suffered traumatic injury to his right shoulder and right elbow that arose out of and in the course of his employment with Respondent Village of Rosemont. It is also undisputed that Petitioner was an employee for Respondent., despite obtaining his job through his union. Petitioner testified that he was a Teamster for the Local 727 working at Allstate Arena.

Petitioner testified that as part of his duties as a Teamster, he is required to carry out the following tasks: loading, unloading, stacking, and unstacking equipment. He testified that the equipment consisted of rolls of carpet and padding and audio-video cases. Petitioner testified that the audio-video cases weigh between 200-400 pounds. He testified that there were occasions where he was required to load the audio-video cases above his shoulder and also unload the audio-video cases from his shoulder down to the ground.

Petitioner further testified that he was not a permanent employee for the Village of Rosemont. Petitioner testified that he was "on-call" out of his Teamsters Union Local. His union provided the opportunity to work for Respondent on the date of the accident. He earned $40.25/hour at the time of his accident but did not testify to how many hours a week he generally worked. He acknowledged that his workhours varied from week to week. He testified that he worked at venues other than Respondent's Allstate Arena. Petitioner testified that Respondent contacted his union hall, and the union would call members who are on a list for the job.

Petitioner testified that he sustained an accident on October 8, 2018 while working for Respondent at Allstate Arena. He was injured when he was unstacking a 200-pound case with a co-worker. He injured his right bicep and right shoulder when the case shifted, and he tried to catch it. Petitioner reported the accident to his union steward and a representative from Respondent. He also testified on cross-examination that he continued to work for another week.

On October 30, 2018, Petitioner presented to Dr. Theodore Suchy of Concentra Urgent Care complaining of right elbow and biceps pain (PX #5). A physical examination revealed no biceps tendon present, weak supination, weak flexion, and the biceps showing no palpation. Dr. Suchy recommended urgent surgical exploration of the rotator cuff along with repair biceps. Dr. Suchy performed surgery on November 3, 2018. surgery with repair of the distal bicep tendon (PX #4). The pre-operative and post-operative diagnoses consisted of acute rupture of the distal biceps tendon. Petitioner testified that following surgery he was prescribed and completed physical therapy and work conditioning. Petitioner testified that he was kept off work by Dr. Suchy throughout the time of that treatment.

Petitioner testified that he continued having issues with his right arm, despite completing the post-surgical physical therapy and work-conditioning. On May 6, 2019, Petitioner presented to Dr. Steven Chudik of Hinsdale Orthopaedics complaining of right elbow, shoulder, and biceps pain (PX #1). The physical examination revealed positive Neer's impingement and Hawkins impingement signs. The doctor's impression was right shoulder pain with concern for rotator cuff and labral tear as well as concern for s distal biceps repair. Dr. Chudik recommended MRIs of the right elbow and right shoulder and kept Petitioner off work.

Petitioner had the MRIs on May 15, 2019. The right shoulder MRI reflected a full thickness tear of the supraspinatus tendon anteriorly with retraction of the torn tendon fibers by 1.4 centimeters, severe tendinosis and interstitial tearing of the remaining central and posterior supraspinatus tendon, severe infraspinatus tendinosis, and a SLAP tear. The right elbow MRI reflected a suspicion of a bicep tendon re-tear, reactive marrow edema in the proximal radius, extensor tendinosis, and partial undersurface tear.

Petitioner followed up with Dr. Chudik on May 20, 2019. After physical examination and review of the MRI imaging, Dr. Chudik diagnosed right distal biceps rupture and right shoulder full thickness tear of the supraspinatus tendon with a partial tear of the posterior cuff. He recommended a right distal bicep revision with possible

autologous hamstring graft and arthroscopic rotator cuff repair. He related the injuries to Petitioner's work accident. Dr. Chudik performed the recommended right distal biceps repair, right long arm splint, right elbow HDW (hardware) removal, and right posterior nerve release (PX #2). The post-operative diagnoses consisted of right biceps rupture and right posterior interosseous nerve entrapment.

Petitioner followed up with Dr. Chudik on November 8, 2019. The doctor's impression was right shoulder full thickness supra tear. Dr. Chudik recommended right shoulder arthroscopy with rotator cuff repair and possible DCR (digital contact radiography). Dr. Chudik performed right arthroscopic subacromial decompression, distal clavicle resection, rotator cuff repair, and labral debridement on January 9, 2020. Following that surgery, Petitioner underwent physical therapy and work-conditioning at ATI Physical Therapy (PX #3).

On November 2, 2020, Petitioner followed up with Dr. Chudik. The doctor recommended a functional capacity assessment upon Petitioner completing his work conditioning program.

On November 17, 2020, Petitioner presented to ATI Physical Therapy for a Functional Capacity Assessment (PX #3). It was a valid assessment. The assessment noted Petitioner's occupational demand level as Heavy and that he demonstrated physical demand level of Medium. The FCA reflects that Petitioner could lift up to 28 pounds above the shoulder, 75.6 pounds from desk to chair, 75.6 pounds from chair to floor, carry 47 pounds with left arm, and carry 47 pounds with right arm.

On March 15, 2021 Dr. Chudik placed Petitioner on permanent restrictions consisting of an 8-hour maximum work day, no lifting more than 28 pounds above the shoulders with both arms, no lifting above 19.6 pounds with the right arm above shoulder, no lifting above 15.2 pounds with the left arm above shoulder, no lifting more than 75.6 pounds with both arms from desk to chair, no lifting over 37.2 pounds with the right arm from desk to chair, no lifting over 28.4 pounds with the left arm from desk to chair, no lifting over 75.6 pounds with both arms from chair to floor, no carrying more than 47 pounds with the right arm, and no carrying over 47 pounds with the left arm.

Petitioner testified that after he was placed on permanent restrictions and that Respondent was able to accommodate his permanent restrictions once but that he received only one call for a job since the time he was placed on permanent restrictions. Petitioner testified that he began searching for jobs that fit his permanent restrictions. He testified that he would apply to 5-10 a week. Petitioner identified Petitioner's

Exhibit #6, his Career Builders records of job searches. He testified that he never received maintenance benefits since he was placed on permanent restrictions. He received a call from his union related to a job with Respondent around August 1, 2021. He testified that the job did fit his permanent restrictions. Prior his work injury he would work between 15-20 jobs in the same time span in which he was placed on permanent restrictions up through the date of the trial.

Petitioner's Exhibit #7, comprising various paycheck stubs and checks covering a period of more than 52 weeks prior to the date of injury, was admitted in evidence. Paycheck stubs indicate overtime pay without evidence of mandatory overtime. Paychecks from Paladin Securities are for gross amounts only, with no deductions, and do not have any information of the hours worked or when. Petitioner did not testify about his work with Paladin Securities.

PX #7 also included a letter from Christopher Owoyemi, Staff Attorney for Teamsters Local 727, stating the job duties for tradeshow employees: loading and unloading trucks by hand forklift or pallet jack, able operate lift gates and ramps, able to lift 60 pounds, have a current forklift operators' card, and complete assigned tasks (without specific description).

Petitioner was examined by orthopedic surgeon Dr. William Heller pursuant to §12 of the Act. Dr. Heller's narrative reports dated May 16, 2019 (RX #1), August 6, 2019 (RX #2), and July 24, 2020 (RX #3) were admitted in evidence. Dr. Heller reviewed Petitioner's medical records in addition to performing clinical exams on May 6, 2019 and July 24, 2020. RX #1, RX #2, and RX #3 were admitted in evidence.

On May 16 Dr. Heller confirmed Petitioner's right distal biceps tendon rupture was causally related to his work accident on October 8, 2018. Dr. Heller had doubts whether the right shoulder pathology was causally related to the accident but did not dispute "causal linkage." He deferred a definitive causation opinion regarding the right shoulder pending a review of the MRI.

On August 6 Dr. Heller did not dispute the acute rotator cuff tear apparent on the MRI could Have been caused by or aggravated by the work accident. He also agreed with Dr. Chudik' s recommendations for surgery.

On July 24 Dr. Heller noted Petitioner was deconditioned and recommended additional work conditioning. He anticipated Petitioner could then return to full duty work but deferred to a June 29, 2020 treatment note limiting Petitioner to 50 pounds floor to waist, 25-pound overhead lifting, and 50-pound lifting/carrying.

Dr. Heller did not review the November 17, 2020 FCA restrictions or Dr. Chudik's March 15, 2021 permanent restrictions and therefore could not comment.

Respondent's Exhibit #4, an accounting of Petitioner's work hours from October 12, 2017 through October 8, 2018, was admitted in evidence. Respondent's Exhibit #7, an accounting of Petitioner's work hours from September 17, 2016 through October 22, 2018, was admitted in evidence. RX #7 was essentially duplicative of RX #4. These exhibits demonstrate that Petitioner worked an irregular schedule with irregular hours. These exhibits also demonstrate Petitioner's work at venues other than Respondent's Allstate Arena.

CONCLUSIONS OF LAW

F: Is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator finds this issue was not genuinely disputed. Therefore, the Arbitrator finds that Petitioner proved his current condition of ill-being in his right arm and shoulder is causally related to the work accident. Respondent presented no credible rebuttal to Petitioner's causation claims.

G: What were Petitioner's earnings?

The Arbitrator finds that Petitioner failed to prove his AWW was $1,306.09. Petitioner testified that Respondent's Exhibit #4 was an accurate accounting of his hours worked in the 52 weeks prior to this accident. This ledger shows Petitioner worked 500 hours. He testified that he earned $40.25 per hour, for a total of earnings over the prior 52 weeks of $20,125.00. The AWW, taken over 52 weeks, is $387.02. Any overtime pay was not included for failure to prove the overtime was mandatory.

Petitioner admitted pay stubs in PX #8. The Arbitrator notes that these checks to not reflect the full 52 weeks prior to the injury. For the checks that were provided, the number of hours Petitioner worked as documented in PX #8 is consistent with the hours in RX #4.

The Arbitrator also finds that the wages to Paladin Securities are not included in the average weekly wage calculation. Petitioner testified that the checks received from Paladin Securities were not checks for jobs performed through his union. For concurrent wages to be included, Petitioner must show that he was employed by two or more employers on the date of accident and that the Respondent had knowledge of

the concurrent employment.

For these reasons, the checks from Paladin Securities are not included in the average weekly wage calculation. The most accurate accounting of Petitioner's hours with Respondent were from Respondent's Exhibit #4. The AWW is therefore $387.02.

K: What temporary benefits are in dispute? Maintenance

The Arbitrator finds that Petitioner is entitled to maintenance benefits. To be entitled to maintenance benefits, a claimant must be engaged in a rehabilitation program, which can be a formal job training or a self-directed job search. Petitioner was placed on permanent restrictions by Dr. Chudik based on a valid FCA. The evidence showed that after Petitioner was placed on permanent restrictions he applied for jobs within his restrictions.

The Arbitrator notes that Petitioner submitted job applications, PX #6, which corroborated his testimony regarding the job applications. The Arbitrator notes that the job applications submitted show that the Petitioner continues to be actively involved in an active job search and is therefore entitled to continued Maintenance benefits under the Act. The Arbitrator also notes that no events were held by Respondent at Allstate Arena from May 2021 through August 2021 due to the COVID-19 pandemic. The Arbitrator also notes that the COVID-19 pandemic likely hampered Petitioner's job search.

Petitioner offered evidence of a job duties description from his union, PX #7. The job duties description notes that a tradeshow employee should be able to lift 60 pounds, which exceeds Petitioner's permanent restrictions.

Petitioner did work one day for Respondent under his permanent restrictions, August 1, 2021. The Arbitrator found Petitioner's testimony credible that that particular assignment was within his restrictions. The Arbitrator also found Petitioner's testimony credible that no further accommodation of his restrictions was offered. The Arbitrator finds Respondent shall pay Petitioner the sum of $258.01/week for a further period of 14 & 1/7 weeks for maintenance benefits from May 5, 2021 through July 31, 2021 and from August 3, 2021 through August 24, 2021. Respondent shall be given a credit for any TTD and/or Maintenance benefits already paid to Petitioner up to the time of the trial.

M: Should penalties be imposed upon Respondent?

The Arbitrator finds that Petitioner failed to prove that he is entitled to penalties and attorney's fees.

The Illinois Supreme Court has long recognized the imposition of penalties is a question to be considered in terms of reasonableness. *Avon Products, Inc. v. Industrial Comm'n (Laura Larson)*, 82 Ill.2d 297 (1980). In *Avon*, the Court looked to Larson on Workmen's Compensation for guidance, noting that penalties for delayed payment are not intended to inhibit contests of liability or appeals by employers who honestly believe an employee is not entitled to compensation. *3 A. Larson, Workmen's Compensation*, §83.40 (1980).

This penalties and fees dispute centers on the one work assignment in August 2021, which was an accommodation of Petitioner's permanent restrictions. However, there were no further offers of accommodated work thereafter. Although the Arbitrator found that maintenance was still owed due to lack of accommodated work, it was not unreasonable or vexatious for Respondent to believe it had made a good faith accommodation.

Further, it cannot be ignored that tradeshow and concert events came to an abrupt halt due to the COVID-19 epidemic and not to the fault of Respondent. There was no work to be had during the epidemic lockdown.

O: Is Petitioner entitled to vocational rehabilitative services?

The Arbitrator finds that Petitioner failed to prove that he is entitled to vocational rehabilitation services.

The Illinois Supreme Court addressed entitlement to vocational rehabilitation in *National Tea Co. v. Industrial Comm'n*, 87 Ill.2d 424 (1983). It was held that vocational rehabilitation is generally appropriate where the employee suffers a reduction in earning power and there is evidence rehabilitation will increase earning capacity. Additional factors include the relative costs and benefits to be derived from the program, work life expectancy, ability, and motivation of the employee to undertake the program, the likelihood of obtaining employment upon completion of the program, previously unsuccessful rehabilitation programs, employee's existing skills, and potential loss of job security. Further, it is Petitioner's burden of proving the necessity of vocational rehabilitation.

Here, no evidence was offered to establish that rehabilitation would increase Petitioner's earning capacity or the relative cost and benefit of any such program or Petitioner's work-life expectancy. There was also no evidence concerning Petitioner's

desire or motivation to undertake the program. In fact, Petitioner did not testify that he was interested in pursuing vocational rehabilitation.

There is clear evidence that Petitioner has permanent restrictions which prevents him from resuming work as a tradeshow employee. The permanent restrictions placed by Dr. Chudik, in accord with the FCA, exceeded the job duties requirements described by Staff Attorney Christopher Owoyemi of Teamsters Local 727 in PX #7. The fact that Petitioner worked one day in August 2021 within his permanent restrictions does not rebut the inference that he is unable to return to full duty employment with Respondent.

Steven Fruth, Arbitrator