STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0150

vs.

No. 14 WC 024705

Radiac Abrasives, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical treatment, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the §19(b) 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).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. Although the Order portion of the Arbitrator's Decision specifies an award of 68-3/7 weeks of temporary total disability at the rate of $536.05/week, the Conclusion portion of the Decision indicates that the total award equals 73 weeks at $535.99/week. The Commission finds that the correct TTD rate is $536.05/week and the correct duration is 71-4/7 weeks for the periods covered by the Arbitrator's award.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

21IWCC0150

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is modified to reflect the award of $536.05 per week for 71-4/7 weeks for the periods between June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, as provided by §8(b) 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 shall 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. 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.

No monetary award is made in this matter, so no appeal bond is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

o-2/4/21
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **14WC024705**

18WC004741

21IWCC0150

RADIAC ABRASIVES INC
Employer/Respondent

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0150

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **14** WC **24705**

Consolidated cases: **18 WC 4741**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **5** 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 $**51,505.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**536.05** per week for **68-3/7**, commencing **June 17, 2014** through **September 7, 2015**, **February 11, 2017** through **March 14, 2017**, and **September 6, 2017** through **September 26, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Dr. Markarian, and to Dr. Fernandez, 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.

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 Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS: 21IWCC0150

The petitioner testified that on May 27, 2014 he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Subsequent to May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner stated that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continues to have swelling and difficulty moving his hands and he indicated that he "can't do much" because activities bother his hands.

In March of 2018, the petitioner was terminated from his employment with Respondent. He was not under any active medical care at the time of his termination.

Following his termination, the petitioner filed an Application for Adjustment of Claim alleging that an injury to his right arm occurred on January 12, 2018. In April of 2018, the petitioner sought treatment for his right arm complaints with Dr. Markarian. That claim is the subject of the Arbitrator's Decision rendered in case number 18 WC 4741.

CONCLUSIONS:

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 and concludes as follows:

The Respondent did not dispute that an accident arising out of and in the course of the petitioner's employment occurred on May 27, 2014. The Petitioner was first seen for medical care at the Rush Copley Medical Center on April 28, 2014 at which time he was diagnosed with bilateral carpal tunnel syndrome due to an overuse at work.

The petitioner then came under the care of Dr. Markarian who, likewise, diagnosed the petitioner with bilateral carpal tunnel caused by repetitive work activities. Dr. Markarian eventually performed bilateral carpal tunnel surgeries on the petitioner. Dr. Markarian performed the right carpal tunnel release on October 9, 2014 and the left carpal tunnel release on February 5, 2015.

When the petitioner continued to voice complaints, he was seen for a second opinion with Dr. John Fernandez. Dr. Fernandez performed bilateral trigger finger surgery on three of Petitioner's right fingers and three of Petitioner's left fingers. The left hand surgery was performed by Dr. Fernandez

on September 6, 2017 and the right hand surgery was performed by Dr. Fernandez on March 1, 2017.

Dr. Fernandez opined that the petitioner's condition of trigger digits (bilateral thumb index and middle fingers) should definitely be treated as work related. Dr. Fernandez reasoned that if the carpal tunnel syndrome and its surgery were treated as work related the same causative factors would be at stake, i.e. exposure, repetition, or frequency with gripping and grasping particularly of a more forceful nature in the operation of machinery and use of tools, with regard to the trigger digits.

Dr. Patari, Respondent's Section 12 examiner, opined that Petitioner's bilateral carpal tunnel was causally related to his work for the Respondent but he opined that the bilateral trigger fingers were not causally related. Dr. Patari did not find permanent restrictions were warranted.

The Arbitrator finds the opinions of Dr. Fernandez regarding causation and permanent restrictions to be credible and persuasive and to be more persuasive than those of Dr. Patari. Dr. Fernandez reiterated in his evidence deposition that Petitioner's bilateral, "carpal tunnel syndrome as well as trigger digits should be treated as work related reasoning that the petitioner had "reasonable causal factors including exposure to frequent gripping and grasping, including use of machinery and tools which is a very well-known and valid risk factor in the development of both carpal tunnel and trigger fingers." Dr. Fernandez also took issue with Dr. Patari's opinions concerning causation to be strange and wrong because the same causative factors that effect carpal tunnel effect trigger fingers.

Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. With regard to the petitioner's permanent restrictions, Dr. Fernandez opined that the petitioner's condition had not completely resolved. Dr. Fernandez opined that if the petitioner returned back to the activities that caused the problem, his condition could get worse, and at that his prognosis of doing well and returning back to that line of work was relatively poor. Dr. Fernandez felt these restrictions were permanent.

The Arbitrator notes Dr. Fernandez's credentials as an upper extremity specialist and finds his opinions to be credible, reliable, and persuasive. As such, the Arbitrator finds Petitioner's bilateral carpal tunnel and bilateral trigger finger conditions to be casually related to his work activities. The Arbitrator also finds the permanent restrictions imposed by Dr. Fernandez upon the Petitioner to be causally related. The Arbitrator further finds that the petitioner reached maximum medical improvement on January 4, 2018 and that his condition of ill-being as of that date is causally related to the injury of May 27, 2014.

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 and concludes as follows:

There was no dispute concerning the bilateral carpal tunnel surgeries and as such the medical expenses related to the petitioner's treatment for those conditions are awarded. While there was a

dispute concerning the trigger fingers treatment that Dr. Fernandez rendered to the petitioner, Dr. Fernandez testified that all of his treatment from May 25, 2016 through January 1, 2018 was reasonable and necessary and causally related. The Arbitrator has found the opinions of Dr. Fernandez to be credible and persuasive and to be more persuasive than those of Dr. Patari. As such, the Arbitrator finds that all the medical care and treatment rendered to the petitioner by Dr. John Fernandez, and the expenses related thereto, are reasonable, necessary, and casually related to the petitioner's accident of May 27, 2014.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The petitioner remained off work from June 17, 2014 through September 7, 2015, while undergoing treatment for his carpal tunnel syndrome. He again was off work from February 11, 2017 through March 14, 2017 and September 6, 2017 through September 26, 2017, while undergoing treatment for his bilateral trigger fingers. The petitioner was determined to be at maximum medical improvement with regard to these conditions in January of 2018. Petitioner has not received any further treatment in relation to the carpal tunnel syndrome or the trigger finger condition since January of 2018. Although there are disputes with regard to Petitioner's restrictions, it is noted that Petitioner had returned to an accommodated position.

The petitioner has alleged entitlement to additional Temporary Total Disability benefits from March 13, 2018 through the date of hearing. It is noted that the petitioner also claims entitlement to Temporary Total Disability benefits for the same period in the companion filing for the alleged accident of January 12, 2018. (Case No. 18 WC 4741) The Arbitrator notes that the petitioner had reached maximum medical improvement with regard to the bilateral hand conditions prior to January of 2018. As such, Petitioner would not be entitled to Temporary Total Disability benefits thereafter. The Arbitrator finds that the petitioner is not entitled to any Temporary Total Disability benefits after September 26, 2017, relative to the April 27, 2014 accident. As such, the Arbitrator finds that Petitioner is entitled to Temporary Total Disability from June 17, 2014 through September 7, 2015, February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017.

The Arbitrator finds Petitioner to have been temporarily and totally disabled from June 17, 2014 through September 7, 2015 and from February 11, 2017 through March 14, 2017 and from September 6, 2017 through September 26, 2017, a total period of 73 weeks, at $535.99 per week.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that Petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2018 companion case. With regard to the 2014 case, Petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of TTD benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr.

Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to Petitioner, Respondent clearly had a good faith basis from which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claim for benefits through that date. As such, Petitioner's claim for penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Artemio Torres,
Petitioner,

21IWCC0151

vs.

No. 18 WC 004741

Radiac Abrasives,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability, and penalties and fees, and being advised of the facts and law, modifies the Section 19(b) 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).

While otherwise affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. At arbitration, Petitioner alleged that he was entitled to temporary total disability benefits from March 13, 2018, the date Respondent terminated him, through the date of hearing, March 13, 2019. At the time of his termination, Petitioner was not actively treating for his work injuries, and Respondent was accommodating his restrictions by providing a sedentary position based upon the restrictions ordered by Petitioner's treating physician. Because the Arbitrator found that Petitioner was always capable of performing his sedentary job with Respondent, he declined to award any temporary total disability benefits for Petitioner's right elbow and right shoulder injuries.

On review, the Commission finds that Petitioner was entitled to TTD as a result of his 2018 injuries. However, it finds that the period of total disability did not begin on the date of his

21IWCC0151

termination by Respondent but on the date his treating physician took him off work for his shoulder and elbow injuries, March 21, 2018. From that date onward through the date of hearing, March 13, 2019, first Dr. Kalina and then Dr. Markarian kept Petitioner off work completely. The Commission finds the opinions of Petitioner's treating physicians more persuasive than those of the Respondent's expert and modifies the Arbitrator's Decision by awarding Petitioner TTD from March 21, 2018 through March 13, 2019, a period of 51-1/7 weeks. The Commission further finds that Respondent paid TTD in excess of the award for Petitioner's 2014 injury, which was modified by the Commission in 14 WC 024705, in the amount of $13,139.42, to be applied toward the total TTD awarded herein.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability benefits is reversed. Respondent shall pay Petitioner temporary total disability benefits of $536.05 per week for 51-1/7 weeks, or $27,415.13. for the period commencing on March 21, 2018 through March 13, 2019, as provided by §8(b) of the Act. Respondent is to receive credit for TTD payments totaling $13,139.42, the amount paid in excess of the TTD awarded in the consolidated matter, 14 WC 024705.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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. 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.

21IWCC0151

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

Marc Parker

Barbara N. Flores

o-2/4/21
mp/dak
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Dissent

I respectfully dissent from the Decision of the Majority. In his decision, the Arbitrator denied Petitioner's request for TTD benefits. The Majority reversed the Decision of the Arbitrator on that issue and awarded Petitioner 51&1/7 weeks of TTD. I would have affirmed and adopted the Decision of the Arbitrator including his denial of TTD benefits.

While Petitioner was on significant work restrictions, Respondent accommodated his restrictions and placed him in a sedentary position. Petitioner testified that he had no difficulty performing his light duty responsibilities and there was no evidence that Petitioner ever complained to Respondent that he was in any way unable to perform his duties. In addition, Petitioner did not demand vocational rehabilitation from Respondent in order to possibly help himself find a more suitable long-term occupation. The Majority appears to rely exclusively on the fact that doctors put Petitioner on no-work status on March 21, 2018 and had not released him from that status until the date of Arbitration, March 13, 2019. However, even though Petitioner was technically taken off work, he actually continued to work. To obtain TTD benefits, a claimant has the burden of proving that he is unable to work his normal job, due to his work-related disability, or that his employer has not been able to accommodate his restrictions. In addition, the Majority reasoning allows the possibility that a claimant could receive both his salary and TTD benefits simultaneously. This result would amount to unjust enrichment for claimants, and not contemplated in the Act. Because Petitioner was clearly able to work, and actually did work, during that period despite any alleged impairment, in my opinion, he is not entitled to TTD for that period.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator. Therefore, I respectfully dissent.

Deborah L. Simpson

DLS/dw
O-

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

TORRES, ARTEMIO
Employee/Petitioner

Case# **18WC004741**

14WC024705

RADIAC ABRASIVES INC
Employer/Respondent

21IWCC0151

On 5/15/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOCIATES
33 N LASALLE ST
SUITE 1210
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JOSEPH ZWICK
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

21IWCC0151

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)

Artemio Torres
Employee/Petitioner

v.

Radiac Abrasives, Inc.
Employer/Respondent

Case # **18** WC **4741**

Consolidated cases: **14 WC 24705**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **January 12, 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 $**41,811.64**; the average weekly wage was $**804.07**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **5** 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 $**51,505.28** (paid in companion case) for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,505.28** (between both claims).

ORDER

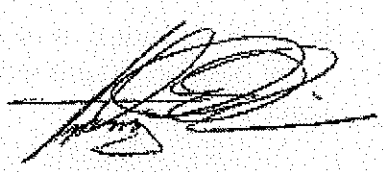
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to Physicians Immediate Care, to Presence Mercy Medical, and to Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for reasonable and necessary medical services as prescribed for the petitioner by Dr. Markarian, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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



Arbitrator Anthony C. Erbacci

May 10, 2019
Date

MAY 15 2019

FACTS:

The petitioner testified that he was employed by the respondent as a machine operator and that he had been so employed since 1993. The petitioner testified that he worked in that position until 2017 and that his job was changed in 2018. The petitioner indicated that the job of a machine operator with this Respondent is a heavy upper extremity repetitive job.

Following a work related injury of May 27, 2014, the petitioner underwent surgeries to his left wrist and right wrist by Dr. Markarian and surgeries to his left hand and right hand by Dr. Fernandez. Dr. Fernandez released the Petitioner at maximum medical improvement on January 4, 2018 with permanent restrictions of no lifting repeatedly more than 5 to 10 pounds and no power tools. That injury is the subject of the Arbitration Decision issued in case number 14 WC 24705.

The petitioner testified that he was off work for periods of time following those surgeries and was paid workers' compensation benefits during that time. The petitioner testified that in 2017, Dr. Fernandez determined him to be at maximum medical improvement and released him from care and provided permanent restrictions. Petitioner testified that the Respondent accommodated the restrictions but began to push him to increase his production to the level of his co-workers. The petitioner testified that he continued to have swelling and difficulty moving his hands and he indicated that he couldn't "do much" because activities bother his hands.

The petitioner testified that on January 12, 2018, he sustained an injury to his right arm at work when he was withdrawing a mold from a press. The petitioner described that he reached in to the press to free a shim that was stuck, and he burned his right arm. The petitioner testified that he pulled his arm back quickly and felt a sharp "pull" in his right elbow. He testified that he then noticed that his right arm began to swell. The petitioner testified that he reported the work injury to his supervisor "Mike" the next day. On cross-examination, the petitioner testified that no supervisor was present on the day his injury occurred and that he reported the injury on the day that an accident report was completed.

A copy of the accident report that was completed was admitted into the record as Petitioner's Exhibit 12A. The accident report was signed by both the petitioner and his supervisor "Mike" and is dated January 16, 2018. The report describes that, "On January 12, 2018, the employee was completing a wheel and had the mold out of P15 press. The employee then noticed that the shim was still stuck on his upper side of the plate. The employee noted that this is a normal thing that occurs when working in the area. The employee while wearing gloves, reached into the press and placed his hand on the shim when he burned his right arm on the top plate. (350 degrees maximum during process). When the employee turned his arm, he jerked it away quickly from the press. The employee then noted that he had pain from his right thumb and right pinky finger, all the way up to his elbow on both sides of his arm."

The petitioner testified that following the last surgery by Dr. Fernandez, and prior to his injury on January 12, 2018, he did what was asked of him at work. The petitioner testified that on January 16, 2018, his job was changed to that of a production planning clerk.

The petitioner testified that after the accident report was completed, he was sent to Physicians Immediate Care. The records of Physicians Immediate Care demonstrate that the petitioner was seen there on January 16, 2018 and gave a history of injury to his left arm on January 12, 2018 when he was

pulling out a mold and touched the oven causing him to pull his arm away. The diagnoses included a burn of the left forearm, pain in the left forearm, pain in the left wrist, and pain in the left shoulder. It was noted that the forearm burn had healed and that the degree of pain in the left upper arm was not consistent with the mechanism of injury. The petitioner was released to return to work with no restrictions.

The petitioner testified that he then sought treatment at Presence Mercy Medical Center in Aurora and then began treating with Dr. Markarian.

The records of the Emergency Department of Presence Mercy Medical Center demonstrate that the petitioner was seen there on January 20, 2018 and reported pain in the right arm after heavy lifting at work. Examination reportedly revealed pain over the lateral epicondyles into the forearm. The petitioner was diagnosed with a right elbow strain/tendonitis and he was released with restrictions of no lifting over 25 Lbs. with the right arm. The petitioner was directed to follow-up with an orthopedic specialist for further evaluation of right arm pain. (PX 2A)

On March 12, 2018, the petitioner was terminated from his employment with Respondent following a verbal altercation with a supervisor.

The records of Dr. Gregory Markarian demonstrate that the petitioner was seen by Dr. Markarian on April 10, 2018. Dr. Markarian noted an alleged injury from "eccentrically" loading the elbow and shoulder when taking a mold out. Physical exam reportedly showed positive O'Brien Test in the right shoulder and pain with tenderness over the biceps. Dr. Markarian also reported positive Tinel's sign in the right elbow and positive elbow flexion test. Dr. Markarian recommended a CT scan to evaluate an osteochondroma and recommended an EMG for potential ulnar neuritis. On May 29 and June 26, 2018, Dr. Markarian stated that Petitioner had rotator cuff tendonitis and biceps tendonitis and recommended conservative management. On September 6, 2018, Dr. Markarian stated Petitioner was post right elbow lateral epicondylitis and right shoulder rotator cuff tendonitis and also stated that Petitioner had a C7 nerve root issue. At that time, Dr. Markarian injected the shoulder and elbow. The diagnoses remained tendonitis and AC joint arthritis. On October 4, 2018, Dr. Markarian indicated that he would put in a request for right elbow and right shoulder surgery. He described the proposed surgery as right shoulder arthroscopy, biceps tenotomy, arthroscopic distal claviculectomy, sub acromial decompression, possible rotator cuff repair and open sub pectoral biceps tenodesis. He states the right elbow would involve a lateral release, debridement and reattachment. (PX 3A)

Records from Imaging Centers of America demonstrate that MRIs of the petitioner's right elbow, right shoulder and cervical spine were completed on March 28, 2018. The MRI of the elbow reported increased fluid, sensitive hyper-intensity of normal caliber ulnar nerve that may be artefactual and clinical correlation with potential ulnar neuropathy was recommended. The shoulder was interpreted as showing articular sided fraying of the infraspinatus tendon and sessile osteochondroma off the medial aspect of the proximal humerus without cartilage cap. The cervical MRI was interpreted as showing mild spondylosis and mild narrowing of the right foramen at C3-4 without significant stenosis. (PX 4A)

An MRI arthrogram of the right shoulder was completed on April 27, 2018, at Niles MRI. The same was interpreted as showing tendinosis of the supraspinatus and subscapularis tendons, osteochondroma, mild changes of the osteoarthritis in the glenohumeral joint and mild degenerative changes in the acromioclavicular joint. An x-ray of the right shoulder reported an area of hypertrophic

bone at the level of the proximal humerus medially. (Dr. Markarian's interpretation of the imaging is reflected in Exhibit 3 was that the osteochondroma was benign). (PX 5A)

Records from Sage Medical Management reflect that Petitioner saw Dr. Kalina on March 21, 2018, at which time he reported neck and shoulder pain following the alleged injury of January 12. Petitioner alleges that he suffered a sudden onset of right forearm, shoulder and neck pain after the burn to the forearm on January 12. Dr. Kalina diagnosed cervicalgia, pain in the right elbow and pain in the right shoulder. Dr. Kalina prescribed the MRIs and provided work restrictions. Petitioner saw Dr. Lotfi, a chiropractor, on March 29. At that time, Petitioner again reported that he had suffered pain in the shoulder and neck area. Petitioner advised Dr. Lotfi that he had been working his regular duties without problem until the alleged injury of January 12. Dr. Lotfi diagnosed occipital cervico-occipital neuralgia, pain in the right forearm and pain in the right shoulder and recommended chiropractic treatment. Petitioner returned to Dr. Kalina on April 4 at which time he recommended orthopedic treatment. It was noted that Petitioner underwent an EMG on May 2, 2018, which was interpreted as showing very mild right sided C7 radiculopathy with no axonal loss which was also noted to be a sign of a good prognosis for complete and timely recovery. (PX 6A)

Records from Dr. Eugene Lipov reflect that the petitioner was seen on September 21, 2018 at which time it was noted that a cervical injection had been recommended. The petitioner reported that therapy was not helping and Dr. Lipov recommended ending the same. In the initial visit with Dr. Lipov on August 29, 2018, he states, "His complaint is essentially right neck pain radiating to the right shoulder as well as mild radiation to the right elbow." Dr. Lipov diagnosed cervical facet arthropathy. (PX 7A)

At the request of the respondent, the petitioner was examined by Dr. Kenneth Sanders on May 7, 2018. The May 7, 2018 report of Dr. Sanders was admitted into the record as Petitioner's Exhibit 8A and Respondent's Exhibit 2. Dr. Sanders noted normal range of motion in the neck and good range of motion in the shoulder with pain and some limitation in abduction and flexion. The exam was noted to be otherwise relatively normal. Dr. Sanders also noted tenderness over the medial epicondyle. Dr. Sanders diagnosed lateral epicondylitis at the right elbow, medial epicondylitis at the right elbow and mild right rotator cuff tendonitis. Dr. Sanders opined that there was a causal relationship between the alleged injury and Petitioner's symptoms and he recommended an injection to assist in defining the definitive pain generator. Dr. Sanders opined that any restrictions due to any work injury would be temporary. Dr. Sanders stated that Petitioner should avoid use of the right arm until a more definitive diagnosis has been delineated.

The petitioner was examined on September 9, 2018 by Dr. Peter Hopefner also at the request of the respondent. Dr. Hopefner's September 20, 2018 report was admitted into the record as Petitioner's Exhibit 9A and Respondent's Exhibit Number 3. Dr. Hoepfner noted diagnoses of right lateral epicondylitis and myofascial trigger points about the right shoulder without pathology and no positive proactive test involving the right glenohumeral or acromioclavicular joint. Dr. Hoepfner noted inconsistencies in testing Petitioner's grip strength. Dr. Hoepfner stated that there was no specific anatomic abnormality appreciated with regard to the right shoulder that would warrant additional treatment. With regard to the elbow, Dr. Hoepfner indicated that the epicondylitis was self-limited and would gradually subside with time. Dr. Hoepfner indicated that "judicious use" of cortisone injections could be considered. Dr. Hoepfner noted the cervical complaints but further noted that this was outside his area of expertise. Dr. Hoepfner confirmed that Petitioner was able to return to full duty employment.

Alejandra Alarcon, the respondent's human resources manager, testified that on January 16, 2018 the petitioner was moved from a lead role on the shop floor into Respondent's office in an administrative capacity in order to comply with Dr. Fernandez's permanent restrictions. Ms. Alarcon testified that when the petitioner was told on January 16, 2018 about his new light duty position, he reported the January 12, 2018 work injury. Ms. Alarcon also testified that the petitioner thereafter expressed his dislike for his new position. Ms. Alarcon testified that on March 12, 2018 the petitioner was terminated for insubordination. Ms. Alarcon also testified that she believed the petitioner to have been a reliable employee and that she believes that the January 12, 2018 accident described by the petitioner did occur.

CONCLUSIONS:

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, the Arbitrator finds and concludes as follows:

Petitioner testified that he suffered an injury to his right arm when he burned his forearm when removing a mold from an oven and pulled his arm back. This incident was unwitnessed but the petitioner did report the incident four days later. The accident report dated January 16, 2018, which was signed by both the Petitioner and his supervisor "Mike", describes how the accident occurred. The description contained in the accident report is substantially consistent with the petitioner's testimony and the histories of injury provided to the petitioner's treating physicians.

Alejandra Alarcon, the respondent's human resources manager, testified that the petitioner reported the accident to her on January 16, 2018 and that she had no reason to doubt that the January 12, 2018 accident occurred.

In light of the foregoing, the Arbitrator finds Petitioner to have sustained an accident that arose out of and in the course of his employment on January 12, 2018.

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 and concludes as follows:

Petitioner testified that he experienced pain in his right arm following the occurrence. When the petitioner was sent for treatment on January 16, 2018 he reported pain in the upper arm and elbow and forearm beginning January 12. In a follow-up visit of January 20, 2018, Petitioner again reported pain in the right arm that appeared to be localized about the proximal forearm. However, after his termination, Petitioner also alleged cervical complaints. Considering that Petitioner's own testimony and the medical records confirm that Petitioner did not have any complaints involving the cervical spine until after his termination, and in the absence of a credible, persuasive, medical opinion which specifically relates any cervical condition to the January 12, 2018 work injury, the Arbitrator finds that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged occurrence.

With regard to the right shoulder and right elbow conditions, it is noted that the physicians at Physicians Immediate Care Center stated at the initial evaluation that Petitioner's symptoms were not consistent with the mechanism of injury. Dr. Markarian noted that imaging of the shoulder showed an osteochondroma, that Dr. Markarian opined was benign. The imaging also referenced findings suggestive of some tendonitis in the shoulder. The medical opinions are all consistent with a diagnosis of epicondylitis in the right elbow. As such, the Arbitrator finds that Petitioner suffered tendonitis in the right shoulder and epicondylitis in the right elbow as a result of the alleged occurrence.

The Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally relates the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes both Section 12 examiners causally relate both the shoulder and elbow injuries. Also, both Section 12 examiners believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner's current condition of ill being is causally related to the injury of January 12, 2018.

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, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As noted above, the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident. Moreover, the petitioner's diagnosis is limited to shoulder tendonitis and epicondylitis in the elbow. A review of the records and billing submitted show that the treatment from Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute primarily involves the cervical spine. As such, the Arbitrator finds that the treatment rendered to the petitioner by Sage Medical and Dr. Lipov of Chicago Pain & Orthopedic Institute is not causally related to the January 12, 2018 work injury and is not awarded herein. The Arbitrator finds that the treatment rendered to the petitioner at Physicians Immediate Care, Presence Mercy Medical and by Dr. Markarian is reasonable, necessary and causally related to the January 12, 2018 work injury. The respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

As the Arbitrator has determined that the petitioner failed to prove that any complaints or diagnoses relative to the cervical spine are related to the alleged January 12, 2018 accident, no prospective medical treatment for the petitioner's alleged cervical condition is awarded herein.

With regard to the proposed surgical treatment for the petitioner's right arm and shoulder, the Arbitrator notes that both of Respondent's examining physicians, Dr. Sanders and Dr. Hoepfner, opined that the petitioner suffered a right upper extremity injury on January 12, 2018. Dr. Sanders diagnosed the petitioner as suffering from both medial and lateral right epicondylitis as well as right rotator cuff tendonitis which he opined were causally related to the petitioner's work injury. Similarly, Dr. Hoefpher diagnosed the petitioner with right lateral epicondylitis and myofascial trigger points about the right shoulder. Dr. Hopefner opined that the conditions were causally related to the accident, and he prescribed further care by way of cortisone injections.

Dr. Markarian, the petitioner's treating orthopedic physician also causally related the petitioner's right elbow injury and right shoulder injuries to the January 12, 2018 work accident. Dr. Markarian has prescribed both right elbow and right shoulder surgery due to Petitioner's failure to improve with conservative care.

The Arbitrator notes that both of the respondent's examining physicians believed the Petitioner to be in need of some type of medical care for both the elbow and shoulder at the time of the respective exams. Dr. Markarian, the treating physician has also prescribed additional medical care for the petitioner by way of surgery. While the Arbitrator questions the prudence of performing the recommended surgeries on the petitioner, the Arbitrator notes that the petitioner's treating physician is a physician in good standing, licensed to practice medicine in the State of Illinois, and defers to his recommendation.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Petitioner alleges entitlement to Temporary Total Disability benefits from March 13, 2018 through the date of hearing and continuing. It is noted that Petitioner was terminated on March 12, 2018 after a verbal altercation with a supervisor. Although there are conflicting allegations regarding the altercation, the Arbitrator is not charged with assessing the merits of the termination but is simply considering the same in the context of Petitioner's lost time.

Petitioner testified that, at the time of his termination, he was receiving treatment from Dr. Fernandez and Dr. Markarian. However, Dr. Fernandez had determined that the Petitioner was at maximum medical improvement and subject to permanent restrictions as of January 4, 2018. Moreover, Petitioner had last seen Dr. Markarian in December of 2015 after which he pursued treatment with Dr. Fernandez. The evidence demonstrates that the petitioner was not under any active medical treatment at the time of his termination. The evidence further demonstrates that the respondent was accommodating the permanent work restrictions placed on the petitioner by Dr. Fernandez, and there is no evidence that the petitioner was having any difficulty performing any aspect of his job at the time of his termination.

It is noted that Petitioner's job changed to a sedentary position on January 16, 2018 based upon the permanent work restrictions placed on the petitioner by Dr. Fernandez. After being notified of

this change in position, Petitioner then reported his alleged accident from four days prior. The incident itself was relatively minor as Petitioner alleges pulling his arm back after suffering a burn. Petitioner continued working his sedentary position without any apparent difficulty. On January 20, 2018, Petitioner received treatment at Presence Mercy Medical Center and the diagnosis remained right arm pain and tendonitis, and the petitioner continued to work without difficulty until his termination. After his termination, the petitioner's complaints increased, and the Petitioner sought treatment for cervical complaints as well as the right arm complaints. It is noted that while Dr. Sanders suggested that the petitioner refrain from using his arm, Dr. Sanders also noted that a more definitive diagnosis was needed. Additional testing was completed after Dr. Sanders' evaluation and the petitioner was then sent to Dr. Hoepfner as Dr. Sanders had retired. Dr. Hoepfner reviewed all of the notes, including the updated testing, and he noted inconsistencies in the petitioner's examination. Dr. Hoepfner indicated that the petitioner was able to perform his regular work activities with regard to his arm diagnoses. Based upon the above, the Arbitrator finds that the petitioner was always capable of returning to his sedentary position as a production clerk.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

It was agreed that the petitioner had received a total of $51,505.28 in Temporary Total Disability benefits paid between this claim and the 2014 companion case. (14 WC 24705). With regard to the 2014 case, the petitioner claimed a total of 68-3/7 weeks of Temporary Total Disability benefits which would equal $36,681.14. This would equal $14,824.14 in additional benefits paid, or the equivalence of approximately 27-4/7 weeks of Temporary Total Disability benefits; 27-4/7 weeks of Temporary Total Disability benefits from March 13, 2018 would have paid Petitioner through September 21, 2018. It is noted that Dr. Hoepfner clearly states that Petitioner was able to return to regular employment as of September 20, 2018. Thus, even in a light most favorable to the petitioner, the respondent had a good faith basis upon which to deny any ongoing Temporary Total Disability benefits as of September 20 and Petitioner would have received the equivalence of any and all claimed benefits through that date. Additionally, the Arbitrator has found that the petitioner failed to prove he is entitled to any Temporary Total Disability benefits as a result of the January 12, 2018 work injury. As such, Petitioner's claim for penalties is denied.

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

Randy D. Little,

Petitioner,

21IWCC0152

vs.

NO: 14 WC 35730 and
16 WC 36913

ADT Home Security,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Arbitration Decision Form, and corrects a scrivener's error. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission solely seeks to correct one clerical error on the Arbitration Decision Form. In the Order, the Arbitrator mistakenly wrote that Respondent shall pay temporary total disability benefits from September 21, **2104**, through July 1, 2015. This is clearly a scrivener's error. The Commission thus modifies the above-referenced sentence to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of $744.00/week for 40-4/7 weeks, commencing **September 21, 2014,** through **July 1, 2015**, as provided in Section 8(b) of the Act.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

21IWCC0152

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2019, is modified as stated herein.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $55,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2021

d: 2/23/21
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, RANDY D
Employee/Petitioner

Case# **14WC035730**

16WC036913

ADT HOME SECURITY
Employer/Respondent

21IWCC0152

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1357 RATHBUN CSEVENVAK & KOZOL
LUIS MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60431

2542 BRYCE DOWNEY & LENKOV LLC
JESSE LANSHE
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

21IWCC0152

☐ 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

Randy D. Little
Employee/Petitioner

v.

ADT Home Security
Employer/Respondent

Case # **14** WC **35730**

Consolidated cases: **16 WC 36913**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 6, 2018**. 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 12, 2014 and September 20, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**58,032.00**; the average weekly wage was $**1,116.00**.

On the date of accident, Petitioner was **30** 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 $**24,279.32** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**24,279.32**.

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 $**744.00**/week for **40 4/7** weeks, commencing **September 21, 2104** through **July 1, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**24,279.32** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.60**/week for **50** weeks, because the injuries sustained caused the **10%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 - 2019

FACTS:

Petitioner, testified that he worked for the Respondent, from 2009 to 2016 installing security products at residential and commercial properties. He would travel to different locations in a truck that contained all necessary installation materials. Prior to 2014, he had not missed any work because of a back injury and had never treated for a back injury. In approximately August, 2014, or shortly before, Petitioner indicated that he began noticing lower back pain that he associated with the work van he was driving. He indicated that his van had been switched from a normal van to a small van shortly before he started noticing problems. He described the new van as, "very tight, cramped, couldn't put the seat back due to the racks in there. They were extremely overloaded with lots of wire. It was kind of like riding in a covered wagon." Petitioner testified that he believed there was a problem with the suspension and indicated driving the van was very rough riding. Petitioner testified that at that time, he was driving about 75 to 125 miles per day doing installations. Petitioner testified that on August 12, 2014, given his ongoing problems with his back and truck, he notified his immediate supervisor, Ms. Rita Last, of his issues. On that date, in a series of text messages, Petitioner stated, "I'm gonna need to see a chiropractor all these hours in this uncomfortable truck" and "my lower back feels like I'm getting hit w a bat daily bc this seat is so uncomfortable and I'm spending 3 he's (sic) a day driving." At hearing, Ms. Last testified that Petitioner made her aware of back pain related to his truck on August 12, 2014.

Petitioner testified that he sought medical treatment for his back pain with a chiropractor, Dr. Van Til on September 8, 2014. At that appointment, Petitioner indicated that he had back pain interfering with his sleep and aggravated by driving a work van for about two months. Petitioner testified he had never noticed lower back pain and symptoms prior to his work truck change. Despite his symptoms, Petitioner continued working until September 20, 2014. On that date, Petitioner testified after a long drive on a very bumpy road, which aggravated his back pain, he lifted a ladder off of the top of his truck and felt a major pinch and a pop in his lower back that caused him to fall over because of pain. Petitioner indicated his lower back symptoms were significantly worse after this incident and he contacted Ms. Last. Ms. Last confirmed that Petitioner texted her on the date of accident complaining about back pain on the way to the job site and then, about 10 minutes later, called her to tell her that he hurt his back getting the ladder off the top of his ADT vehicle.

Following September 20, 2014, Petitioner sought treatment at Silver Cross Emergency Room and then followed up with Dr. Harris Waheed on September 22, 2014. At that examination, Petitioner indicated that the van he travels in is very uncomfortable and he drives a lot causing him lower back pain and numbness. After an examination, Dr. Waheed referred him to a neurosurgeon and give him a referral for physical therapy. Petitioner sought therapy at River Valley Physical Therapy on October 2, 2014. On that date, the therapist, Katelin Fane, indicated that Petitioner was referred from Dr. Waheed, and she recorded a history from the Petitioner. In her history, Ms. Fane documents that Petitioner was suffering from, among other complaints, low back pain that he associated to a change to different work vans and driving for long periods of time. Ms. Fane also documented Petitioner reported lifting his ladder and his back giving out. Petitioner then began a course of physical therapy.

Due to ongoing lower back symptoms, Petitioner testified he followed up with Dr. Anthony Rinella on October 15, 2014. On that date Petitioner gave a history both driving extensively in the newer work truck causing lower back pain and the September 20, 2014 ladder incident. After a physical examination, Dr. Rinella reviewed Petitioner's previously taken lumbar MRI and prescribed another lumbar MRI because he believed Petitioner may have a pars defect in his lumbar spine. Dr. Rinella also prescribed a Medrol Dosepak and indicated Petitioner should remain off work. Petitioner

followed up with Dr. Rinella on November 5, 2014, at which time the doctor reviewed the CT scan of his lumbar spine and confirmed that Petitioner had a bilateral pars defect in his lumbar spine. Despite additional conservative measures such as therapy and epidural steroid injections, Petitioner's lumbar complaints continued and Dr. Rinella recommended an L4-5 transforaminal lumbar interbody fusion. Petitioner underwent the fusion procedure on May 20, 2015 and returned to see Dr. Rinella's physician's assistant, Doug Stevens, on June 3, 2015 at which time he reported being pleased with the results.

Following his fusion, Petitioner testified that his lumbar symptoms decreased and by, July 1, 2015, he returned to full duty work. At hearing, Petitioner testified that after he returned to work for ADT, he began working for another employer in approximately May, 2016. Petitioner further testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over.

CONCLUSIONS:

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, (E.), Was timely notice of the accident given to Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner's diagnosed pars fracture was aggravated by driving his company vehicle after the van was switched to a smaller model. This condition was then aggravated to the point that fusion surgery was necessary after suffering further trauma after lifting the ladder. The evidence presented demonstrates Petitioner had continuous and ongoing lower back pain only after the Respondent changed the work truck that he drove to installation sites. Respondent verified Petitioner's testimony through the testimony of Ms. Last. Ms. Last confirmed Petitioner contacted her about his back pain after he began driving the new truck. Further, Respondent submitted an email between Ms. Last and ADT's area general manager, Mr. Travis Miller that substantiates Petitioner's complaints. In Respondent's Exhibit 5, Mr. Miller wrote, in part, "The tech claimed that his back has bothering (sic) him due to driving the ADT transit vehicle. He has made multiple requests to his manager to be transferred into a full-size van which have been denied due to full size vans no longer being available at ADT." (R5) Additionally, Respondent offered no rebuttal to Petitioner's testimony that the new van was uncomfortable and rode very hard. It appears clear that the breakdown date of accident is August 12, 2014, the date on which Petitioner directly texted his immediate supervisor, Ms. Last, of his back pain that he indicated would necessitate medical care. Petitioner reported to Dr. Van Til that his back hurt when he drove his ADT truck. Although he continued to attempt to work through the pain, Petitioner suffered the second accident on September 20, 2014, when lifting a ladder. Again, this accident was confirmed by Ms. Last and an accident report was filed by Respondent. (R4) In fact, on that day, Petitioner reported both to Ms. Last that his back hurt from driving to the location of the ladder incident and, shortly thereafter, he lifted the ladder that had substantially increased his lower back pain. This incident exacerbated Petitioner's condition to the point that surgery became necessary.

Dr. Rinella discussed both accidents in his testimony taken on August 3, 2016. On that date, he indicated that a pars fracture is a fracture of the bone between, in Petitioner's case, L4 and L5

and that Petitioner had the pars fracture for a period of time. Dr. Rinella testified that, although the pars fracture was present for a long time, it was aggravated by the work injury, specifically, the ladder incident on September 20, 2014. Further, Dr. Rinella considered that that Petitioner was having back pain while driving the ADT truck and stated, "he may have had periodic pain related to these pars fractures; but obviously, he didn't even know he had them, so they never required any specific diagnosis previously" and that the acute mechanism of accident got it to a point of surgical intervention.

The evidence presented supports Dr. Rinella's opinions. It is not disputed that Petitioner had continuous back complaints while driving his new ADT truck but that he continued to work until after the September 20, 2014 ladder incident. It is clear Petitioner had back pain caused by his work truck and the second accident involving the ladder aggravated his pars fracture symptoms to the point that surgery was necessary. Additionally, despite Respondent's contention, Petitioner reported the ladder incident. Ms. Last testified that Petitioner called her about the ladder incident on the day of accident and an accident report was created. Further, the ladder incident was recorded by Petitioner's therapist at River Valley Therapy even prior to Petitioner seeing Dr. Rinella.

Respondent relies on the testimony of Dr. Steven Mather who saw Petitioner for the purposes on an independent medical examination on March 25, 2013. Dr. Mather also offered opinions in an addendum report dated January 23, 2018. Dr. Mather opined that Petitioner's condition was pre-existing and not caused by the ladder incident or riding uncomfortably in his van. Dr. Mather further indicated that Petitioner's accident had no relation to the need for surgery. Dr. Mather's testimony ignores the facts of the evidence presented. Petitioner clearly had lumbar spine complaints that began only after driving his smaller ADT truck. There is no evidence that Petitioner had any low back complaints of any kind predating this. These symptoms got worse after he lifted the ladder on September 20, 2014. As discussed, Ms. Last confirmed that Petitioner called her immediately and reported that he hurt his back again after lifting the ladder off the roof of his truck. Petitioner then goes on a course of treatment that resulted in fusion surgery. Dr. Mather offers no explanation why Petitioner's symptoms only began with the change in his work truck and were worse after lifting the ladder on September 20, 2014. It is not simply coincidence that Petitioner's preexisting pars fracture was asymptomatic his entire life prior to the truck change and ladder accident.

Based on the greater weight of the evidence, the Arbitrator finds that both Petitioner's August 12, 2014 and September 20, 2014 work accidents arose out of and in the course of his employment with the Respondent.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's condition of ill being regarding his lumbar spine is causally related to both his August 12, 2014 and September 20, 2014 work accidents. The Arbitrator finds the testimony of Dr. Rinella sufficiently credible and persuasive so as to satisfy the Petitioner's burden of proof.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner gave proper notice of both his August 12, 2014 and September 20, 2014 work accident. This was confirmed by the testimony of Ms. Last.

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 and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for payment of reasonable and necessary medical bills. During his deposition, Dr. Rinella was asked if he believed Petitioner's lumbar spine including surgery was reasonable and necessary based on the symptoms indicated. To this, Dr. Rinella responded, "I think all treatment for cervical, thoracic and lumbar was very reasonable and necessary." Respondent offered no evidence to the contrary.

Based on the greater weight of the evidence, the Arbitrator finds that Petitioner's treatment was reasonable and necessary. The Arbitrator awards Petitioner unpaid medical bills as outlined in Petitioner's Medical Bills Exhibit submitted as exhibit 1, pursuant to the fee schedule.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

Given the Arbitrator's finding of compensability for both of Petitioner's work injuries, Respondent is liable for temporary total disability. Petitioner was given an off work notes from Silver Cross emergency room on September 20, 2014, then by Dr. Waheed on September 22, 2014 and finally from Dr. Rinella when treatment began on October 15, 2014.) Petitioner was continuously off work by Dr. Rinella's order until he returned to Respondent to work on July 1, 2015.

Based on the greater weight of the evidence, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 21, 2014 until July 1, 2015, a period of 40 4/7 weeks. The Arbitrator awards Respondent credit of $24,279.32 for paid Temporary Total Disability benefits.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered an aggravation of his pre-existing back condition which led to the necessity of an L4-5 transforaminal lumbar interbody fusion. The Petitioner testified that he currently continues to experience occasional muscle pain and stiffness in his lower back and has difficulty bending over. Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and

* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a residential alarm installer, and that the Petitioner has returned to that same type of work without much apparent difficulty. The Arbitrator therefore gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 30 years old at the time of the accident. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less likely to fully recover from his injuries. The Arbitrator therefore gives significant weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work with earnings that are the same. Because there is no evidence of any impairment to future earnings, the Arbitrator gives significant weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Petitioner credibly testified that he currently experiences occasional muscle pain and stiffness in his lower back and has difficulty bending over. The Arbitrator notes that the Petitioner's current complaints are relatively minimal and evidence a good result from the treatment rendered to him. These complaints are corroborated in the medical records of the Petitioner's treating physicians. The Petitioner's complaints as supported by the medical records, evidence some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), and the Petitioner's relatively minimal current complaints, the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 10% disability to his whole person.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANATOLY DAVYDOV,

Petitioner,

21IWCC0153

vs.

NO: 16 WC 23007

SUPERIOR BROKERAGE 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 issues of accident, causal connection, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner sustained his burden of proving he sustained a work-related accident on April 28, 2016 which caused his current condition of ill-being in the right shoulder and awards benefits.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner worked for Respondent as a truck driver for eight years and had been a truck driver his entire life. During his employment with Respondent, the medical records reflect that Petitioner previously suffered a work-related injury to his left foot and ankle while working for Respondent on September 16, 2015. Petitioner underwent treatment with Dr. Sergey Kachar and Dr. Thomas Tingle, who are in the same practice, for that injury.

Petitioner then saw Dr. Kachar at Northwest Orthopedic Surgery for evaluation of the right shoulder on November 3, 2015. He reported some mild intermittent pain for many months, maybe up to a year. About three months previously, Petitioner reported that he was swatting a bee and felt a sharp pain in the shoulder and had been having some increasing pain recently. Petitioner had some pain with reaching, lifting, overhead activities as well as pain with activities of daily living. Dr. Kachar ordered x-rays, which showed mild degenerative changes of the

glenohumeral joint. Dr. Kachar diagnosed Petitioner with a right shoulder injury, pain, and impingement. He administered an injection, prescribed physical therapy, and ordered an MRI.

Petitioner acknowledged that he had shoulder pain prior to his first visit to Dr. Kachar in November of 2015. He first reported shoulder pain while on light duty for his ankle and in physical therapy for his ankle. Petitioner did not recall reporting the mechanism of injury or all of the symptoms identified in Dr. Kachar's record because it was long ago, but testified that he would not dispute the medical records indicating that he made those statements. Petitioner testified that the cortisone injection decreased his pain and he was feeling pretty good, working his job until the time of the injury.

Petitioner underwent the recommended MRI on November 5, 2015. The interpreting radiologist found a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant muscle atrophy. More specifically, the radiologist noted a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. He also found that a majority of the tendon is increased in signal and thickened likely related to fraying and tendinosis, and there is also tendinosis of the infraspinatus tendon. The radiologist further noted findings of external impingement and degenerative changes at the glenohumeral joint space with abnormal appearance of the majority of the labrum likely degenerative in origin.

Petitioner also underwent an initial physical therapy evaluation on November 5, 2015 for his right shoulder. The evaluating therapist, Dorota Kus, P.T. (PT Kus), noted an onset of right shoulder pain on August 21, 2015 while sleeping and driving his truck. He reported that he was swatting a fly with his right arm and that it hurt a lot and had been more sore now. Petitioner also underwent his continued physical therapy for the left ankle.

Petitioner returned to Dr. Kachar the following day reporting persistent right shoulder pain and 30% relief from the injection. Dr. Kachar noted that Petitioner had the MRI and recommended continued conservative treatment including physical therapy. Dr. Kachar diagnosed Petitioner with a superior glenoid labrum lesion of the right shoulder and a rotator cuff tear. He indicated that they would consider arthroscopic surgery if he was not improving.

On November 19, 2015, Dr. Kachar noted that Petitioner was doing well with improvement of his right shoulder symptoms. He recommended continued physical therapy. On December 28, 2015, Petitioner was discharged from physical therapy after deciding to go to a facility closer to home. PT Kus noted that Petitioner felt minimal soreness after exercises and no pain.

The following day, December 29, 2015, Dr. Kachar noted that Petitioner was improving overall and functionally better, but he still had some persistent pain. Dr. Kachar continued physical therapy for another six weeks.

On February 25, 2016, Dr. Kachar noted Petitioner's "follow up for work-related injury, right shoulder rotator cuff tear." Petitioner reported that his pain was worse, describing pain at night, and he reported difficulty lifting heavy objects. Petitioner denied any recent traumatic

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injuries. On physical examination, Dr. Kachar noted positive impingement signs. He administered another injection and referred Petitioner to Dr. Tingle for evaluation of right shoulder rotator cuff tear and released him from treatment to follow up as needed.

Petitioner testified that he continued to work through this treatment and that his shoulder felt "better, much, much better" after the injection. He was able to do some home therapy and exercise. Petitioner testified that he did not believe that he needed to see Dr. Tingle and continued to work.

Then, on April 28, 2016, Petitioner testified that he sustained an accident affecting his right shoulder at work, which Respondent disputes. While decoupling a trailer from the cab and pulling on the handle with his right arm he hurt himself and almost fell down when he pulled on the handle. Petitioner testified that "[i]t's really pain, like almost crying, you know, it's so painful." He explained that the pain was worse, "20 times more[,]" than the pain he had previously.

B. Medical Treatment

Petitioner was sent for treatment that day and presented to Dr. Reese at Alexian Brothers' Medical Group. The medical records reflect Petitioner's report of right shoulder pain while pulling on a trailer hitch earlier that day. He reported some shoulder pain a year ago, physical therapy, and improved symptoms. Dr. Reese noted that Petitioner now complained of pain over the side of the shoulder. On physical examination, Petitioner had tenderness of the right deltoid, full range of motion, and normal sensation. Dr. Reese diagnosed a right shoulder sprain, especially over the right deltoid. An ice pack was applied and Dr. Reese prescribed Naproxen and restricted Petitioner from lifting/pushing/pulling over 10 pounds. Petitioner was instructed to follow up on May 4, 2016.

On April 29, 2016, Petitioner presented to Dr. Tingle for an initial orthopedic consultation for right shoulder pain status post work-related injury. The following history was noted:

> The patient is a 68-year-old right-hand-dominant male presents today for an orthopedic consultation regarding right shoulder injury sustained yesterday on 04/28/2016. He works as a truck driver. Apparently, he was pulling on a trailer when he developed a sharp pulling tearing sensation over the anterior aspect of his shoulder. He developed immediate pain. He reported the injury to work, was seen by an occupational medicine physician. He was given work restrictions, placed on naproxen and recommended ice his shoulder. He describes pain and weakness with reaching, lifting and overhead activity. Pain localized primarily over the anterior aspect of his shoulder, but some discomfort feels deep inside, has some clicking or popping sensation with motion of his shoulder. He denies any neck pain, numbness and tingling and radicular symptoms. Symptoms are worse with activity, improved with rest. The pain was initially severe. Now, it is mild to moderate with treatment and rest.

On physical examination, Dr. Tingle noted nearly full passive range of motion with discomfort at end ranges, 4/5 strength in scaption, and positive Neer and Hawkins impingement signs. He diagnosed Petitioner with right shoulder pain, placed him on light duty work restrictions, and ordered an MRI.

The MRI was performed the same day. The interpreting radiologist's impression was of a large full-thickness rotator cuff tear and degenerative arthritis. Specifically, he found the following:

> There is mild to moderate glenohumeral and acromioclavicular degenerative arthritis. There is marginal spurring from the inferomedial humeral head. There is thinning of the glenoid labral cartilage.
>
> There is a large full-thickness rotator cuff tear involving the supraspinatus tendon with portions of the tendon retracted over a length of 3.5 cm. The tear extends to the most anterior band of the infraspinatus tendon. There is considerable coexistent supraspinatus and infraspinatus tendinopathy.
>
> The teres minor and subscapularis tendons are intact. The superior labrum is not ideally visualized probably due to chronic degeneration although a SLAP tear cannot be completely excluded. Visualized portions of the labrum otherwise unremarkable.
>
> Minimal joint effusion. Small to moderate subacromial bursal effusion.

On May 3, 2016, Petitioner returned to Dr. Tingle reporting some improvement in his overall comfort level, with some pain with overhead-type motion, and some continued weakness. Dr. Tingle noted the MRI results and diagnosed Petitioner with a massive rotator cuff tear as well as probable superior labral tear significantly worse after work-related activity. Dr. Tingle discussed non-operative and operative treatment options noting there did not appear to be any musculature atrophy, and the natural history of a rotator cuff-deficient shoulder and likelihood of progression of arthrosis. He recommended an arthroscopic rotator cuff repair, and restricted Petitioner from any lifting or carrying over 20 pounds but allowed him to drive a truck. Dr. Tingle noted that Petitioner was going to consider his options and report whether he wished to proceed with surgery.

Petitioner returned to Dr. Tingle on June 10, 2016 reporting difficulty lifting his arm above shoulder level, 6/10 pain, and 10/10 pain with sleep. He also reported that Respondent had not been able to accommodate his restrictions. Petitioner attended the session with his son-in-law and indicated that he wished to undergo surgery. Petitioner reported a previous shoulder problem "which was completely resolved with rehabilitation prior to his work injury." Dr. Tingle noted his review of a previous MRI dated November 5, 2015. He found that it showed a large full-thickness rotator cuff tear mainly involving the supraspinatus tendon without significant atrophy. The tear measured 1.5 cm with a 2 cm retraction, tendinosis of the infraspinatus tendon, findings of external impingement, and degenerative changes at the glenohumeral joint and labrum. Dr. Tingle noted that Petitioner "had a previous rotator cuff tear

managed conservatively with rehabilitation managed by another physician, which was aggravated and increased in size after work injury. The tear increased in size from 1.5 cm to 3.5 cm in length after the work injury. The rotator cuff tear now extends in[] the infraspinatus tendon when comparing MRI's." He noted that Petitioner wished to undergo the right shoulder arthroscopy with rotator cuff repair and subacromial decompression surgery, which might involve implantation of instrumentation to be determined intraoperatively. Dr. Tingle maintained Petitioner's work restrictions of no lifting with the right arm.

On August 30, 2016, Petitioner returned to Dr. Tingle who noted "some apparently insurance issue[] in regards to the approval from the Workman's Comp versus his private insurance carrier. He is here for repeat evaluation." Petitioner reported pain ranging from 3-5/10 with overhead reaching and at night, and continued discomfort with any overhead lifting or reaching as well as some weakness. Dr. Tingle noted their discussion about the large size of his tear which has enlarged after once again an occurrence at work. Dr. Tingle noted that they would proceed with surgery at Petitioner's earliest convenience and the possibility of inability to repair the tear if he waits too long. He recommended continued home exercises and no lifting or carrying over 10 pounds or overhead lifting.

Petitioner underwent a third MRI on October 4, 2016, which was compared to the April 29, 2016 MRI. The interpreting radiologist noted no significant change compared to the prior MRI. He again found a full-thickness supraspinatus tendon tear as well as moderate infraspinatus and mild subscapularis tendinopathy with small interstitial tears in both tendons. The radiologist also noted mild glenohumeral and acromioclavicular joint osteoarthritis, a small glenohumeral joint effusion, and an abnormal signal in the superior glenoid labrum, for which a tear cannot be excluded. The radiologist issued an addendum report the same day specifying that the supraspinatus tendon tear measured 2.1 cm in anteroposterior dimension and retraction of the tendon stump by 3.5 cm.

On October 6, 2016, Petitioner underwent the recommended surgery with Dr. Tingle. Pre-operatively, he diagnosed a right shoulder rotator cuff tear and impingement syndrome. Dr. Tingle performed an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, he diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome.

Petitioner returned to Dr. Tingle for post-operative follow up care beginning on October 7, 2016. Petitioner remained in an immobilizer for a time and was then referred to physical therapy, which he underwent at AthletiCo. Use of the right arm sling was discontinued on November 23, 2016. Additional physical therapy was ordered on December 20, 2016 and January 20, 2017.

By February 24, 2017, Dr. Tingle noted that Petitioner was doing extremely well and had been discharged from physical therapy. Petitioner reported that he felt very good and very pleased with his progress, and quite functional. However, Petitioner still had some occasional

mild weakness. Dr. Tingle recommended a continued home exercise program for functional strength, and Petitioner was released from treatment to follow up on an as-needed basis. Petitioner testified that he last saw Dr. Tingle on February 24, 2017, at which time he was released to full work and from treatment.

C. Deposition Testimony – Dr. Tingle (Petitioner's Orthopedic Surgeon)

Petitioner called Dr. Tingle as a witness and he gave testimony at an evidence deposition on August 29, 2018. He discussed his treatment of Petitioner and gave opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Tingle testified that he was a board-certified orthopedic surgeon and performed surgery on a regular basis. He first saw Petitioner on April 29, 2016 for severe right shoulder pain after hurting it at work. Dr. Tingle understood the mechanism of Petitioner's injury to be that he was pulling a trailer when he developed a sharp, pulling, tearing sensation over the anterior aspect of his shoulder. Dr. Tingle was aware that Petitioner had a right shoulder problem and that he had received treatment prior to seeing him from his partner [Dr. Kachar] in the same practice, and those notes were available for his review.

Dr. Tingle reviewed all of Petitioner's MRI films from his 2015 and 2016 scans. In comparing the November 2015 MRI to the April 2016 MRI, Dr. Tingle felt that it was significantly worse because the large tear was now a massive tear, the centimeter findings of retraction [changed], and there was involvement of another tendon (the infraspinatus) that was not present of the 2015 films according to the radiologist's readings, which he felt had enlarged. Dr. Tingle opined that the findings in the April 2016 MRI were consistent with Petitioner's symptoms and his exam, and also with the mechanism of injury as described.

Dr. Tingle issued a narrative report at the request of Petitioner's counsel. Therein, he referred to a report of Dr. Hennessy on behalf of the employer dated July 27, 2016. Dr. Tingle disagreed[1] with Dr. Hennessy's opinion explaining that "I don't think the literature necessarily

[1] The Commission notes that there were no express rulings made on either parties' objections or motions at either Dr. Tingle or Dr. Hennessy's depositions. Here, Respondent objected to Dr. Tingle's testimony regarding any medical literature on which he relied based on *Ghere* asserting that it had not been provided with such literature 48 hours in advance of the deposition. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840 (1996). Respondent made additional objections, maintained a "standing" *Ghere* objection, and moved to strike various portions of the doctor's testimony. The Commission finds the Arbitrator implicitly overruled both parties' objections at both depositions, as well as Respondent's *Ghere* objection and explicitly overrules it here. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, *16-17 (2011) (*citing In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003)). The Court went on to specify that such opinions are "only as valid as the reasons for the opinion." *Id.* (citing *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998)). Dr. Tingle's reference to medical literature at the time of his deposition is the type of testimony that can be expected from a medical expert when explaining the reasoning for causal connection opinions particular to a patient. Moreover, Respondent suffered no harm as a result of the testimony. Respondent's Section 12 examiner, Dr. Hennessy, was later deposed and even agreed with some of the propositions set out by Dr. Tingle regarding the medical standards identified. In addition, both physicians reviewed the other's written reports and had the opportunity to explain any disagreement and the bases therefore. As such, the Commission finds no harm to

supports that that's the natural progression of a rotator cuff tear in a 69-year-old gentleman over five months. I mean there was - - I mean there's literature out there that basically had studied this and for a full thickness tear the incidence of increased retraction, about 22 percent of those full thickness tears will increase at the two-year mark, so I followed these patients for an extended period of time, and 50 percent will increase over a five-year period. And the other thing they noted, the main thing was someone had progression of a tear was that their pain increased significantly." Dr. Tingle identified this as a JBJS article by Keenan and Ken Yamaguchi from Washington University in St. Louis.

Dr. Tingle maintained his opinion that the tear in the April 2016 MRI was larger and there appeared to have some more retraction compared to the 2015 MRI. He opined that the accident aggravated Petitioner's previous condition and was a factor leading to his treatment and surgery. Dr. Tingle maintained his opinion regarding the MRIs from 2015 to 2016 explaining that he reviewed the MRIs himself, but he would defer to the radiologists that read the MRIs that are board-certified and have better software to interpret films. He also maintained his opinion, throughout his testimony, that Petitioner's pre-existing condition was aggravated by the accident.

On cross-examination, Dr. Tingle testified that Petitioner was referred to him by Dr. Kachar, another orthopedic surgeon, for a surgical consultation for the diagnosis of rotator cuff tear. He was asked about Petitioner's prior treatment with Dr. Kachar, and he acknowledged that Petitioner underwent a previous injection, physical therapy, and was taking anti-inflammatories. He agreed that Petitioner was symptomatic at that time, and he reported that he was asymptomatic when he first saw Dr. Tingle. Dr. Tingle acknowledged that Petitioner's prior symptoms were not documented in his "history of present illness" at his initial visit. However, Dr. Tingle pointed out that Petitioner's prior symptoms were "already documented in the chart."

Dr. Tingle agreed that the 2015 and 2016 MRIs both showed a large full thickness tear of the rotator cuff, degenerative joint disease in the glenohumeral joint space, and degenerative tears in the labrum. He agreed that the small to moderate bursal effusion noted in his initial note could possibly be related to degenerative changes and could be read either to indicate an acute injury or not. The November 5, 2015 MRI showed tendinosis, which are changes caused by chronic inflammation and could be a precursor to tearing of the tendon. Dr. Tingle testified that there was also some degenerative joint disease.

Dr. Tingle acknowledged that rotator cuff tears do not heal on their own. When asked whether one can employ conservative treatment to "calm it down," Dr. Tingle answered in the affirmative. He also agreed that the rotator cuff tear is always going to be there, and injections typically wear off eventually. However, he testified that not all rotator cuff tears are symptomatic and he disagreed with the proposition that a 69 year-old man with a previous rotator cuff tear and arthritis would have continued progression of the tear because he has some arthritic findings in the shoulder. With regard to the onset of Petitioner's rotator cuff tear before the November 5, 2015 MRI, Dr. Tingle believed it would have begun a year or two prior because there was not much muscle atrophy.

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either party by the Arbitrator's consideration of the testimony of the physicians in its entirety and, likewise, considers the testimony of both physicians in its entirety assigning appropriate weight, if any, to the physicians' opinions as explained in the conclusions of law.

Dr. Tingle acknowledged that patients with asymptomatic rotator cuff tears are not referred for a surgical consultation. He agreed that when he first saw Petitioner, he reported pain and difficulty with reaching, with lifting, and with overhead activities. Petitioner also reported difficulty with lifting heavy objects when he saw Dr. Kachar on February 25, 2016. Petitioner also had impingement signs both before and after the accident, as well as some weakness. However, Dr. Tingle pointed out that at Petitioner's November visit [with Dr. Kachar] Petitioner had a negative drop test, which was "significantly different from [his] exam from April 29, 2016, when [Petitioner] had difficulty with active motion above 90 degrees so basically [he] did not have full range of motion actively, his strength was four out of five which is a specific test to evaluate the rotator cuff strength" in addition to the positive Neer and Hawkins impingement signs. Dr. Tingle also acknowledged that is was possible for a degenerative SLAP tear to lead to progression of a rotator cuff tear over time absent trauma.

On redirect examination, Dr. Tingle testified that Petitioner presented to him as an emergency add-on appointment for severe shoulder pain. He explained that they get as much information as possible but may not cover every single detail of the patient's complete care. Notwithstanding, Dr. Tingle testified on direct, cross-examination, and re-direct examination that Petitioner's prior right shoulder problems and treatment were documented in the office file and he was aware of it. Dr. Tingle maintained the opinion that there was change in Petitioner's November 2015 and April 2016 MRI findings, and those findings were consistent with his opinion that the accident aggravated Petitioner's condition. Dr. Tingle testified that is was possible for Petitioner to have become asymptomatic from February to April 2016.

D. Section 12 Reports and Deposition Testimony – Dr. Hennessy (Respondent's Section 12 Examiner)

On July 27, 2016, Dr. Ryon Hennessy performed a records review and rendered various opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work. At the time, Dr. Hennessy did not have MRI films to review. In his report, he diagnosed Petitioner with a large, full thickness rotator cuff tear with 3.5 cm retraction and a supraspinatus tear likely at 1.5 cm and found the remaining pathology to be degenerative in nature. He diagnosed progression of a rotator cuff tear with regard to retraction as well as persistent tendinopathy of supraspinatus and infraspinatus and degeneration of the labrum. Dr. Hennessy opined that Petitioner's condition was degenerative, that the retraction was consistent with the natural progression of a full thickness rotator cuff tear in a nearly 69 year old man, and that the incident of pulling on a trailer at work would not cause retraction. He further opined that the alleged incident at work did not cause any new pathology. In the remainder of his report, Dr. Hennessy maintained that there was "clearly no acute injury."

On June 1, 2018, Petitioner submitted to a Section 12 examination with Dr. Hennessy at Respondent's request. Dr. Hennessy reviewed various records including Petitioner's post-accident treatment records, and examined Petitioner. He was provided with Petitioner's MRI scans, but was "unable to open the disc however on three separate computers." Dr. Hennessy stated "[b]riefly, the opinions I generated in my chart review in July 2016 remained unchanged."

He added that "[a]fter review of further records as well as interview with Mr. Davydov, my opinions were strengthened."

On June 23, 2018, Dr. Hennessy issued an addendum report in which he noted his review of November 3, 2015 x-rays, and all three of Petitioner's right shoulder MRIs. Dr. Hennessy was also provided with Dr. Tingle's narrative report. Dr. Hennessy's ultimate opinions did not change after reviewing diagnostic films. He found the November 2015 MRI to reflect a 23 mm [2.3 cm] by 36.6 mm [3.66 cm] rotator cuff retraction. He found the April 2016 MRI to be "essentially the same as the 11/5/2015 film" reflecting a 22.4 mm [2.24 cm] tear. He then found the October 2016 MRI to be "unchanged from April 2016[]" and again reflect a 22.4 mm [2.24 cm] tear with a 36 mm [3.6 cm] tear on one image and a 38 mm [3.8 cm] on another image. Dr. Hennessy believed that the radiologist had underread the films. He agreed that the treatment rendered by Dr. Tingle was appropriate, but unrelated to an accident at work.

Dr. Hennessy also disagreed with Dr. Tingle's narrative report and noted that Dr. Tingle made no comparison between the November 2015 MRI and the April 2016 MRI. He also stated that Petitioner made no mention of his prior right shoulder complaints, which were "directly refuted" by Dr. Kachar's February 2016 note. Dr. Hennessy reiterated his belief that the radiologist that read Petitioner's November 2015 MRI under-read the films, which were in his opinion "essentially identical" to the October 2016 MRI. He also indicated that "regarding retraction of rotator cuff tears over 18 months to 5 years" his "personal review of the MRI films would be consistent with the literature Dr. Tingle cited."

Respondent called Dr. Hennessy as a witness and he gave testimony at an evidence deposition on October 2, 2018. He discussed his Section 12 reports and opinions regarding the relatedness, if any, of Petitioner's right shoulder condition to his work.

Dr. Hennessy testified that he was a board-certified orthopedic surgeon. About 70% of his practice involved general orthopedics and about 30% involved treatment of the spine. He sees 80 to 90 patients, performs 4-10 surgeries, and performs about one to two Section 12 examinations a week. He reviewed Petitioner's medical records and issued three reports.

Initially, Dr. Hennessy only had the MRI reports and not the actual films. He noted that the November 5, 2015 MRI report showed a full-thickness rotator cuff tear measuring 1.5 cm with 2 cm of retraction, moderate infraspinatus and mild subcapularis tendinosis, with fluid along the supraspinatus muscle and subacromial without atrophy, moderate AC joint arthritis with anterior acromial spurring and thickened coracoacromial ligament, and labral degeneration/tearing of the superior, anterior, posterior and anterior inferior aspects. The MRI report from April 29, 2016 indicated a full-thickness rotator cuff tear with 3.5 cm retraction, supraspinatus and infraspinatus tendinopathy, degeneration of the labrum, and a small amount of subacromial fluid. Otherwise, the labrum was considered normal.

Dr. Hennessy noted that based on the November 2015 MRI report, the labrum tearing and rotator cuff tear pre-dated April 2016. The second MRI just noted labrum degeneration. However, the labrum would not have repaired itself in the interim. In interpreting the MRI reports, Dr. Hennessy the rotator cuff "tears were likely similar." While there was some

progression of the retraction, "it would have been more due to the pre-existing condition and the natural history of that pre-existing condition as full thickness rotator cuff tears could progress or can progress with further retraction." Both he and Dr. Tingle agree about Petitioner's diagnosis, however, Dr. Hennessy believed the retraction represented a natural progression of the underlying pre-existing disease. Based on the MRI reports, Dr. Hennessy opined "that it would be highly unlikely there would be a 1.5 centimeter change in retraction in just six months. That's highly unlikely." When asked why, Dr. Hennessy testified that "[i]n six months, retraction happens a little more slowly over years. It doesn't happen acutely like that. Actually it was a five-month interval. That would be highly unlikely." Dr. Hennessy explained that retraction is a generally degenerative rather than an acute process.

Dr. Hennessy found no acute findings in either of the MRI reports. There had been persistent weakness when Petitioner was discharged from physical therapy in December 2015. He did not appreciate any new rotator cuff injury in the second MRI and the pre-existing rotator cuff tear was symptomatic prior to the accident. Therefore, he found no exacerbation, acceleration, or aggravation of the pre-existing condition. Dr. Hennessy believed that all treatment provided to Petitioner was appropriate, though he believed the need for surgery was the underlying condition and not the work injury.

Two years after his initial records review, Dr. Hennessy examined Petitioner, reviewed additional records, including records from before the accident, and issued another report. It was noted that on November 3, 2015, Petitioner reported to Dr. Kachar that he had shoulder pain for up to a year with associated difficulty lifting heavy objects, and positive impingement signs. Petitioner also reported that the pain increased when he swatted at a bee three months earlier. Petitioner treated with Dr. Kachar through February 25, 2016, at which time he referred Petitioner to Dr. Tingle for a surgical consultation.

Dr. Hennessy reviewed the operative report. Dr. Tingle noted that the rotator cuff tear was 3.4 cm by 3 cm, which he agreed was massive. Dr. Tingle also noted that the tendon was mobile and therefore, in Dr. Tingle's opinion, more consistent with an acute, rather than chronic, injury. Dr. Tingle also noted some granulation, which he posited was more consistent with an acute injury than a chronic one. He also debrided an old biceps rupture injury. When asked whether he agreed with Dr. Tingle's assessment that the injury appeared acute, Dr. Hennessy responded that the biceps injury was clearly an old one and he was "not sure the granulation would necessarily tell us acute versus chronic;" he really hadn't seen that. "But as far as the size of the tear, [it] would be documented by [Dr. Tingle's intraoperative] pictures. He said it was 3.4 by 3. That's probably what it was."

When asked whether he would "agree or disagree that these were acute injuries as opposed to chronic injuries[,]" Dr. Hennessy responded that "[w]ithout seeing the actual pictures I have to take [Dr. Tingle's] report on its face value. Pictures of the surgery, except for the biceps which everyone seems to say which was old." Nevertheless, he concluded that the rotator cuff injury was chronic and not an acute injury. Petitioner had an uneventful postop recovery and was released from treatment within five months.

At the time of Dr. Hennessy's physical examination of Petitioner, he reported to Dr. Hennessy that he did not remember his February 2016 visit to Dr. Tingle and therefore could not relate whether he had pain at that time, but reported that his right shoulder was pain free at some point. At the time of his exam, Petitioner had returned to work driving a truck with a manual transmission but did have to load/unload the truck. He had stopped that about 10 years earlier, though he still had to pull the pin of the trailer and operate the fifth wheel of the trailer. Petitioner complained of 1-3/10 shoulder pain with occasional tingling in right fingers.

On examination, Dr. Hennessy found that Petitioner was pleasant and cooperative the entire visit, and never gave any undue behaviors. Petitioner had full strength in his rotator cuff but showed some reduced range of motion and mildly positive impingement signs on the right shoulder. He had very little decreased motion considering the size of the tear. In Dr. Hennessy's opinion, Petitioner had a good surgical result.

Dr. Hennessy was eventually able to read the actual MRI films. His examination of Petitioner and his review of the additional medical records did not change his original opinions. Dr. Hennessy noted that the infraspinatus remained intact and it would be highly unlikely that the rotator cuff tear could widen that much without also affecting the infraspinatus. There just is not that much width of the supraspinatus, and it would be highly unlikely for such worsening to occur in that time frame. Petitioner also had a long history of right shoulder pain. In February 2016, Dr. Hennessy noted that Petitioner was being actively treated for his right shoulder, had another cortisone injection, and was assessed as having failed conservative treatment and had been referred for a surgical option. In his opinion, it was very common to see rotator cuff tears in patients of Petitioner's age (70-71) and the probability of developing rotator cuff tears increases with age. The rotator cuff would not have healed between February 2016 and the work accident.

Dr. Hennessy also thought it was significant that the April 2016 MRI report did not include a comparison to the November 2015 MRI. "You had two markedly different measurements of films, and yet it would have been nice at the onset of all this had they just looked at the two films and made a direct comparison contemporaneously." Dr. Hennessy ascribed "some of the difference in terms of the width to me could just be observer error."

Dr. Hennessy diagnosed symptomatic large full-thickness rotator cuff tear documented in a November 2015 MRI with long-standing rupture of the long-head biceps tendon both of which predated April 2016. Dr. Hennessy testified that surgery had been "recommended" just over a month prior to his accident. Petitioner was at maximum medical improvement and did not need any additional medical treatment.

Dr. Hennessy testified that June 23, 2018 was the first time he was able to see the actual MRI films, and he testified consistent with the measurements and opinions rendered in his addendum report. To him, the MRI from April 2016 was almost identical to the November 2015 film; he "did not appreciate any significant progression or retraction." The three films were all almost identical.

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Dr. Hennessy also reviewed the statement of Dr. Tingle, in which he opined that prior to the instant accident Petitioner was essentially pain free, had full functionality of his right shoulder, and the accident caused permanent aggravation of his condition and made it symptomatic again. He disagreed with Dr. Tingle's opinion that Petitioner suffered increased retraction. Initially, Dr. Hennessy opined that it would be extremely unlikely that Petitioner would show such increased retraction in such a short time span. After he saw the films, he found there was no retraction. He also questioned Dr. Tingle's conclusion that Petitioner was pain free in February 2016, because he administered an injection at that time.

On cross examination, Dr. Hennessy agreed that he saw no treatment records between February 25, 2016 and April 28, 2016. He acknowledged that, while Petitioner told him he could not remember the February 2016 visit to Dr. Tingle, he reported that at some point he was pain free. Dr. Hennessy also admitted that while the condition itself would not cure itself, [the patient] could be asymptomatic.

On cross-examination, when asked whether he disagreed with the opinions of the radiologists, Dr. Hennessy testified that "I would say in terms of magnitude and the size of the tears on the different films, I think we all, Dr. Tingle, myself, and the radiologist all agreed on the basic premises that he had a full thickness rotator cuff tear and biceps tendon rupture from 2015 and as well as the two MRI's that he had in '16. So my disagreement was more in the magnitude … and the fatty atrophy being present in 2015." He had no reason to question Dr. Tingle's intraoperative measurements, but he added that they were consistent with his reading of the MRI. He did not agree that the tear went from large to massive.

On redirect examination, Dr. Hennessy agreed that the cortisone injection administered on February 25, 2016 was intended to relieve pain and their lasting effects are highly variable ranging from very little relief to sometimes relief for months.

E. Additional Information

Petitioner testified that he had no other accidents affecting his shoulder other than the one on April 28, 2016.

Regarding temporary disability related to this accident, Petitioner testified that he worked light duty until May 18, 2016 and was then off work until he was released back to full duty work on February 24, 2017.

Regarding his current condition of ill-being, Petitioner testified that currently he had pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects. Sometimes he takes over-the-counter pain medication, which helps a bit.

Regarding his medical bills, Petitioner testified that they were paid by Medicare and through a Medicare supplemental insurance policy, which Petitioner paid for.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner proved he sustained a work-related accident on April 28, 2016. The Commission agrees.

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she 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" one's 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" 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.*

Moreover, the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828 further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment. *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny and found that a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner gave uncontroverted testimony that on April 28, 2016 he sustained an accident affecting his right shoulder at work while decoupling a trailer from the cab and pulling on the handle with his right arm. He explained that the pain he experienced was 20 times worse than the pain he had previously experienced in his shoulder. Respondent sent him for treatment at an occupational health clinic that day. The records of the examining physician, Dr. Reese, at Respondent's designated occupational health clinic corroborate Petitioner's testimony about the acute mechanism of injury and severity of his symptoms following the traumatic incident earlier that day. It is plausible that Petitioner, a truck driver, would decouple a trailer from his truck. No evidence was presented that he was precluded from doing so. Regardless, it was an act that Petitioner might reasonably be expected to perform incident to his assigned duties as a truck driver. *McAllister*, 2020 IL 124828, ¶ 46. Moreover, Petitioner's reported mechanism of injury and immediate onset of symptoms were clinically correlated by the most contemporaneous medical evaluation performed at the occupational health clinic.

Thus, the Commission affirms the Arbitrator's conclusion that Petitioner has met his burden of proof and established that he suffered a compensable accident at work on April 28, 2016 as claimed.

B. Causal Connection

While finding that Petitioner had suffered an accident at work, the Arbitrator found that Petitioner did not sustain his burden of proving that the accident caused his current condition of ill-being of his right shoulder. Accordingly, the Arbitrator denied compensation and, in so doing, gave greater weight to the opinions of Dr. Hennessy over those of Dr. Tingle. In reviewing the record, the Commission is not similarly persuaded.

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). 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). Thus, 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. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981). A claimant may rely on the "chain of events" in his or her case to demonstrate the aggravation or acceleration of a preexisting condition. See *Schroeder v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC, ¶¶ 25-29.

In this case, Petitioner was an older, long-time truck driver that suffered an acute accident causing a breakdown in his condition due to an occupational cause when he pulled a pin to decouple his truck from a trailer. There is no question that Petitioner had a pre-existing right shoulder condition. Indeed, he was receiving treatment from Dr. Kachar after an onset of symptoms prior to November 2015 affecting his right shoulder. He first sought treatment for a right shoulder condition with Dr. Kachar, the physician treating him for an unrelated left ankle and foot injury, on November 3, 2015. He underwent a right shoulder MRI two days later that confirmed a full-thickness rotator cuff tear involving the distal supraspinatus tendon measuring approximately 1.5 cm anterior posterior and tendon retraction measuring approximately 2 cm. Dr. Kachar treated Petitioner's right shoulder condition conservatively with injections and physical therapy thereafter noting that surgery might be an option if his condition did not improve. Petitioner continued physical therapy through January 6, 2016. Petitioner returned to Dr. Kachar on February 25, 2016 at which point he was released from care and referred to his colleague, Dr. Tingle, for a surgical consultation. Petitioner did not undergo treatment after February 25, 2016 until the date of accident or see Dr. Tingle. He testified that he was able to work and did not feel that he needed to see Dr. Tingle at that time.

Respondent asserts that "[w]hile there was *some* controversy about the size and magnitude of the tear (i.e.[,] a large tear versus a massive tear), all doctors agree [P]etitioner had a rotator cuff tear that was objectively sympto[ma]tic and present on radiographs several months before the work accident." (Emphasis added). In sum, Respondent urges the Commission to find that the presence of an objectively symptomatic rotator cuff tear prior to the accident at work with a surgical consultation referral should preclude recovery of benefits, finding the opinions of its Section 12 examiner to be persuasive. The Commission cannot so find given the objective medical evidence in this case.

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The pre-accident MRI and post-accident MRIs were read by three different radiologists who measured the size and extent of Petitioner's rotator cuff tear and retraction. The radiologists' measurements indicate a significant increase in tear size from 1.5 cm to 3.5 cm as well as significant retraction increase from 2 cm to 3.5 cm. In order to find the opinions of Dr. Hennessy persuasive in this case, the Commission would have to ignore the interpretation of three different radiologists regarding the magnitude of Petitioner's right shoulder tears as reflected in the 2015 and 2016 MRIs. Such a finding would also require the Commission to ignore Dr. Tingle's interpretation of the pre- and post-accident MRI films, which he had access to in his chart at the time of Petitioner's initial visit with him, contrary to Dr. Hennessy's assumption. Indeed, Dr. Tingle testified that Dr. Kachar's records were in his chart, so he was aware of the entirety of Petitioner's treatment with his partner and he could compare Petitioner's reports to him with the prior treatment records.

Conversely, the Commission would further have to accept Dr. Hennessy's opinion that it was "highly unlikely" that Petitioner's MRIs would show such a significant increase in retraction between November 2015 and April 2016 solely to degeneration, and the change should be attributed to human error, not only by the radiologists, but also by Dr. Tingle. The Commission finds it more likely that Dr. Hennessy refused to detach from his initial opinions regardless of any objective evidence to the contrary. Dr. Hennessy's initial records review, in which he had no access to the MRI films, resulted in the opinion that Petitioner's condition was degenerative. Years later, after overcoming technical difficulties with the initial MRI films provided, Dr. Hennessy ultimately opined that his reading of all three films only strengthened his initial opinions and that the marked differences observed by other professionals in this case were due to observer error. Dr. Hennessy's final opinion after seeing the MRI films that there was no difference whatsoever among them undercuts the reliability of all of his opinions.

In sum, the Commission does not find the opinions of Dr. Hennessy to be persuasive given the objective diagnostic findings of four different physicians, including Petitioner's orthopedic surgeon who always had access to all of Petitioner's prior treatment records and films, to the contrary. Rather, we find that the opinions of Dr. Tingle, which are corroborated by the diagnostic interpretations of three radiologists, to be persuasive and based on a complete and accurate understanding of Petitioner's presentation at his initial visit and thereafter.

In addition, the "chain of events" in this case support's Petitioner's claim of causal connection. Petitioner was able to perform his work activities prior to the accident whereas he was not after the accident. Petitioner needed no treatment from the last injection on February 25, 2016 until the instant accident, but experienced pain and symptoms that prevented him from working immediately after the accident as corroborated by Respondent's occupational health clinician immediately thereafter.

The Commission observes that in denying compensation, the Arbitrator questioned Petitioner's credibility. As noted above, the Commission finds ample objective medical evidence to corroborate Petitioner's medical condition contemporaneous to his reported accident at work and complaints to the various evaluating physicians. While Petitioner did not require a translator at the hearing, a cursory evaluation of the transcript reflects that Petitioner had

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difficulty expressing himself and understanding questions posed on direct and cross-examination. The Commission does not find Petitioner's testimony to be evasive and notes that, while he did not recall certain reports as specifically as posited on cross-examination, he readily admitted that he had a pre-existing shoulder condition, treatment for the condition, and periods of repose where he felt no debilitating symptoms. The Commission finds Petitioner to be credible overall.

Thus, the Commission finds that Petitioner's pre-existing right shoulder condition was aggravated and is causally related to the traumatic incident at work on April 28, 2016.

C. Temporary Total Disability

On the issue of temporary total disability (TTD), Petitioner seeks benefits from May 18, 2016 through February 24, 2017. Petitioner claims that Respondent was no longer able to accommodate his restrictions as of May 18, 2016 and he did not return to work until he was released to full duty as of February 24, 2017. The medical records reflect that Petitioner was either placed off work or on restrictions during the claimed period, and Dr. Tingle noted Petitioner's report in June 2016 that Respondent did not accommodate the restrictions. No evidence was presented to the contrary. Therefore, the Commission awards Petitioner TTD benefits as claimed totaling 40 and 3/7ths weeks.

D. Medical Expenses

As explained above, the record reflects that Petitioner sought immediate care and treatment of the right shoulder after his accident at work, and the Commission finds the opinions of Petitioner's treating physician, Dr. Tingle, to be persuasive in this case. On the issue of medical expenses, the evidence establishes that Petitioner's right shoulder treatment after the accident at work was reasonable and necessary to alleviate Petitioner of the effects of his occupational injury. Indeed, while finding that Petitioner's condition was wholly degenerative, Dr. Hennessy testified that all of the treatment that Petitioner received after April 2016 was appropriate. Thus, the Commission finds Respondent responsible for the payment of Petitioner's charges for reasonable and necessary medical services related to his right shoulder injury pursuant to §8(a) and §8.2 of the Act and the fee schedule.

E. Permanent Partial Disability

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, 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).

The Commission places no weight on factor (i) because there is no impairment report. The Commission places some weight on factor (ii), noting that Petitioner continues to work as a

truck driver. Regarding factor (iii), the Commission places greater weight to Petitioner's age (68) at the time of his injury, given that Petitioner likely will remain in the workforce for a less prolonged period. The Commission places some weight on factor (iv) due to the lack of evidence regarding Petitioner's future earnings capacity compared to his pre-injury position.

The Commission places significant weight on factor (v). Petitioner ultimately underwent an exam under anesthesia of the right shoulder, right shoulder arthroscopy, right shoulder arthroscopic rotator cuff repair for a massive tear, extensive debridement of the labrum, glenohumeral synovectomy, chondroplasty of the humeral head and glenoid, and subacromial decompression. Post-operatively, Dr. Tingle diagnosed Petitioner with a right shoulder massive rotator cuff tear, labral tear, glenohumeral synovitis, chondromalacia, and impingement syndrome. Petitioner testified that he continues to experience pain in his shoulder while sleeping, lifting his hand, lifting overhead, and with some weather changes. He no longer lifts heavy objects and sometimes takes over-the-counter pain medication to manage his symptoms.

Having considered all of the statutory factors, the Commission finds that Petitioner suffered a permanent partial disability representing a 10% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $574.02 per week for a period of 40 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses under the fee schedule and pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $516.62 per week for a total of 50 weeks because the injuries sustained resulted in the permanent loss of the use of 10% 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.

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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.

DATED: APR 5 - 2021

Barbara N. Flores

BNF-MP/dw
O-2/4/21
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Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. The Arbitrator found that Petitioner did not prove that his alleged work-related accident caused his current condition of ill-being, his rotator cuff tear, and denied compensation. The Majority reversed the Decision of the Arbitrator, found causation, and awarded benefits. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

First, while the Arbitrator found accident, he did so "with hesitation." He found Petitioner's testimony lacked credibility because his testimony was at odds with the medical records. His skepticism of Petitioner's veracity forced him to question whether Petitioner even had an accident, despite the fact that there was no evidence specifically rebutting his testimony. The Arbitrator specified that "Petitioner's demeanor changed dramatically between direct examination and cross examination." His memory appeared selective in nature. His recollections became much more complete on direct than cross, and "almost in all instances where Petitioner did not remember [or] recall an event favored his case." Most notably, Petitioner appeared to be evasive and untruthful about the extent of his symptoms and treatment prior to the instant accident. I find no reason for the Majority to substitute its assessment of credibility for that of the Arbitrator who actually observed the Petitioner's testimony.

Prior to the instant accident, Petitioner treated with Dr. Kachar for his right shoulder condition since November 3, 2015. At that time, he reported that he had shoulder pain for at least a year and had aggravated it a couple of months earlier "swatting a bee." He reported "some pain with reaching, lifting, overhead activities as well as pain with activities of daily living." Dr. Kachar administered an injection, prescribed physical therapy, and ordered an MRI. The MRI dated November 5, 2015 showed a large, full-thickness tear of the rotator cuff. Petitioner last saw Dr. Kachar before the instant accident on February 25, 2016, only two months before the alleged accident. At that time, Dr. Kachar administered another injection and referred Petitioner for a surgical consultation.

The Arbitrator also found the opinions of Respondent's Section 12 medical examiner, Dr. Hennessey, more persuasive than those of Dr. Tingle. Contrary to the Majority, I concur with

the Arbitrator's assessment of the persuasiveness of the doctors' opinions. Dr. Tingle, one of Petitioner's treaters, based his opinion that Petitioner's condition was causally related to the accident on his assumption that Petitioner was pain free from February 25, 2016 up to the date of the accident. That assumption is not sustainable because on that date Dr. Tingle's partner, Dr. Kachar, administered an injection and referred him to surgery because he had failed conservative treatment for his large rotator cuff tear. Dr. Tingle agreed that injections are not provided, and surgery is not indicated, for patients with asymptomatic rotator cuff tears. Therefore, it is clear that Petitioner was substantially symptomatic for a large rotator cuff tear prior to the accident.

The Majority relies mostly on the radiologist's report that the rotator cuff tear grew from 2 cm to 3.5 cm from November 5, 2015 to March 29, 2016. This interpretation was at odds with that of Dr. Hennessey. He explained that retraction is degenerative in nature and he would find it difficult to believe that a rotator cuff tear could retract that much is such a short period of time, that such retraction was not consistent with the mechanism of injury reported, and explained how an error in the calculation of retraction could have happened. I agree with Dr. Hennessey that it does seem unlikely that there could have been such dramatic increase in retraction over a few months, especially because the injury Petitioner described cannot be considered extremely traumatic. Finally, Petitioner's testimony about the accident itself was sketchy. He did not testify as the amount of force necessary to decouple the trailer and he simply testified that he pulled the handle and felt pain.

The Majority accepted Petitioner's questionable testimony that his symptoms resolved completely after the injection on November 3, 2015. As Dr. Hennessey explained it is extremely unusual for an injection to completely resolve rotator cuff pain. In this instance, I find it much more conceivable that Petitioner's prior symptoms returned as the effects of the injection wore off. That was why the second injection was administered. Petitioner had his first injection on November 3, 2015 and the second on February 25, 2016. The fact that Dr. Kachar referred Petitioner to a surgeon on February 25, 2016 shows that he did not believe Petitioner's treatment for Petitioner's shoulder condition was completed and that surgery was indicated. In addition, Dr. Hennessey noted that the MRIs showed "fatty atrophy" which indicated the chronicity rather than acuity of Petitioner's condition.

Because the Arbitrator observed Petitioner's testimony and found him not credible, because Petitioner had extensive pre-accident treatment for the same shoulder condition prior to the accident, because Petitioner had actually been referred for a surgical consultation prior to the accident, and because Dr. Hennessey explained that the presence of fatty atrophy points to a chronic rather than acute shoulder condition I would have affirmed and adopted the Decision of the Arbitrator, found Petitioner did not sustain his burden of proving that a work-related accident caused his current condition of ill-being and denied compensation. Therefore, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

DLS/dw
O-2/4/21
46

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

TIMOTHY DAVIS,

Petitioner,

vs. NO: 18 WC 18489

TYSON FOODS,

Respondent.

21IWCC0154

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 medical expenses 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. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020 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 $21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: APR 5 - 2021

Christopher A. Harris

Barbara N. Flores

Marc Parker

CAH/pm
d: 4/1/21
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

DAVIS, TIMOTHY
Employee/Petitioner

Case# **18WC018489**

TYSON FOODS
Employer/Respondent

21IWCC0154

On 9/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0656 GLASS & KOREIN LLC
MICHAEL H KOREIN
7012 W MAIN ST
BELLEVILLE, IL 62223

0000 WIEDNER & McAULIFFE LTD
JUAN ARIAS
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

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)

Timothy Davis
Employee/Petitioner

v.

Tyson Foods
Employer/Respondent

Case # 18 WC 18489 .

Consolidated cases: n/a

21IWCC0154

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 26, 2020. 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 **Did Petitioner exceed two choices of medical providers**

FINDINGS

On the date of accident, May 25, 2018, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $10,607.04; the average weekly wage was $505.10.

On the date of accident, Petitioner was 49 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $33,440.07 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $33,440.07.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary partial disability benefits of $512.09, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $336.73 per week for 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, January 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the fusion surgery recommended by Dr. David Raskas.

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.

William R. Gallagher, Arbitrator
ICArbDec19(b)

September 21, 2020
Date

SEP 24 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 25, 2018. According to the Application, Petitioner "slipped and fell on banana in the employee only breakroom" and sustained an injury to his "low back and right ankle" (Arbitrator's Exhibit 2). Petitioner sought an order for payment of medical bills, temporary total disability benefits and temporary partial disability benefits as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship. Respondent also disputed liability for a portion of Petitioner's medical expenses on the basis Petitioner had exceeded two chains of medical providers (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018; January 8, 2019, through July 21, 2020; and August 22, 2020, through August 26, 2020 (the date of trial). Respondent claimed Petitioner was entitled to temporary total disability benefits of 75 4/7 weeks, commencing June 8, 2018, through October 23, 2018; and January 8, 2019, through January 30, 2020 (Arbitrator's Exhibit 1).

In regard to temporary partial disability benefits, Petitioner claimed he was entitled to temporary partial disability benefits of 15 2/7 weeks, commencing October 24, 2018, through January 7, 2019; and July 22, 2020, through August 21, 2020. Respondent claimed Petitioner was entitled to temporary partial disability benefits of 10 6/7 weeks, commencing October 24, 2018, through January 7, 2019 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a crane operator in the shipping department. Petitioner's job duties included pulling and picking up pallets and scanning them. Petitioner was also required to lift items which weighed 15 to 50 pounds. Prior to the accident of May 25, 2018, Petitioner had no low back or leg pain.

On May 25, 2018, Petitioner was in the employee breakroom and he slipped/fell when he stepped on the skin of a banana. Petitioner testified he fell at an angle and experienced left lower back pain and pain in his right leg/ankle.

At the direction of Respondent, Petitioner was evaluated at Midwest Occupational Medicine by Dr. Bradley Breeden on May 25, 2018. When seen by Dr. Breeden, Petitioner complained of left lower back and right ankle pain. Dr. Breeden diagnosed Petitioner with a lumbar contusion and right ankle strain. He directed Petitioner to use an Ace wrap on his ankle and use over the counter medications for pain. He authorized Petitioner to return to work the following day, May 26, 2018. This was the only occasion Petitioner sought Dr. Breeden (Petitioner's Exhibit 1).

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. Dr. Stark saw Petitioner on May 29, 2018. At that time, Petitioner advised Dr. Stark that he had sustained an injury at work when he slipped on a banana. Petitioner stated he hurt his right ankle and fell on

the left side of his lower back. Dr. Stark treated Petitioner through June 18, 2018, and imposed work restrictions (Petitioner's Exhibit 2).

At trial, Petitioner testified he went to the ER of SLU Hospital on June 10, 2018, because he was having severe low back pain and pain/numbness in his right leg. According to the medical record, Petitioner sustained a work-related injury and was seen by the company's physician who "did nothing." Petitioner complained of low back pain and burning pain down the right leg. Petitioner was diagnosed with low back pain with sciatica, given pain medication and discharged (Petitioner's Exhibit 3).

Petitioner was subsequently seen in the ER of Touchette Regional Hospital on June 14, 2018. At trial, Petitioner testified that on June 14, 2018, he had a work restriction of doing a sit down job, but Respondent assigned him to work duties inconsistent with his restriction. Petitioner said he worked for about an hour and, because his back pain became intense, he went to HR. Petitioner was informed he could leave and went directly to the ER of Touchette Regional Hospital.

The ER record of Touchette Regional Hospital noted Petitioner had sustained a work injury on May 26, 2018, and had low back and right leg pain. Petitioner was diagnosed with a lumbosacral sprain with sciatica, prescribed medication and discharged (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. David Raskas, an orthopedic surgeon, on June 19, 2018. At that time, Petitioner advised Dr. Raskas of the work-related accident of May 25, 2018, and that he had low back pain which radiated into the right lower extremity. Petitioner also complained of numbness/tingling in the right leg. Petitioner advised Dr. Raskas he was seen in an ER on June 16, 2018 because of severe low back pain (Petitioner's Exhibit 5).

Dr. Raskas authorized Petitioner to be off work and ordered an MRI scan. The MRI was performed on July 10, 2018. According to the radiologist, the MRI revealed disc bulges at multiple levels and a right paracentral protrusion at L5-S1 resulting in a mass effect on the right S-1 nerve root. Dr. Raskas saw Petitioner on July 17, 2018, and reviewed the MRI. At that time, Dr. Raskas recommended Petitioner undergo a right epidural steroid injection, but Petitioner declined to undergo same. Dr. Raskas ordered physical therapy and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Petitioner received physical therapy at Touchette Regional Hospital from July 27, 2018, through September 17, 2018. According to the physical therapy records, Petitioner was diagnosed with lumbar radiculopathy (Petitioner's Exhibit 4).

When Dr. Raskas saw Petitioner on October 16, 2018, he noted Petitioner still had complaints of low back and right leg pain. He again reviewed the MRI and opined it revealed a herniated disc at L5-S1. He referred Petitioner to Injury Specialists for an epidural steroid injection on the right at L5-S1 (Petitioner's Exhibit 5).

Petitioner was seen at Injury Specialists on December 21, 2018, and January 2, 2019. On those occasions, Dr. Tong Zhu administered epidural steroid injections on the right at L5-S1 (Petitioner's Exhibit 6).

On January 3, 2019, Petitioner was driving his car in St. Louis and his back "locked up" on him. At that time, Petitioner was a couple of blocks from Barnes-Jewish Hospital. Petitioner went to the ER of Barnes-Jewish Hospital. According to the ER record, Petitioner sustained an injury approximately six months prior and had a steroid injection about one week ago. On January 3, 2019, Petitioner experienced an "acute worsening" of his low back pain with radiation in to the right buttock/leg. Petitioner was diagnosed with an acute exacerbation of chronic low back pain and sciatica on the right side (Petitioner's Exhibit 8).

Dr. Raskas again saw Petitioner on January 8, 2019. At that time, Petitioner advised Dr. Raskas that Respondent required him to perform work duties inconsistent with his restrictions. Petitioner continued to work until the pain became so severe he sought treatment at the ER of Barnes-Jewish Hospital on January 3, 2019. Dr. Raskas ordered various lab tests and indicated that if they were abnormal, he would order a new MRI with and without contrast. He also authorized Petitioner to be off work (Petitioner's Exhibit 5).

Petitioner underwent the lab tests which were ordered by Dr. Raskas. Based upon the number of abnormal test results, Dr. Raskas ordered the MRI with and without contrast (Petitioner's Exhibit 5).

The MRI with and without contrast was performed on March 25, 2019. According to the radiologist, the MRI revealed central broad-based protrusions at L3-L4 and L4-L5 and a central focal protrusion at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on April 29, 2019. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and diagnostic studies provided to him by Respondent. Dr. deGrange opined Petitioner had a herniated disc at L5-S1 which was caused by the accident of May 25, 2018. He recommended Petitioner undergo a microdiscectomy at L5:S1; that Petitioner could work with restrictions and was not at MMI (Respondent's Exhibit 1; Deposition Exhibit D).

Dr. Raskas saw Petitioner on May 6, 2019, and Petitioner continued to complain of low back and right leg pain. Dr. Raskas reviewed the MRI and opined it revealed a protrusion at L5-S1. He opined Petitioner had a herniated lumbar disc with lumbar radiculopathy. Given the fact Petitioner had back problems for over a year and did not get improvement with injections, therapy and activity modifications, he recommended Petitioner undergo discography at L3-L4, L4-L5 and L5-S1 with a CT scan to determine if an annular tear was the cause of his pain symptoms (Petitioner's Exhibit 5).

In a narrative report dated June 10, 2019, Dr. Raskas noted Respondent had authorized a microdiscectomy for Petitioner. He opined this procedure would likely fail and renewed his recommendation Petitioner undergo discography. Dr. Raskas also opined that, in all likelihood, Petitioner would need either a fusion or disc replacement at L5-S1 (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included the records of Dr. Raskas in which he recommended Petitioner undergo discography. In a report dated July 11, 2019, Dr. deGrange opined that there was no "reasonable medical basis" for

Petitioner undergoing the discography recommended by Dr. Raskas. Dr. deGrange referenced a number of authoritative studies/articles which concluded discography had a high error rate and increased the risk of disc problems in patients (Respondent's Exhibit 3; Deposition Exhibit E).

Dr. Raskas saw Petitioner on August 13, 2019. At that time, Petitioner informed him the "other physician" had recommended a microdiscectomy and did not believe in discography. Dr. Raskas noted there were some shortcomings of discography, but there were positive attributes in the treatment and diagnosis of chronic low back pain. Dr. Raskas specifically noted the North American Spine Society's Coverage Policy recommendations regarding discography which noted it could be used effectively in diagnosis and treatment of chronic back pain (Petitioner's Exhibit 5).

On September 16, 2019, Petitioner underwent a discogram at L3-L4, L4-L5 and L5-S1. According to the radiologist, the study was negative at L3-L4 and L4-L5, but positive at L5-S1. At L5-S1, Petitioner complained of severe central low back pain and the study revealed annular tears into the epidural space. A post discogram CT scan was performed which revealed a fissure/protrusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas subsequently saw Petitioner on November 15, 2019, and reviewed the diagnostic studies. He opined Petitioner should have surgery, either disc replacement or a fusion at L5-S1 (Petitioner's Exhibit 5).

Dr. Raskas again saw Petitioner on December 27, 2019. At that time, Petitioner informed him he wanted to undergo fusion surgery. Dr. Raskas noted this would be a "staged" surgical procedure which would consist of two separate surgeries. The first surgery would be a lumbar discectomy and fusion with cage/plating. The second surgery would be a facet fusion with decompression (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. deGrange reviewed medical records which included reports of the discography and CT scan as well as Dr. Raskas' surgical recommendation. Dr. deGrange opined there were "confounding results" and inconsistencies in Petitioner's complaints. He opined the discography and CT scan were medically unnecessary and disagreed with the recommendation Petitioner undergo fusion surgery. Further, Dr. deGrange opined that it was not clear that any surgery would benefit Petitioner and he rescinded his prior recommendation Petitioner undergo a microdiscectomy (Respondent's Exhibit 3; Deposition Exhibit F).

Petitioner was last seen by Dr. Raskas on March 30, 2020. At that time, Dr. Raskas reviewed Dr. deGrange's report of January 30, 2020. Petitioner's complaints and findings on examination were consistent with what they had been previously. Dr. Raskas noted he disagreed with Dr. deGrange's opinion that surgery would not benefit Petitioner. He continued to impose light duty/sedentary work restrictions (Petitioner's Exhibit 5).

Dr. deGrange was deposed on June 2, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. deGrange's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. deGrange testified that when he examined Petitioner on April 29, 2019, he diagnosed Petitioner with a

herniated disc at L5-S1 and recommended Petitioner undergo a microdisectomy (Respondent's Exhibit 3; pp 16-19).

In regard to the discography and CT scan, Dr. deGrange testified these were not medically necessary. He also stated a staged fusion was not medically necessary and recanted his prior surgical recommendation (Respondent's Exhibit 3; pp 24-27, 34-37).

On cross-examination, Dr. deGrange agreed that the treatment and diagnostic studies Petitioner underwent prior to his examination of him were medically appropriate. He also agreed Petitioner's subjective complaints were consistent with the objective findings on examination and diagnostic studies. Dr. deGrange was questioned about the "inconsistencies" of Petitioner's symptoms in what he told him and what he read in the records; however, he could not specifically identify what they were. Dr. deGrange reaffirmed his opinion that surgery was not appropriate for Petitioner, but he had no treatment recommendations (Respondent's Exhibit 3; pp 70-74, 82-83).

Petitioner testified that Respondent terminated his employment on March 16, 2020. However, Respondent continued to pay Petitioner temporary total disability benefits through June 8, 2020. When Petitioner's temporary total disability benefits were terminated, he subsequently obtained a part-time job on July 22, 2020, with Hire Level, a temporary employment agency. Hire Level provided Petitioner with work which conformed to his work restrictions until August 21, 2020. At that time, Petitioner stopped working because being on his feet too long and bending aggravated his back symptoms to the point to where he could no longer work.

Petitioner testified he has had low back pain since he sustained the accident. Petitioner continues to have right leg pain as well as numbness and shock type sensations. Petitioner stated he is fallen several times because of his right leg symptoms. Petitioner wants to proceed with the fusion procedure as recommended by Dr. Raskas.

Petitioner worked for Respondent with restrictions from October 24, 2018, through January 7, 2019. Respondent did not dispute its liability for temporary partial disability benefits during this period of time; however, Respondent did not pay any temporary partial disability benefits to Petitioner. Petitioner tendered into evidence Petitioner's wage records for that period of time as well as a computation of the temporary partial disability benefits owed which were $154.77.

From July 22, 2020, through August 21, 2020, Petitioner worked for Hire Level. Petitioner tendered into evidence his paycheck stubs for that period of time as well as a computation of the temporary partial disability benefits owed to him which amounted to $357.32.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of May 25, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on May 25, 2018.

The Arbitrator acknowledges that when Petitioner initially sought medical treatment following the accident, he complained of left lower back pain. It was not until Petitioner was seen in the ER of SLU Hospital on June 20, 2018, that Petitioner complained of right leg pain.

The fact that Petitioner did not experience right leg pain immediately after or shortly after the accident, does not, in and of itself, constitute a basis to dispute causal relationship.

There was no dispute Petitioner was diagnosed with a herniated disc at L5-S1 by Dr. Raskas, Petitioner's treating physician, and Dr. deGrange, Respondent's Section 12 examiner.

Further, Dr. deGrange agreed the herniated disc at L5-S1 was causally related to the accident of May 25, 2018.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The dispute regarding the reasonableness and necessity of medical services is primarily limited to the discography and CT scan ordered by Dr. Raskas.

Dr. deGrange, Respondent's Section 12 examiner, opined that discography was not appropriate and referenced authoritative studies/articles which concluded that there was a high error rate and increased risk of disc problems in patients.

Dr. Raskas, Petitioner's treating physician, acknowledged there were some shortcomings with the use of discography, but there were positive attributes in their use for the treatment and diagnosis of chronic back pain. Dr. Raskas specifically noted the North American Spine Society Coverage Policy recommending the use of discography.

The discography at L5-S1 was positive, which was a finding consistent with the prior diagnosis of disc pathology at that level.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (K) Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment, including, but not limited to, the fusion surgery recommended by Dr. Raskas.

In support of this conclusion the Arbitrator notes the following:

Dr. Raskas has treated Petitioner for approximately two years. Dr. Raskas initially treated Petitioner conservatively with physical therapy and injections. Ultimately, Dr. Raskas recommended Petitioner undergo either disc replacement or fusion surgery. Petitioner has decided to undergo fusion surgery.

Respondent's Section 12 examiner, Dr. deGrange, opined Petitioner had a herniated disc at L5-S1 and recommended a microdiscectomy. However, Dr. deGrange subsequently recanted that recommendation and presently has no recommendation whatsoever for treatment.

Based on the preceding, the Arbitrator finds the opinion of Dr. Raskas to be more persuasive than that of Dr. deGrange.

In regard to disputed issue (L) Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary partial disability benefits of $512.09.

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 100 5/7 weeks, commencing June 5, 2018, through October 23, 2018, June 8, 2019, through July 21, 2020, and August 22, 2020, through August 26, 2020.

In support of these conclusions the Arbitrator notes the following:

Respondent did not dispute Petitioner's entitlement to temporary partial disability benefits of 10 6/7 weeks and Petitioner's computation of temporary partial disability benefits owed was unrebutted.

Petitioner was under active medical treatment and either authorized to be off work completely or subject to work restrictions which were not accommodated by Respondent.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner did not exceed his two choices of chains of medical providers.

In support of this conclusion the Arbitrator notes the following:

Following the accident, Petitioner was directed by Respondent to go to Midwest Occupational Medicine where he was evaluated by Dr. Bradley Breeden. While Dr. Breeden apparently provided some treatment, he was not a medical provider chosen by Petitioner.

Petitioner subsequently sought treatment from Dr. Jeffrey Stark, a chiropractor. This was Petitioner's first choice of a medical provider.

As noted herein, Petitioner later sought medical treatment at three emergency rooms. At trial, Petitioner testified he sought treatment on those occasions because of his severe low back and right leg symptoms.

Section 8(a) of the Act, excludes "emergency treatment" as one of the medical providers "chosen by the employee."

In the case of *Wolfe v. Industrial Commission*, 416 N.E.2d 280 (Ill. App. 4th Dist. 1985) the Appellate Court held that Petitioner's seeking treatment at an ER constituted a choice of a medical provider. In that case, Petitioner testified he went to the ER because his treating physician was not available to see him. However, Petitioner was, in fact, seen by his treating physician the same day he went to the ER and made no effort to contact his physician prior to going to the ER. Under these circumstances, the Arbitrator ruled Petitioner's seeking treatment at the ER was a "choice" of a medical provider. This ruling was then upheld by the Commission, Circuit Court and Appellate Court. *Wolfe* at 286.

The factual circumstances in the *Wolfe* case are clearly distinguishable from the circumstances in the instant case. On all three occasions, Petitioner sought "emergency treatment" because of his severe low back and right leg pain.

None of the three ER visits made by Petitioner constituted a choice of a medical provider under Section 8(a) of the Act.

When Petitioner sought treatment from Dr. Raskas, this was the second choice of a medical provider.

William R. Gallagher, Arbitrator

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 no occupational disease	☐ Second Injury Fund (§8(e)18)
X NO CC, compensation denied	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DALE BASIL,

Petitioner,

vs. NO: 16 WC 16172

PATTON MINING, LLC.,

Respondent.

21IWCC0155

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, causal connection, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, for the reasons stated below.

Findings of Fact

Petitioner is 61 years old, married and resides in Kincaid, Illinois. After he graduated from high school, he enrolled at Lincoln Land Community College studying to become an arborist. He did not receive a degree or certificate. Petitioner testified he worked in the coal mines for 33 years, all underground. He testified that he had regularly been exposed to coal dust, silica dust and roof bolting glue fumes. (T.7-9)

Petitioner was employed as a mine shuttle car operator for Respondent since 2011. Petitioner first started working in coal mines in 1977 at Peabody Coal Company in Pawnee, Illinois. He was hired as a supply-man. This entailed loading supplies and transporting them to certain sections. In that position he went all over the mine; he did that job for a couple of years. (T.12-13)

21IWCC0155

Petitioner also worked as a recovery-man. After the coal was mined, they went in and removed everything out of a section and transported it to the belt section. This included removing I-beams which caused it to cave in. Petitioner testified that that was a very dusty job. When they recovered the belt line, there was coal mine dust left on the fan line. They flipped it to take it somewhere else, which was a very dusty job. They had to pull the pillars and the air would hit you in the face. Petitioner performed that job for about 6-7 years. (T.13-15)

At Peabody Mine, Petitioner also performed roof bolting which involved drilling into the top and anchoring a bolt in at least a foot of rock. He would place the bolt in, secure and tighten it. In the 1980's, they just had a "cob" which spread and tightened it up. At that time, they were not using glue pins. Roof bolting was the last position he held at Peabody. (T.15-16)

Petitioner next worked at Crown III, owned by General Dynamics, starting in 2000-2001, as a shuttle car operator. In that position, he ran a ram car, a shuttle car without a cable. The car was battery operated and he would run the car up to the miner, get a load of coal, return to the belt and drop it off. He would go up to the face where they were cutting out the coal. Petitioner testified the dust level was pretty bad as the coal was coming off of the tail of the miner and coming right at him. Petitioner performed that job for 4-5 years. (T.16-17)

Petitioner then obtained a job hauling rock dust in a ram car. The dust was hauled and spread to make the coal mine white and prevent fires. When he went to the location, he would hit a lever and it paddled the dust, slinging it everywhere. Petitioner had to keep pushing the dust to the paddles until it was empty and then return for another load. Petitioner described this as driving the car in the middle of a dust storm. Petitioner held that position for 4-5 years. Petitioner also performed roof bolting when people were not there. (T.17-19)

When Petitioner performed roof bolting at Crown, it was different than at Peabody. Times changed, he testified, and they started using glue pins. Petitioner had to drill the hole and get to a foot of rock. Before he put the pin in, he put in a stick of glue and pushed and spun it. He stated that would mix the glue and tighten it for about 90 seconds. Petitioner testified the glue sticks would break open emitting a very strong odor. At times the odor would take your breath away. He had performed all 3 jobs at Crown. (T.19-20)

Petitioner next worked at mine Federal #2 in West Virginia for about 11-12 months to get his medical card. In the mine, Petitioner performed the roof bolting job. Petitioner testified the mine there was very similar to the Illinois mines. Petitioner then returned to Illinois. (T.20-21)

Petitioner started at Respondent's mine, Patton Mining or the Deer Run Mine, as a shuttle car operator in 2011. This entailed driving the machine to the miner, loading the coal and taking it to the belt. He did not perform roof bolting there because they thought he was getting too old for that job. (T.21-23) Petitioner last worked at Deer Run Mine on March 25, 2015. He was 58 at that time. Petitioner testified that he was exposed to coal mine dust on that date. On that day, they had a hot spot/fire and the mine had ceased operating. He chose not to seek other mining employment after that time. He ran a tree service, Midland Tree Service, after that with his son where he trimmed trees, took down trees and ground tree stumps. He did not climb; he worked out of a bucket. He earned between $20,000 and $50,000 annually. The decline in business was because

he did not have stamina any longer. He testified he was "getting too old or something." Petitioner has had no other jobs since that time. (T.9-12)

Petitioner testified that in the early 1990's, he started noticing breathing problems. At that time, he noticed he was not able to walk as far, and testified it was "just my stamina." When he went back into the mine, the breathing problems started to get worse. Since the time he left mining up until the Arbitration hearing, Petitioner testified, his breathing problems have gotten a little worse. (T.23-24)

Petitioner does not take any medications for breathing. With activities of daily living, he stated he likes to walk and exercise, but he is not able to go as far; he can probably walk about a mile. When asked how many stairs he is able to climb before he has to rest, Petitioner testified he does not really know, and he tries to stay away from using stairs. When asked if there were other things specifically in life that breathing affects, he responded, "No." Petitioner testified he used to be able to cut a big tree and clean it up with no problem. Petitioner stated he now tries to leave the big trees for his son to do as he does not have the energy to do it like he used to. (T.24-25)

Petitioner treated with Dr. Manson, his family doctor, until Dr. Manson's retirement. Since then, Petitioner has seen Dr. Del Valle. Petitioner testified he did not really talk to his doctors about his breathing issues. His main concern was his throat and acid reflux. Petitioner testified that his doctors were aware he was a coal mine worker. He testified that he has never been a smoker. (T.25-26)

Petitioner indicated his acid reflux began when he had problems swallowing and he had gone to West Virginia. He had his throat stretched 5 times since his return from West Virginia. He was on a pill for acid reflux and cholesterol. Aside from the breathing issues, acid reflux and throat issues, Petitioner testified that he has had no other health issues. Petitioner was still taking a cholesterol pill, but his doctor wanted to take him off it soon. Petitioner was taking no other medications. (T.26-28)

On cross examination, Petitioner testified that he was hired by Respondent around November 14, 2011. He agreed he had left Respondent's mine as a result of a mine fire. He was laid off. Had he not been laid off, Petitioner would have reported to his next shift as he had a mortgage and still needed to keep going. The mine had been sealed off around January 2016 and he was let go at that time. (T.28-29)

Petitioner agreed he had worked for Peabody and Freeman Coal or General Dynamics at Crown III. They were both UMWA mines. Petitioner did receive his pension from his mine employment. He received credit for 27 years. He testified they took 48% as he was not yet 55 years old. (T.29)

Petitioner testified he had gone to West Virginia for the medical card. With UMWA if you had 20 years you could get a medical card. When he left Farmersville mine he did not have the card so he had to go elsewhere for it. Petitioner was on the Peabody panel so he went to West Virginia and got his medical card locked in before he returned home. The medical card pays for everything less a $20 co-pay. The pension he received was for his years with UMWA. He had not

yet applied for social security but would do so in June given his age. (T.29-31)

Petitioner agreed his attorney sent him to Dr. Suhail Istanbouly for an examination. He had also gone to Methodist Hospital located in Henderson, Kentucky, for testing at Respondent's counsel's request. Other than those two sites for testing, Petitioner had not seen anyone else regarding this case. (T.31-32)

Petitioner agreed he treated with Dr. Manson and Dr. Del Valle in Taylorville, Illinois. He testified that he had been honest with the doctors about his complaints. (T.32-33)

Petitioner agreed over the years, from time to time, he had x-rays, screening by NIOSH for Black Lung. He believed he had been told the x-ray results, but it had been a long time ago and he did not recall the results. He did not bring any letters to the hearing. (T.33)

Petitioner testified the tree trimming business is a very physical job. He stated he has a 60-foot bucket truck and you start trimming trees and as you go up, taking off limbs. Then you "chunk" it as you come back down and clean up with a woodchipper and backhoe. Petitioner testified he does not have a CDL and it is not required because the bucket truck is not that big or heavy. Petitioner testified the work requires quite a bit of lifting and carrying and that is why he has a backhoe. He testified some of the logs can weigh in the tons, but he does not personally lift those. He does not lift over 50 pounds. The time it takes to take down a tree depends on the size and situation. He stated some can be 2-3-day jobs. (T.33-36)

Petitioner testified he tries to walk regularly for exercise in the summer. He used to walk 2-3 miles, but he cannot walk that far anymore. He has a small dog that he does not walk. He stated he walks and does the tree service business. He no longer has hobbies. He did some woodworking, making small things like baby rockers as his specialty. In his shop he was doing a little bit of woodworking and he watches TV when not doing tree service. (T.36-37)

Medical Records

The medical records of Springfield Clinic (RX 4) show numerous visits beginning in 1994. On January 25, 1994, Petitioner's chest x-ray showed an essentially normal chest radiograph. During 1998, Petitioner returned regarding ear problems. At that visit, a respiratory exam revealed good air bilaterally and no adventitious sounds. No complaints related to breathing were noted. Petitioner was seen on April 22, 2004, for an evaluation of a right inguinal hernia. Physical examination of the chest revealed the lungs were clear to auscultation. The chest x-ray performed on that date showed no active cardiopulmonary disease. No complaints related to breathing or cough were noted.

On February 7, 2006, Petitioner complained of purulent productive deep cough associated with sore throat. Tremendous amount of nasopharyngitis and oropharyngitis was noted. The chest was noted as clear on examination. Petitioner returned on November 8, 2008, for an elevated blood pressure issue and complaining of light headedness. Physical examination of the chest revealed lungs were noted as clear to auscultation. No rales or wheezes were noted. No complaints related to breathing or cough were noted. (RX4)

On March 25, 2012, Petitioner returned complaining of a sore throat, headache, body ache, temperature, and fatigue. He was noted to have a productive cough of brown sputum. No complaints related to breathing were noted. (RX 4)

Petitioner was seen on July 6, 2012, complaining of choking and difficulty swallowing. The assessment was dysphagia. He returned on August 16, 2012 and underwent a chest exam revealing normal findings. A review of systems revealed no pulmonary symptoms.

On November 19, 2013, Petitioner complained of fever and aches. A productive cough with yellow sputum was noted. Petitioner denied chronic respiratory illness. No shortness of breath or chest discomfort was noted. It was noted Petitioner is a non-smoker. Lungs were noted as clear. Petitioner had multiple procedures over time regarding dysphagia. (RX 4)

Petitioner returned to the Springfield Clinic on July 29, 2014, complaining of dysphagia and choking. Petitioner denied shortness of breath, chest pain or chest tightness. Petitioner was diagnosed with GERD. Petitioner had a past history of bronchitis it was noted and never smoked. Respiratory exam revealed clear to auscultation bilaterally, no wheeze. No complaints related to breathing or cough were noted. An esophagogastroduodenoscopy was performed. (RX 5)

Petitioner was seen on October 25, 2014, complaining of headache, sinus drainage, sore throat, and a productive cough for 4 days with occasional colored sputum. Petitioner had reported then that several miners had similar symptoms. The record notes Petitioner has a history of sinus infections in the past. No history of asthma or allergies. Positive history of GERD; no other chronic illnesses. No breathing complaints were noted. (RX 4) A November 12, 2014, emergency room visit was noted regarding his back. No complaints related to breathing, cough were noted. (RX 4). Petitioner returned on December 29, 2014, for unrelated stomach issues. No complaints related to breathing or cough were noted. (RX 4).

On September 18, 2015, the Springfield Clinic medical records indicate Petitioner has a long history of GERD and dysphagia. An EGD was performed on that date which showed a tremendous amount of inflammation and scarring at the gastroesophageal junction. (RX 4) In 2016, Petitioner presented at Springfield Clinic regarding an eye issue. No complaints related to breathing or cough were noted. (RX 4) Petitioner returned on May 4, 2017 and completed a new patient questionnaire. He denied lung disease, asthma and shortness of breath.

He returned on November 2, 2018, for an EGD consult reporting problems swallowing and GERD. Physical exam of the chest revealed the lungs were clear to auscultation and percussion. Review of systems revealed no shortness of breath or cough. (RX 4) An operative report dated November 12, 2018, showed Petitioner underwent esophageal dilation. The 12/18/18 record notes a history of dysphagia. Petitioner's problems were listed as Barrett's esophagus, dysphagia, pre-op GI exam, hyperlipidemia, and GERD. No history of breathing complaints was noted. (RX 4)

Petitioner was seen on May 13, 2019, for EGD. He denied shortness of breath, dyspnea on exertion or proximal nocturnal dyspnea. His review of systems showed he had good exercise tolerance. Physical examination showed the lungs were clear to auscultation bilaterally without

any wheezing. (RX 4)

Petitioner underwent an x-ray examination on May 2, 2016, which was interpreted by Dr. Smith, a B-reader. His interpretation was mild interstitial fibrosis p/p, bilateral mid to lower zones involved, profusion 1/0. No chest wall plaques or calcifications. Simple CWP with small opacities, primary p, secondary p mid to lower zones involved bilaterally. The film quality was noted to be 1. (PX 2)

Spirometry was performed for Black Lung screening on October 4, 2016 and found to be within normal limits. (RX 3)

Testimony of Dr. Istanbouly

Dr. Istanbouly is a physician specializing in pulmonary and critical care medicine. He is board certified in internal medicine, pulmonary medicine and critical care medicine. He has been in practice in southern Illinois for 11 years. His practice is mixed between inpatient and outpatient. In the course of his practice, he has had numerous occasions to treat coal miners and former coal miners. The lung diseases he treats include emphysema, COPD, chronic bronchitis, asthma, CWP, and lung cancer patients. He is affiliated with numerous hospitals and holds privileges at many others in the area. (PX 1, p. 5-7)

Dr. Istanbouly examined Petitioner on August 30, 2016, at Petitioner's attorney's request. He authored a report of his findings of that exam and he identified RX 2 as a copy of his report. He testified he obtained a detailed history from Petitioner, including occupational history. He reviewed the x-ray and spirometry testing. He did a detailed physical exam before he made his conclusions. He noted Petitioner had been a coal miner for 33 years and worked underground. He noted Petitioner had no history of smoking. Petitioner had mentioned that he had a long history of intermittent occasional coughing triggered by strenuous activity or brisk walking. Petitioner reported the cough as mild to moderate in intensity and used to produce milky, mild dark black sputum. But at the time he saw Petitioner, it was clearing up. (PX 1, p.7-9)

Dr. Istanbouly testified the cough and data qualified as chronic bronchitis. He noted Petitioner reported he had the ability to walk 3 miles without breathing problems and had not noticed any decline in respiratory capacity in the prior 6 months. Petitioner had noted wheezing and runny nose on occasion and Petitioner had reported a history of GERD, but that was apparently now under control with medication. As to a runny nose, he testified Petitioner had postnasal drip which was perennial rather than seasonal. He stated wheezing indicated bronchospasm. Chronic bronchitis (cough) is a manifestation of bronchospasm as well, so there was a correlation. The sinus drip indicated inflammation of the nasal mucosa. The mucosa was the same lining affected when you have chronic bronchitis, except further into the bronchial area. (PX 1, p.9-10)

Dr. Istanbouly agreed Petitioner had pulmonary function testing performed and it was within normal range. The FEV1 was 3.65 liters, 144% predicted. The FVC was 4.72 liters, 112% predicted. The FEV1/FVC was 78%. Dr. Istanbouly testified the x-rays revealed mild interstitial changes bilaterally consistent with mild CWP. He stated the profusion, per the B-reader, Dr. Smith, was 1/0. He had decided whether it was positive or negative before he looked at Dr. Smith's report.

He does not use the same terms as a B-reader he stated. Dr. Istanbouly testified, within a reasonable degree of medical certainty, that Petitioner has chronic bronchitis. He stated the cause in this case, or "main culprit", was the long-term coal dust inhalation. (PX 1, p.10-12)

Dr. Istanbouly testified further that per Petitioner's occupational history, chest x-ray, and symptoms, he has CWP caused by long-term coal mine dust inhalation. Dr. Istanbouly testified the Petitioner had normal spirometry, but that is not uncommon, especially with early to mild cases of CWP. Chronic bronchitis is one of the chronic obstructive pulmonary diseases. With the normal pulmonary function test, it did qualify Petitioner to have early stage COPD, which he would put under CWP. (PX 1, p.12-13)

Dr. Istanbouly testified that in light of Petitioner's diagnoses of chronic bronchitis, CWP and COPD, Petitioner should have no further exposure to that environment as it would subject Petitioner to high risk of progressive lung damage. (PX 1, p.13-14) He testified it is medically advisable for Petitioner to permanently avoid further coal dust inhalation. (PX 1, p.14)

Dr. Istanbouly testified that after 33 years of coal dust exposure, a certain percentage of the coal dust Petitioner had inhaled will stay inside his lungs permanently. He agreed the weight of a coal miner's lungs can be accounted for by the trapped coal mine dust in his lungs but was unsure if it was 50% of the weight of the lungs. He agreed the trapped coal dust would be exposed to the lung tissue for the rest of his life. There is still the coal dust trapped in Petitioner's lungs and that, though not active current exposure, could still lead to further lung damage. Lung function and lung damage keeps getting worse despite quitting the coal mining career. (PX 1, p.14-15)

Dr. Istanbouly testified that the most accurate way to diagnose CWP would be pathologic versus radiologic. He agreed that the combination of a positive x-ray for CWP along with sufficient exposure to cause CWP, was sufficient for him to diagnose CWP. He testified a negative x-ray would not necessarily rule out the existence of CWP. He would agree a recent study showed that 50% of long-term coal miners were found to have CWP on autopsy, even though it was not found on x-ray during their life. He stated the pattern of progression of CWP may vary. He agreed over decades, miners have died from advanced CWP. At some point they would have had CWP seen at a pathogenic level. It possibly would have progressed to 1/0 level, early radiologic significant CWP and possibly continued to progress to be at the life-threatening stage and eventually took their life. (PX 1, p.15-18)

On cross examination, Dr. Istanbouly agreed he had seen Petitioner one time at Petitioner's attorney's request. He does 5-7 such exams per month, for state Black Lung claims, always at the request of claimants' attorneys. He has been doing that for about 7 years. (PX 1, p.18.)

Dr. Istanbouly agreed Petitioner relayed no past history of respiratory disease. Petitioner had relayed an occasional cough that had only been triggered by strenuous activity or brisk walking, not dust, smoke or fumes. He agreed currently the cough produced little sputum. Petitioner had reported no significant dyspnea. Petitioner had suffered from a runny nose on a perennial basis; it could be associated with cough. He agreed Petitioner was not taking any medications for breathing and he had no history of ever taking breathing medications. Petitioner was taking medication for GERD and that condition is associated with cough. (PX 1, p.18-20)

Dr. Istanbouly testified that he had reviewed medical records regarding Petitioner. He reviewed the exam and narrative report of Dr. Smith, a B-reader, before he examined Petitioner. He agreed Petitioner's O2 saturation was normal at 96%. He agreed Petitioner's chest exam revealed no adventitious sounds, including wheeze. Dr. Istanbouly agreed there was no sign of disease on the physical examination of Petitioner's chest stating, "It was within normal range." He agreed Petitioner's Forced Vital Capacity, evaluated by spirometry, was 112% of predicted which was normal. He did not perform lung volumes on Petitioner which, he agreed, would be the best test. He agreed Petitioner's Forced Expiratory Volume was 114% of predicted, which was normal. He agreed FEV1/FVC ratio was 78%, which was greater than predicted, and was normal. This ruled out obstruction. (PX 1, p.20-22)

Dr. Istanbouly testified he subscribes to the GOLD (Global Initiative on Obstructive Lung Disease) standard to diagnose COPD. He agreed the GOLD standard states that spirometry is required to make a clinical diagnosis of COPD. He stated spirometry ruled out COPD per PFT criteria, but not on a clinical basis. On a clinical basis, the diagnosis was made per the history indicating long-term coal dust inhalation and a long history of intermittent coughing and wheezing. He stated it was early stage because the spirometry test was normal. The clinical diagnosis was based on what Petitioner told him, Petitioner's occupational history and the x-ray findings. (PX 1, p.22-24)

Dr. Istanbouly testified if one comes to him as a coal miner, he does not necessarily have a higher suspicion of the presence of COPD. He stated he does not diagnose COPD frequently, but he does know they have a risk factor for COPD. Dr. Istanbouly agreed Petitioner did not report he left work due to respiratory problems or symptoms. He further agreed Petitioner did not tell him he had difficulty performing the duties of his last job in the mine. (PX1, p.24)

Dr. Istanbouly testified he does not possess the standard ILO films used to interpret chest x-rays for Black Lung. He agreed he was neither an A-reader nor B-reader. Dr. Istanbouly agreed when he interprets films for Black Lung, he classifies them as early, moderate or severe and he classified Petitioner's films as early Black Lung. He agreed with Dr. Smith who noted the only opacities present in Petitioner's lungs were in the mid and lower lung zones. Dr. Istanbouly agreed he did not provide profusion ratings for the films and he could not say whether this film had a 1/0 or 0/1 profusion. (PX 1, p.24-25)

Dr. Istanbouly agreed his sole diagnosis listed in his report was coal worker's pneumoconiosis, early stage. (PX 1, p.26)

Testimony of Dr. Meyer

Dr. Meyer is a board-certified radiologist and certified B-reader, through 12/31/18. He graduated from the University of Virginia in 1983 with a BS in chemical engineering, graduated with honors, the highest distinction. He attended Washington University School of Medicine in St. Louis and obtained his M.D. in 1987; he is a member of Alpha Omega Alpha the medical honor fraternity. He did an internship from July 1987 to June 1988 at Tripler Army Medical Center in Honolulu and he completed his residency in diagnostic radiology at Walter Reed Army Medical

Center in D.C. (RX 1, p.4-8)

Dr. Meyer was Chief Resident at Walter Reed from 1991 to 1992. He became board certified in radiology and has been certified since 1992. He became Chief of Thoracic Imaging at Madigan Medical Center in Tacoma in 1992. There he was in charge of all imaging procedures related to the chest, which included chest x-rays, CT scans and all biopsy procedures. He was also in charge of training Army residents in thoracic imaging and preparing them for their boards. He remained at Madigan until 1996 when he became an Assistant Professor of Radiology at the University of Maryland Medical System in Baltimore. (RX 1, p.8-10)

Dr. Meyer testified that at the University of Maryland, the subjects were fairly diverse in chest imaging, including interpretation of conventional chest radiograph, interpretation of films in the intensive care unit, high resolution CT of the chest, and some subspecialty in high resolution CT, like small airways. He was also the primary interventional chest radiologist, teaching residents how to perform biopsy procedures. There, he often reviewed articles and manuscripts for various professional journals for possible publication. He served and continues to serve on several journals as a manuscript reviewer with his expertise in thoracic imaging. (RX 1, p.10-11)

Dr. Meyer became an Associate Professor of Radiology at University Hospital in Cincinnati in 1998. His area of subspecialty was thoracic imaging. He taught interventional chest radiology, interpretation of chest x-rays, CT scans, and high-resolution CT scans. He had received the Spitz award for excellence in teaching residents. (RX 1, p.11-12)

Dr. Meyer became an Associate Professor of Radiology at Indiana University Hospital in Indianapolis in 2000. He also taught at Indiana University. He returned to Cincinnati in 2003 and for a time was in private practice and then joined University Hospital. (RX 1, p.12-14)

Dr. Meyer remained there until 2010 when he accepted his current position as Vice Chair of Finance and Business Development and Professor of Diagnostic Radiology at the University of Wisconsin Hospital in Madison. He had been contacted by Wisconsin University and recruited to join them in his current position. He works in clinical radiology about 50% of the time, interpreting x-rays and CT scans 2-3 times per week. About 20% of his time is academic and he also performs administrative work. He reviews 200-250 chest x-rays per week and 20-40 chest CT scans per week. (RX 1, p.14-18)

Dr. Meyer agreed when he was in Cincinnati in 2008-2009, he was recognized with the Benjamin Felson Medical Student Teaching award, an honor for teaching medical students. He noted Dr. Felson was considered the father of chest radiology and one of the originators of the B-reading classification system. (RX 1, p.19-20)

Dr. Meyer stated B-reading is an epidemiologic evaluation of the chest x-ray. He stated there is a very specific form developed to evaluate the chest x-ray for the presence or absence of occupational lung disease. They describe the quality, limitations of the x-ray and the classifications of the abnormalities. They describe any small nodular opacities or linear opacities and based on size and appearance of the small opacities, assign them a letter score. He stated P, Q, R are nodular opacities; S, T, U are linear opacities. They describe the distribution of the findings. Different

pneumoconiosis are seen in different regions of the lung. He stated it was important as CWP is typically predominantly an upper zone process and other idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. It is very important to show small opacities and their distribution on the form. (RX 1, p.23-24)

Dr. Meyer stated the last component of the lung involvement piece for small opacities is the extent of lung involvement, the so-called profusion. That is the most difficult component of the classification system for most radiologists and varies from 0/0 (normal) to 3/+ which is the most abnormal. The large opacities are separate categories for pleural disease. There are also miscellaneous findings like atherosclerotic calcifications (granulomas). (RX 1, p.24-25)

Dr. Meyer indicated the P, Q, R opacities are for progression of size. The S, T, U opacities are for progression of the linear. He agreed the film must be graded first. He indicated on a regular camera it is easy to over or under expose and the same was true for analog x-ray. If underexposed, they are extremely white and have a tendency to artificially increase the look of opacities in the lung parenchymal. If overexposed, it is too dark and this can artificially make the small opacities disappear. If there is mottle on the x-ray, the film may look grainy and that can simulate small opacities. When underexposed it tends to accentuate pulmonary vasculature and you have to be careful not to mistake that for a nodule or opacity. If a film is graded as UR, or unreadable, they do not complete the rest of the form. (RX 1, p.26-29)

Dr. Meyer indicated it was important to identify opacities as specific opacity types. Silicosis and CWP are characteristically small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, are described by small linear or small irregular opacities. The B-reader describes primary and secondary, to decide which the predominant shape is. Often they are mixed. You can see 2 different sizes of round opacities. Sometimes a primary could be Q and secondary R. (RX 1, p.29-30)

Dr. Meyer testified the distribution of dust exposure depends on the particles involved. Small particles like silica and coal are upper zone processes. He stated they expect CWP and silicosis early in disease to be upper zone predominant. (RX 1, p.30-31)

Dr. Meyer agreed profusion is the hardest definition. It is trying to define density of the small opacities in the lung. If normal, it is profusion "0". The most abnormal would be 3. Threshold implies mild amount of disease. A "2" would be medium profusion and "3", severe involvement of the lung. He indicated 0/1 he would say normal, but may be a little abnormal. He indicated a 1/0 would be borderline between abnormal and normal. (RX 1, p.31-32)

Dr. Meyer stated it was important to be able to recognize simple variations between normal and abnormal. Radiologists who are used to chest x-rays can compensate for over or underexposure on x-rays. (RX 1, p.36-37)

Dr. Meyer reviewed the digital PA chest radiograph from Harrisburg Medical Center, dated 5/2/16. He stated the film was quality 1. He stated the film revealed the lungs were clear. There were no small or large opacities. There were some mild degenerative changes in the thoracic spine, but the exam was essentially normal. Dr. Meyer testified there was no evidence of CWP on

Petitioner's chest x-ray. (RX 1, p.41-42)

On cross examination, Dr. Meyer agreed that, notwithstanding Petitioner having a negative reading, he could still have CWP. He agreed CT scans have not been accepted by NIOSH for purposes of B-reading. They do not need contrast CT scan to evaluate interstitial lung disease like CWP. (RX 1, p.42-45)

Dr. Meyer agreed most B-readers prefer not to know anything about the patient, they just want to look at the films for anything consistent with abnormalities of CWP. He assumes when asked to interpret a chest x-ray for B-reading that there was appropriate exposure history and he looks for evidence of CWP. He agreed two B-readers can disagree whether they're seeing small opacities or not. He stated distinguishing between 1/0 and 0/1 opacities is one of the most difficult processes for a B-reader. He stated the issue is making sure the person interpreting the exam has ample experience reading them and can sort out what is a normal variation. Dr. Meyer testified you have to recognize the spectrum of normal. He spent his career as a chest radiologist looking at chest x-rays all day to establish a spectrum of normal. (RX 1, p.47-50)

Dr. Meyer agreed it is possible for one to appreciate the existence of CWP on a CT scan that may have been missed on an analog x-ray. CT scans have a high opportunity to identify abnormalities. He stated symptomatic disease should be evidenced on analog chest x-rays. Dr. Meyer testified pulmonary function testing would not change his opinion of what he read on x-ray, nor would patient complaints of shortness of breath. He testified he treats the x-rays as a piece of hard data and symptoms can vary by individual. (RX 1, p.51-52)

Dr. Meyer agreed long-time coal miners are going to come out with some dust deposits in the lungs; the majority will not have changes in the lungs that qualify for CWP. He stated the manifestation of CWP is based on the body's ability to clear the dust. Dr. Meyer stated there is actually very little inflammation reaction to pure coal dust. He stated what occurs is there is a buildup of dust over time to the point, depending on level of exposure, the amount of dust can be as much as half the total weight of the lungs. A large component is the dust that fails to clear. He stated the presence of coal macule is the pathologic lesion that defines CWP. The coal macule is a conglomerate of white blood cells with the coal dust in it. It may be emphysema on the edges. He stated there may be some mild fibrosis around the coal macule. He stated the lung reacts to coal dust because the dust is typically fairly inert. He stated you see an immunologic response and collection of the white blood cells, some associated with mild fibrosis, adjacent to the macule. (RX 1, p.53-56)

Dr. Meyer agreed whether measurable or not there would be some change in the function of the lung. He agreed that with mixed dust exposure (i.e., coal and silica dust), there may be more toxicity to lung tissue. The macules then may be different shapes, sizes and locations in the lungs. It is called coal workers pneumoconiosis (not coal pneumoconiosis) as there are mixed dusts in the mine, not just coal dust. (RX 1, p.56-57)

Dr. Meyer agreed the macule of CWP is a permanent abnormality. It can progress depending on the individual macule or more dust. He testified that to his knowledge, there is no medication to stop or reverse the progression; however, it may improve by removing the exposure.

He agreed CWP can be considered a chronic progressive disease in some coal miners, and it can progress after leaving the mine exposure. Dr. Meyer agreed if a miner had CWP in their lifetime, they probably had it at some level when they left the mine. He agreed a susceptible host can progress to progressive massive fibrosis; it can impair pulmonary function. It can progress to involve the heart with cor pulmonale, which can be life threatening if significant enough. (RX 1, p.57-59)

Dr. Meyer agreed x-rays can be interpreted as demonstrating findings of emphysema or COPD. On chest x-ray they often look for secondary signs of emphysema, often directly seeing the lung destruction on CT scan. A finding of COPD or emphysema can be consistent with hyperinflation. Often the diaphragm will flatten. CWP may first appear radiographically and then become more significant, affecting pulmonary function. (RX 1, p.59-61)

Dr. Meyer agreed CWP is a chronic, slowly progressive disease; not acute, sudden onset. Not all coal miners develop a tissue reaction to the dust. Some may be sensitive and have extreme reaction; it depends on composition of the dust itself. Dr. Meyer agreed it was possible for a miner to work 30-40 years and develop radiographically significant CWP after they leave the mine. (RX 1, p.73-76) Dr. Meyer agreed it is possible for a miner to have CWP determined by pathology and not appreciated radiographically. It is possible a miner can have differing radiograph B-reader opinions and found CWP on autopsy/biopsy. He stated it shows radiograph has limitations relative to looking at tissue samples. (RX 1, p.86-87)

On re-direct examination, Dr. Meyer agreed pathologic basis would mean looking at lung tissue under a microscope. Dr. Meyer stated typically simple CWP will not progress once exposure ceases. He testified that Petitioner has neither progressive massive fibrosis nor cor pulmonale. He testified the films did not show evidence of bulla or hyperinflation. (RX 1, p.89-90)

Dr. Meyer's 11/9/16 B-reader report noted film quality 1. He noted no radiographic findings of CWP. He disagreed with Dr. Smith's interpretation. (Dep. Exhibit 3)

Testimony of Dr. Castle

Dr. Castle is a pulmonologist. He is board certified in internal medicine and his subspecialty is in pulmonary disease. He graduated from West Virginia School of Medicine in 1969. He completed his first-year internship at Charlotte Memorial Hospital and later attended University of Florida for internal medicine. He completed his residency in 1972. He joined the Navy Reserve in medical school and deferred entry to the military until finishing school. He went in the Navy as a pulmonary physician at Naval Regional Medical Center in Philadelphia and then Roanoke and opened his practice in 1977. He had been in practice there for 30 years. (RX 2, p.4-7)

Dr. Castle stated his practice is limited to pulmonary disease and chest disease, including critical care medicine, and he later became involved in sleep medicine. He saw usual things like COPD, asthma, pneumonia, interstitial lung disease, and occupational lung disease. He had some patients who had CWP, some simple, some complicated CWP. The biggest group of occupational disease cases were asbestos exposure cases from a railroad engine company. He had older patients

who had significant exposure to asbestos and many had asbestosis. He also did pharmaceutical studies over the years and taught medical students regarding lung disease. (RX 2, p.7-10)

Dr. Castle stopped seeing patients in 2007 and remains semi-retired. He continues with occupational lung disease to the present time. Dr. Castle testified that he became a B-reader in 1985 was certified to 6/30/17. (RX 2, p.10-14) He started doing medicolegal work around 1985 as a minor part of his practice. He performs a complete physical with chest x-ray, spirometry, blood gas, and EKG, sometimes CT scans also. The majority of the cases are federal cases. He may perform 5-6 forensic exams per month. He has performed exams for the Department of Labor. (RX 2, p.14-19) Dr. Castle indicated his forensic reviews of records and films was done primarily for coal mines or employers rather than employees.

Dr. Castle reviewed medical records and films regarding Petitioner at Respondent's counsel's request. He reviewed records of the Springfield Clinic. He reviewed a radiographic report of 1/25/94, indicating the lungs were clear of infiltrates, negative x-ray. He noted there were a number of office notes pertaining to the cardiorespiratory system. There were records of unrelated conditions. He noted records reflected that Petitioner did not smoke and had worked in coal mining and tree trimming. Dr. Castle noted the x-ray report of 4/22/04 that noted no cardiopulmonary abnormality and lungs clear with no mass or effusion. Petitioner had other treatments for lacerations and respiratory infections. The records dated 3/25/12, noted Petitioner was seen for sudden onset of sore throat, headache, body ache, and cough producing brown sputum; lungs were noted clear. Assessment was bronchitis. Dr. Castle stated the 8/6/14 record noted various issues and there was minimal infiltrate or atelectasis in lung bases, more left. He noted various records indicating pain and symptoms of choking and Petitioner had an esophagus issue with dilation. (RX 2, p.21-25)

Dr. Castle reviewed the medical records of Dr. Istanbouly who examined Petitioner on 8/30/16. Those records noted Petitioner had worked in coal mines, underground, for 33 years to 3/15. Petitioner's last job in the coal mine was noted as roof bolting machine operator. Petitioner never smoked. Petitioner's wife smoked, but outside. He had no history of asthma. Petitioner reported cough occasionally and his cough was triggered by strenuous activity or brisk walking. Petitioner had some sputum but recently started to clear. He had nocturnal dyspnea but denied exertional dyspnea. The record noted Petitioner was able to walk three miles without breathing problems and he had not noticed any decline of respiratory capacity in the prior six months. Petitioner did wheeze occasionally. He had frequent heartburn and Petitioner had a normal spirometry test. (RX 2, p.25-26)

Dr. Castle noted Dr. Istanbouly had reviewed a chest x-ray of 5/2/16 and said it indicated interstitial changes bilaterally consistent with simple CWP, profusion 1/0, per Dr. Smith a B-reader. The chest exam revealed normal respiratory effort and lungs clear to auscultation. Dr. Castle noted Dr. Istanbouly's assessment was CWP early stage related to long history of coal dust exposure and had noted spirometry was valid and normal. The record included Dr. Smith's report that indicated p/p opacities in mid to lower lung zones with 1/0 profusion. Diffusing capacity was noted as valid, normal. (RX 2, p.26-28)

Dr. Castle reviewed the records of Dr. Meyer. This included the report of Dr. Meyer on

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the 5/2/16 film indicating no parenchymal abnormalities consistent with CWP, lung fields clear. Dr. Castle testified that cough is not considered to be an objective determinant of pulmonary impairment. He stated chronic bronchitis is a chronic cough productive of sputum, on most days, for 3 consecutive months for 2 years per the definition of the American Thoracic Society. Dr. Castle testified that chronic bronchitis does not appear anywhere in the treatment records he reviewed. (RX 2, p.28)

Dr. Castle agreed Petitioner was diagnosed with GERD and dysphasia with choking. He stated that is associated with a cough, particularly with GERD. Dr. Castle stated it does not have to get up into the lungs or laryngeal area, but it can stimulate the lower esophagus and cause a cough. The same would be true with sinus congestion and drainage. Dr. Castle testified that pulmonary function testing was normal. He stated there was no evidence of obstructive or restriction whatsoever. Dr. Castle agreed the gold standard on obstructive lung disease requires FEV1/FVC to be below 70% to make a clinical diagnosis of COPD. He questioned how you can have chronic obstructive pulmonary disease if there is no obstruction. (RX 2, p.28-30)

Dr. Castle testified, within a reasonable degree of medical certainty, that Petitioner does not have COPD. That diagnosis was nowhere in treating records. He agreed diffusing capacity was 103%, which is normal. Dr. Castle testified there was no evidence of impairment in gas exchange. (RX 2, p.30)

Dr. Castle is familiar with the AMA Guidelines to the Evaluation of Impairment, 6th edition. He indicated that applying table 5-4 of the guides to results obtained in pulmonary function, Petitioner would fall in a class "0". Dr. Castle testified that, in his opinion, Petitioner was capable of heavy manual labor. (RX 2, p.30-31)

Dr. Castle agreed he stated that he had reviewed the chest x-ray, dated 5/2/16, on CD-ROM from Harrisburg Medical Center. Dr. Castle stated that in his opinion there was no parenchymal abnormalities consistent with CWP. In his opinion Petitioner did not have radiographic evidence indicating the presence of CWP or any coal mine dust induced lung disease. (RX 2, p.31-34)

Dr. Castle testified there was no lung pathology in the medical he reviewed. He found no clinical significance to sub radiographic pneumoconiosis stating, "The term simply means that you have an individual that may have pathological evidence of pneumoconiosis but the x-ray doesn't show anything." He stated there was no clinical significance of any scarring in the lung based on Petitioner's diffusion capacity. (RX 2, p.34-35)

Dr. Castle stated it was unlikely for simple CWP to progress once exposure has ceased. (RX 2, p.35-36).

Dr. Castle testified that, within a reasonable degree of medical certainty, based on a thorough review of all the data, including medical history, physical exams, radiographic evaluation, physiologic testing, hospital records and other data, that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust while working in the mining industry. Dr. Castle stated Petitioner certainly did work in the coal mining environment for a sufficient amount of time to have developed CWP, if he was a

susceptible host. (RX 2, p.36-37)

Dr. Castle testified that Petitioner did not demonstrate any consistent physical findings indicating the presence of interstitial pulmonary process. He did not have any consistent findings of rales, crackles or crepitation. Dr. Castle stated the majority of radiographic reports indicated no findings of CWP. Dr. Castle stated only Dr. Smith noted the minimal changes consistent with CWP and had described the film showing p type opacities in middle and lower lung zones with 1/0 profusion. He stated that would seem to mean Dr. Smith also considered the film as negative. (RX 2, p.37)

Dr. Castle stated Dr. Meyer, a radiologist and B-reader, found no parenchymal abnormalities consistent with CWP. Dr. Castle stated that he had personally reviewed the same film and, in his opinion, within a reasonable degree of medical certainty, there were no changes indicating presence of CWP. He had only reviewed one spirometry test and that study was entirely normal. His function was exactly what would be expected for his age, height, race, and sex. Dr. Castle stated Petitioner's diffusion capacity was also entirely normal. Dr. Castle opined Petitioner had no evidence of respiratory impairment occurring as a result of his occupational exposure to coal mine dust. In his opinion, Petitioner does not suffer from any pulmonary disease or impairment occurring as result of his occupational coal mining exposure during his employment. (RX 2, p.37-39)

Dr. Castle agreed no matter what he saw or did not see on an x-ray, it did not rule out the possibility Petitioner could have CWP pathologically or on autopsy. He agreed recent studies indicate as many as 50%+ of autopsies performed on long term coal miners found pathology significant for CWP that was not appreciated on x-ray exams during their life. (RX 2, p.44-45)

Dr. Castle agreed if a person has CWP they would have impairment of the function of the lung at the site of scarring and emphysema. He stated the scar tissue can restrict or obstruct causing measurable pulmonary impairment. He testified the onset is slow and insidious. (RX 2, T.50)

On re-direct examination, Dr. Castle agreed he had opportunity to review records of Dr. Istanbouly. He agreed Dr. Istanbouly took a history of Petitioner regarding cough and sputum and he did take that into consideration as to whether Petitioner suffered from chronic bronchitis. Dr. Castle testified that Petitioner did not suffer from asthma, hyper airways disease, or emphysema. Dr. Castle testified none of the B-readers interpreted Petitioner's films to find evidence of emphysema. (RX 2, p.80-81)

Dr. Castle testified that Petitioner does not suffer from progressive massive fibrosis nor cor pulmonale. He stated it would be extremely unlikely Petitioner would develop those conditions.

Conclusions of Law

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 999 N.E.2d 382, 389, 376 Ill. Dec. 499, 506 (5th Dist. 2013); citing *Anderson v. Industrial Comm'n*, 321 Ill. App.

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3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Where conflicting medical testimony is presented, it is for the Commission to determine which testimony is to be accepted. *Martin v. Industrial Comm'n*, 91 Ill. 2d 288, 294, 437 N.E.2d 650, 63 Ill. Dec. 1 (1982).

§1(d) of the Occupational Diseases Act ("ODA") states, in pertinent part:

> A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease needs not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence.
>
> An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists... If a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall, effective July 1, 1973 be a rebuttable presumption that his or her pneumoconiosis arose out of such employment.

§1(e) of the ODA states, in pertinent part:

> "Disablement" means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body.

§ 1(f) of the ODA states, in pertinent part:

> No compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease.

In the present case, the experts differed as to whether chest x-rays performed on 5/2/16 proved the presence of coal worker's pneumoconiosis ("CWP"). While it is true that Dr. Meyer agreed that a negative x-ray does not necessarily rule out CWP, that is not the same as saying that Petitioner in fact suffers from the disease. Instead, Petitioner bears the burden of proving by a preponderance of the credible evidence all the elements of his claim, including the threshold consideration of whether he has an occupational disease, including CWP.

Furthermore, while it is true that Petitioner worked as a coal miner for 33 years, the provisions set forth in Section 1(d) of the Occupational Diseases Act – wherein a rebuttable presumption exists that a coal miner's pneumoconiosis arose out of such employment if he or she was employed for 10 years or more in one or more coal mines -- does not apply, by a plain reading of the statute, unless and until it is shown that the claimant has CWP.

The evidence shows Petitioner last worked in the mine on 5/25/15. Petitioner is a non-smoker, but his wife does smoke, albeit outside. Petitioner testified that in about the early 1990's he started noticing breathing problems. At that time, he testified, he noticed he was not able to walk too far; he had a lack of stamina. Petitioner testified when he went back into the mine his breathing problems started to get worse. Petitioner testified from that time on, his breathing problems had gotten a little worse. (T.23-24)

Petitioner testified he does not take any medications for breathing. He testified he liked to walk and exercise, but he could no longer go as far, and he tried to stay away from stairs. He could not say other things in life it affected. Petitioner was able to cut big trees and clean up with no problem before and now he leaves the big trees for his son stating he did not have energy as he did before. However, a review of the record of primary care physician Dr. Manson who retired and then Dr. Del Valle during the period leading up to Petitioner's last day of work in the mines (5/25/15), reveals no references to any breathing complaints, other than to several episodes of GERD and having dilation of his throat several times because of swallowing issues.

It is noted there were some complaints with headaches, sinus drainage, sore throat, and a productive cough on a few occasions, as well as some fatigue. However, in 1998, his respiratory exam was normal. An exam in 2008 found no rales or wheeze and Petitioner presented no complaints related to breathing or cough. No history of any allergies or asthma was noted. Petitioner denied any chronic respiratory illness, there was no shortness of breath, and no chest discomfort in November 2013. Other than complaints of sinus drainage and productive cough for 4 days in October 2014, there were no complaints noted regarding breathing issues or cough through December 18, 2018. A November 6, 2018 visit regarding his esophageal condition exam noted as lungs clear to auscultation bilaterally, non-labored respiration.

The Commission finds significant that Petitioner stopped working for Respondent after a mine fire that closed the mine. Petitioner did not cease mining work because of any respiratory issues but he ceased because he was laid off. Petitioner opted to pursue his tree trimming business rather than seek further mining work.

Petitioner also claims that his breathing has gotten worse since he left Respondent's employ and that it affects his daily activities. The medical records fail to reflect any ongoing complaints relative to a diagnosis of CWP or any other chronic respiratory ailments during this period, and, in fact, much of his current complaints voiced at Arbitration could just as easily be explained by the limitations with fatigue, his chronic esophageal condition and GERD.

Dr. Istanbouly, a pulmonology and critical care doctor, not a B-reader, testified Petitioner's chest exam was within normal range. His Forced Vital Capacity, tested by spirometry, was normal. Petitioner's Forced Expiratory Volume was likewise normal. His FEV1/FVC ratio was also normal, ruling out obstruction. Dr. Istanbouly did not perform lung volumes testing on Petitioner which he admitted would be the best test. He indicated Petitioner's cough and the data he reviewed qualified as chronic bronchitis. Dr. Istanbouly indicated it was not uncommon with early CWP to have normal spirometry and he also indicated the pulmonary function test qualified Petitioner to have early stage COPD, related to long-term coal dust inhalation. He opined Petitioner had CWP,

early stage, but, as he was not a B-reader, he stated profusion was 1/0 per the B-reading of Dr. Smith (5/20/15). Dr. Istanbouly and Dr. Smith both believed Petitioner had simple CWP.

Dr. Smith, board certified radiologist and B-reader, interpreted the May 2, 2016 chest x-ray as positive for pneumoconiosis, profusion 1/0 with p/p opacities in bilateral mid to lower zones involved. No chest wall plaques or calcifications were noted.

In contrast, Dr. Meyer and Dr. Castle both read the 5/2/16 chest x-ray as normal, finding no evidence of CWP or other pulmonary condition. They had also noted that with CWP, the opacities would be found in the upper lung zones which was not the case here. Also, a profusion finding of 1/0 is considered open for interpretation by equally qualified B-readers. Petitioner had had normal chest exams over the years and did not report breathing issues from 1998 through 2018 at Springfield Clinic.

Furthermore, Petitioner has failed to prove he suffers from any obstructive respiratory disease given his normal pulmonary function test with which all doctors agree.

Therefore, upon a thorough review of the evidence, including the deposition testimony of the Drs. Meyer, Castle and Istanbouly, the Commission finds the opinions of Respondent's §12 physicians, Drs. Meyer and Castle, to be more persuasive and worthy of greater weight than those offered by Petitioner's §12 physicians, Drs. Istanbouly and Smith.

Based on the above, and the record taken as a whole, particularly the opinions of Drs. Meyer and Castle, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that he suffers from an occupational disease that arose out of and in the course of his employment on or about 3/25/15, and failed to prove that said condition was causally related to his employment.

The Commission further notes that even if Petitioner had proven the presence of an occupational disease, he failed to prove disablement within two years of the date of last exposure, as required by the Act. More to the point, while Dr. Istanbouly agreed that patients with CWP should avoid the coal mining environment, there is no evidence that any physician specifically restricted Petitioner from returning to work due to an occupational disease. In fact, Petitioner chose not to seek other mining employment and operated his own tree trimming service. Indeed, Dr. Castle opined that from a respiratory standpoint, Petitioner was capable of heavy manual labor. Thus, disablement has not been shown to have occurred within two years of the date of last exposure, and as a result Petitioner's claim would likewise be denied.

Accordingly, Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated 5/5/20 is vacated and Petitioner's claim for compensation is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

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DATED: APR 5 - 2021
o-2/9/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BASIL DALE
Employee/Petitioner

Case# **16WC016172**

PATTON MINING LLC
Employer/Respondent

21IWCC0155

On 5/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
JULIE A WEBB
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

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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
CORRECTED ARBITRATION DECISION

DALE BASIL
Employee/Petitioner

Case # **16** WC **16172**

v.

Consolidated cases_____

PATTON MINING, 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 **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **February 20, 2020**. 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 **Disease/Exposure, Causation and Sections 1(d)-f of the Occupational Disease Act**

FINDINGS

On **03/25/15**, 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 **$57,551.52**; the average weekly wage was **$1,106.76**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

- The respondent shall pay the petitioner the sum of $664.05/week for a further period of 30 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 6% MAW.

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

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

Signature of Arbitrator

4/29/20
Date

MAY 5 - 2020

STATEMENT OF FACTS

Petitioner, Dale Basil of Kincaid Illinois was 61 years old at the date of arbitration with the birth date of June 18, 1958. He is married to Debra Basil. He graduated high school from South Fork Community high school in Kincaid Illinois. After high school he took a couple years of schooling at Land of Lincoln College to become an arborist. He did not obtain a certificate or a degree. He worked 33 years in the coalmine industry all of which were underground. In addition to coal dust he was regularly exposed to and breathed silica dust and roof bolting glue fumes.

His last day of employment in the coalmines was March 25, 2015. He was working for Patton Mining at the Deer Run mine in Hillsboro, Illinois. He was 58 years old with the job classification of a shuttle car operator. He was exposed to coal dust on that day. That was his last day of employment because there was a fire in the mine and the mine was shut down. Since leaving the mine he has continued employment running his own tree trimming service that is called Midland Tree Service. Petitioner indicated that he had made as much as $50,000 a year in the tree trimming business but now is down to under $20,000 a year. The reason for this is that he just does not have the stamina that he once did to do the job. That is the only job he has had since he left the mine.

Petitioner began his mining career in 1977 working in Peabody Coal Company. This mine is located in Pawnee, Illinois. He was hired in as a supply man. Petitioner describes this job as taking supplies to all of the sections of the mine. He then became a recovery man. A recovery man takes the equipment and things that are left in a section that has been mined out and move it to another section of the mine. Petitioner describes this as a very dusty job. When you recover the belt line all the coal dust that was left on the line falls off it when you flip the belt. Petitioner did this job for about six or seven years. Petitioner also roof bolted at Peabody. Roof bolting is when you drill into the top of the mine until you hit one foot of rock then a bolt is placed in and anchored to help secure the ceiling. Petitioner next worked at Crown III and that would have been around 2000 or 2001. He was hired in as a shuttle car operator. A shuttle car operator operates the shuttle that takes the coal from the face of the mine and runs it back to the belt and dumps it off. Petitioner described how the coal dust coming off the tail of the continuous miner would come right into the ram car and create quite a bit of dust. Petitioner did this job for four or five years. Petitioner then began hauling rock dust in the ram car and taking it to all the sections in the mine. While he would haul the dust there would be paddles on it that would sling the dust everywhere so that it would cover the mine. This was done to prevent fires. Petitioner did this job for around four or five years. Petitioner also roof bolted for Crown III. He described the process as being somewhat different than the previous roof bolting, that they used glue pins to secure the bolts into the roof. Petitioner described these glue pins breaking and admitting a very strong odor that at times would take your breath away. Petitioner then went out and took a job at a coalmine in West Virginia for approximately a year. This mine was called Federal Number 2, which was close to Morgantown, West Virginia. Petitioner roof bolted for this mine and did this for approximately twelve months before moving back to Illinois. Petitioner took a job at Patton Mining in Hillsboro he was hired back into the shuttle car operator and stayed in that position until he retired.

Petitioner first started noticing breathing problems back in the early 1990's. He noticed that he just wasn't able to walk as far and his stamina wasn't the same as it use to be. From the first time he noticed breathing problems in the mine until he left the mine his breathing seemed to get worse. Since the time he left mining up to the time of this trail his breathing has continued to get a little worse. He does not take any breathing medication Petitioner describes not being able to walk as far for exercise as he once did. He testified that he can walk probably about a mile before becoming short of breath. He also testified that he tries to stay away from climbing stairs Petitioner also described how his breathing has slowed down his tree trimming business.

Petitioner's family doctor is now Dr. DelValle. It was Dr. Manson before his retirement. Petitioner was never a smoker. In addition to his breathing difficulties Petitioner has described how he has had to have his throat stretched several times because he has trouble swallowing. He also suffers from acid reflux. Petitioner also described breaking his jaw in the 1980s and having hernia surgery in the 1990s. He also takes a cholesterol pill.

Deposition of Dr. Suhail Istanbouly

At Petitioner's attorney request Petitioner was examined by Dr. Suhail Istanbouly Dr. Istanbouly is board certified in internal medicine, pulmonary medicine, and critical care medicine. (rx1, p5) He is currently affiliated with SIH hospitals including Herrin Hospital, Memorial Hospital of Carbondale, and St. Joseph Hospital (rx1, p6) Petitioner gave a history of no smoking. He mentioned a long history of intermittent occasional coughing triggered by strenuous activities or brisk walking and according to Petitioner, the cough is mild to moderate in intensity and used to be productive of milk duct – mild dark black sputum, but recently, close to the time that he was seen by Dr. Istanbouly it was clearing up. (rx1, p8-9) Petitioner also mentioned a history of occasional wheezing. He does have history of acid reflux disease, but apparently that was well controlled by taking pantoprazole. Petitioner mentioned a history of runny nose, postnasal drip, which was perennial rather than seasonal. (rx1, p9-10) Dr. Istanbouly testified that Petitioner's wheezing indicates bronchospasm. And chronic bronchitis, which means chronic cough, is a manifestation of bronchospasm as well. (rx1, p10) Petitioner's pulmonary function testing is within a normal range. FEV1 365 liters, 114% predicted. FVC 4.72 liters, 112% predicted. FEV1/FVC 78% (rx1, p10-11) Dr. Istanbouly testified that the x-ray he reviewed did reveal mild interstitial changes bilaterally consistent with simple coal worker's pneumoconiosis. Dr. Istanbouly testified to reasonable degree of medical certainty that Petitioner has chronic bronchitis with the main culprit being long-term coal dust inhalation. (rx1, p11) Dr. Istanbouly went on to testify to a reasonable degree of medical certainty that he feels Petitioner has coal worker's pneumoconiosis, which was caused by long-term coal dust inhalation. (rx1, p12) In light of his diagnosis of chronic bronchitis and coal worker's pneumoconiosis Dr. Istanbouly testified that the Petitioner could no longer have any further exposure to the environment of a coal mine without endangering his health. (rx1, p13) That would be permanent medical preclusion (rx1, p14)

Dr. Henry Smith

At Petitioners request, B-Reader, Dr. Henry Smith, who reviewed a grade one chest x-ray dated May 2, 2016. Dr. Smith found an interstitial fibrosis of classification p/p, bilateral mid to lower zones involved, or a profusion 1/0. There are no chest wall plaques or calcifications. His impression was finding a simple coal-worker's pneumoconiosis with small opacities, primary p, secondary p, mid to lower zones involved bilaterally, profusion 1/0.

Charges of Dr. Castle

Petitioners exhibit 3 shows the charges for Dr. Castle are $3,850.00.

Deposition of Dr. Castle

At Respondents request Dr. James Castle did a records review of Petitioners case. Dr. Castle testified within a reasonable degree of medical certainty, the Petitioner has no evidence of any respiratory impairment occurring as a result of his occupational exposure to coal mine dust in the mining industry. (rx1, p38-39) On cross examination Dr. Castle acknowledge that recent studies have shown that as many as 50% of long-term coal miners have pathological coal workers pneumoconiosis that was not appreciated by a radiographic study during their life. (rx1, p45) Dr. Castle admitted that to have the most accurate assessment of a patient he would always want to do his own examination if possible. (rx1, p47) Coal workers pneumoconiosis is basically a trapped coal dust in a part of the lung, which ends up wrapped in scar tissue and can be accompanied by emphysema around it. (rx1, p49) Dr. Castle confirmed that the affected tissues there of the scar and the emphysema, that tissue itself cannot perform the function of healthy normal lung tissue. (rx1, p49-50) Therefore by definition of a person who has coal worker's pneumoconiosis, they would have an impairment in the function of the lung at the sights of the scarring and emphysema. (rx1, p50) Dr. Castle also answered affirmatively to the fact that a person can have radiographically significant coal worker's pneumoconiosis yet have normal spirometry, normal pulmonary function in all areas, normal blood gases, normal physical exam of the chest, and maybe even no complaints. (rx1, p50-51) If they do have complaints shortness of breath is the most likely one. (rx1, p51) A person can have mixed dust pneumoconiosis from coal mining, which could include silica. Silica is toxic to the surrounding lung tissues. (rx1, p55) Dr. Castle testified that the coal dust that is trapped within the lungs is always going to be there for the rest of the coal miners life. (rx1, p55-56) The only treatment for coal worker's pneumoconiosis is to remove the miner from any further exposure. (rx1, p56) Dr. Castle agreed that the scarring of coal worker's pneumoconiosis does not return to normal healthy lung tissue. (rx1, p57)

Deposition of Dr. Christopher Meyer

At Respondents request Dr. Christopher A. Meyer read a PA Chest Radiograph from Harrisburg Medical Center dated May 2, 2016. (rx1, p41) Dr. Meyer testified that it was a quality 1. The lungs were clear. There was no small or large opacities. There was some mild degenerative changes of the thoracic spine. The examination was essentially normal. (rx1, p41-42) Dr. Meyer did not find any pneumoconiosis. (rx1, p42) On Cross-examination Dr. Meyer

testified that to his knowledge there is no medicine or anything modern medical science can do to stop or reverse the progression of coal workers pneumoconiosis. Removing the worker from the exposure is the best response. (rx1, p57) Dr. Meyer testified affirmatively under cross-examination that coal worker's pneumoconiosis can be considered a progressive chronic disease that can progress even after the coal miner leaves the exposure. (rx1, p58) If a person has coal workers pneumoconiosis at any time in their life it would be true that they probably had coal worker's pneumoconiosis at some level when they left the coal mine. (rx1, p58) Dr. Meyer testified that it is true that when a coal worker has coal workers pneumoconiosis the rate of progression would vary from miner to miner rather than be exactly the same in all miners. (rx1, p62) The silica in the coal mine generally comes from the rock that's associated or intermixed with the coal that's being mined. (rx1, p63-64) It is Dr. Meyer's understanding that certain occupations in the mines such as roof bolting or drilling or shooting where you disturb the coal and where there may be rock involvement those occupations in the coal mine would tend have greater silica exposure. (rx1, p64) Dr. Meyer agreed that it would be fair to say that a miner who has 1/0 pneumoconiosis probably won't even know he has it, probably won't complain to his doctors until he gets a B-reading that tells him he has it, he probably just won't know. (rx1, p66) It is possible that a coal miner would find the first manifestations of coal workers pneumoconiosis toward the end of his career or even the first year after. (rx1, p75-76) Dr. Meyer agreed that there are studies that show autopsy as much as 50 percent of coal miners are found to have abnormalities of coal workers pneumoconiosis when they might not have been apparent radiographically during their life. (rx1, p88)

Medical records of Methodist Hospital

This is a pulmonary function report dated 10/4/2016.

Springfield Clinic records

Medical records of Springfield Clinic dated June 23, 2017. He has history of bronchitis. (rx1, p50) On an office note dated October 25, 2014, under chief complaint patient presents with headaches, sinus drainage, sore throat, productive cough x 4 days. Under subjective Dale is a 56 year old coal miner who presents to Prompt Care with complaints of a headache and sinus congestion and drainage, sore throat and cough, occasional productive colored sputum. He has had symptoms for about 4 days. … Dale has had a history of sinus infections in the past. (rx1, p108) Office note dated March 25, 2012, under subjective a 53 year old white male presents with sudden onset of illness a day and a half ago. He has had sore throat, headache, body aches. He has had cough productive of brown sputum. He has mild sinus congestion. He is not a smoker he does wok in a coalmine. (rx1, p156) An office note dated February 7, 2006, patient presents complaining of a purulent productive deep cough associated with a sore throat. (rx1,p186)

Updated Springfield Clinic records

Medical records of Springfield Clinic dated November 7, 2019, these medical records pertain to an esophagogastroduodenoscopy procedure that was done on May 13, 2019.

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), which was caused by his exposures as a coal miner. He worked as a coal miner for 33 years, all of which were underground. He is a lifelong never smoker of cigarettes. The Arbitrator found Petitioner to be a candid and credible witness.

At Petitioner's request, he was examined by Dr. Istanbouly on 8/30/16. Dr. Istanbouly reported that Petitioner coughs occasionally and intermittently, and that his cough is triggered by strenuous activity or walking. It is mild to moderate in intensity. It was formerly productive of mild, dark black sputum but recently had begun to clear up. Dr. Istanbouly reported that Petitioner denied significant exertional dyspnea, and is able to walk three miles without breathing problems. Petitioner wheezes occasionally and complains of a runny nose and postnasal drip, which is perennial rather than seasonal. Petitioner's spirometry was within the range of normal. Dr. Istanbouly reviewed Petitioner's chest x-ray, and found it to reveal mild interstitial changes bilaterally, consist with simple CWP. He reported that the same film was read as 1/0 by Dr. Smith. Dr. Istanbouly found that Petitioner's long-term coal dust exposure is a significant contributor to his current respiratory symptoms of intermittent and exertional-related cough, wheezing and occasional nocturnal dyspnea. From a medical standpoint, he advised Petitioner to avoid any further coal dust exposure to prevent progression of his pneumoconiosis. The Arbitrator assigns significant weight to Dr. Istanbouly's complete examination and conclusions.

Dr. Castle did not examine Petitioner, but performed a records review at the request of Respondent. The evidence reviewed consisted of medical records from the Springfield Clinic and evidence developed for this claim as well as the reports of Dr. Istanbouly, Dr. Meyer, and a diffusion capacity study performed at Methodist Hospital on 10/4/16 at Respondent's request. Dr. Castle also read Petitioner's chest x-ray of 5/2/16. The Arbitrator notes that the Springfield Clinic records apparently contained three radiographic studies; two chest x-rays from 1/25/94 and one from 4/22/04, and one CT scan of the abdomen and pelvis dated 8/6/14. While the x-rays from 1994 and 2004 were not apparently read by any expert witness, Petitioner continued to work as an underground coal miner for 21 years following the 1994 x-ray and 11 years following the 2004 x-ray. As such, they are given no weight in resolving the question of whether Petitioner suffered from CWP by 2017, within two years of his date of last exposure. It is not clear whether or not Dr. Castle reviewed the CT scan of the abdomen and pelvis of 2014; however, the Arbitrator notes that the report in the medical records indicates there were abnormalities in the lung bases. Neither Dr. Meyer nor Dr. Castle noted any abnormalities in the lower lungs; however, both Dr. Smith and Dr. Istanbouly did find abnormities which they assigned to CWP. The Arbitrator considers this significant in assigning greater weight to the readings of Dr. Smith and Dr. Istanbouly than to those of Dr. Meyer and Dr. Castle. In addition, while Dr. Castle did not find that Petitioner suffered from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust, he did report that Petitioner's 33 years of coal

mining was sufficient exposure to cause CWP in a susceptible host. He also confirmed that Petitioner is a lifelong never smoker.

Dr. Castle reported that Dr. Smith found minimal changes of p-type opacities in the middle and lower lung zones in a profusion of 1/0. He surmised that Dr. Smith's description of the CWP abnormalities meant that Dr. Smith also considered that the x-ray may be negative. He further confirmed that Dr. Meyer found no parenchymal abnormalities consistent with pneumoconiosis. The Arbitrator believes that a competent reader who finds an x-ray to be positive at the threshold level of 1/0 also considered the possibility that it might not be negative. The Arbitrator also believes that a competent reader who finds an x-ray to be negative would consider that it could possibly be positive before arriving at a final conclusion that it is negative. Such would only be prudent and thorough in making such determination of positive versus negative. Regarding the testimony or reporting of either Dr. Meyer or Dr. Castle that they disagree with contrary conclusions of other witnesses to be self-serving and unnecessary. The conflicting reports speak for themselves.

Dr. Castle also reported that Petitioner's pulmonary function testing was within the range of normal; however, the Arbitrator notes that it is the unrebutted testimony that with simple CWP, it is expected that the pulmonary function testing will be normal, as will the physical examination of the chest. It is also not necessary that there be respiratory complaints for there to be CWP.

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of treatment records and the other medical data developed by the parties for this claim. Dr. Castle, who performed the records review, has been retired for a number of years, and his practice consists of records reviews and depositions such as he did here. He did not examine, speak to, nor see Petitioner. In addition, Respondent sent Petitioner to Methodist Hospital in Kentucky for a diffusing capacity measurement on 3-24-16, but did not have any other pulmonary function testing administered. The Arbitrator considers the fact that Respondent limited the scope of the evidence it developed to be significant.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. He cited studies that show that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. And there are older studies that show a much higher incidence than that. The Arbitrator notes that Petitioner worked as an underground coal miner for 33 years. This qualifies him as a long-term coal miner. Based on the studies cited by Dr. Meyer, having no medical evidence at all, it could still be likely that Petitioner could have CWP. The Arbitrator is not speculating that Petitioner would be one of the miners found to have

CWP if an autopsy were taken at his death. However, this evidence regarding the nature of CWP and the likelihood of its existence is a significant fact to be considered along with the rest of the evidence regarding CWP, particularly since it was offered by Respondent's witness.

According to Dr. Meyer, it is possible for a miner to work 30 to 40 years in a mine, develop radiographically-significant CWP, but not have it manifest itself until the last year or even the first year after he leaves the mine. Further, when a miner has CWP that progresses, the rate of that progression could vary from miner to miner, as could the exact shape, size, and location of the macule. These things could also vary within an individual miner.

Dr. Meyer defined the difference between a positive x-ray and a negative x-ray when looking for CWP. He testified that if he has read an x-ray to be positive and the miner has a sufficient history of exposure to cause CWP, such would warrant a diagnosis of CWP; however, if he finds the x-ray to be negative, such could never rule out the possibility that the miner has CWP. Further, regarding the nature of pathologic CWP, he testified that the abnormalities found pathologically, which were not found radiographically, would have the same constitution as the macules or nodules that would be apparent on x-ray, just perhaps smaller. They would still be subject to potential progression as any other CWP abnormality might be. He added that not all miners have the same reaction to coal mine dust.

In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He compared it to prostate cancer or colon cancer: most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lungs of a miner can be as much as one-half the total weight of the lung itself. He said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle did not disagree with Dr. Meyer.

The Arbitrator notes that while none of the above-mentioned evidence may determine the outcome by themselves, each adds weight to Petitioner's case and is significant. In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. Petitioner has met his burden.

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

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court.

Issue (L): What is the nature and extent of the injury?

The Arbitrator finds Petitioner to be disabled to the extent of 6% MAW. In arriving at this conclusion, the following factors were taken into consideration:

(i) Impairment rating. Petitioner's pulmonary function testing was within the range of normal. As per the universal testimony, such does not rule out CWP. No weight is given to this factor.

(ii) Occupation of Injured Employee. The Arbitrator notes that coal mining involves daily exposure to coal mine dust, and that the unrebutted testimony of Petitioner was that he was also regularly exposed to silica dust. The clear preponderance of the evidence, as well as a ruling of the Appellate Court establish that when a miner has CWP, he has an impairment in the function of his lungs whether such can be measured or not. It also establishes that there is no safe level of coal mine exposure for a miner who has been diagnosed with CWP. Based on the evidence in this case, the coal mine environment contains many exposures in addition to just coal dust, which present a significant risk to the miner's pulmonary health. The Arbitrator finds this to be significant.

(iii) Petitioner's age. Petitioner was in his mid-50's when he ended his coal mine employment with Respondent. The Arbitrator considers it significant that he was not precluded from further coal mine work because of his age.

(iv) Petitioner's future earning capacity. Petitioner's determination to end his coal mine employment has caused a reduction of his earning capacity. By the universal testimony, a miner with CWP is medically precluded from further coal mine work, and such was the only type work Petitioner engaged in since his early 20's. The Arbitrator finds this to be significant.

(v) Evidence of disability. The Arbitrator concludes that Petitioner's CWP provides sufficient evidence of disability to result in the award of 6% person as a whole as described above.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Ratfield,

Petitioner,

21IWCC0156

vs.

NO. 17WC002176

Ventra Plastics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical, permanent disability, temporary disability 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 14, 2019 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.

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

DATED: APR 6 - 2021

Stephen J. Mathis

Thomas Tyrrell

SJM/sj
o-3/3/21
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0156

RATFIELD, JERRY
Employee/Petitioner

Case# **17WC002176**

VENTRA PLASTICS
Employer/Respondent

On 6/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0522 THOMAS MAMER & HAUGHEY LLP
ERIC CHOVANEC
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

21IWCC0156

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ 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

JERRY RATFIELD
Employee/Petitioner

v.

VENTRA PLASTICS
Employer/Respondent

Case # **17** WC **2176**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **1/14/19**. 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 _____

21IWCC0156

FINDINGS

On **2/2/2016**, 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 earned $**32,968.00**; the average weekly wage was $**634.00**.

On the date of accident, Petitioner was **57** years of age, ***single*** with 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 $ 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. Respondent is entitled to credit for all bills paid by its group health care plan.

ORDER

Arbitrator finds that Petitioner did not sustain and accident that arose out of the course of his employment for the Respondent. All compensation is hereby 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.

Jason C. Myatt

Signature of Arbitrator

6/10/19
Date

JUN 14 2019

STATE OF ILLINOIS)
)ss
COUNTY OF WINNEBAGO)

21IWCC0156

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JERRY RATFIELD, Employee/Petitioner)
)
v.)
)
VENTRA PLASTICS, Employer/Respondent)

Case # 17-WC-2176

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified he began working for Respondent in 2012, having worked there for approximately 4-5 years as a full-time material handler and forklift driver, working 10-15 hours a day, 4 days a week. He testified his duties included operating a standing forklift, pulling boxes of parts from bins in the stock room and transporting the boxed parts to the assembly line. The parts were for the assembly of bumpers and cars for Chrysler. Petitioner testified he loaded the boxes onto a pallet, transported them to the assembly line and then removed the boxes from the pallet on the forklift and placed them into racks on the assembly line. The boxes weighed about 60 pounds. On the assembly line, the materials were placed waist height or slightly higher than waist height. He testified that he did that all day long as the assembly line constantly needed more material to continue. (Trans. 6-9)

Petitioner's application for adjustment of claim alleges a work accident that took place on 2/2/2016. Petitioner testified that at some point he started having problems doing his job. He woke up one morning with a sore back and he don't know what had happened. He didn't remember the exact date. (Id.,12).

Petitioner was asked by his attorney, "Were you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id., 14).

Petitioner testified that he went to work and talked to his supervisor, Jason Funkman, about it and was told to try to work through the day. He continued working that day, then had two days off work, and sought treatment the day after his days off.

Petitioner testified he did have some back treatment prior to 2016. In 2013, he had undergone physical therapy and returned to work without restrictions as of May 2013. Petitioner testified that he did not experience any back problems between May of 2013 when he returned to work without restrictions and February of 2016. He was able to do his regular job, on a full-time basis, without pain or limitations.

On 2/6/16, Petitioner presented to his primary care provider, Dr. Shobha Iyengar, who noted a history of pain in the right lateral lower back and right anterior area groin area for the last 2 weeks. The doctor further noted Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night". (PX.1, p. 22). Dr. Iyengar referred Petitioner to Dr. Borchard. (Id.).

On 2/16/16, Dr. Iyengar noted Petitioner's complaints of persistent lower back pain. X-ray was significant for wedge compression deformity and osteopenia in L4 with and L5 S1 lumbar disc changes and facet arthritis.

(Id., p. 20). Dr. Iyengar noted she would try to obtain MRI results from "a few years ago" . (Id.) . Petitioner was referred to Dr. Borchard. (Id.)

On 3/23/16 Petitioner presented to Dr. Robin Borchard at OrthoIllinois with a history of back pain since around January of 2016. (PX.2) Additionally, the doctor noted Petitioner has had lower back pain for the last couple of years. Dr. Borchard reviewed a 2013 MRI and recommended Petitioner obtain further imaging. (*Id.).*

On 3/30/2016 Petitioner presented for MRI which was reviewed by Dr. Borchardt on 4/6, 2016 at which time the doctor noted a large disk herniation at L4-5 that was a "new finding" not present on the 2013 MRI. (Px. 2)

Dr. Borchard recommended an epidural steroid injection which Petitioner underwent approximately a week a later. (*Id.).* Petitioner returned to see Dr. Borchard on 4/20/16 reporting that although his pain level had improved, he was still experiencing symptoms. (*Id.).* At this point, Petitioner was working without restrictions. Petitioner underwent one additional epidural steroid injection on 6/1/2016. (*Id.).*

On 8/9/16 Dr. Richard Broderick at OthoIllinois noted Petitioner presented with a history of low back pain beginning in 2/16. Petitioner reported low back, bilateral radiating pain aggravated by any movement. He was taking Gabapentin, Mobic/Meloxicam, and Norco. (Id.).

Dr. Broderick reviewed lumbar MRI from 2013, noting herniated nucleus pulposus ("HNP") right L/5 S1 with degenerative disc disease ("DDD") at L4/5. (Id., 144). The doctor compared the 2013 MRI to one taken on 3/30/2016 noting, a large herniation at L4/5 with central stenosis. (Id., p. 145). Regarding the mechanism of injury, the doctor noted "unknown". It was noted Petitioner was still working without restrictions for Respondent and had undergone 2 injections by Dr. Mackenzie, the last injection had improved his pain according to the medical records. (*Id.).* Dr. Broderick recommended a trial of physical therapy ("PT") noting Petitioner's past PT had been very effective. (Id). If PT proved to be ineffective surgery would be considered. (Id.).

On 8/18/16, Petitioner presented for initial evaluation at Belvidere Physical Therapy with Tim Seppelt PT, DPT, who noted a history of low back pain beginning in February of 2016. (PX 2, p. 184) Petitioner reported being a "stand up forklift driver at Ventra Plastics in Belvedere, IL." The therapist further noted Petitioner "is required to stand for 2 hours at a time without a rest break. His work duties include lifting 10-20# from floor to waist frequently and pushing/pulling 40-50 pounds occasionally." (Id.). Petitioner reportedly could not perform his work duties without pain. He noted 5/10 resting low back pain although at the end of his work shift, his pain increased to 8/10. (Id.). Petitioner reported his pain was aggravated by standing, walking, ascending stairs, and work activities." (Id.). Petitioner reportedly was unable to stand or walk for more than 15 minutes without pain. A one month, three times per week PT plan was proposed. (Id.).

On 10/4/16, Dr. Broderick again reviewed MRI imaging of Petitioner's lumbar back noting "a large central herniated disc with superior extrusion at the L4-5 level causing sever central stenosis and bilateral lateral recess stenosis." (Id., p. 139). Dr. Broderick recommended a microscectomy left L4/5, "possibly bilateral". (Id.).

Following some additional conservative treatment, Petitioner underwent surgery consisting of right L4-5 hemilaminotomy, microdiscectomy, and foramenotomy on 10/20/2016. (Px. 2). Petitioner ceased working for Respondent as of the date of surgery. Petitioner testified that the surgery did decrease his pain, but did not resolve it. He underwent physical therapy postoperatively from 12/20/2016 through 12/30/2016. On December 28, 2016, it was noted he had slipped going up the steps and was experiencing left hip pain. (Px. 2). He went to the emergency room on January 2, 2017 due to low back and left leg symptoms after slipping and catching himself on the railing of the stairs. (Px. 4). Dr. Broderick recommended additional injections on January 18, 2017 due to Petitioner's ongoing symptoms, which were provided on January 24, 2017, February 7, 2017, and February 14, 2017. (Px. 2). Due to ongoing symptoms, another surgery was recommended. (Px. 2).

On March 16, 2017, Petitioner underwent a lumbar fusion from L4-S1. (Px. 2). Petitioner testified that the fusion relieved some of the numbness in his leg. Physical therapy was started on June 9, 2017 and performed through July 21, 2017. On September 19, 2017, Dr. Broderick recommended a Functional Capacity Evaluation to assess his ability to return to work. (Px. 2).

On 10/16/2017 Petitioner saw Dr. Broderick reporting pain and numbness. Petitioner noted a history of being on the floor "cleaning some tile on his hands and knees and had difficulty getting back up." (*Id.)*.

On 10/19/17 Petitioner saw Dr. Broderick who told him to follow up in approximately 6 months. (*Id.)*. On 4/3/2018 Dr. Broderick noted Petitioner was ambulating without difficulty. An x-ray showed a stable fusion. (*Id.)*. Petitioner was told to return in one year. No discussion of work restrictions are contained in this note. (*Id.)*.

Petitioner consulted with Dr. Jeffrey Coe, board certified in occupational medicine who rendered an expert opinion in this case. Dr. Coe is a Pediatrician and practices occupational medicine. Petitioner saw Dr. Coe on 10/10/2017. (PX.5) It was Dr. Coe's opinion that a causal relationship existed between Petitioner's repetitive work activities and his current lower back and lower extremity symptoms. Dr. Coe noted the repetitive strain injuries were a factor aggravating or accelerating pre-existent degenerative disc disease and degenerative arthritis and causing break down of the L4-5 disc. (*Id.)*. It was Dr. Coe's understanding that Petitioner was a forklift operator who used a forklift described as poorly sprung. (*Id.)*. Petitioner reported he frequently lifted weights of 50 pounds or more and occasionally lifted 100- pound weights while working for Ventra Plastics. Petitioner noted his job was fast paced and required twisting and bending. (*Id.)*.

Dr. Coe agreed that it was a possibility that Petitioner's back condition may have simply progressed to this point as a result of age and not in connection to his work for Respondent. (*Id.)*.

Respondent sent Petitioner to Dr. Carl Graf for an Independent Medical Examination on June 13, 2018 and he testified via deposition on October 15, 2018. (RX. 1) Dr. Graf is a board certified Orthopedic Spinal Surgeon.

Dr. Graf noted Petitioner claimed a single traumatic accident on February 2, 2016 when he was moving some empty totes by hand, indicating they had to be done in order to get them for the standup forklift. Petitioner noted that he twisted and felt a stabbing pain in the low back on that date. Petitioner denied any previous back pain to Dr. Graf. (*Id.)*.

It was Dr. Graf's opinion that Petitioner's current condition of ill-being was not causally related to his alleged work accident. Dr. Graf opined that while Petitioner claimed and described a specific injury to him, the medical records did not reflect that specific injury. (*Id.)*. Dr. Graf stated that until Dr. Coe's independent medical examination, there was no comment regarding a work-related injury in any of the medical records. In addition, Dr. Graf opined that further there was no evidence of a repetitive injury, according to the medical records, and no scientific basis for any repetitive type injury causing this lumbar disk herniation. Dr. Graf stated that, regardless of causation, he believed Petitioner was at MMI as he had essentially been released by his treating physicians and wasn't undergoing any care at that time. Lastly, Dr. Graf stated that based upon his physical examination, he believed Petitioner could return to work with no restrictions. (*Id.)*.

CONCLUSIONS OF LAW

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

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

The Arbitrator adopts the statement of facts detailed above and finds that Petitioner has failed to sustain his burden with respect to the issues of accident and causal connection.

According to Petitioner's application for adjustment of claim. He is alleging a work accident that took place on 2/2/2016. During his testimony Petitioner's description regarding his injury was extremely brief:

Q. At some point you started having problems doing the job?
A. Yes.
Q. What kind of problems were you having?
A. I woke up in the morning, and my back was really sore, and I don't know what had happened.
Q. Do you recall around when that was?
A. No, I don't remember the exact date. (Trans.12).

Additionally, he testified that he wasn't having any problems doing his actual job. (*Id.).* Petitioner was asked by his attorney, "[W]ere you having any problems doing your actual job?" to which he replied "No". (Id.,13-14).

Petitioner was also asked by his attorney "[W]ere you having any pain while you were working?" to which his reply was, "I had some after that, after I felt like I twisted my back." (Id.,14). That is all the information Petitioner provided during his testimony to support his alleged claim.

Petitioner gave the Arbitrator insufficient information during his testimony as to what caused his back condition.

Dr. Iyengar's records from the alleged accident date, 2/6/2016 note a history of right lower back and groin pain for 2 weeks. It was noted that Petitioner "stands at his work place and he is driving fork lift. [I]t is worse at night", however, Petitioner does not report he believes his pain was caused by his work duties. (PX1

A careful review of Petitioner's medical records shows that Petitioner routinely denied any known injury. Every report from Dr. Borchard and Dr. Broderick state that Petitioner's pain began in January or February of 2016 with no known injury. (PX2,3)

Contrary to the history reported in his treating medical records, Petitioner told Respondent's IME doctor that he did have a specific and concrete accident on February 2, 2016 which is the alleged accident date from Petitioner's Application for Adjustment of Claim. (RX1) This statement to Dr. Graf puts Petitioner's testimony in doubt as he told two different stories about how his back condition and its relation to work. During this visit, Dr. Graf notes Petitioner denied that he had experienced a previous back condition which was clearly false based upon his treatment with Dr. Borchardt prior to the accident. (RX3)

During all of Petitioner's treatment, including two different surgeries over the course of two and half years, he repeatedly denies any work injury which is documented in note after note. Petitioner doesn't obtain a causal opinion from either of his treating doctors and instead, consults Dr. Coe, a pediatrician and occupational medicine doctor. He then sees Dr. Graf at the request of the Respondent and reports a specific injury on the alleged accident date.

While Petitioner described the duties of his job, he gave the Arbitrator scant information as to how those duties bothered his back or whether anything he did at work actually gave him discomfort while he was working. Petitioner testified that he woke up in the morning and his back was sore and he had no idea of when that happened. (*Id.).*

The evidence contained in the record with respect to an alleged accident is inconsistent and unreliable. The Arbitrator finds Petitioner has failed to sustain his burden with respect to this issue.

Assuming Petitioner did prevail on the issue of accident, the Arbitrator would find that he failed to prove his current condition of ill-being was causally related to his alleged work injury, adopting the opinion of Dr. Graf.

In conclusion, all claims for compensation are denied based upon both a failure to prove a compensable accident and failure to prove his current condition was causally related to the alleged 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?

Based upon the arbitrator's decision issue J. is herby denied.

K. Is Petitioner entitled to any prospective medical care?

Based upon the arbitrator's decision issue K. is hereby denied.

L. What temporary benefits are in dispute?

Based upon the arbitrator's decision issue L. is hereby denied.

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

IVETTE PEREZ RODRIGUEZ,

Petitioner,

21IWCC0157

vs.

NO: 18 WC 17917 18 WC 17792

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitioner for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

On June 10, 2018 Petitioner filed an application for adjustment of claim alleging repetitive trauma to the right hand and thumb with a manifestation date of April 16, 2018. On June 15, 2018 Petitioner filed an application for benefits asserting that she sustained injury to her left thumb on November 13, 2017 that occurred while carrying GPS equipment. The matters were consolidated for trial.

Petitioner had been employed by IDOT as a land surveyor for 18 eighteen years and is 53 years of age. She testified that in her work she utilizes a device known as a controller. This is a GPS device attached to a pole which combine to weigh 10-15 lbs. and is carried from one

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location to another over the course of her workday. Petitioner uses both hands to type and rotates her wrists continually while recording data which measure roads, buildings, sidewalks and trees on the controller.

On November 13, 2017 Petitioner consulted Dr. Michael Birman for symptoms of numbness, tingling and pain in both hands. Dr. Birman diagnosed Petitioner with left carpal tunnel syndrome, trigger finger in the left thumb and right de Quervain's tenosynovitis. Dr. Birman administered a steroid injection in Petitioner's left thumb.

Petitioner returned to Dr. Birman in follow up on December 20, 2017 at which time a recommendation was made for surgery on Petitioner's left hand. On April 16, 2018 Petitioner underwent a bilateral EMG of the upper extremities which revealed moderate to severe bilateral median neuropathies at the wrist. The left wrist was more symptomatic. Petitioner elected to proceed with surgery. Throughout this time Petitioner continued to work full duty.

On May 1, 2018 Dr. Birman performed a left carpal tunnel release and left trigger finger release. Post-operatively Petitioner had work restrictions which included no forceful grip and no lifting, pushing or pulling. On June 12, 2018 Petitioner had surgery on her right hand which included trigger thumb release, carpal tunnel release, and first extensor tunnel release. Petitioner was off work and undergoing occupational therapy. She returned to full-duty work on August 27, 2018 and was discharged from care by Dr. Birman in September 2018.

Petitioner testified that she continues to experience occasional numbness and pain in both thumbs which she treats with Tylenol. She also experiences a loss of hand strength overall which is more pronounced on the right.

Dr. Birman, Petitioner's treating physician authored a report on August 5, 2019 which was received in evidence (PX4) which expressed the opinion that her described work activities "could have" aggravated the condition in her hands. He notes that an EMG performed on April 16, 2018 which was diagnostic for bilateral carpal tunnel syndrome. He additionally diagnosed right and left trigger thumbs, right de Quervain's tenosynovitis, and right and left thumb carpometacarpal joint arthritis.

In his report Dr. Birman comments that Petitioner's description of her work activities which include forceful and sustained use of her thumbs could be aggravating factors in her symptomatology. Petitioner's testimony at hearing describes work activities that would support causal connection.

Respondent retained Dr. Andrew Zelby as a Section 12 expert who examined Petitioner on May 22, 2019. Dr. Zelby characterized the EMG study as "equivocal" and did not believe that her subjective complaints could be ascribed to any kind of neurological condition of her neck or upper extremities. He maintained that Petitioner had undergone bilateral carpal tunnel releases

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and had "essentially normal motor and sensory exams of both hands" and failed to demonstrate causal connection. The Commission finds it notable that Dr. Zelby did not offer any opinion concerning Petitioner's de Quervain's tenosynovitis or trigger fingers.

The Arbitrator denied Petitioner's claims on both hands finding that the medical opinion on causal connection stated by Dr. Birman was equivocal and ambiguous. He found the opinions expressed by Dr. Zelby to be persuasive. The Commission views the evidence differently and finds that the causation opinion expressed by Dr. Birman concerning Petitioner's condition of ill-being in her right and left thumbs supports the claim. Petitioner has met her burden of proof and the Commission hereby reverses the Arbitrator's Decision on the causal connection concerning injury to Petitioner's thumbs and affirms all else.

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as he considered the issue of nature and extent moot. The Commission having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner 30% loss of the use of the right thumb and 30% loss of the use of the left thumb.

(i) Impairment rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of the Injured Employee:
(iii) Petitioner's Age:
(iv) Petitioner's Future Earning Capacity:
(v) Evidence of Disability:

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards 30% loss of the use of the right thumb and 30% loss of the use of the left thumb for Petitioner's bilateral hand condition.

For the foregoing reasons the Commission reverses the Decision of the Arbitrator filed on January 28, 2020 in claim numbers 18 WC 17792 and 18 WC 17917 with regard to the condition of ill being in Petitioner's right and left thumbs and affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is reversed in part for the reasons stated above, as to the causal

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connection of the condition of ill-being in Petitioner's right and left thumbs and is affirmed in all else.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 17 weeks, commencing May 1, 2018 through August 27, 2018, 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 all reasonable and necessary medical expenses detailed in Petitioner's Exhibits 1 & 2, namely the bill from Alexian Brothers Medical Center totaling $11,685.43, and Hand to Shoulder Medical Associates totaling $4,696.00, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for amounts paid on behalf of Petitioner on account of said accidental injuries under its group health plan pursuant to Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8 (e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the right thumb. Respondent shall also pay Petitioner the sum of $843.84 per week for a period of 22.8 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the thirty percent (30%) loss of use of the left thumb.

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

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

DATED: APR 6 - 2021
SJM/msb
D: 2-26-21
44

Stephen J. Mathis
Stephen Mathis

Marc Parker
Marc Parker

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs. NO: 12 WC 25446

Elgin Police Department and
City of Elgin,

21IWCC0158

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, 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.

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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.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
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Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **12WC025446**
15WC021342

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0158

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0158

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **12** WC **25446**

Consolidated cases: **15 WC 21342**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were 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 **December 17, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**82,516.20**; the average weekly wage was $**1,586.85**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BLOOD ON DECEMBER 17, 2011, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S 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.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 – 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 15 WC 21342 (DOA: August 12, 2012). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Rick Demierre testified that he has worked for Respondent Elgin Police Department for 18 years. He is currently a sergeant and supervisor of the Community Initiative Division which coordinates community events for officers to attend.

On December 17, 2011, he was working as a patrol police officer in the gang crime unit. He was wearing plain clothes. He and three other officers responded to a male subject with a weapon on E. Chicago Street. The subject was in the middle of the roadway, covered in blood, and pretty much naked. The subject was aggressive and resisted arrest. The officers took him to the ground as he struggled for several minutes. Petitioner was exposed to a significant amount of blood on his hands, arms, and legs while restraining the subject. Petitioner had no open cuts or sores. Petitioner completed an employee's injury report stating he was exposed to a large amount of blood on his legs and hands. The subject's name was Marvin Finklea (PX 2). Petitioner testified that the subject died about a week after December 17, 2011. Petitioner did not know if Respondent tested him for HIV or Hepatitis. Respondent completed an exposure report documenting a December 17, 2017 exposure to blood on intact skin. Petitioner was wearing leather gloves and blue jeans as protective barriers. He removed the leather gloves and blue jeans, and placed them in a bio hazard bag at the police department jail (PX 3).

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). He reported that he was involved with an individual who was extremely bloody. He was wearing gloves at that time, but he got some blood on his pants and on his wrist areas just proximal to the gloves. He had no open areas at the time. He had no symptoms since the exposure. Physical examination noted no physical findings. The handwritten exam notes small healing abrasions on his wrists which were not there when exposed. The impression was body fluid exposure 15 days ago. Blood was drawn for testing for hepatitis B, C, and HIV. Petitioner could continue with regular work. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination. Petitioner testified he believes he was vaccinated for Hepatitis B. He does not recall if he had or was vaccinated for Hepatitis A.

Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner testified that he had an additional exposure to the saliva of an infant, as more fully detailed in the decision in the consolidated case 15 WC 21342 decided in conjunction with this matter.

Petitioner underwent additional blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner

appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr. John J. Koehler, performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on December 17, 2011 when he was required to restrain a subject. Petitioner admits he suffered no physical injury in doing so, but came in contact with the subject's blood. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to blood from the subject on December 17, 2011. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. Petitioner presented no evidence that the subject tested positive for a blood borne disease such as HIV or Hepatitis. He does not know if the subject had an infectious disease.

Petitioner's blood tests performed at Sherman Health on January 11, 2012, February 6, 2012, August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding

Hepatitis C testing. Dr. Weinstein opined that, although Petitioner did have blood and saliva exposures to his gloves and abrasions on his wrists, the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the blood exposure on December 17, 2011. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of December 17, 2011.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), our supreme court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related incident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any documented exposure and the negative blood testing, the

Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to blood on December 17, 2011.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the December 17, 2011 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Demierre,

Petitioner,

vs.

NO: 15 WC 21342

21IWCC0159

Elgin Police Department and
City of Elgin,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, occupational disease, stress, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019, 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.

21IWCC0159

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.

DATED: APR 7 - 2021
MP:yl
o 4/1/21
68

Marc Parker

Barbara N. Flores

Christopher A. Harris

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DEMIERRE, RICK
Employee/Petitioner

Case# **15WC021342**

12WC025446

ELGIN POLICE DEPT AND CITY OF ELGIN
Employer/Respondent

21IWCC0159

On 6/6/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.25% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1380 LAW OFFICES OF DANIEL E MURPHY
53 W JACKSON BLVD
SUITE 1342
CHICAGO, IL 60604

5541 FRED J BEER LAW OFFICES PC
2295 VALLEY CREEK DR
UNIT K
ELGIN, IL 60123

21IWCC0159

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rick Demierre
Employee/Petitioner

v.

Elgin Police Department and City of Elgin
Employer/Respondent

Case # **15** WC **21342**

Consolidated cases: **12 WC 25446**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were 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 **August 12, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**84,149.99**; the average weekly wage was $**1,618.25**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

BECAUSE PETITIONER HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUFFERED AN EXPOSURE TO AN OCCUPATIONAL DISEASE AND FURTHER FAILED TO PROVE ANY CONDITION OF ILL BEING CAUSALLY RELATED TO THE EXPOSURE TO BODILY FLUIDS ON AUGUST 12, 2012, OR IN FACT ANY CONDITION OF ILL BEING AT ALL, PETITIONER'S 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.

Signature of Arbitrator

June 6, 2019
Date

ICArbDec p. 2

JUN 6 - 2019

Statement of Facts

This matter was tried in conjunction with consolidated case number 12 WC 25446 (DOA: December 17, 2011). A single transcript was prepared although the Arbitrator is entering separate decisions.

is currently a sergeant and supervisor of the Community Initiative Division which coordinated community events for officers to attend.

On December 17, 2011, Petitioner was involved in an incident that resulted in exposure to blood as more fully described in the decision in the consolidated case 12 WC 25446 decided in conjunction with this matter.

Petitioner was examined at Sherman Health on January 11, 2012 (PX 1, RX 20). Blood was drawn for testing for Hepatitis B, C, and HIV. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination Petitioner also underwent blood testing on February 6, 2012 with same findings of HIV and Hepatitis negative and immune to Hepatitis A and B due to either prior exposure(s) or vaccination. On June 28, 2012, Petitioner was seen for a six month follow up. No findings were noted, and he was ordered for a blood draw (RX 20).

On August 12, 2012, Petitioner had an additional exposure as an initial responder for an infant in cardiopulmonary arrest. He initiated CPR before the paramedics came. He was an emergency medical technician and CPR EEG instructor licensed in the State of Illinois. He opened the infant's mouth with his hands to check for an impeding airway and for resuscitation. His fingers were exposed to the infant's saliva. He was not exposed to the infant's blood. He performed chest compressions. The postmortem autopsy for the infant was positive for HIV and Hepatitis A (PX 4, PX 5, RX 20). The Petitioner testified that Respondent contacted him and advised him to undergo blood testing because the infant had diseases. Petitioner did not know if the infant had HIV.

Petitioner was seen at Sherman Health on August 21, 2012. He had no fevers, chills, sweating, weaknesses, fatigue. He had no recent illnesses, sore throat, chest pain, shortness of breath, cough, abdominal pain, nausea, vomiting. He had no jaundice or scleral icterus. He had no loose stools, numbness, tingling, or focal weakness. His physical exam revealed a well-developed, nourished male, in no acute distress. His skin was without any lesions and he had no rashes or ulcers. The assessment was bodily fluid exposure. The doctor ordered tests for Hepatitis C and B, and HIV 1 and 2. Petitioner was returned to work without restrictions. Petitioner underwent blood tests on August 21, 2012, November 19, 2012, and February 22, 2013. The HIV and Hepatitis C tests were negative. He was found to be immune to Hepatitis A and B due to either prior exposure(s) or vaccination (RX 20).

On June 12, 2015, Dr. Mitchell Weinstein, M.D. of Lakeshore Infectious Disease Associates performed a Section 12 examination of Petitioner at the request of the Respondent. Dr. Weinstein testified by evidence deposition taken December 4, 2015 (RX 18). Dr. Weinstein is Chief of the Section of Infectious Diseases and Infection Control Chairman at Presence St. Joseph Hospital in Chicago, IL. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months.

Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing (RX 4-14, RX 18). Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure (RX 18).

On July 11, 2016, Dr John J. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified by evidence deposition taken March 30, 2017 (RX 19). He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler reviewed Dr. Weinstein's report and agreed with his opinions. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner testified that he did not take any medicines as a result of the exposure. Respondent paid for the blood testing. Petitioner did not take any time off work as the result of the exposure. Petitioner testified that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. He did not undergo any mental health treatment for his concerns. As of the hearing date, he could deal with his exposure. Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. He was proceeding with a hearing because of concern that he may develop HIV or Hepatitis.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

Petitioner suffered an undisputed event on August 12, 2012 when he initiated CPR and opened the infant's mouth with his hands to check for an impeding airway and for resuscitation, exposing his fingers to the infant's saliva. The claim is for possible infection as a result of that exposure. The claim is therefore properly examined as an occupational disease exposure.

The term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists. 820 ILCS 310/1(d).

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. Likewise, whether a claimant has established disablement or impairment is a question of fact. *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 200 Ill. Dec. 865 (1994).

It is undisputed that Petitioner was exposed to the infant's saliva on August 12, 2012. However, Petitioner bears the burden of proving that he was exposed to an occupational disease, not simply a "potentially" hazardous substance. While the infant did test positive for HIV, Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. Petitioner's blood tests performed at Sherman Health on August 21, 2012, November 19, 2012, and February 22, 2013 were negative for HIV and Hepatitis C. Petitioner had evidence of protective antibodies to Hepatitis B which means he is immune to and not at risk of Hepatitis B.

Dr. Weinstein testified that HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3--4 months. Hepatitis C testing is also highly reliable, and the guidelines recommend testing only out to 6 months. The Respondent's testing protocol exceeded the accepted guidelines for both HIV and Hepatitis C. Dr. Weinstein referred to two studies regarding the very high level of accuracy of the HIV testing as well as two accepted guidelines regarding HIV testing. He also referred to 3 studies regarding the high level of accuracy of the Hepatitis C testing and to accepted guidelines regarding Hepatitis C testing. Dr. Weinstein opined that the August 12, 2012 exposure only involved saliva exposure, without a bite, laceration or blood exposure and would be considered extremely low risk for any infectious transmission. The multiple follow-up blood tests showed Petitioner to be immune to Hepatitis B, and negative for HIV and Hepatitis C. Dr. Weinstein opined that there was an "infinitesimally small" risk that Petitioner either contracted in the past or would contract in the future any infectious diseases as the result of the exposure. Dr. Weinstein clarified that although symptoms from HIV may remain dormant, the blood tests would detect HIV positive within 3-4 months of the exposure. He testified that while he was 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Petitioner has presented no evidence that any further testing documented that he has contracted an occupational disease. He testified that he had no symptoms and did not previously develop any symptoms that were consistent with HIV or Hepatitis. He was not disabled for any period of time as a result of the fluid exposure on August 12, 2012. No evidence was presented that Petitioner is at an increased risk of developing any occupational disease. The Petitioner failed to prove that he has any condition of ill being at all and thus failed to prove any condition of ill being causally connected to the incident of August 12, 2012.

Petitioner has also raised a claim for psychological trauma on a theory of mental-mental. *In Pathfinder Co. v, Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913 (1976), the Supreme Court held that a claimant can recover under the Act where he or she "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm * * *, though no physical trauma or injury was sustained."

Because employment conditions in themselves may produce stress, the "mental-mental" theory of recovery is generally recognized as a more difficult basis for Petitioner to prove that his psychological injury is compensable. Recovery for non-traumatically-induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the non-employment conditions, were the major contributory cause of the mental disorder. The Act does not permit recovery for every non- traumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety. Whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard.

The Arbitrator has considered Petitioner's testimony that the exposure affected his life in that he had concerns with his spouse regarding intimacy issues. He used contraceptive protective measures for one year after exposure. He testified that his emotional health was affected because he thought something could occur as a result of the exposure for the first several months to a year after the exposure. The Arbitrator notes that he did not undergo any mental health treatment for his concerns. He testified that as of the hearing date, he could deal with his exposure. The Arbitrator's finds Petitioner's testimony unpersuasive and finds the undocumented claim fails to rise to the level of a credible mental disorder or psychic injury. Although not dispositive as a matter of law, evidence that a claimant failed to seek treatment for alleged psychological injuries following a work-related accident may still be relevant. Such evidence undermines the inference that Petitioner suffered a severe emotional shock that caused a psychological injury. Petitioner's testimony describes only concern, not a true psychological injury. He notes that it was temporary, lasting only about a year. After considering the evidence presented, including the lack of any likely exposure and the Petitioner's negative blood testing, the Arbitrator does not find Petitioner's testimony persuasive and does not establish either a mental disorder or an emotional shock sufficient to warrant recovery by an objective, reasonable person standard.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered an occupational exposure to an infectious disease or mental disorder or psychological injury and further failed to prove that he suffered any condition of ill being causally connected to the exposure to bodily fluids on August 12, 2012.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator found that Petitioner failed to prove an occupational disease or work-related condition of ill being. Petitioner further admitted that he suffered no physical injury at the time of the August 12, 2012 incident.

Dr. Koehler performed an examination of Petitioner and an impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition at the request of Respondent. He testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination. He assessed 0% whole person impairment using the appropriate AMA Guides tables regarding liver disease and HIV because Petitioner contracted no disease and did not have any active disease as a result of the exposure.

Petitioner, a 46-year-old police officer, has not missed any time from work. He is continuing in the same job as prior to the exposure with no loss of earning.

Petitioner testified that he is in good health. He has no unusual symptoms that required him to go to a doctor. He is not aware of the symptoms of HIV or Hepatitis. Petitioner had no health issues that he claimed arose out of the exposure. He is not contending that he has any symptoms consistent with HIV. Dr. Weinstein testified that Petitioner appeared in good health and did not report any past or present symptoms consistent with any infectious diseases. Dr. Weinstein testified that the blood tests are highly accurate and can reliably rule out the acquisition of HIV or Hepatitis C from his work-related exposures. HIV antibody testing is usually positive within a few weeks of exposure, and is practically 100% accurate by 3–4 months. Hepatitis C testing is also highly reliable. Dr. Weinstein opined that the multiple follow-up blood tests showed him to be immune to Hepatitis B, and negative for HIV and Hepatitis C. He testified that while he could not be 100% sure that Petitioner did not contract HIV or Hepatitis C as a result of the exposure, he was 99.9% sure. Dr. Koehler diagnosed zero-risk body fluid exposure with no diseases contracted with a normal examination.

Utilizing the factors delineated in Section 8.1b of the Act, an AMA impairment rating, occupation, age, future earing capacity, and evidence of disability, Petitioner has also failed to establish any partial permanent disability.

The claim for compensation is denied.

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

SYLVIA MORALES,

Petitioner,

vs. NO: 12 WC 37862

STAFFMARK,

Respondent.

21IWCC0160

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 causation, medical, temporary total disability, permanent partial disability, penalties and fees 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed March 14, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back, and right elbow. All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she also proved, in part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner failed to establish her condition of ill-being after January 2013 is causally related to work incident. Further medical benefits and TTD benefits are denied.

21IWCC0160

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 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 a 5% loss of use of the person-as-a-whole..

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties and attorney's fees is denied. The Commission finds no basis to award any attorney's fees to the Vrydolyak Law Group.

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 including a credit of $3,960.00 for temporary total disability benefits and $11,019.89 for medical benefits previously paid to Petitioner.

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.

DATED: APR 7 - 2021

cak

O: 1.19.21

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Stephen Mathis

Thomas J. Tyrrell

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on January 19, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

21IWCC0160

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

MORALES, SILVIA
Employee/Petitioner

Case# **12WC037862**

STAFFMARK
Employer/Respondent

21IWCC0160

On 3/14/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
30 N LASALLE ST SUITE 1750
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
LILIA Y PICAZO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21IWCC0160

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

SYLVIA MORALES
Employee/Petitioner

v.

STAFFMARK
Employer/Respondent

Case # **12** WC **37862**

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JANUARY 29, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS:

On **OCTOBER 9, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,720.00**; the average weekly wage was $**360.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**3,960.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**11,019.89** for other benefits, for a total credit of $**14,979.89**.

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

ORDER:

ACCIDENT/CAUSATION:
Based upon the evidence considered in its entirely in this matter, the Arbitrator finds Petitioner failed to prove an accident occurred that arose out of and in the course of her employment as it relates to the left shoulder, right shoulder, neck, low back and right elbow because All other issues regarding causation, medical benefits, TTD, and nature and extent are moot.

ACCIDENT/CAUSATION: MID-BACK
Petitioner has proven by a preponderance of the evidence that she sustained a mid-back contusion on October 9, 2012. As such, she has also proven in-part, that her condition of ill-being was causally related to the work incident through January 2013. Petitioner has failed to establish her condition of ill-being after January 2013 is causally related to the work incident. Further medical benefits and TTD benefits are denied.

Respondent shall pay Petitioner the sum of **$220.00 per week** for a further period of **25 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused a **5% loss of use of the person-as-a-whole**.

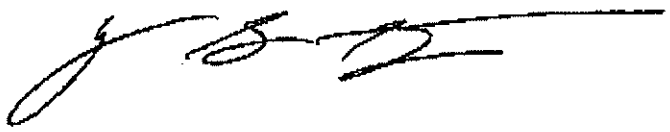
Respondent is entitled to a credit of $3,960.00 for TTD benefits and $11,019.89 for medical benefits previously paid to Petitioner.

Petitioner's claim for penalties and attorney's fees is denied.

The Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.

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

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



Signature of Arbitrator

March 13, 2019
Date

MAR 14 2019

SILVIA MORALES v. STAFFMARK

12 WC 37862

****CORRECTED DECISION****

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on January 29, 2019. The issues in dispute were accident, causal connection, medical bills, TTD, penalties and attorney's fees, attorney's fees for the Petitioner's former attorney, and the nature and extent of the injury, if any. Arbitrator's Exhibit 1. The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. Arbitrator's Exhibit (*hereinafter*, AX) 1.

FINDINGS OF FACT

Petitioner testified she began working for Staffmark on August 25, 2012. Tx at 15. Petitioner first started working as a trimmer and later worked in quality control. Id. at 15-16. Petitioner testified she was required to pull a cart with uniform-filled boxes and place it near a desk. Id. She then would place the boxes on a desk. Id. Petitioner testified the heaviest box she would lift on her own weighed between 30-35 pounds. Id. at 17. Petitioner testified the carts were heavy and taller than her. Id. at 17-18.

On October 9, 2012, Petitioner testified she was getting ready to take her break and leave her cart between two desks when a co-worker threw her cart to make it go in place. Id. at 20. Petitioner testified the cart came back and she felt impact in her back. Id. She testified the cart was empty. Petitioner testified she was not able to breathe but managed to grab onto a desk. Id. at 21, 23. Petitioner testified she felt pain throughout her back. Id. at 25. She was transported to the company clinic and MacNeal Hospital by taxi. Id. at 25-26.

The medical records indicate Petitioner was seen at MacNeal Hospital on October 10, 2012. An interpreter was present, and a good history was taken from Petitioner. She stated she was bumped in the back with a metal cart. She complained of generalized midback pain as well midback pain upon moving her left shoulder. She reported the cart did not touch her shoulder. She did not fall, hit her head or lose consciousness. She denied numbness and tingling

throughout her body, headaches and neck pain. X-rays taken of the lumbar and thoracic spine revealed very mild degenerative changes. X-rays of the left shoulder revealed unremarkable findings. Petitioner was diagnosed with a backache and contusion of the back. She was prescribed hydrocodone. PX 3.

On October 11, 2012, Petitioner presented to Rehab Dynamix by referral from MedLegal. Tx. at 30. She was seen by chiropractor Krysten Kuk. Petitioner reported she was struck in her back by a heavy metal cart weighing 300 pounds and approximately five feet tall and three feet wide. Petitioner testified she reported pain in her entire back. Tx. at 30 She complained of mid back pain, low back pain without radiation, and left shoulder pain. On a symptom survey sheet, Petitioner checked approximately 50 of the 76 symptom boxes listed on the survey, stating she was also feeling nervous, irritable, depressed, fatigued, and generally run down. She was diagnosed with lumbar intervertebral disc syndrome without radiation, thoracic strain, internal derangement of the left shoulder, and muscle spasms. PX 2.

On October 18, 2012, Petitioner presented to Dr. Paul Marsiglia of Chicago Pain and Orthopedic Institute. Petitioner reported she was pushing a cart full of uniforms with a height of 6ft and boxes of 50 pounds each when she noticed she was struck from behind by another cart being pushed by another employee. Petitioner stated she was almost sandwiched in between the two carts and noticed immediate back pain. She did not report falling forward or hitting a table. She reported she was undergoing physical therapy, but she was unsure if she made any significant gains. She complained of pain in the cervical, thoracic and lumbar spine with radiation down the left lower extremity over the left lateral calf. Straight leg raise was positive bilaterally. No significant radicular components were noted. She was diagnosed with cervicalgia, lumbar radiculopathy, and myofascial pain syndrome. A lumbar MRI was recommended, and continued physical therapy was prescribed. PX 5.

Petitioner continued to undergo treatment with Rehab Dynamix. She reported consistent improvement with exercises. On November 8, 2012, Petitioner stated she temporarily discontinued therapy due to personal issues. She stated she was seen in the hospital where she was worked up and discharged with unremarkable findings.

On November 8, 2012, Petitioner returned to MacNeal Hospital complaining of back and neck pain. Pain was rated 1 out of 10. She testified she was transported by ambulance due to her panic attacks. Tx. at 33. Her son served as an interpreter. The report indicates a good history was obtained from Petitioner. Petitioner gave a history of left-sided neck pain from a prior work accident where a box fell on her back. Petitioner denied the statement at trial. Tx. at 35. On exam, Petitioner denied significant complaints of low back pain. She denied symptoms of radicular numbness in the lower and upper extremities. X-rays taken of the cervical spine revealed normal findings. Petitioner was diagnosed with a trapezius strain and torticollis. PX 3.

She testified she was given a pill which made her feel out of this world and was discharged for the day. Tx. at 35.

On November 12, 2012, Petitioner underwent an MRI of the lumbar spine. The radiologist discerned diffuse lumbar spondylosis and multilevel degenerative disc disease along with a small focal superimposed left lateral recess disc protrusion at L5-S1. PX 8.

On November 16, 2012, Petitioner underwent an MRI of the left shoulder. The radiologist discerned a full thickness tear involving the supraspinatus insertion, a one-centimeter ganglion cyst adjacent to the superior aspect of the distal clavicle and acromioclavicular joint, mild subacromial/subdeltoid bursitis, and diffuse osteoarthritic changes.

On November 19, 2012, Petitioner presented to Dr. Jain. She reported worsening pain. She complained of severe left-sided neck pain extending into the left upper extremity with numbness and tingling along the left upper extremity. She also complained of pain down the thoracic and lumbar spine with radiation and paresthesias into the left lower extremity. She reported ongoing panic attacked requiring a recent trip to the emergency room where she was diagnosed with benign positional vertigo. Dr. Jain diagnosed cervical facet syndrome, lumbar facet syndrome, lumbar discogenic pain, and lumbar radiculopathy. A left L5-S1 facet injection and cervical MRI was recommended. Petitioner was prescribed Prozac for her anxiety, and tramadol. PX 5. Then, on November 24, 2012, Petitioner underwent an MRI of the cervical spine. The radiologist discerned disc bulges at C3-5 and left foraminal narrowing along with bulges at C5-T1. PX 8.

On November 26, 2012, Petitioner returned to Rehab Dynamix. She reported 40% improvement with overall activities. On December 4, 2012, the chiropractor indicated continued improvement overall. Petitioner was able to handle new exercises. Petitioner reported she was recommended shoulder surgery. On December 19, Petitioner reported a palpable mass along the lower ribs on the left. X-rays findings were unremarkable. On January 7, 2013, Petitioner reported pain over the weekend due household chores such as washing and sweeping. On January 30, Petitioner reported 50% improvement with exercises. She was discharged from care pending left shoulder surgery. PX 2.

On December 3, 2012, Petitioner presented to Dr. Steven Sclamberg. She reported she was struck in the back, left side, and left shoulder by a metal pallet while at work on October 9, 2012. She complained of pain in her shoulder radiating down her deltoid without numbness or tingling. On exam, she exhibited mild lateral deltoid tenderness. Left shoulder was negative for SC clavicular or AC tenderness. She was able to forward flex with extension to 140 degrees.

Passive range of motion was near full. Dr. Sclamberg noted a left full-thickness supraspinatus tear. PX 5.

On December 7, 2012, Petitioner underwent an x-ray of the left shoulder which revealed unremarkable findings. PX 8. Petitioner then returned to Dr. Sclamberg and Dr. Jain from December 10, 2012 to February 13, 2013. Petitioner complained of ongoing left lumbar and leg pain, neck pain and left upper extremity pain. On February 13, 2013, she complained of new onset of right chest wall pain with spasms in her neck. Her diagnosis remained unchanged. Cervical and lumbar injections were recommended along with continued physical therapy. PX 5.

A Section 12 examination with Dr. Zelby was scheduled for December 19, 2012. Petitioner failed to attend the appointment. RX 10.

On March 1, 2013, Petitioner underwent arthroscopic left shoulder rotator cuff repair, subacromial decompression, and synovectomy with debridement. PX 5 and 6. Subsequently, on March 20, 2013, Petitioner returned to Rehab Dynamix for post-surgical chiropractic care. On April 9, Petitioner stated she was in a lot of pain due to activities performed over the weekend. On April 11, Petitioner was seen by Alix Crone, DC. She reported severe pain was causing extreme anxiety. Alix Crone noted psychosomatic manifestations of pain. On May 8, 2013, active flexion of the left shoulder was 150 degrees. On June 3, 2013, abduction was at 160 degrees. PX 2.

Petitioner also continued to undergo treatment with Dr. Jain and Dr. Sclamberg. Petitioner complained of worsening pain, dizziness and shortness of breath to Dr. Jain. She was continuously recommended cervical and lumbar epidural injections and to follow-up with her primary care physician. She reported improved pain in her left shoulder to Dr. Sclamberg. Exams revealed good range of motion and she was able to walk with ease. On May 13, 2013, Petitioner began complaining of right shoulder mild motion restriction. On June 21, 2013, Petitioner complained of significant pain in the right shoulder and down the deltoid. On exam she exhibited positive impingement signs on the right. Dr. Sclamberg diagnosed right shoulder impingement syndrome and gave her an injection. PX 5.

On May 31, 2013, Petitioner saw Dr. Axel Vargas. She complained of cervical axial pain, low back pain, and bilateral upper extremity and lower radicular pain. On exam, Petitioner walked with a limp favoring her left lower extremity. Dr. Vargas diagnosed cervical discogenic radiculopathy, cervical facet syndrome, lumbar discogenic radiculopathy, lumbar discogenic pain syndrome, lumbar facet syndrome, and right shoulder derangement. On June 28, 2013, Dr. Vargas reviewed and disagreed with IME opinions of Dr. Zelby. PX 5.

Petitioner continued chiropractic care at Rehab Dynamix from June 4, 2013 to July 3, 2013. Petitioner reported continued improvement of left shoulder symptoms. She did not

complain of right shoulder symptoms. On July 3, 2013, Petitioner reported 60% improvement. She was released to Dr. Sclamberg. PX 2.

On July 23, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6. Petitioner then continued treatment with Dr. Vargas and Dr. Sclamberg. On August 5, 2013, Petitioner stated both her left and right shoulders were improving. On August 9, 2013, Petitioner reported improvement following the previous injection, but she continued to complain of distal lower back pain with intermittent left-sided L5-S1 radiculopathy, neck pain, upper extremity radiculopathy, and right shoulder pain. PX 5. Thereafter, on August 27, 2013, Petitioner returned to Dr. Vargas who performed a left L5-S1 transforaminal epidural steroid injection. PX 5 and 6.

On September 13, 2013, Petitioner returned to Dr. Vargas. She stated there was no improvement after the second injection, and her symptoms worsened. At trial, she testified she heard a buzzing sound after the injection. Tx. at 39. The doctor recommended a provocative lumbar functional discogram with post CT prior to a neurosurgical evaluation for surgical decompression and possible fusion of the lumbar spine. Dr. Vargas also recommended a neurosurgical evaluation for cervical spine surgery. PX 5.

On September 20, 2013, Petitioner followed up with Dr. Sclamberg. She complained of left shoulder and right elbow pain. Dr. Sclamberg diagnosed right medial epicondylitis, and he administered an injection in each area. PX 5.

On December 13, 2013, Petitioner returned to Dr. Sclamberg. She noted she had not been doing any physical therapy, was awaiting neurosurgical evaluation, and had been to the County clinic. On exam, Petitioner had negative impingement signs. Dr. Sclamberg recommended starting physical therapy again for the left shoulder. PX 5.

On December 20, 2013, Petitioner returned to Dr. Vargas. The doctor noted Petitioner presented previously with clear signs of congestive heart failure and he had recommended she seek treatment before moving forward with any procedures. Petitioner was instructed to follow up with Dr. Sclamberg and a neurologist at Cook County Hospital to discuss a cyst visualized on a November 2012 cervical spine MRI. PX 5.

On January 15, 2014, Petitioner presented to Cook County Health and Hospital Systems. She was diagnosed with low back pain, migraines, obstructive sleep apnea and obesity. On January 29, 2014, she returned complaining of headaches, only. On April 8, 2014, Petitioner was diagnosed with depressive disorder, low back pain and obesity. PX 9. However, prior to that diagnosis, on March 7, 2014, Petitioner returned to Dr. Sclamberg. Dr. Sclamberg placed Petitioner at MMI for the left shoulder with no mention of right shoulder symptoms. PX 5.

On April 25, 2014, Petitioner returned to Dr. Vargas. Dr. Vargas noted Petitioner saw an internist at Cook County Hospital for congestive heart failure. Dr. Vargas also recommended Petitioner see a neurologist for her persistent headaches. Petitioner reported she saw one, but the neurologist dismissed the findings as emotional in origin. Petitioner also noted this doctor told her she had nothing going on and should return to work, but then referred her to the Cook County pain clinic for further evaluation and injections. Dr. Vargas again recommended a lumbar discogenic provocative functional discogram before referring her to neurosurgery. PX 5.

Petitioner did not return for care from April 25, 2014 to October 10, 2014 when she presented to Dr. Amish Patel. She complained of neck pain left greater than right, occipital headaches, thoracolumbar pain, and lower extremity radicular pain left greater than right. She stated she tried going back to work but her pain was too significant. Petitioner also stated she saw her primary care physician in July of 2014. No issues arose at that time. Diagnosis remained unchanged from prior visits. Dr. Patel noted Petitioner showed symptoms of possible autoimmune disease and recommended follow up with her primary care physician. PX 5.

On October 14, 2014, Petitioner presented to Dr. Amit Mehta who performed bilateral L5-S1 transforaminal epidural steroid injections and trigger point injections at the bilateral trapezius, splenius capitus, and paracervical erector spinae muscles. PX 6.

On November 10, 2014, Petitioner was examined by Dr. Thomas Pontinen. She reported the injections provided some relief, but she was experiencing increased left leg pain. Petitioner was diagnosed with lumbago, radicular low back pain, neck pain and cervical radiculopathy. PX 5.

On December 15, 2014, Petitioner returned to Dr. Pontinen. She reported she was recently told by a GI doctor and rheumatologist that had gastritis and osteoarthritis. Petitioner did not provide the names of the GI doctor or rheumatologist. On exam, she exhibited a positive left straight leg exam, but she had a normal gait and no sensory deficits. Dr. Pontinen recommended bilateral L3-S1 medial branch nerve blocks followed by bilateral L3-S1 radiofrequency ablation for her back pain. He also recommended a surgical consult. Petitioner underwent the procedures on February 10, 2015 and March 24, 2015. PX 5 and 6.

On April 20, 2015, Petitioner followed up with Dr. Pontinen. She complained of neck pain and continued radicular pain down the left leg. The doctor recommended repeat cervical and lumbar MRIs and referred Petitioner to neurosurgery. PX 5. Shortly thereafter, on April 22, 2015, Petitioner underwent an MRI of the lumbar spine. The MRI revealed chronic and very minor L3-L4 disc bulge narrowing the right foramen, and chronic very minor L4-L5 disc bulge minimally narrowing the foramina. PX 8.

Petitioner also underwent an MRI of the cervical spine. The MRI revealed progressive mild diffuse C4-C5 disc bulge and chronic C3-C4 minimal disc bulge with disc-osteophyte complexes narrowing the left-side foramina; and chronic minimal bulging of the C6-C7 and C7-T1 discs, with residual C5-C6 disc bulge. Facet joints were unremarkable throughout with no significant foraminal narrowing. PX 8.

Petitioner did not return for care from April 22, 2015 to September 14, 2016 when she presented to Dr. Ignas Labanauskas at Holy Cross Hospital. Petitioner complained of low back pain and neck pain. She reported she had not worked since 2012 because of her pain. Petitioner reported her left shoulder was recovered. She complained of right shoulder pain. Dr. Labanauskas recommended and Petitioner MRI of the right shoulder on September 16, 2016. PX 10.

On September 21, 2016, Petitioner returned to Dr. Labanauskas. Petitioner reported right shoulder symptoms beginning three years prior, but she was told the right shoulder was not related to her work injury. Petitioner was recommended right shoulder surgery, which she underwent on March 16, 2017. Petitioner last presented for follow up on June 20, 2017. She was 70-80% improved in her right shoulder. PX 10.

Section 12 examinations with Dr. Arbindi and Dr. Zelby

On March 20, 2013, Petitioner was examined by Dr. Ram Aribindi at Respondent's request pursuant to Section 12 of the Act. Dr. Aribindi performed a physical exam, took a history and reviewed Petitioner's medical records. Dr. Aribindi diagnosed a back contusion. He opined Petitioner did not need any further medical and placed Petitioner at MMI as it related to the neck and back. He also opined Petitioner's left rotator cuff condition not related to the October 9, 2012 work injury. Dr. Aribindi specifically opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. He recommended left shoulder surgery if the MRI showed a full thickness tear. He opined the surgery was unrelated to the work injury. RX 2.

Petitioner returned to Dr. Aribindi for a second IME exam on January 6, 2016. Petitioner reported she was not working due to her back and right shoulder pain. Petitioner denied specific injury to her right shoulder. Dr. Aribindi opined Petitioner reached MMI for the unrelated left shoulder condition on March 7, 2014. She could return to work without restrictions. Dr Aribindi assigned a 0% impairment rating. RX 3.

On May 22, 2013, Petitioner was examined by Dr. Andrew Zelby at Respondent's request. Dr. Zelby took a history from Petitioner, performed a physical exam, and reviewed medical records. Dr. Zelby opined Petitioner sustained a soft tissue spinal strain or contusion at

most. He noted mild degenerative spondylosis in the cervical and lumbar spine but opined there was no evidence the conditions were caused, aggravated, exacerbated, accelerated, or even made symptomatic because of Petitioner's reported injury. Dr. Zelby opined Petitioner did not require any further treatment including narcotics, medications, or injections. He opined Petitioner was able to work full duty without restrictions and reached MMI by January 2013 at the latest and required no more than 3-4 weeks of physical therapy. RX 4.

Petitioner returned to Dr. Zelby for a second IME on January 11, 2016. Petitioner complained of pain from the top of her head to the tip of her toes. She stated her symptoms were exacerbated by anything and nothing gave her relief. Dr. Zelby diagnosed mild cervical spondylosis without radiculopathy, mild lumbar spondylosis without radiculopathy, and spinal strain. Dr. Zelby noted Petitioner's complaints did not follow any neurologic or dermatomal distribution. The complaints inconsistent with a condition of the spine or the nervous system. Dr. Zelby opined Petitioner's subjective complaints were unrelated to the October 2012 work injury. He maintained medical treatment was unreasonable, irrespective of cause, and Petitioner could have returned to full duty work by January 2013. PX 5.

At trial, Petitioner testified she felt initial pain throughout her entire back. She testified she reported pain in her back to MacNeal Hospital and Rehab Dynamix. Tx. at 27. Petitioner testified she was recommended a discogram by her providers, but it was never performed because the procedure was too dangerous. Id. at 40. She testified she was never advised of heart concerns. Id. Petitioner recalled left shoulder pain upon questioning from her attorney.

Petitioner also testified she worked as her son's caregiver and was paid by the State of Illinois from January 2015 to August 2015. Tx. at 43. She testified she would assist him with taking medication, assist him getting into a bath, washing clothes and cooking. Id at 43-44. Petitioner testified she also worked for Ron's Staffing packing boxes of Jell-O. Id. at 45. She testified she was unable to complete her work because of pain in spine and left leg. Id. Petitioner testified she was offered a job as a dishwasher during St. Joseph's carnival. Id. She testified she was required to wash plastic containers. Id. Petitioner testified she did not have the strength to continue performing the job. Id. at 46. As of the date of trial, Petitioner testified to continued pain in her spine, hands and below her bilateral legs. She also complained of swelling in her left shoulder. Id. at 50-51.

CONCLUSIONS OF LAW

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

Issue C: *Accident*

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, ***Edward Don v Industrial Commission,*** (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. ***Hansel & Gretel Day Care Center v Industrial Commission,*** (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. ***Board of Trustees of the University of Illinois v. Industrial Commission,*** 44 Ill.2d 207. When an employee has a pre-existing condition, he must "show that a work-related accident injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connect to the work-related injury and not simply the result of a normal degenerative process of the pre-existing condition. ***Sisbro Inc. v Industrial Comm'n,*** 207 Ill. 2d at 205, 797 N.E.2d at 7473.

Petitioner testified a co-worker threw a cart, which hit her back and caused pain throughout. She testified she reported back pain to her company clinic and MacNeal Hospital. In review of medical records entered into evidence, initial medical records from MacNeal Hospital corroborate Petitioner was hit in the mid-back area by a cart. The cart did not hit her left or right shoulder, lower back, neck or right elbow. PX #3. The Arbitrator notes Petitioner did not testify to left shoulder pain until led by her attorney. Further, Petitioner did not complain of right shoulder or right elbow pain until after she underwent left shoulder surgery in 2013. An Application for Adjustment of Claim and Employee Incident Report signed by Petitioner further support a mid-back injury.

After carefully considering Petitioner's testimony and medical records entered into evidence, the Arbitrator finds Petitioner sustained a minor mid-back injury which arose out of and in the course of her employment with Respondent.

The Arbitrator finds Petitioner's testimony as it relates to the left shoulder, right shoulder, low back, neck and right elbow not supported by initial accounts of Petitioner's work incident. As such, Petitioner's injuries as it relates to the left shoulder, right shoulder, low back, neck and right elbow did not arise out of her employment and her claim for compensation is denied. All other issues relating to these body parts are therefore moot.

Issue F: *Causal connection*

The Arbitrator finds Petitioner's current condition of ill-being as it relates to the mid-back causally related through January 30, 2013. Petitioner's condition of ill-being after January 30, 2013 is not causally related to the work incident of October 9, 2012. In so finding, the Arbitrator relies on the Application for Adjustment of Claim signed on October 10, 2012 and filed on October 31, 2012, Employee Incident Report signed on October 12, 2012, the unrebutted medical records of MacNeal Hospital from October 10, 2012, as well as the opinions of Dr. Aribindi and Dr. Zelby. Further, Petitioner lacks credibility. Accordingly, her claim for benefits is denied and all other issues are moot.

As discussed above, Petitioner testified she was hit by a cart that was thrown forward by a co-worker. The cart came back and hit her back due to the speed of the cart. Petitioner caught herself on a desk. While the Arbitrator does not question a cart bumped into Petitioner's back, the Arbitrator notes inconsistencies.

First, the Arbitrator notes Petitioner reported the metal cart was heavy. Medical records entered into evidence suggest the cart may have weighed 300 pounds. The Arbitrator cannot reason a 300-pound metal cart could be thrown so easily and return back to hit her. Additionally, Petitioner testified she was placing her cart in an aisle near her work station desk when she was hit from behind. Petitioner did not testify she turned her body to the side to catch herself from falling or losing her balance. Petitioner reported she "noticed" a cart had hit her.

Second, Petitioner indicated injury to her mid-back, only, in an Application for Adjustment of Claim. RX 6. She also claimed injury to her back in an Employee Incident Report. RX 8. The documents were in English. During direct examination, Petitioner affirmed she was able to read and speak some English. Tx. at 49.

At trial, it was stipulated, and Petitioner testified she signed the Application for Adjustment of Claim on October 10, 2012. Tx. at 55-56. Petitioner also testified she completed and signed an Employee Incident Report. She testified she signed the document on October 12, 2012. The incident report indicates Petitioner was placing a metal cart back in place when she felt something hit her back. Petitioner did not indicate pain or injury to her shoulders, head, neck or right elbow. She did not indicate she caught herself on a desk. RX 6.

Contrary to her prior testimony during direct examination, Petitioner was no longer able to recall the contents of the Application for Adjustment of Claim or Employee Incident Report despite previously confirming her signature. Tx. at 58. Petitioner reasoned she was unable to understand the English statements. Id.

Third, Petitioner testified she was sent to MacNeal Hospital on October 9, 2012. The medical records entered into evidence affirm she was seen on October 10, 2012. Petitioner complained of pain in her back. While Petitioner complained of some arm pain, Petitioner specifically denied the cart hit her shoulders. She did not lose consciousness or report injury to her neck or head. During direct examination, Petitioner was only able to recall left shoulder pain upon direction from her attorney. Petitioner did not question the validity of the history provided in the MacNeal Hospital records until she was questioned regarding her specific denial of a cart hitting her shoulders during cross examination. Tx. at 59. The record indicates Petitioner was diagnosed with a contusion of the back, only. She returned to MacNeal Hospital on November 8, 2012 complaining of panic attacks. She denied any specific pain to her low back. Again, the note is absent any indication of left or right shoulder pain or injury. Petitioner was diagnosed with a trapezius strain and wry neck.

Fourth, the Arbitrator notes inconsistent histories of pain amongst the various providers from Rehab Dynamix, and Chicago Pain and Orthopedic Institute. Specifically, chiropractic notes from Rehab Dynamix indicate continued improvement, while records from Chicago Pain & Orthopedic Institute indicate severe complaints of pain to the left shoulder, low back and neck. Electric stimulation and hot packs were further administered to the low back throughout chiropractic care, despite Petitioner complaining of pain mostly in her upper back. The Arbitrator notes MRIs of the lumbar spine and cervical spine revealed normal degenerative findings. On December 3, 2012, near full passive range of motion of the left shoulder was noted; however, Dr. Sclamberg maintained a surgical recommendation. PX 5.

The Arbitrator also notes medical records from Alix Crone, DC indicate psychosomatic manifestations of pain. PX 2. Medical records from Dr. Vargas indicate Petitioner had seen a neurologist and was advised her complaints were emotional in origin. PX 5 Medical records from Dr. Patel indicate Petitioner showed signs of an autoimmune disease. PX 5. Medical records from Dr. Pontinen indicate Petitioner was seen by a rheumatologist in 2014 and

possibly diagnosed with osteoarthritis. PX 5. The Arbitrator finds it difficult to understand how a cart hitting Petitioner's mid-back area could result in bilateral rotator cuff tears, cervicalgia, lumbar radiculopathy, myofascial pain syndrome and epicondylitis.

Lastly, the Arbitrator notes Petitioner did not complain of any right shoulder or right elbow pain until seven months after the October 9, 2012 work incident. Petitioner specifically stated she did not have any pain complaints until after the left shoulder surgery in March 2013. Petitioner's statements are corroborated by normal right shoulder exams in 2012.

The Arbitrator ultimately finds the causation opinions of Dr. Vargas, Dr. Jain, Dr. Sclamberg, Dr. Patel and Dr. Pontinen were based on questionable statements and material misrepresentations made by Petitioner. The Arbitrator places greater weight on the IME opinions of Dr. Aribindi and Dr. Zelby

Specifically, Petitioner inconsistently reported pain complaints to her treating providers. Petitioner also reported she was unable to work since October 9, 2012. However, she testified she obtained employment with Ron's Staffing and at a pizzeria. She also testified she applied and was approved by the State of Illinois to work as a caregiver for her adult son over a period of nine months in 2015. Tx. at 62. Petitioner's son was 25-26 years old at the time and weighed around 170 pounds. Tx. at 63-64. While employed by Staffmark, Petitioner testified the heaviest box she lifted on her own weighed 30-35 pounds. She was assisted by co-workers if the boxes weighed greater than 30-35 pounds. She did not testify to any assistance while serving as her son's state-appointed caregiver.

Dr. Aribindi and Dr. Zelby opined Petitioner sustained a contusion to her back. Dr. Zelby opined Petitioner required no more than 3-4 weeks of directed physical therapy. Dr. Zelby opined Petitioner could return to full duty work without restrictions by January 2013. Dr. Aribindi also opined Petitioner reached MMI for her back condition in 2013. He opined it was inconceivable how a contusion to the mid back region/posterior aspect of the left arm would cause a full thickness rotator cuff tear involving the supraspinatus tendon of the left shoulder. The Arbitrator notes Petitioner was able to recall attending the IMEs with Dr. Aribindi and Dr. Zelby when questioned by her attorney during direct exam. Tx. at 50. During cross examination, Petitioner was no longer able to recall seeing either doctor. Tx. at 61.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being as it relates to the mid-back is causally related in part to the accidental injury of October 9, 2012 up to January 30, 2013.

The Arbitrator finds Petitioner's condition of ill-being as it relates to the mid-back after January 30, 2013 is not causally related to the accidental injury of October 9, 2012. The Arbitrator also finds Petitioner has not proven by a preponderance of the evidence that her

condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow are not relates to the accidental injury of October 9, 2012. As such, all other issues as it relates to these body parts are moot.

Issue J: *Medical bills*

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and are determined to be required to diagnose, relieve or cure the effect of a Petitioner's injury. The Petitioner has the burden of providing that the medical services were necessary, and the expenses incurred were reasonable. ***City of Chicago v. Illinois Workers' Compensation Commission, 409 Ill. App. 3d 258, 267 (1st Dist., 2011).*** In determining the reasonableness and necessity of medical treatment, the Commission also considers whether the records demonstrate subjective or objective improvement or whether the treatment undertaken failed to provide a benefit. ***Hugo Alvarez v AMI Bearings, 16 IWCC 0408***.

Petitioner in this case has presented unpaid medical bills from Soma Rehab totaling $2,563.65 (PX 11); Gray Medical totaling $29,395.48 (PX 12); La Grange Memorial Hospital totaling $2,179.41 (PX 13), IWP for $3,391.98 (PX 14); Rx Development totaling $6,052.02 (PX 15); Rehab Dynamix totaling $31,593.47 (PX 16); Preferred Open MRI totaling $8,520.00 (PX 17); Accredited Ambulatory Care totaling $103,146.02 (PX 18); Chicago Pain and Orthopedic Institute totaling $33,608.32 (PX 19); Dr. Ignas Labanauskas totaling $12,950.00 (PX 21); Prescription Partners totaling $6,129.01 (PX 22); Essential Testing totaling $311.28 (PX 23); Metropolitan Advanced Radiological totaling $944.92 (PX 24); and Walgreens Out-of-Pocket Expenses totaling $84.23 (PX 26). *See also* AX 2.

As discussed above, Petitioner's current condition of ill-being as it relates to the mid-back is causally related in part through January 30, 2013. The Arbitrator agrees a maximum of 3-4 weeks of physical therapy would have been appropriate to treat Petitioner's condition. The Arbitrator notes Respondent paid $11,019.89 in medical expenses through April 2013. RX 7.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, as well as her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds Respondent has paid all reasonable and necessary medical treatment pursuant to Section 8(a) and 8.2 of the Act. The remaining issues of Respondent's liability of outstanding Section 8 medical benefits are moot. Accordingly, benefits are denied. Irrespective of any causation opinion, the Arbitrator further denies payment of any medical bills not presented at trial.

The Arbitrator also highlights for further discussion Petitioner's Exhibits 11, 13, 23 and 25, medical bill statements from Soma Rehab, La Grange Hospital, Walgreens and Essential Testing.

The Arbitrator notes Petitioner did not present any medical evidence aside from medical statements to support treatment undertaken at Soma Rehab or La Grange Memorial Hospital. In addition to the Arbitrator's findings regarding causation, the Arbitrator denies medical charges from Soma Rehab or La Grange Memorial as no medical record evidence was presented at trial to support this medical treatment. PX 11 and13.

With respect to Petitioner's Exhibit 23, medical bills from Essential Testing. The Arbitrator notes a description of charges indicates "quantitative" and "qualitative" procedures. The Arbitrator is unable to determine what the charges refer to. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Essential Testing as no medical record evidence was presented at trial to support medical treatment from Essential Testing.

With respect to Petitioner's Exhibit 25 prescription refills from Walgreens, the Arbitrator notes medications were dispensed to treat bacterial infections. The Arbitrator cannot reason the medications were prescribed to treat Petitioner's questionable low back, neck or bilateral shoulder pain complaints. In addition to the Arbitrator's findings regarding accident and causation, the Arbitrator denies medical charges from Walgreens as no medical record evidence was presented at trial to support the medications were prescribed to treat any of Petitioner's claimed injuries.

Issue K: *TTD*

Petitioner argues TTD benefits are owed from October 10, 2012 through December 31, 2014 and September 1, 2015 through January 29, 2019. The Arbitrator notes Respondent paid TTD benefits from October 10, 2012 to December 18, 2012. Respondent also paid TTD benefits from March 20, 2013 to May 14, 2013 totaling $3,960.00. RX 7. The Arbitrator notes TTD benefits were suspended in December 2012 after Petitioner failed to attend an IME with Dr. Zelby. RX 10.

While a job log was presented at trial, the Arbitrator notes Petitioner sought employment on five separate occasions between July 23, 2014 and August 24, 2014. PX 26. At trial, she testified she was hired by two employers, but she voluntarily quit. She also testified

she applied with the State of Illinois and was accepted to work as a caregiver for her adult son. Petitioner worked in this position for nine months and did not seek any other employment during this time. She performed this task on her own. The Arbitrator cannot reason Petitioner put in effort into finding employment. As discussed above, Petitioner testified she was required to lift boxes weighing 30-35 pounds while employed with Staffmark. She was assisted by co-workers if she was required to lift heavier items. The Arbitrator reasonably infers Petitioner's adult son weighed more than 30-35 pounds and was capable of returning to 100% of her prior job demands.

In light of the Arbitrator's determination Petitioner failed to establish her present condition of ill-being as it relates to the mid-back after January 30, 2013, and her present conditions of ill-being as it relates to the left shoulder, right shoulder, low back, neck and right elbow are causally related to the work incident of October 9, 2012, the Arbitrator finds all remaining issues of Respondent's liability of TTD benefits moot. Accordingly, further TTD benefits are denied.

Issue L: *Nature and extent of injury*

In light of the Arbitrator's determination regarding Petitioner's credibility and based on the totality of evidence entered at hearing, the Arbitrator finds there is some residual pain of back pain, only, that is part of permanent disability. The Arbitrator finds Petitioner has not provided evidence of a left shoulder, right shoulder, neck, low back or right elbow injury related to the October 9, 2012 work incident.

In determining permanency, the Arbitrator considers multiple factors. The mere existence of testimony does not require its acceptance. ***Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983).*** To argue to the contrary would require that an award be entered or affirmed whenever Petitioner testified to an injury no matter how much testimony might be contradicted by the evidence, or how evident it might be that a story is fabricated afterthought. ***U.S Steel v. Industrial Commission, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).***

First, under subsection (i) of Section 8.1b(b), an impairment rating considers loss of range of motion, loss of strength, measured atrophy of tissue mass consistent with the injury, and any other measures that establish the nature and extent of the impairment. No impairment rating was assigned as it relates to the mid-back. There is no impact on the permanency based upon this factor.

As it relates to the left shoulder, Dr. Arbindi opined Petitioner's condition off ill-being was not causally related to the October 9, 2012 work incident. Regardless of his causation opinion, Dr. Aribindi provided an impairment rating as Petitioner had reached MMI. RX #3. Based on AMA guides to the Evaluation of Permanent Impairment 6th Edition, given a resolved rotator cuff tear with no significant objective findings status-post surgical intervention, a final impairment of 0% whole person impairment was given. Petitioner corroborated fully resolved left shoulder symptoms in September 2016 when she presented to Dr. Labanauskas. The Arbitrator finds the opinions of Dr. Aribindi credible and agrees Petitioner's left shoulder condition is not causally related to the October 9, 2012 work incident.

Second, with regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, Petitioner testified she worked in quality control for Respondent since August 2012. Her job required her to check orders, places boxes in carts and then onto a desk. Petitioner lifted no more than 30-35 pounds on her own. Petitioner was released to return to work at 100% of her job demands by IME experts, Dr. Aribindi and Dr. Zelby. RX #2-5. Petitioner testified she found employment with two companies, but voluntarily left after 1-2 days because she was unable to perform her work. However, she was able to work as a caregiver for her adult son for a period of nine months. Her position was approved by the State of Illinois. Petitioner's ability to work as a caregiver with approval by the State of Illinois lowers any impact on the permanency based upon this factor.

Third, under subsection (iii) of Section 8.1b(b), Petitioner was 56 on the date of accident. Petitioner complained of pain throughout her body and reported to her providers that she had not worked since 2012. As discussed above, Petitioner was fully capable of finding employment during July-August of 2014 when she was hired by two companies. Petitioner was also capable of working as a caregiver for nine months in 2015. While Petitioner obtained the position to care for her son, the caregiver position allows for greater future earning potential for other employers. This again lowers any impact on the permanency based upon factor (iii).

Fourth, under subsection (iv) of Section 8.1b(b), evidence regarding any impact to future earning capacity, Petitioner presented wages earned from January 2015 to September 2015 while working as a caregiver for the State of Illinois. PX 27. Petitioner was earning almost identical pay while employed by Staffmark. Petitioner's capability to work was corroborated by IME experts Dr. Aribindi and Dr. Zelby. Petitioner was and is capable of returning to 100% of her job demands. This again lower any impact on the permanency based upon this factor.

Fifth, with regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the medical records, Petitioner has continued with pain complaints throughout her entire back and body. However, initial medical records, incident reports and an Application for Adjustment of Claim indicate mid-back pain, only with a contusion diagnosis. Petitioner

testified to pain in her back and did not claim any other pain until directed by her attorney. Further, chiropractic medical records indicate reports of improvement and negative sensory deficits despite undergoing various injections, medial branch blocks and ablations. Dr. Aribindi and Dr. Zelby also opined Petitioner's back condition had resolved. RX 2-5. Petitioner did not seek any medical care from 2015 to 2016 when she returned complaining of severe right shoulder pain. This factor is given greater weight.

Although one of many factors may not be the sole determinant of disability, the Arbitrator notes inconsistent statements and misrepresentations of material facts to Petitioner's various medical providers and at trial. At the time of hearing, Petitioner testified to pain in her back. She did not recall any shoulder pain until directed by her attorney. Petitioner also affirmed signing an Employee Incident Statement and Application for Adjustment of Claim, though she later denied understanding the contents of the documents. The medical records from MacNeal Hospital also clearly indicate Petitioner specifically denied a cart hit her shoulders. Petitioner later disagreed with the history she provided to the hospital. She testified she was capable of returning to work in 2014 and 2015.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole at a PPD rate of $220.00 pursuant to Section 8(d)2 of the Act.

Issue M: *Penalties and attorney's fees*

As noted above, the Arbitrator has found Petitioner's current condition of ill-being as it relates to the mid-back after January 2013 is not causally related to the work incident of October 9, 2012. The Arbitrator has also found Petitioner's condition of ill-being as it relates to the low back, neck, left shoulder, right shoulder and right elbow is not causally related to the work accident of October 9, 2012. As such, further benefits are denied. As will be discussed below, Penalties and fees are also denied as provided in Section 16 of the Act; Section 19(k) of the Act; and Section 19(l) of the Act.

There is adequate evidence to validate Respondent relied upon Petitioner's own reporting of initial mid-back pain only in her Application for Adjustment of Claim, Employee Incident Report and initial medical records from MacNeal Hospital to deny payment of medical care and TTD benefits after the respective IMEs of Dr. Aribindi and Dr. Zelby in March 2013 and May 2013. Further, while Respondent did suspend TTD benefits on December 12, 2012, the Arbitrator notes TTD benefits were suspended after Petitioner failed to attend a scheduled IME

with Dr. Zelby in December 2012. Medical records into evidence support Petitioner reported her IME was being rescheduled. The Arbitrator notes TTD benefits were reinstated on March 20, 2013, when Petitioner attended the first rescheduled IME. RX #7. The language of the Act confirms a failure to pay because of a good faith belief that no payment is due will not warrant a penalty. See generally, ***Avon Products, Inc. v. Industrial Commission, 82 Ill.2d 302, 412 N.E.2d 470 (1980).***

Additionally, the Arbitrator notes Petitioner presented various medical bills from Soma Rehab, LaGrange Memorial Hospital, Essential Testing and Walgreens for treatment that was not presented into the record. The Arbitrator cannot reason penalties are warranted when the Arbitrator is unable to ascertain the type of treatment offered during any of the visits alleged by the providers. The Arbitrator further notes various medical bills presented at trial were addressed to Petitioner, directly. There is no indication the medical bills were issued to Respondent. As discussed above, Respondent paid $11,019.89 in medical bills to various providers through April 1, 2013.

Where Respondent's actions are consistent with the Act, Respondent's nonpayment, underpayment, or delayed payment cannot be deemed vexatious or without just cause, and Section 19(k) and 19(l) penalties must be denied. RX 9. Where Respondent has acted in accordance with the Act, it also should not be held liable for Petitioner's attorney's fees in his effort to establish otherwise, and Section 16 fees also must be denied. RX 9.

Issue N: *Respondent's credit*

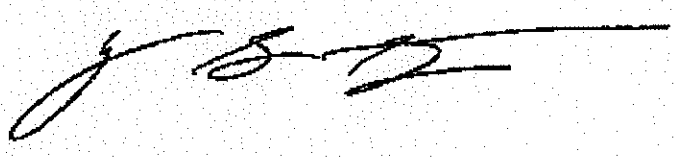
As noted above, Respondent paid $3,960.00 in TTD benefits and $11,019.89 in medical expenses. AX 1, AX 3, and RX 7. Based upon the opinions of the arbitrator regarding causal connection, the Arbitrator finds Respondent shall have a credit for all amounts paid for TTD to or on behalf of Petitioner in the amount of $3,960.00. Respondent shall also have a credit for all amounts paid towards medical treatment in the amount of $11,019.89.

Issue O: *Former attorney's fee petition*

The parties stipulated a petition for attorney's fees by a former attorney for the Petitioner was pending at the time of trial and the Petitioner's current attorney "has notified

the former attorney of the date of this hearing." AX 1 and Tx. at 7. The IWCC case file for this matter contains a September 24, 2014 order from Arbitrator Kane continuing The Vrdolyak Law Group, LLC's Petition for Fees to the disposition of this case.

However, the Petition for Fees covered by Arbitrator Kane's order does not itemize any time spent by The Vrdolyak Law Group in the prosecution of this claim. This Petition also does not list any incurred expenses and/or costs by The Vrdolyak Law Group during its representation of the Petitioner. Furthermore, no testimony or documentary evidence was entered into evidence during the January 29, 2019 hearing to support the Petition for Fees. As such, the Arbitrator finds no basis to award any attorney's fees to The Vrdolyak Law Group.



Signature of Arbitrator

March 13, 2019
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN DELGADO,

Petitioner,

vs.

NO: 17 WC 23580

21IWCC0161

PNR PAINTING PLUS, INC., and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, and workers' compensation insurance coverage, 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 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.67 per week for a period of 60 2/7 weeks, representing July 16, 2017 through September 10, 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 to Petitioner the sum of $456.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 25% loss of use of the person as a whole.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General. This award is hereby entered against the IWBF to the extent permitted

21IWCC0161

and allowed under §4(d) of the Act. Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF. The award or findings in this matter in no way limit or modify the Respondent-Employer's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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

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

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

DATED: APR 7 - 2021

Stephen Mathis

mck

O: 3/3/21

Thomas J. Tyrrell

43

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JUAN
Employee/Petitioner

Case# **17WC023580**

PNR PAINTING PLUS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0161

On 9/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1361 BARRY STEWART SILVER
302 SAUNDERS RD
SUITE 200
RIVERWOODS, IL 60015

0000 PNR PAINTING PLUS, INC
22850 W ILLINOIS ROUTE 173
ANTIOCH, IL 60002

0143 ASSISTANT ATTORNEY GENERAL
KRISTIN LEASIA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Juan Delgado
Employee/Petitioner

Case # **17** WC **023580**

v.

PNR Painting Plus, Inc.; Illinois State Treasurer as *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Waukegan, Illinois**, on **July 29, 2019**. 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 **Insurance**

FINDINGS

On **July 15, 2017**, 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 earned **$39,520.00**; the average weekly wage was **$760.00**.
On the date of accident, Petitioner was **30** years of age, ***single*** with **1** dependent children.
Respondent-Employer 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-Employer is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent-Employer shall pay Petitioner Temporary Total Disability benefits of $506.67/week for 60-2/7 weeks, because Petitioner remained off work due to his injuries during the period from July 16, 2017 through September 10, 2018.

Respondent-Employer shall pay Petitioner permanent partial disability benefits of $456.00/week for 125 weeks, because the injuries sustained caused the Petitioner 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

Injured Workers' Benefit Fund

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund ("IWBF") was named as a co-Respondent in this matter. The IWBF was represented by the Illinois Attorney General's Office. This finding is hereby entered as to the IWBF to the extent permitted and allowed under §4(d) of the Act. No party shall seek or have a right to any recovery from the IWBF. The award or findings in this matter in no way limit or modify the Employer-Respondent's independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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.

Carolyn M. Doherty

9/23/19
Date

Signature of Arbitrator

SEP 25 2019

FINDINGS OF FACT

An Application for Adjustment of Claim was filed by Petitioner, Juan Delgado, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, PNR Painting Plus, Inc. This action sought further relief from the Illinois Workers' Benefit Fund (IWBF) because Respondent-Employer allegedly did not maintain workers' compensation insurance. A hearing was held on July 29, 2019 in Waukegan, Illinois. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio custodian* of the IWBF, and participated in the proceeding. No appearance was made by the Respondent-Employer at trial, despite proper notice.

Petitioner testified that his name is Juan Jose Delgado. In July 2017, he was 30 years old with one dependent minor child, though he currently has two minor dependent children. In May 2017, Petitioner saw an ad on Facebook for a painter, posted by PNR Painting Plus, Inc. ("Respondent-Employer"). He responded to the ad, and made arrangements to meet Rick Jones, owner of Respondent-Employer. Upon meeting Mr. Jones, Petitioner was hired as a house painter. He completed his first job for Respondent-Employer in May 2017 in Antioch, Illinois.

While working for Respondent-Employer, Petitioner made $20.00 per hour, and worked 40 hours per week. Petitioner placed into the record a copy of a paycheck, written from Respondent-Employer's business account, paying $760.00 for one week of work in June 2017 (Petitioner's Exhibit "Pet. Ex." 1). The reason the check did not reflect the full $800.00 he would be owed for a week of work is that some of the money was held over for the next paycheck.

As a painter Petitioner tracked the time he worked. He marked down the hours worked on a timesheet, which he was required to complete before leaving a specific job. Petitioner's Exhibit 2 reflects the time Petitioner clocked for the pay period ending on June 29, 2017, and shows that Petitioner worked 40 hours during that pay period. (Pet. Ex. 2).

Petitioner received his job assignments via telephone calls from Rick Jones. Jones would provide instructions for Petitioner to report to Respondent-Employer's headquarters, which were located at Jones's home in Antioch, Illinois. Once at Respondent-Employer's office, Jones informed Petitioner regarding the day's job assignment, including where Petitioner was to report and what supplies were needed. Jones transported Petitioner and anyone else working the assignment to the job site in a company van. Jones also provided the supplies and equipment needed for an assignment, including the ladders.

In June 2017, Petitioner received notice that he would be placed on a crew to paint a house in Lake Geneva, Wisconsin. Prior to beginning the job, Petitioner went with Jones to look at the site. Petitioner took photographs of the home to be painted. (Pet. Exs. 6-7). One of the photographs shows the type of extension ladder used at the job site. (Pet. Ex. 6). Petitioner took these photos on his personal cell phone about a week prior to the accident. At any job, there was a daily exchange of photographs between himself and Jones to report progress on the assignment and receive additional instructions regarding what still needed to be completed.

On July 15, 2017, Petitioner was working at the assignment in Lake Geneva with a crew of four people. He was painting a "peak" section of the home – a high point on the building requiring a ladder to access. He was standing on an extension ladder by himself, although one of his coworkers was at the bottom of the ladder holding it for stability. Around 4:00pm that evening, Petitioner was working to finish a few last spots needing more paint on the peak. He climbed the ladder to the peak; about two to three minutes later, while he was painting, the ladder gave way. Petitioner does not know if his spotter had abandoned his post and was no longer spotting at the time of the accident, but essentially the ladder began sliding down with Petitioner still on it. Petitioner fell, hitting his head and sustaining an open fracture to his right ankle. At the time that the accident occurred, Jones was at the job site. An ambulance was called. The paramedics secured Petitioner, provided him with medication and first aid treatment, and transported Petitioner to Mercy Hospital in Janesville, Wisconsin.

Upon arrival at the hospital, Petitioner's bone was exposed out of his ankle and skin, and the foot was turned 360 degrees. Petitioner did lose consciousness for a period of time while he was first being treated. They diagnosed Petitioner with a dislocated fracture of the right ankle, and fractures to the 3rd through 5th metatarsals of the right foot. Petitioner underwent ankle surgery. He was ultimately released home after five days.

Following his release from Mercy Hospital, Petitioner followed up with his primary care physician, Dr. Bains. Dr. Bains referred Petitioner to an orthopedic surgeon at Illinois Bone and Joint Institute, Dr. Weatherford. Dr. Weatherford determined that Petitioner needed further surgery to his right ankle, which was undertaken at St. Francis hospital in Evanston, Illinois. Petitioner was placed on non weightbearing restrictions for his right foot, which remained in effect for eight weeks. While recovering at home from surgery, Petitioner had to convert the first floor of his home into a bedroom. He used a knee scooter or crawled to get around.

Petitioner followed up with Dr. Weatherford for several months. He began physical therapy three weeks after the surgery. Physical therapy lasted several months, and took place in Schaumberg, Illinois, about 60 miles from Petitioner's home. Dr. Weatherford released Petitioner from care and back to work with a 10-pound carrying restriction and no standing for more than five minutes. Petitioner must be able to lift or elevate his leg at work and is not to engage in excessive climbing.

Petitioner is no longer under Dr. Weatherford's care. Dr. Weatherford referred Petitioner to a rheumatologist, Dr. Morris, due to concerns over early-onset arthritis developing in Petitioner's right ankle.

Prior to the accident, Petitioner worked as a professional painter for 15 years. Due to his permanent restrictions, Petitioner is unable to return to work in that capacity. Petitioner now works for another company, Epsco Industries, 40 hours per week and earns $15.00 per hour. Petitioner submitted several exhibits, including tax returns and Year-to-Date earnings statements from Epsco, confirming same. (Pet. Ex. 3-5). His work at Epsco is sedentary in nature.

Petitioner still feels pain in his foot and ankle from the moment he wakes up in the morning, and when completing everyday tasks. How long he can stand in a day depends on the amount of pain

he experiences. He uses a knee scooter for long distances, and also has a cane. He can drive, but has difficulty doing so. He feels pain with breaking, and cannot drive more than 10 to 15 minutes without having to stop. He cannot drive long distances. Petitioner experiences pain during most of his day-to-day activities including taking his kids to the park, grocery shopping, cooking, and picking up his kids at daycare. Petitioner testified he feels his whole life has "done a total turnaround" since his fall.

On cross exam, Petitioner testified that Jones was the co-owner of Respondent-Employer, and that Petitioner received his paychecks from Jones. When Jones hired Petitioner, he did not give Petitioner an employment contract to sign. The van used to transport crew members to job sites was a company van that had the company's name painted on the side. Petitioner clarified that the photo he submitted showing an extension ladder (Pet. Ex. 6) did not depict the actual spot where he fell, but rather the front door of the same property, and was taken a week prior to the fall. Petitioner further clarified that he called the ambulance following the fall after speaking to Jones about the accident. Petitioner testified that Mr. Jones refused to call an ambulance.

Petitioner reported to Mercy Janesville Hospital in Janesville, Wisconsin, on July 15, 2017. (Pet. Ex. 10). He reported that he fell from a ladder while working on a roof, and hit his head. Petitioner presented with an open fracture with displaced bones sticking out of his right lower extremity after a 15-foot fall. (Pet. Ex. 10). X-rays of his right ankle revealed an open subtalar fracture dislocation with medial dislocation of the right foot. The x-rays also showed a fracture of the shaft of the 5th metatarsal. X-rays taken of the right foot as a whole displayed a stable alignment with a complex fracture. (Pet. Ex. 10). CT scans taken of Petitioner's head, lumbar spine, cervical spine, and chest/abdomen/pelvis area were unremarkable and showed no signs of acute trauma. A CT scan of Petitioner's right ankle revealed a complex open fracture of the hindfoot, midfoot, and proximal forefoot, as well as an interval reduction of the previously-seen subtalar joint dislocation. (Pet. Ex. 10). Petitioner underwent laceration repair with sutures. The fracture was reduced and splinted. (Pet. Ex. 10). On July 18, 2017, Petitioner underwent irrigation of the open wound, incisional and excisional debridement of the wound with wound repair at both the ankle and subtalar region. (Pet. Ex. 10). Petitioner was discharged from Mercy Hospital on July 19, 2017 with crutches and prescriptions for ibuprofen, oxycodone, and cephalexin. He was placed on non weightbearing status along with crutches and a walker. (Pet. Ex. 10).

Petitioner saw his primary care physician, Dr. Rushin Bains, on July 20, 2017. (Pet. Ex. 11). Dr. Bains diagnosed degenerative joint disease of the ankle and foot, namely primary osteoarthritis to the right ankle and foot. (Pet. Ex. 11). He also noted the unspecified fracture to the right lower leg. Dr. Bains noted good sensation in the right foot. He opined that Petitioner needed a referral to an orthopedic surgeon, which was given. (Pet. Ex. 11).

On July 23, 2017, Petitioner presented to Northshore University Health System/Highland Park Hospital with an open nondisplaced fracture of the fourth metatarsal bone of the right foot, which displayed routine healing. (Pet. Ex. 12). Dr. Stacey Becker attended to Petitioner. X-rays of his right foot were taken, which confirmed the comminuted fracture of the 5th metatarsal, the nondisplaced fracture of the 4th metatarsal, and a suspected avulsion fracture of the cuboid. (Pet. Ex. 12). He presented for evaluation of the injury, as he reported that the posterior mold he was

given from his stay at Mercy Hospital was digging into his leg. (Pet. Ex. 12). A shorter posterior mold (splint) was applied and Petitioner was discharged home with antibiotics. (Pet. Ex. 12).

Petitioner first saw Dr. Brian Weatherford, an orthopedist at Illinois Bone and Joint Institute, on July 26, 2017. (Pet. Ex. 13). Dr. Weatherford noted with concern the presence of active drainage at the wound site and a lack of healing. He placed Petitioner in a compression wrap and a Cam boot. (Pet. Ex. 13).

Petitioner followed up with Dr. Weatherford on July 28, 2017. (Pet. Ex. 13). Dr. Weatherford confirmed a diagnosis of a right-side type 3 open subtalar dislocation with delayed wound healing and continued drainage, an intraarticular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. Dr. Weatherford opined that Petitioner should proceed to surgery to repeat debridement. (Pet. Ex. 13).

Dr. Weatherford performed repeat surgery on Petitioner on July 31, 2017. The surgery occurred at St. Francis Hospital in Evanston, Illinois. (Pet. Ex. 14). Petitioner's pre-and-post-operative diagnosis was right open subtalar dislocation, open wound with delayed healing, cuboid fracture, displaced intra-articular 5th metatarsal fracture, and equinus contracture. (Pet. Ex. 14). Petitioner underwent a right gastrocnemius recession; irrigation and debridement associated with an open fracture dislocation including skin and subcutaneous tissue, muscle, and fascia; open reduction internal fixation of the right cuboid; open reduction internal fixation of the right 5th metatarsal; and application of negative pressure wound therapy. (Pet. Ex. 14). Synthes implants including two 2mm plates with screws were used. Petitioner was placed on non weightbearing status for his right lower extremity for eight weeks, and was given compression wrapping. (Pet. Ex. 14). He was discharged on August 2, 2017 with a prescription for Norco. (Pet. Ex. 14).

Following surgery, Petitioner followed up with Dr. Weatherford on August 2, 2017; August 7, 2017; August 15, 2017; August 22, 2017; September 5, 2017; September 26, 2017; November 17, 2017; March 2, 2018; and May 5, 2018. (Pet. Ex. 13). At the August 22 appointment, Dr. Weatherford recommended that Petitioner begin physical therapy and gave him a referral. (Pet. Ex. 14). Petitioner's records indicate that he underwent physical therapy at Physical Therapy-Team Rehab under the direction of Kristin Dryden. (Pet. Ex. 16). He attended physical therapy approximately two times per week from September 27, 2017 through May 7, 2018. (Pet. Ex. 16).

At the November 17, 2017 appointment, Dr. Weatherford opined that Petitioner would likely develop activity limitations secondary to the severe nature of his injury; in particular, Dr. Weatherford stated that Petitioner would likely form subtalar arthritis due to the injury. (Pet. Ex. 13). By December 7, 2017, Petitioner could only walk for 2 hours and was unable to sit without swelling. (PX16, 12/7/17, p.2-3). A new long-term goal of improving his ability to squat and kneel to permit child care was identified but unmet at that time. By the end of January 2018, Petitioner was unable to stand or walk for more than 3-4 hours for job duties, unable to fully squat to reach and lift painting supplies, unable to travel stairs at home reciprocally or climb ladders at work, and unable to fully assist with cooking and cleaning tasks at home. (PX16, 1/29/18, p.2-3). Petitioner was still experiencing pain levels between 6 and 8 out of 10, which were caused by joint and tissue hypomobility, lower extremity weakness and decreased dynamic balance. To increase function and reduce pain, Petitioner's plan of care included manual therapy,

therapeutic exercise, neuromuscular reeducation and therapeutic modalities. Petitioner's newest round of therapy would be three times weekly for 6 weeks to yield improvements.

One month later, on February 26, 2018, Petitioner had completed 8 therapy sessions. (PX16, 2/26/18, p.1-3). His pain levels had improved to a range of 2-6/10 and had partially met the goals of squatting and kneeling and increasing standing/ambulating to unlimited time periods to permit work activities. Deficits from the functional analysis in January remained.

At the March 2 appointment, Dr. Weatherford noted Petitioner was weightbearing as tolerated in a standard shoe and continuing with physical therapy 3x/weekly. He had intermittent pain particularly along the plantar aspect of the foot which was relieved with anti-inflammatories. Petitioner was not yet able to return to his heavy labor job. Petitioner's gait still demonstrated a slight external rotation and shortened stride length on the right hand side. The slight dysesthesias in the sural nerve distribution remained as did the diminished range of motion of the right ankle though it had improved markedly since the November visit. The peroneal tendon strength also improved though the focal tenderness over the plantar fascia remained. X-rays revealed appropriate alignment on all views. Dr. Weatherford noted that Petitioner continued to do well and stated that Petitioner could make office visits as needed. (Pet. Ex. 13).

On April 11, 2018, Petitioner underwent a reevaluation at Team Rehabilitation which noted a 60-70% improvement at that time. (PX 16, 4/11/18, p.1). Petitioner noticed gains in standing, ambulation tolerances, ability to turn directions and flexibility in his foot and ankle. However, he remained hypomobile and lacked the eccentric lower extremity strength / endurance needed to perform full work duties and felt full squatting, descending stairs and prolonged standing were the most challenging. Pain levels had not improved, and Petitioner reported prolonged walking and standing on vacation exacerbated his pain levels. Dr .Weatherford ordered another 4 weeks of twice weekly physical therapy. (PX 16, 4/11/18, p.3).

By the re-evaluation on May 7, 2018, Petitioner noticed less frequent pain and was able to squat to reach the floor with minimal difficulty but when pain appeared, it completely limited his ability to stand or walk. (PX 16, 5/7/18, p.1). Most challenging was using stairs while carrying weighted objects and prolonged standing. Petitioner was relatively pleased with his overall improvement and gains in strength and range of motion, though he stated that if the pain lessened, he would be able to do a lot more on his feet. Progress towards long term goals and current deficits were the same as the previous month's evaluation. (PX 16, 5/7/18, p.2). Dr. Weatherford again recommended another month of twice weekly physical therapy. (PX 16, 5/7/18, p.3).

On May 18, Dr. Weatherford provided Petitioner with a referral to a rheumatologist in order to explore the potential for a long-term prescription for THC medication. (Pet. Ex. 13). At this appointment, Dr. Weatherford also allowed Petitioner to return to work with appropriate restrictions and limitations. (Pet. Ex. 13). In his records, Dr. Weatherford stated, "...He was also given a repeat referral to physical therapy today, which will help with assisting him with day to day walking. He is allowed to return to work from my standpoint with appropriate restrictions or limitations. I discussed with him that I would expect lifelong limitations secondary to the severity of his injury. Further surgery may even be necessary. I do suspect he will develop

progressive subtalar arthrosis. ... I would be happy to see him in the office on an as-needed basis." PX 13, p. 41.

Petitioner next treated for this injury on July 9, 2018, with Dr. Bains. (Pet. Ex. 11). Dr. Bains reported that post-surgery, Petitioner was still experiencing pain and discomfort, and had been participating in physical therapy. (Pet. Ex. 11). He gave Petitioner one final prescription for Norco, and suggested the possibility of treatment with medical THC under the care of a rheumatologist. (Pet. Ex. 11).

Petitioner followed up at the rheumatology department at Northshore University Health in Evanston, Illinois on August 3, 2018. (Pet. Ex. 15). At this time, Petitioner was still using the knee scooter, and reported having been participating in physical therapy through mid-June. (Pet. Ex. 15). He reported experiencing burning sensations in his foot and big toe that shot up his leg and into his back. Since the surgery, his right foot would turn bright red and swell, with a burning hot sensation. He reported that the pain became worse with weightbearing, and that it was sometimes so painful that he could not walk. He also reported some swelling and pain in his left foot due to having to use the scooter. (Pet. Ex. 15). An EMG was ordered to evaluate Petitioner's condition and check his A1c levels. (Pet. Ex. 15). He was given a new physical therapy referral and prescriptions for gabapentin and Naprosyn. (Pet. Ex. 15).

Petitioner followed up with rheumatology on September 6, 2018. (Pet. Ex. 15). He reported experiencing warmth, swelling, and a "weird" sensation in his right foot triggered by activity. (Pet. Ex. 15). He stated that the prescribed medications were not helping with the pain. He stated that he did not want to do the EMG, and had been performing self-trials with medical marijuana. (Pet. Ex. 15). The treating physician opined that Petitioner could have Complex Regional Pain Syndrome (CPRS), and indicated that they would refill the gabapentin. (Pet. Ex. 15). Petitioner was also certified as treating for a qualifying condition for medical THC. (Pet. Ex. 15)

On September 10, 2018, Petitioner began working for Ebsco Industries as a sales representative for Luxor furniture in the education sector. Petitioner testified this position is a phone-bank desk job where he processes incoming sales orders, makes cold calls and works a 40-hour week earning $15/hourly. (PX4B, PX5).

Petitioner's final appointment at rheumatology occurred on November 29, 2018. (Pet. Ex. 15). At this time, Petitioner was still taking gabapentin and naproxen. He reported that he had yet to send in the paperwork to qualify for medical THC treatments. (Pet. Ex. 15). He reported experiencing baseline pain in his right foot, but that "really bad" pain was not as frequent but was still debilitating when it occurs. He reported increased mobility in his right foot with his new job and that he was exercising at his stand up desk. He reported that his overall pain was better and that he did not attend the physical therapy but was doing his at home exercises. (Pet. Ex. 15). He reported wearing a compression sock on his right foot but that he felt as if the sock was cutting off his circulation. Dr. Morris renewed the opinion that Petitioner could be experiencing CPRS, and renewed his certification for medical THC as gabapentin did not help.

On December 17, 2018, Petitioner returned to Dr. Bains for follow up and medication refill. He reported continued ankle pain (PX11, 8-9). He told Dr. Bains that Dr. Morris recommended a

medical marijuana program, but was hoping for a refill on Norco prescription in case there was a delay in authorization. (PX11, 8). Dr. Bains informed Petitioner that would be the final prescription issued as he did not prescribe them chronically. (PX11, 9).

On July 15, 2019, Petitioner returned to Dr. Bains for follow up. Dr. Bains ordered Petitioner to resume physical therapy with Team Rehabilitation in Libertyville or another in-network facility. (PX11, 10-11).

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

A. Was Respondent-Employer operating and subject to the Illinois Workers' Compensation Act?

Petitioner testified that Respondent-Employer, PNR Painting Plus, Inc., engaged in the work of residential home painting. As part of this operation, employees, including Petitioner, regularly used extension ladders and worked on the "peaks" of homes. The Arbitrator finds these conditions sufficient to subject Respondent-Employer to the automatic coverage provisions of Section 3 of the Illinois Workers' Compensation Act.

B. Was there an employer-employee relationship?

Petitioner testified that he met Rick Jones, owner of Respondent-Employer, in response to an employment ad placed through Facebook. After this meeting, Jones hired Petitioner as a painter. Jones assigned job sites via telephone and directed Petitioner where to report and which supplies to use. Jones would transport Petitioner and other crew members to job sites in a van marked with the company's name. Jones provided all the supplies and equipment needed to complete an assignment. Petitioner was required to complete and submit timesheets upon leaving a job site. Petitioner received his pay via checks that were written from Respondent-Employer's business account. PX 1, PX 2. The Arbitrator finds that the above conditions sufficiently establish that an employee-employer relationship existed between Petitioner and Respondent-Employer.

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

Petitioner testified that on July 15, 2017, he was working at a job site in Lake Geneva, Wisconsin, that had been assigned to him by Rick Jones. Petitioner had climbed up on a ladder in order to finish painting spots on the home's "peak." A coworker was acting as a spotter. While Petitioner was on the ladder, it slid down, causing Petitioner to fall. Petitioner hit his head on the ground and sustained fractures to his right foot and ankle. Medical records submitted by Petitioner corroborate this mechanism of injury. The Arbitrator therefore finds that on July 15, 2017, Petitioner sustained an accident that arose out of and occurred in the course of Petitioner's employment with Respondent-Employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 15, 2017. Petitioner's testimony is supported by medical records and there is no evidence to the contrary. Thus, the Arbitrator finds the accident occurred on July 15, 2017.

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

Petitioner stated that Rick Jones was present at the job site at the time of the July 15, 2017 accident. Petitioner testified that after the fall, he asked Jones to call an ambulance, to which Jones refused. Petitioner called an ambulance, and was transported to the hospital from the job site. As such, the Arbitrator finds that Respondent-Employer had timely notice of the accident.

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

Petitioner testified that he fell from a ladder while working to paint a house. The fall caused Petitioner to sustain a right-side type 3 open subtalar dislocation, an intra-articular fracture of the cuboid, and a displaced 3rd through 5th metatarsal base fracture. There is no evidence that Petitioner's right foot or ankle were fractured prior to the fall. Petitioner's medical care was immediate and continuous. The Arbitrator finds that Petitioner's current condition of ill-being is casually related to the July 15, 2017 accident.

G. What Were Petitioner's Earnings?

Petitioner testified that while employed with Respondent-Employer, he earned $20.00 per hour for 40 hours of work during a week. In support thereof, Petitioner tendered into evidence a copy of a paycheck issued to him by Respondent-Employer, showing a week's pay of $760.00 (Pet. Ex. 1). Petitioner explained that a portion of his weekly pay would be held over to the next paycheck/pay period. The Arbitrator therefore finds that Petitioner's average weekly pay while employed with Respondent-Employer was $760.00.

H. What Was Petitioner's Age at the Time of Accident?

Petitioner testified that he was born on August 12, 1986. Medical records submitted by Petitioner corroborate this testimony. As such, the Arbitrator finds that on July 15, 2017, Petitioner was 30 years old.

I. What Was Petitioner's Marital Status at the Time of Accident?

Petitioner testified that at the time of the accident, he was not married. Petitioner's testimony remains unrebutted, and is supported by information contained in Petitioner's medical records. As such, the Arbitrator finds that on July 15, 2017, Petitioner's marital status was "single." Petitioner has one dependent. ARB EX 1.

J. Were Medical Services Received by Petitioner Reasonable and Necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical care received by Petitioner following this injury was reasonable, necessary and causally related to the injury sustained as a result of the work accident on July 15, 2017. The Arbitrator notes that Petitioner is not requesting an award of any medical expenses, paid or unpaid. ARB EX 1. Accordingly, no finding that Respondent shall pay for or reimburse for paid medical expenses is made by the Arbitrator. To the extent Petitioner requests a finding of a specific prospective medical treatment, the Arbitrator notes that no such finding was requested by Petitioner on the stipulation sheet and the nature and extent of Petitioner's injuries was placed at issue at trial. Thus, no specific award of prospective medical is made under Section 8(a).

K. Temporary Total Disability

Following the accident on July 16, 2017, Petitioner was placed off work and in a non weightbearing status for eight weeks. Throughout his treatment for the injury, Petitioner remained off work. His work restrictions are permanent. On September 10, 2018, Petitioner returned to work for Epsco industries in a sedentary capacity within his work restrictions. Therefore, the Arbitrator finds that Petitioner is entitled to 60-2/7 weeks of Temporary Total Disability at the applicable rate of $506.67 per week.

L. What Is the Nature and Extent of Petitioner's Injury?

Pursuant to Section 8.1(b) of the Illinois Workers' Compensation Act, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b). The criteria to be considered include: (i) the reported level of impairment pursuant to the physician's findings per the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Regarding criterion (i), no AMA Impairment Rating was rendered, and therefore, this factor is given no weight in determining the nature and extent of Petitioner's disability.

Regarding criterion (ii), Petitioner testified that he was a professional house painter at the time of the accident. Petitioner testified that he had operated in this occupation for 15 years prior to the date of accident. Petitioner is not able to return to this profession due to his physical disabilities resulting from the work related accident. The Arbitrator gives this factor great weight.

Regarding criterion (iii), Petitioner was 30 years old at the time of the injury. The Arbitrator gives this factor great weight given that Petitioner has many years left in the work force to contend with his injury which limits his abilities in certain physical labor work fields.

Regarding criterion (iv), Petitioner testified that following the accident, he was unable to return to work as a painter due to the permanent restrictions placed on him by his treating physician. Petitioner testified that he was able to successfully secure work in sales at Epsco Industries beginning about September 2018. Petitioner works in a sedentary capacity, and earns $15.00 per hour. In support thereof, Petitioner submitted 2017 and 2018 tax returns (Pet. Exs. 3-4), as well as 2019 Year-to-Date earnings (Pet. Ex. 5). There is no additional evidence to indicate the range or type of job pay available to Petitioner to evaluate Petitioner's future earning capacity. However, based on his current job in a different work arena and the demonstrated decrease in pay, the Arbitrator gives this factor great weight.

Regarding criterion (v), Petitioner testified that he still feels pain in his foot and ankle when he wakes up in the morning and when completing everyday tasks. Post-surgical follow up visits and x-rays revealed Petitioner was healing and his internal fixation was well-aligned. (PX13). Nevertheless, his pain, stiffness and deficits persisted. (PX13, PX16). On May 18, 2018, ten months after the injury and eight months after surgery, Dr. Weatherford released Petitioner from his care, and told him he could return to work with permanent restrictions. (PX13, 40-42). Petitioner testified that orthopedically, there was nothing more that could be done for him at that time. (PX11, 7). Dr. Weatherford believed Petitioner would eventually develop subtalar arthrosis given the shear nature of the injury and the intraoperative damages noted to the subtalar joint, particularly the posterior facet of the calcaneus. He warned Petitioner might need subtalar joint injection under fluoroscopy in the future. (PX13, 37).

Petitioner testified he was told not to carry anything over 10 pounds, no standing for more than 5 minutes, no climbing ladders or stairs and to elevate his leg at work. Petitioner testified that based on these restrictions, he was unable to return to painting, which had been his profession for 15 years. Petitioner found a sedentary job within his restrictions. The Arbitrator notes that Petitioner request an award under Section 8(d)(2) of the Act and is not requesting an award under Section 8(d)(1) for wage differential.

Petitioner testified as to the daily pain and stiffness he still experiences, now over two years after his injury. He testified that he cannot drive more than 10-15 minutes, struggles to perform daily tasks including playing with his children and regular household chores. Petitioner requires the use of a scooter or cane for walking longer distances. The Arbitrator gives this factor great weight.

Upon consideration of all factors as noted above, the Arbitrator finds that Petitioner has sustained a loss of his trade as a painter based on and in addition to his severe and permanent injury to his right foot and ankle. Accordingly, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

M. Other: Insurance and Liability of the IWBF

The Arbitrator finds that the evidence submitted by Petitioner is sufficient to establish that Respondent-Employer did not maintain active workers' compensation insurance on July 15, 2017. Petitioner submitted a "Request for Information on Employer's Insurance Coverage," (Pet.

Ex. 18), which Petitioner's counsel stated he received from the Illinois Workers' Compensation Commission. The exhibit contains a hand written notation dated 2/6/18 stating "no insurance coverage found on NCCI database." While noting that the NCCI search may have been conducted under the incorrect name of "PN Painting Plus," the search was also performed using the correct address of P N R Painting Plus which was the same address listed on the paycheck given to Petitioner admitted as PX 1. The search using the correct address also revealed no insurance for a business at the address. The Arbitrator's findings are not dissuaded by the disclaimer placed on the address search option, presumably by NCCI. Taken as a whole, the Arbitrator finds these records provide a sufficient basis on which to find the Respondent failed to maintain the appropriate Workers' Compensation insurance.

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

JAMES GOMEZ,

Petitioner,

vs. NO: 18 WC 32003

ADVANCED DISPOSAL SERVICES,

Respondent.

21IWCC0162

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 issue of causation, prospective medical, 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, with the correction and clarification below.

The Arbitrator incorrectly stated that the first mention of Petitioner's shoulder pain was three days after the accident on October 19, 2018. The Arbitrator noted that the record states only "pain in unspecified shoulder." *Arbitration Decision* at p. 6. The Commission's review of the record shows that the note referenced by the Arbitrator appears in records for an office visit on November 1, 2018, which is more than two weeks after the accident at bar. PX5 at 20-24.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8(a) of the Act with credit to be given for any payment made directly by respondent or pursuant to §8(j) of the Act. All medical expenses incurred, or to be incurred, after February 28, 2019 are denied.

21IWCC0162

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of $1,062.37 per week for 21-2/7 weeks, for the period from October 17, 2018 through March 14, 2019 per the stipulation, 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 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 $2,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 3.3.21

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Stephen Mathis

Thomas J. Tyrrell

21IWCC0162

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 11, 2021, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three-member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GOMEZ, JAMES
Employee/Petitioner

Case# **18WC032003**

ADVANCED DISPOSAL SERVICES
Employer/Respondent

21IWCC0162

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5094 SKLARE LAW GROUP LYD
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CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
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21IWCC0162

21IWCC0162

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

James Gomez
Employee/Petitioner

v.

Advanced Disposal Services
Employer/Respondent

Case # **18** WC **32003**

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 **Christine M. Ory**, Arbitrator of the Commission, in the city of Wheaton on **December 18, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident **October 16, 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 **$82,880.20;** the average weekly wage was **$1,593.35.**

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$22,754.76** for TTD, **$0** for TPD, $**0** for maintenance, and **$4,069.35** (PPD Advanced) for other benefits, for a total credit of **$26,824.11**

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

ORDER

Medical benefits

Respondent shall pay Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act. All medical expense incurred, or to be incurred, after February 28, 2019 is denied.

Temporary Total Disability

Respondent shall pay and has paid Petitioner temporary total disability benefits at the rate of **$1,062.37 per week for 21-2/7weeks**, for the period from **October 17, 2018 to March 14, 2019** per the stipulation.

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.

Christine M Ory

Signature of Arbitrator

January 26, 2020

Date

IC ArbDec19(b) p. 2

JAN 28 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Gomez	)	
Petitioner,	)	21 IWCC0162
vs.	)	**No. 18 WC 32003**
Advanced Disposal Services	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Geneva on December 18, 2019. The parties agree that on October 16, 2018, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act that their relationship was one of employee and employer. They agree petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent. They agree that in the year predating the accident, petitioner earned $82,880.20 and his average weekly wage calculated pursuant to §10, was $1,593.35.

At issue in this hearing is:

1. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
2. Whether respondent is liable for the unpaid medical bills
3. Whether petitioner is entitled to payment for prospective medical treatment.
4. Whether petitioner is due temporary total disability

FINDINGS OF FACT

Petitioner testified that he had worked for respondent for 5 years as a rolloff driver. He started work at 4:00 AM on October 16, 2018. While on his route later that day at about 2:45 PM, his truck was pulled over to the side of the road, and he was outside of it tarping a rolloff container when he was struck by the passenger-side mirror of a passing vehicle.

Petitioner testified that the mirror hit his left shoulder blade and spun him around. The driver pulled over and petitioner went up to talk with him, then petitioner called his supervisor and reported the incident.

Paramedics were dispatched to the scene, and the history they took from petitioner was that he was in the process of securing his load "when he felt a side mirror of a vehicle hit him in his back." Petitioner confirmed that he was ambulatory the entire time and did not fall down. He also reported that the vehicle tire grazed his boot, but did not run over his foot. "Crew noted no redness, bruising, or swelling to the pt's back or foot." (PX1, p.6).

Petitioner was transported to Alexian Brothers Hospital and was seen in the emergency room. There, petitioner reported that a vehicle going 10 to 15 miles per hour struck his left side and ran "over the edge of his left foot slightly." He was wearing steel toed boots and denied pain and swelling to the toes or the foot. He did complain of pain radiating to the neck and left lateral ribs on a level of 8/10 associated with a slight headache. He confirmed that he did not fall from the occurrence. (PX3, p.13).

The physical examination showed diffuse tenderness to palpation in the neck with no vertebral tenderness, normal range of motion and no bruising or swelling. He had mild diffuse thoracic and lumbar vertebral pain, likewise with no edema or hematoma. His extremities all had normal range of motion with no swelling, open wounds or bruising. (PX3, p.14)

X-rays were taken of the ribs and all levels of the spine, but not the shoulder or the foot. The rib x-rays showed no fractures or deformities. Findings in the cervical, thoracic and lumbar spine studies showed no evidence of acute fracture or malalignment, along with "interval progression of arthritic changes since previous x-rays" at all three levels, with the cervical spine studies specifically noting "multilevel arthritic changes." (PX3, pp.15, 27-30).

Petitioner was discharged in stable condition, with noted improvement in his pain complaints. The "Impression and Plan" section upon discharge actually only noted "Acute pain of the left foot," though petitioner was also provided education materials on back pain. He was provided pain medications and instructed to follow up with Dr. Scholl in two days (PX3, p.16).

According to Petitioner's Exhibit 5, records from Alexian Brothers Medical Group, petitioner reported being hit by a car mirror on the left side "a few days ago." His emergency room visit was recorded, as were his current complaints of headaches, neck pain and pain in his left foot. The physical examination noted that petitioner was ambulating with a mild limp from discomfort on his left hip, he had left side of paraspinal muscle tightness in his back and pain with external rotation of the left hip and on palpation of the joint. No specific examination of the upper extremities is noted, and the cervical spine showed normal flexion and extension, but with spasms on the left side of the posterior cervical region.

The assessment included cervicalgia, pain in the left hip for which an MRI was ordered and pain in the left foot, which was to continue to be monitored. There is also an indication of "pain in unspecified shoulder." (PX 5, p. 25). The MRI of the left hip was performed on November 16, 2018, and showed no obvious tear of the acetabular labrum, no evidence of joint effusion or avascular necrosis of the femoral head. All hip muscles appeared normal and the joint spaces were maintained bilaterally. (PX 5, p.29).

There is then record of a November 1 visit and a history that petitioner reported no improvement since his work accident. Petitioner had undergone two physical therapy sessions at that point, which only helped him temporarily. His primary complaint again was left hip pain, which he felt was aggravated during therapy. He also reported left upper back and neck pain with no numbness or tingling in the left arm, and he was able to move all of his extremities. (PX 5, p.24).

By November 15, 2018, petitioner had improvement in his headaches but no significant improvement in neck pain or hip pain despite additional therapy sessions. The summary of the work accident again notes only that petitioner was "hit by a car mirror on the left side." The physical examination findings with regard to the neck, left hip and cervical spine were all similar to the November 1 visit, once again with no indication of any specific examination on either shoulder. The assessment following this visit is only of neck pain and left hip pain. (PX 5, pp. 17-21).

At his follow-up visit on November 27, petitioner brought in the CD of the hip MRI, and noted that he was told that there was nothing wrong in the hip, though he still complained of pain. He also complained of a knot in his neck. The assessment again included only neck pain and left hip joint pain. Dr. Scholl referred petitioner to Dr. Odell due to petitioner's lack of subjective improvement. (PX 5, pp.13–17).

Petitioner was last seen by Dr. Scholl on January 22, 2019 for what appears to be a general checkup. His only subjective complaint on this date was "back pain." The examination of the neck showed full range of motion, the musculoskeletal examination was negative as to motor strength, tone, joints, bones and muscles, and normal movement was noted of all extremities. Petitioner had a normal gait and his pulses were normal as well. The assessment at this time was an examination without abnormal findings, along with uncontrolled type II diabetes, which had been noted on petitioner's prior medical history. He was scheduled for a follow-up examination in three months. (PX 5, p.13).

According to the records of Midwest Sports Medicine, Dr. Odell first saw petitioner on December 11, 2018. (PX 11, p.7). Petitioner's history at that time was that he was standing outside next to his work truck when he was hit by the mirror of the car, "which spun him and he then hit the quarter panel of the car. He states his left foot was run over by the car," though petitioner confirmed that he was wearing steel toed shoes. Petitioner complained of pain in his left hip, left shoulder and cervical spine. Following his examination and review of the diagnostic studies, Dr. Odell's impression was left hip pain, exacerbation of cervical spondylosis, C4–C7 disc herniations and left shoulder pain and biceps tendon injury. (PX 11, pp.12–15).

Dr. Odell saw petitioner on three more occasions through February 12, 2019, and petitioner's complaints, examination findings and assessments were essentially the same. He ordered MRIs of the left shoulder and the lumbar spine, and kept him off of work (PX 11, pp.26-55).

At that point, respondent scheduled an IME with Dr. Michael Lewis at Illinois Bone & Joint. According to his history to Dr. Lewis, petitioner was outside of his truck on October 16, 2018 when a passenger mirror hit him on his left shoulder while the car was moving. This is the first indication of the vehicle mirror striking petitioner's shoulder, as opposed to his left side or the left side of his back. The impact resulted in a twisting motion to his lower back and the car running over his left foot.

Petitioner reported no pain in the foot, but did have pain in the low back area with radiation into the left thigh. He also complained of pain in the posterior cervical spine with radiation to the left shoulder. Petitioner noted a prior injury to his low back in 2008, for which he had received an injection into his sacroiliac joint.

Examination showed petitioner walking with a normal gait, and normal range of motion of the cervical spine. Range of motion of the shoulders was equal bilaterally as was strength, sensation and reflexes. Examination of the left shoulder was negative for apprehension and impingement signs.

The examination of the lumbar spine showed no spasm in the paravertebral muscles with equal range of motion bilaterally, and normal muscle strength sensation and reflexes in the lower extremities bilaterally. (RX 2, pp.1-2).

Dr. Lewis reviewed the ER records, the October 19, 2018 examination note as well as the MRIs of the left hip, cervical spine, left shoulder and lumbar spine. He also had the off work notes from Dr. Odell and petitioner's physical therapy records.

Following his examination of petitioner and review of the records, Dr. Lewis concluded that there was no objective evidence of orthopedic pathology in regard to the left foot, left hip, cervical spine, lumbar spine or left shoulder. This was confirmed by his review of the diagnostic studies, including all of the MRI films. He specifically stated that there was no evidence of acute pathology on any of those studies, nor objective evidence of orthopedic pathology from his

examination. Therefore, he found that petitioner did not sustain even an aggravation of any underlying conditions.

He did state that the treatment rendered to date, including that by Dr. Odell had been appropriate and causally related to the conditions from the work accident, but that no further treatment was necessary. He felt that petitioner could resume working with no restrictions. (RX 2, pp.3-5).

Petitioner returned to Dr. Odell on March 12, 2019 and according to his work restriction form of that date, the list of diagnoses now takes up nine lines, ranges from the cervical to the lumbar spine and includes the left shoulder and left hip conditions. He was already contemplating surgery to address petitioner's left shoulder complaints, but referred him to Dr. DiGianfilippo for exploration of possible cervical spine surgery. (PX 11, pp.57-60).

Petitioner saw Dr. DiGianfilippo on April 3, 2019. Petitioner's history is recorded almost simultaneously as "he was hit on the left side of his hip" and "He was hit with car mirror behind left shoulder blade." He complained of pain on the left side of his neck and shoulder, but noted that the knot in his neck had improved. "He apparently also developed a rotator cuff tear, along with tingling down his left arm to his last two fingers." (PX 13, p. 9).

Following physical examination findings that are alternately noted as "no neck pain or swelling in the extremities" followed almost immediately by "neck pain, back pain, arm pain, and leg pain," along with buttock and groin pain radiating down the left leg to the knee, the assessment is "significant cervical spinal canal stenosis with spinal cord compression" along with indications of a spinal cord injury and low back pain with mild L4–5 stenosis. He also includes cervicalgia and headache in his diagnoses. (PX 13, p.10).

His proposed treatment was a C3–C6 decompressive laminectomy due to what he deemed a tight canal and cord compression with possible spinal cord injury. Dr. DiGianfilippo was told that the IME doctor had suggested petitioner could go back to work, but he disagreed with that (PX 13, p.11).

Four weeks later, on May 2, 2019, Dr. DiGianfilippo performed a decompressive laminectomy from C3 to C6. He was seen on two occasions through May 22, at which time he was still authorized off of work. (PX 13, pp.12–15). There is no indication petitioner has returned to Dr. DiGianfilippo since May.

Petitioner has continued to follow-up with Dr. Odell, however. Through his visit on August 6, 2019, Dr. Odell took petitioner off of work and charted his complaints regarding his left hip and his left shoulder. The examination noted tenderness to palpation over the subacromial area of the left shoulder, but range of motion to 150°. Positive impingement signs were also noted. The examination of the left hip revealed mild trochanteric tenderness. (PX 11. Pp.82-101).

The assessment and plan were a left shoulder partial thickness rotator cuff tear and biceps tendinitis versus partial tear and impingement, along with left leg lumbar radiculopathy and "disc bulges/herniations" from L2 through S1. Petitioner was released to light duty as of August 12, 2019 with a 20-pound lifting restriction. It was noted that he would continue following up with Dr. DiGianfilippo (PX 11, pp.98-99), though there are no further records from that physician in evidence.

Based on the ongoing complaints and treatment petitioner was undergoing, and particularly after the cervical spine surgery, respondent forwarded petitioner's updated records to Dr. Lewis for an addendum opinion. Specifically, the initial paramedic and emergency room records were provided, along with additional notes of examination from Dr. Scholl, Dr. Odell and Dr. DiGianfilippo, including his operative report of May 5, 2019.

Following his review of these additional records, Dr. Lewis stated in an August 31, 2019 report that while petitioner may have had continued subjective complaints, there was no objective evidence of orthopedic pathology as of the IME on February 28, 2019. Therefore, his opinions as to the need for treatment after that date, the diagnosis of strains and contusions that had resolved, and petitioner's ability to work after that date were unchanged. He acknowledged that petitioner may have made subjective complaints to the other doctors that he did not make during his IME, but this did not impact his opinion with regard to Petitioner's objective physical condition, either as of February, 2019, or thereafter. (RX 3, pp.1-2).

Consistent with this opinion, and despite the most recent diagnosis of multiple herniated lumbar discs by Dr. Odell, a repeat MRI of the lumbar spine dated August 12, 2019 revealed diffuse disc bulges, not herniations, with no resulting spinal stenosis at L2-3, L3-4 and L4-5, and specifically "no disc herniation or spinal stenosis" at L5-S1. The report further notes normal alignment of the lumbar spine without evidence of subluxation, and normal vertebral body heights and disc spaces. (PX 11, pp.102–103).

Petitioner returned to Dr. Odell on September 5, 2019 and the listed diagnoses were now left bicipital tendinitis, osteoarthritis of the left shoulder, and muscle and tendon strains in the rotator cuff of the left shoulder, along with pain in the left hip. These were essentially maintained following his October 5, 2019 visit, at which time, petitioner agreed to proceed with a left shoulder arthroscopy with subacromial decompression, rotator cuff repair, open distal clavicle excision and open biceps tenodesis.

That surgery took place on November 6, 2019, and the postoperative diagnoses were right [sic] shoulder traumatic partial thickness rotator cuff tear, partial-thickness long head biceps tendon rupture, impingement syndrome, anterior superior labral tear and AC joint osteoarthritis. (PX 11, pp.141–143). He followed up on a couple of occasions through November 19, 2019, which was the last examination before trial. Petitioner was authorized off of work and was undergoing therapy at the time.

CONCLUSIONS OF LAW

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

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The petitioner bears the burden of proving every element of his claim by a preponderance of the evidence. Arbuckle v. Industrial Commission, 32 Ill.2d 581 (1965). The arbitrator is asked herein to determine whether petitioner met his burden of proving by a preponderance of the credible evidence that he required treatment from the effects of the October, 16, 2018 work injury following the February, 28, 2019 examination with Dr. Lewis, whether he was unable to return to work without restrictions after that date and at the time of trial, and whether the two surgeries that followed were in fact medically necessary and causally related to the injuries from the October 16, 2018 work accident.

Shoulder surgery

The arbitrator addresses the shoulder surgery first, as this was most recent in time, and the issue of causal connection, or lack thereof, is perhaps more obvious. The extensively recorded summary of the accident histories above that petitioner provided to the paramedics, to the emergency room and to Dr. Scholl early on in the case, and even to Dr. Odell and Dr. DiGianfilippo, establish by overwhelming evidence that the passenger side mirror of the vehicle

that struck petitioner did not strike him in the left shoulder, contrary to his trial testimony. Every history petitioner provided until his IME with Dr. Lewis and his trial testimony referenced only being struck in the back or on the left side of the back. The history to Dr. DiGianfilippo actually records being struck both in the hip and the shoulder.

Corroboration of the absence of a direct impact on petitioner's left shoulder in the accident is further found by the fact that x-rays were done of every area of the body that petitioner reported being injured in the accident, and every area of concern to the emergency room doctors, yet no x-rays were taken of either shoulder.

Likewise, there are no directed examinations of the left shoulder, and to the extent that there is reference to musculoskeletal examinations of petitioner's extremities at all in the early records, no positive objective findings are recorded. There is thus no contemporaneous, objective evidence that petitioner was struck in the left shoulder blade at the time of the accident, or that he in any other way injured his left shoulder in the accident.

Although the first reference to shoulder pain appears three days later at petitioner's follow-up examination on October 19, 2018, that record is devoid of any complaints of pain or injury to either shoulder, or evidence of examination to the upper extremities. In addition, the assessment does not specify which shoulder is involved as it literally states, "pain in unspecified shoulder." (PX 5, p.25).

The focus of petitioner's complaints, examination, findings and treatment thereafter were to the cervical spine on the left side and the left hip. By January 22, 2019, petitioner's only subjective complaints were unspecified back pain, he had full range of motion in the neck, and the musculoskeletal examination was negative. (PX 5, p.13).

The MRI of the left shoulder revealed tendinopathy with a partial-thickness articulating undersurface tear, along with hypertrophic spurring and possibly some mild impingement (RX 2, p.3). None of petitioner's treating doctors have indicated that any of these findings were either acute or represented an aggravation of the underlying findings by the work accident.

Neither Dr. Odell nor Dr. DiGianfilippo have explained or implied in their records how a rotator cuff tear arose from the described accident of petitioner being struck in the back by the rearview mirror of a vehicle passing him at about 10 miles an hour. Dr. Lewis specifically found no evidence of any acute pathology on the shoulder MRI, or any of the other MRIs. (RX 3, p.4).

As a result, the Arbitrator adopts the opinion of Dr. Lewis in his February 28, 2019 report (RX 2), as amplified in his August 31, 2019 report (RX 3), that petitioner was not in need of any further treatment to any body part, much less the left shoulder, after that date as the more credible medical opinion on this issue.

Thus, whether petitioner actually needed the shoulder surgery that Dr. Odell performed on November 6, 2019 or not, the record is devoid of credible, objective evidence that the need for that procedure had anything to do with the October 16, 2018 work injury.

Based on the above, the arbitrator finds that petitioner failed to prove that his medical treatment after February 28, 2019, his lost time beginning with the November 6, 2019 left shoulder surgery, the medical bills for the surgery itself, any prospective treatment, as well as any disability that may later be found to result from the left shoulder surgery, were causally related to or necessitated by the October 16, 2018 work injury.

Cervical spine surgery

The issue of causal connection between the cervical surgery petitioner underwent and the work accident is less obvious than with regard to causal connection between the shoulder surgery and the work accident. As it remains petitioner's burden to prove by a preponderance of the credible

evidence, however, that the cervical spine surgery was causally related to the work accident, the arbitrator finds that petitioner likewise failed to meet his burden of proof on this issue.

Once again, the diagnostic studies, specifically the cervical spine MRI and x-rays, along with petitioner's initial presentation to the paramedics, emergency room and Dr. Scholl all point to a soft tissue contusion/strain injury, and point away from a traumatic injury or aggravation of an underlying condition necessitating surgery.

Although petitioner did have neck and cervical spine complaints, and diagnostic studies were undertaken of the neck and cervical spine (unlike with regard to the left shoulder) in the emergency room, it is significant that the x-ray findings of all three areas of petitioner's spine all noted merely "interval progression of arthritic changes since previous x-rays," with the additional, and significant, detail in the report of the cervical spine x-rays noting "*multilevel* arthritic changes." (PX 3, pp. 27–30).

The arbitrator thus finds that the objective evidence from the diagnostic studies as well as the examination findings in the emergency room and by Dr. Scholl thereafter fail to support any reasonable conclusion that petitioner was a) actually in need of multilevel repairs in his cervical spine or b) that such a procedure, even if medically necessary, was at all causally related to the October 16, 2018 work accident.

Dr. Lewis' reports substantiate this finding, (RX 2,3) and are more credible on the issue than Dr. Odell or the one visit and quick surgery performed by Dr. DiGianfilippo.

In further support of the arbitrator's decision that petitioner failed to meet his burden of proving that the cervical spine surgery was causally related to the work accident, petitioner testified at trial of ongoing stabbing pain from his neck into his left arm, despite the fact that both his neck and his shoulder have undergone surgical procedures, allegedly to alleviate his symptoms. The fact that petitioner has not had any resolution of his symptoms now after two surgeries supports the opinion of Dr. Lewis that petitioner was actually not in need of any further treatment to any body part as of February 28, 2019.

While a surgical result is not always a reliable indicator of medical necessity or causal connection, both surgeries were clearly fueled by petitioner's subjective complaints rather than the objective diagnostic and examination findings. The fact that Dr. Odell references four levels of *herniated* discs in petitioner's lumbar spine as late as August, 2019 (PX 11, pp.98-99), and only backtracks from that diagnosis after yet a second lumbar MRI fails to substantiate this, provides a further basis for the Arbitrator to find his opinions, and those of Dr. DiGianfilippo, less credible on this issue than Dr. Lewis'.

Lastly, the arbitrator notes that a history of being struck by a moving vehicle as a pedestrian, the history relied upon by Drs. Odell and DiGianfilippo, suggests that significant injuries can result. There is no doubt that while working on the side of his truck in the road on October 16, 2018, petitioner was struck by the rearview mirror of a vehicle going about 10 miles per hour or so. The potential severity of that impact, however, is diminished in this case by the factual evidence that petitioner was not knocked down, and walked on his own power over to the offending car, which had pulled over to the side of the road, to advise the driver.

Petitioner then called his supervisor, and when the paramedics showed up, they noted that petitioner was ambulatory the entire time, and their initial examination showed no redness, bruising or swelling to the petitioner's back and foot (PX 1, p.6).

This, of course, does not impact the compensability of the claim, but does confirm the relatively minor nature of the impact on petitioner's body. The resulting absence of findings in the

emergency room records and the initial visits to Dr. Scholl of any swelling in any of the body areas petitioner complained of lends further credence to this conclusion.

In short, petitioner was injured in a work-related accident on October 16, 2018, but fortunately for him, the nature of the resulting injuries was essentially strains that took a couple of months of follow-up visits and physical therapy to resolve. Thereafter, petitioner's subjective complaints led to his ongoing treatment, and eventually surgeries, performed by Dr. Odell and Dr. DiGianfilippo, but the objective evidence and credible opinions in the record do not establish that any of that was causally related to injuries sustained on October 16, 2018.

For the foregoing reasons, the arbitrator finds that petitioner failed to prove that respondent is liable for the costs of the petitioner's cervical spine surgery and its follow-up since July 6, 2019, failed to prove that petitioner was both in need of medical treatment and incapable of working after February 28, 2019, and has failed to prove that any disability that is found to be related to the cervical spine surgery is causally related to the work injury.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator determined petitioner's extensive treatment after February 28, 2019 was not causally related to the work accident of October 16, 2018. Furthermore, based upon the lack of objective findings, the Arbitrator finds all treatment after February 28, 2019 was not reasonable or necessary as required in §8 of the Act and denies petitioner's claim for all medical treatment incurred after February 28, 2019

Specifically, the Arbitrator awards payment to Itasca Fire Department bill of $1,545.00 and MEA Elk Grove bill of $1,110.00 for services rendered on October 16, 2018 to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 of the Act with credit to be given for any payment made directly by respondent or pursuant to §8j of the Act.

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

As the Arbitrator determined no further treatment was causally related, or reasonable and necessary, after February 28, 2019, the Arbitrator denies the claim for prospective medical treatment.

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

The Arbitrator finds petitioner was temporarily totally disabled from October 17, 2018 only to March 14, 2019 as stipulated by respondent, based upon the opinion of Dr. Michael Lewis. Petitioner is awarded TTD from October 17, 2018 to March 14, 2019, which is 21-2/7 weeks at the rate of $1,062.57 per week.

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

VICKI MITCHANER,

Petitioner,

vs. NO: 11 WC 5574

SYNGENTA SEEDS, INC,

Respondent.

21IWCC0163

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 23, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $439.80 per week for a period of 200 1/7 weeks, representing August 19, 2010 through Juy 1, 2013 and August 11, 2015 through July 28, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the amount of $439.80 per week for a period of 75 6/7 weeks, representing April 3, 2017 through June 30, 2018 and April 15, 2019 through June 30, 2019, as provided in §8(a) of the Act

21IWCC0163

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the vocational service expenses of Bob Hammond, CRC, in the amount of $7,649.73, pursuant to section 8(a) of the Act. PX18.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $466.13 per week for life, representing the minimal permanent total disability rate for Petitioner's date of accident, commencing on July 16, 2019, as provided in §8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses pursuant to the fee schedule, relating to the treatment Petitioner underwent for bilateral carpal tunnel syndrome. Respondent is not liable for medical expenses for treatment of Petitioner's left cubital tunnel syndrome.

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.

Commencing on the second July 15th after the entry of the Arbitrators 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

cak

O: 2.16.21

43

Stephen J. Mathis

Stephen Mathis

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MITCHANER, VICKI
Employee/Petitioner

Case# **11WC005574**

SYNGENTA SEEDS INC
Employer/Respondent

21IWCC0163

On 12/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0874 FREDERICK & HAGLE
JEFFREY D FREDERICK
129 W MAIN ST
URBANA, IL 61801

0000 RUSIN & MACIOROWSKI LTD
TERRY SCHROEDER
2506 GALEN D SUITE 102
CHAMPAIGN, IL 61821-7047

21IWCC0163

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VICKI MITCHANER
Employee/Petitioner

v.

SYNGENTA SEEDS, INC.
Employer/Respondent

Case # **11** WC **5574**

Consolidated cases: **D/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 **Christina Hemenway**, former Arbitrator of the Commission, in the city of **Urbana**, on **July 16, 2019**. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the case to Arbitrator Mason for the purpose of reviewing the transcript and exhibits and issuing a decision. The parties agreed to proceed in this fashion. 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. xx 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. xx 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. xx Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. x What temporary benefits are in dispute?
   [ ] TPD x Maintenance xTTD
L. x What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **June 14, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to her current post-operative bilateral carpal tunnel syndrome condition of ill-being but did not establish causation as to her claimed left cubital tunnel syndrome.

In the year preceding the injury, Petitioner earned $**57,078.44**; the average weekly wage was $**659.70**.

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

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

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

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

Respondent is entitled to a credit of $**10,920.21** under Section 8(j) of the Act for payments made under Respondent's short-term disability policy. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against her by reason of having received such payments, pursuant to Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $439.80 PER WEEK DURING TWO INTERVALS, FROM 8/19/10 THROUGH 7/1/13 (THE DATE DR. OAKEY RELEASED PETITIONER TO FULL DUTY) AND FROM AUGUST 11, 2015 (THE DATE OF THE RIGHT CARPAL TUNNEL RELEASE) THROUGH 7/28/16, AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $439.80 PER WEEK FROM 4/3/17 (THE DATE OF PETITIONER'S FIRST RECORDED JOB CONTACT, PX 20) THROUGH 6/30/18 AND FROM 4/15/19 THROUGH 6/30/19, AS PROVIDED IN SECTION 8(A) OF THE ACT. IN ADDITION, RESPONDENT SHALL PAY VOCATIONAL EXPENSES OF BOB HAMMOND, CRC, IN THE AMOUNT OF $7,649.73, PURSUANT TO SECTION 8(A) OF THE ACT. PX 18.

RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $466.13 PER WEEK FOR LIFE, REPRESENTING THE MINIMUM PERMANENT TOTAL DISABILITY RATE IN EFFECT AT THE TIME OF PETITIONER'S INJURY, COMMENCING 7/16/19, AS PROVIDED IN SECTION 8(F) OF THE ACT.

PETITIONER CLAIMS THE MEDICAL EXPENSES ENUMERATED IN PX 21. SOME OF THESE EXPENSES RELATE TO TREATMENT PETITIONER UNDERWENT FOR LEFT CUBITAL TUNNEL SYNDROME. THE ARBITRATOR DID NOT FIND CAUSATION AS TO THIS CONDITION. RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL EXPENSES, PURSUANT TO THE FEE SCHEDULE, RELATING TO THE TREATMENT PETITIONER UNDERWENT FOR HER LEFT AND RIGHT CARPAL TUNNEL SYNDROME.

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.

Molly C Mason

Signature of Arbitrator

12/23/19
Date

DEC 23 2019

Vicki Mitchaner v. Syngenta Seeds, Inc.
11 WC 5574

21IWCC0163

Procedural History

Former Arbitrator Hemenway conducted a hearing in this case on July 16, 2019. In November 2019, after Arbitrator Hemenway's departure, the Commission reassigned the matter to Arbitrator Mason for the purpose of reviewing the transcript, exhibits and proposed findings and issuing a decision. The parties agreed to proceed in this manner.

Summary of Disputed Issues

Petitioner, a longtime "supply tech" who worked in Respondent's lab, claims left carpal tunnel syndrome manifesting on August 18, 2010 secondary to repetitive trauma. She also claims left cubital tunnel syndrome, secondary to the left carpal tunnel surgery, and right carpal tunnel syndrome secondary to overuse. [At the beginning of the hearing, Petitioner amended her Application to clarify she is not alleging injuries to her neck, back or shoulder. T. 7.]

The disputed issues include accident, notice, causal connection, medical expenses, temporary total disability from August 19, 2010 through July 28, 2016, maintenance from March 13, 2017 through the hearing of July 16, 2019 and nature and extent. The parties agree that Respondent paid $10,920.21 in non-occupational benefits. They also agree that, as of the hearing, Petitioner would be earning $22.95 per hour if she still worked for Respondent. Arb Exh 1. T. 5.

Arbitrator's Findings of Fact

Petitioner testified she was born on August 26, 1954. She is right-handed. She graduated from high school in 1972. She did not attend college. Her first job out of high school was for a maid service. She then worked as a stock clerk for Colwell Systems and in the office at United Waste Systems. T. 21-22.

Petitioner testified she began working as a supply tech for Respondent in 1990. She was 37 years old at that time. She continued to work as a supply tech, on a full-time basis, through August 18, 2010. She typically worked overtime from September through January. She testified that overtime was required. Her employment at Respondent ended in February 2011. At that point, her hourly rate was $15.57. T. 22-23.

Petitioner identified PX 16 as a description of the various tasks she performed as a supply tech. She created PX 16 and provided it to Dr. Fletcher. She provided a verbal, less complete description to Dr. Kohlmann, an examining physician she saw at Respondent's direction. She testified she made an unsuccessful attempt to provide Dr. Kohlmann with a more complete description. T. 26-28.

Petitioner testified that Respondent operates a soybean production plant. Respondent contracted with soybean growers. After a harvest, the growers brought their seeds to the plant. She worked in Respondent's lab, performing quality assurance testing on these seeds.

Petitioner testified she initially tested "bin samples." Co-workers placed these samples on a pallet outside the lab. The samples were in white bags. Each bag weighed 5 pounds. Petitioner testified she would carry 5 or 6 bags at a time into the lab. She untied the bags, poured the seeds into trays, performed a two-minute visual inspection and then poured the seeds into metal pans. The pans were 11 x 20 inches in size. Each pan had a hole in the end. She then had to pour the seeds back into the bags. She testified she put her hands over the end of the hole to avoid spillage. She estimated she tied and untied each bag 4 to 6 times during the testing process.

Petitioner also described the "purity checks" she performed. She had to ensure that the seeds were all the same variety. T. 33. She would place a seed on a rough wooden board that was 20 x 20 in size. The surface of the board was carpeted so that the seeds would not roll too quickly. She poured seeds onto this surface and inspected them, using a magnifying glass that lit up. She testified she rested her wrists at an angle on the wooden part of the board as she pulled the magnifying glass down and inspected the seeds. She then used a pencil to roll 500 seeds slowly, while checking their size, shape and coat. She held the pencil in her right hand. She used her index finger and thumb to remove any seeds that seemed questionable. Some seeds were pea-sized while others were smaller. T. 36-37. It took her 10 to 15 minutes to inspect 500 seeds. She rested her wrists against the wooden board during this time period. T. 38.

Petitioner also described a process known as "rag dolls." She started this process by retrieving a 50-pound box of paper from a warehouse, carrying it 200 feet to the lab and using a utility knife to cut it open. The box contained 2000 sheets of paper. She used both hands to remove about three inches of paper at a time. She placed the paper on a baker's sheet and then wet the paper, using water from a plastic container. She then used both hands to flip the paper over and wet the other side. The paper swelled as she wet it. She placed the wet paper into storage containers that had snap-close lids. If the sample was classified as a "round up," she used "round up" solution, rather than water, to wet it down. She made this solution. She then took a sheet of wet paper and folded it halfway down. She then poured seeds into a 10-inch triangular plastic pan and, from there, into a "planting board" that was about 4 x 22 inches in size. She held the "planting board" in both hands and rolled it around until the seeds filled 50 holes. She then poured off the excess seeds into the pan. She then set the "planting board" onto a wet piece of paper and released the seeds, using her thumb. She then used both hands to flip the folded half sheet of paper up onto the seeds. She then used her fingers and thumbs to roll the paper from left end to right end until she "had that rag doll rolled." T. 41. Once it was rolled, she folded it into two, put a rubber band around it and put it into a wired bucket that had holes in it. Her goal was to plant 400 seeds. She repeated the process eight times, put plastic over the bucket and affixed it with a rubber band. In the busiest part of the year, she

might do "300 a day in rag dolls." T. 42. During "bin sampling", she might stand there for five hours in a row, "just doing rag dolls." T. 43.

Petitioner identified PX 22 as a photograph of a gallon jug that co-workers would bring to her. The jugs were referred to as "truck samples." They would be filled with five pounds of seed. There would be a ticket at the top, identifying the grower. She would hold the lid with her left hand and try to twist the lid off, using her right hand. She would alternate if she was not able to untwist the lid on the first try. The lid was 4 inches in diameter. The jug was made of plastic but was sometimes slick due to being covered with bean dust. T. 45. After she removed the lid, she would write out an envelope, using the information from the ticket. She would then grasp the lip of the jug, using her left hand, use both hands to lift the jug to the height of her head and pour the contents into a copper divider. She then put the lid back on the jug and threw the jug into a box. She would have to unscrew and screw jug lids between 20 and 50 times per shift, depending on the number of truckloads that arrived. T. 48.

Petitioner then described the screening process. She handled three types of screens: 12 slotted, 11 ½ slotted and 11. After she poured the seeds into the copper divider, they went down into two brass pans. The pans had 4-inch handles at the top. She would pour 250 grams out of one, using her right hand, and 250 grams out of the other, using her left hand. She poured the seeds onto screens and then started shaking down the seed. She had to use her thumbs and forefingers to pick out all foreign material, including pods, bugs and mice, "whatever the grower picked up in the seed." She used both hands to rub over the screens to get any spilt seeds to fall down through the screens. The screening process could take between 10 and 30 minutes, depending on how dirty the seeds were. T. 51.

Petitioner explained that she did not work one seed sample through all of the stages because it "wasn't productive." Instead, she would take a stack and do the two-minute check, take a stack and do the test weights, take a stack and do the testing and then do the planting and screening. She would never have been able to keep up the pace if she had taken one sample and run it through. T. 52-53.

Petitioner testified that, in May or June, she also performed tasks in locations other than the lab. Out in the field, she would take a post and put a sign on it, indicating the variety of seed that was planted in that area. She would then take a two-handled post hole driver and "slam that down over the top of the post to drive the post into the ground." T. 54. She placed one hand on each handle. She had to slam three or four times to drive the post down. She also put out plastic signs. This involved placing plastic rivets and clips in the signs. In the warehouse, she and a co-worker would sort through old pallets that were stacked 100 feet long. She would be on one side and her co-worker on the other. Together, they would flip each pallet to see whether it needed to be repaired. If they encountered a pallet that needed to be worked on, they would throw it off to the side. T. 56. The "good" pallets had to be "slip sheeted." This involved grabbing stacks of cardboard and using a heavy stapler to "slap" the cardboard onto the pallet. Petitioner testified she had to "slap" pretty hard to get the staple to go through the pallets because the pallets were made of oak or other hard material. T. 56-57.

She used a crowbar to "bust up" the broken boards on pallets that required repair. She then used a pry bar to "pop" the broken boards off so that new boards could be put on. A pneumatic tool was used to affix the new boards but she did not use this tool. T. 57. She also used a push broom in the warehouse to clean the area where the pallets were sorted. This area was 100 x 100 feet in size. She also used a "scoop shovel" while cleaning up. She would put the debris into a wheelbarrow, maneuver the wheelbarrow out to the dumpster and pour the contents into the dumpster. T. 58-59.

Petitioner testified she sometimes worked with sand during the "rag doll" process. If she planted "rag dolls" and they did not meet the germ requirements, she had to replant on sand. Co-workers would bring in sand, using wheelbarrows. She had a bucket that held 50 pounds of sand. The sand could be wet or dry. She used her right hand to scoop the sand from the wheelbarrow into the bucket. She used her left arm to "hoist" the bucket and carry it to her work station. She would typically fill the bucket about ¾ full so that it weighed between 30 and 40 pounds. Once she got the bucket to her work station, she pushed it onto the counter. She would take 600 milliliters of water from her water container and pour that onto special "Kinpack" paper that resembled the lining of a plastic diaper. She then used her hands to flatten the paper. She then poured seed into a pan and then onto a planting board. She would roll it around until she got 100 seed in the holes. She would then pour off the excess and lay that down on each corner of the Kinpack paper. She would release the spring load, press it down and pour sand over the seeds, using the scoop, until the seeds were covered. She then used her hands to "smooth that out" and carried it over to the germ room. She would slide the planted board into racks in that room. T. 60-62.

Petitioner testified that each task she performed throughout each shift required her to use her hands. T. 62.

Petitioner denied performing any hand-intensive activities outside of work. She does not knit. T. 63-64. She does not have any problems with her thyroid. She is 5 feet, 9 inches tall. T. 64.

Petitioner denied having any problems with either of her hands before she started working at Respondent. She first noticed problems with her hands in the spring of 2010. She noticed problems with grip and strength. She also noticed that her hands would shake when she lifted things. She began dropping objects. T. 65.

Petitioner testified she had experienced problems with her neck for several years before the spring of 2010. T. 65.

Petitioner testified she first saw a doctor for left hand and wrist problems on June 14, 2010. She went to the office of her primary care physician and saw that physician's assistant, Bill Kilpatrick. She informed Kilpatrick that she was experiencing pain, tingling and numbness in her left hand. She also told Kilpatrick that she had noticed a knot on the top of her wrist. T. 66.

She discussed her job duties with Kilpatrick. He provided her with a cock-up splint for her left hand and wrist.

Records in PX 1 and RX 5 reflect that Petitioner saw William Kilpatrick, a nurse practitioner, at Christie Clinic on June 14, 2010. Kilpatrick noted a complaint of left wrist and hand pain that had worsened over the previous three days. He also noted a knot on the posterior aspect of Petitioner's left hand near the wrist. Petitioner denied having anything similar in the past. Petitioner reported being "busier at work" and doing "a lot of repetitive movement with her arms and hands on a daily basis." She also reported taking one Aleve daily for ongoing neck discomfort. She denied any specific injury but reported doing a lot of lifting throughout the day. Kilpatrick described her as right-handed.

In addition to the knot, Kilpatrick noted mildly positive Tinel's and Phalen's testing to the left wrist. His impression was: 1) ganglion cyst; 2) wrist strain; and 3) early carpal tunnel syndrome. He placed Petitioner in a left wrist cock-up splint. He recommended that Petitioner take Aleve twice daily for four to five days. He directed Petitioner to return in two to three weeks if she did not improve. RX 5, p. 24/113.

Petitioner testified that, as of her visit to Kilpatrick, she understood that she had left carpal tunnel syndrome that was due to her repetitive work duties. T. 68. She returned to work the same day she saw Kilpatrick. T. 68. She was wearing the splint. The splint was visible. It was dark blue with white trim. She went to the office of Kevin Kaiser, the plant manager, and spoke with Kaiser that day. [She identified Kaiser in the hearing room. T. 69-70.] Kaiser was her supervisor. From where she was standing, the splint was within Kaiser's view. Kaiser asked her what the splint was for. She told him she was having issues with her hand. She also told him she had just come from the doctor's office, where she had learned she had carpal tunnel syndrome. Kaiser then asked her whether she had any work restrictions. She said "not at this time." Kaiser replied, "okay, keep me posted." T. 70-71. During this same conversation, she told Kaiser that she understood the carpal tunnel syndrome was related to her job duties. T. 71.

Petitioner testified she performed full duty at Respondent during the following two weeks and then returned to Kilpatrick. She wore the splint during this time. When she saw Kilpatrick, he sent her to Dr. Freeman, an orthopedic surgeon affiliated with Christie Clinic. T. 71-72.

Records in PX 1 reflect that Petitioner saw David Freeman, PA-C, a certified physician's assistant affiliated with the Christie Clinic, on July 2, 2010. Freeman noted that Petitioner complained of dull, achy left wrist pain of several months' duration that increased with usage of "overuse while at work." He also noted that Petitioner complained of numbness and tingling in all of her fingers, worse on the left. On left wrist examination, he noted a palpable cyst to the dorsal aspect, positive Phalen's testing, negative Tinel's testing, 5-/5 strength and some thenar eminence atrophy. He obtained left wrist X-rays which showed no bony abnormalities. He

diagnosed a left wrist dorsal ganglion cyst and bilateral carpal tunnel syndrome. He referred Petitioner to Dr. Thatcher for bilateral upper extremity EMG/NCV testing. PX 1, pp. 7-8.

Dr. Thatcher performed the prescribed EMG/NCV testing on July 14, 2010. He found the results to be consistent with mild to moderate left carpal tunnel syndrome and mild bilateral cervical radiculopathy. He found no evidence of right carpal tunnel syndrome or ulnar neuropathy. PX 1, pp. 9-11.

Petitioner testified she returned to Dr. Freeman on July 21, 2010. The doctor referred her to Dr. Love, a surgeon. T. 72-73. PX 1, p. 12.

Petitioner testified she went to work the following day, July 22, 2010, and spoke with Kevin Kaiser in his office. Two of her co-workers, Tom Condron and Mike Thomas, were present when she spoke with Kaiser. She told Kaiser that her doctor had referred her to a surgeon and so "more than likely [she] was going to be having a carpal tunnel release." Kaiser then asked her whether she was going to file this under workers' compensation. She told him no, that she was going to file it under her own insurance and take short-term disability. He asked whether she was sure about this. She replied yes. He then said, "well, let me know when you find out the date of the surgery so I can start the paperwork." T. 74.

Petitioner testified she told Kaiser she was going to use her health insurance rather than workers' compensation based on interaction she had had with her previous supervisor, Lou Rhodes, around 1996, in connection with a work-related injury involving her right shoulder. She had gone to Rhodes after seeing her doctor and had told him her doctor had prescribed medication. While she was in Rhodes' office, he called her doctor and asked whether Petitioner could take Ibuprofen instead of prescription medication so he could avoid having to file a recordable accident. T. 75. Based on Rhodes' reaction, she knew how Respondent was about work accidents so she concluded it would be easier to use her health insurance to cover the carpal tunnel surgery and file for short-term disability. T. 76. It was her understanding that the carpal tunnel surgery took only 15 to 20 minutes to perform, that she would need some physical therapy afterward and that she would be back to work within two to three weeks, in time for Respondent's busy season. T. 76.

Petitioner testified that, when she spoke with Kaiser on July 22, 2010, she again told him that her work duties had caused the carpal tunnel. T. 76-77.

Petitioner first saw Dr. Love on August 3, 2010. The doctor described Petitioner as a "55-year-old right-handed woman who has worked for 20 years doing repetitive work with her hands." She noted that Petitioner worked as a lab technician at a seed company. She noted complaints of left hand numbness and tingling, along with pain that increased with lifting, gripping, grasping and twisting. After examining Petitioner and reviewing the X-rays and EMG/NCV results, Dr. Love diagnosed left carpal tunnel syndrome and "double crush" syndrome. She recommended a left carpal tunnel release but cautioned Petitioner that the results would be "tempered by her double crush with the cervical radiculopathy." PX 1, p. 13.

Petitioner testified she underwent carpal tunnel surgery with Dr. Love. [This surgery took place on August 19, 2010. PX 1, pp. 21-22. RX 5, pp. 102-103, 113.] She described the results as "horrible." Her left hand ended up being much worse than it was before the surgery. Her hand was totally numb and the pain was worse. [At the first post-operative visit, Dr. Love noted that Petitioner complained of significant numbness and an inability to grip. PX 1, p. 23.] The pain went up her entire arm and she was not able to use her hand because it was so swollen. At Dr. Love's direction, she underwent physical therapy at Champion Fitness following the surgery. [The therapy records reflect consistent left hand and left elbow complaints that worsened with various household activities. PX 2. RX 5, pp. 75-77, 113.] Petitioner testified that the therapy "helped somewhat" but she was still experiencing excruciating pain. The therapists used ultrasound but this sent pain shooting up her arm. She said "something is not right" and the therapists agreed. T. 78. She returned to her primary care physician and he referred her to Dr. Lee at Bonutti Clinic. Dr. Lee prescribed a Medrol Dosepak to try to reduce the swelling. He felt some of her problems could be neck-related so he sent her for a cervical spine MRI and X-rays that day. T. 78-79.

Dr. Lee's note of November 15, 2010 reflects that Petitioner underwent a left open carpal tunnel release by Dr. Love on August 19, 2010 and described her symptoms as dramatically worsening after this surgery. Dr. Lee noted that Petitioner complained of constant numbness in the index finger, partial numbness in the middle finger, swelling of the hand, difficulty gripping and grasping and worse symptoms at night. Petitioner reported being unable to perform her job as a seed lab technician because she could not feel her fingertips. Dr. Lee reviewed the EMG. On examination, he noted a standard, well-healed incision at the base of the palm and no thenar atrophy. He found Petitioner's symptoms to be "compatible with cervical pathology." He also felt Petitioner could have a double crush injury syndrome. He prescribed cervical spine X-rays and a cervical spine MRI. He prescribed a Medrol Dosepak. RX 5, pp. 91-92/113.

On February 16, 2011, Petitioner filed an Application for Adjustment of Claim alleging repetitive trauma injuries and an accident date of June 14, 2010. Arb Exh 2.

Petitioner testified she later sought another opinion from Dr. Li at Safeworks. Dr. Li's office was closer to her home. It was his belief that Dr. Love did not release the median nerve far enough. At his direction, Dr. Thatcher performed EMG/NCV testing of the left upper extremity on June 30, 2011. This testing revealed mild to moderate left carpal tunnel syndrome. PX 1, pp. 36-37. Following this testing, Dr. Li recommended a release and revision. He performed revision surgery on July 29, 2011. Petitioner testified this surgery helped in the sense that her hand numbness lessened but she was still experiencing tingling and pain shooting up her arm. T. 79. She was still unable to use her left hand. Dr. Li referred her to Dr. Atwater. He concluded her symptoms were neck-related so he prescribed neck treatment. She ended up undergoing a cervical fusion at C4-C5 and C6-C7. This surgery did not alleviate her left hand or arm problems. Repeat EMG/NCV testing performed on October 16, 2012 showed mild left carpal tunnel syndrome, moderate right carpal tunnel syndrome and mild left cubital tunnel syndrome. Dr. Thatcher described these conditions as having progressed since January

2012. PX 1, pp. 41-43. Dr. Atwater was concerned. He referred her to Dr. Oakey, who recommended a carpal tunnel release with a "fat flap revision." Dr. Oakey explained he was going to remove fat from her hand and wrap it around the median nerve so that the nerve would not collapse again. He performed this surgery along with an ulnar nerve transposition. T. 81.

Records in PX 6 reflect that, on November 5, 2012, following repeat EMG/NCV testing performed by Dr. Thatcher, Dr. Oakey noted that Petitioner's left carpal tunnel syndrome had "actually progressed" since her last surgery and that Petitioner also had left cubital syndrome and right carpal tunnel syndrome. He discussed the possibility of revision surgery and injected the left carpal tunnel. PX 6, pp. 46-47. On December 17, 2012, he noted that the injection provided no relief. He again discussed revision surgery, noting that the results were "unpredictable." PX 6, p. 45. He performed a left subcutaneous ulnar nerve transposition and left revision carpal tunnel release with hypothenar fat pad flap on February 12, 2013. At the first post-operative visit, on February 25, 2013, he provided Petitioner with a "boomerang" splint for her left elbow. He prescribed a cock-up splint for the left wrist. He directed Petitioner to return in one month. On April 3, 2013, he described Petitioner as doing well. He removed the braces and indicated Petitioner was "still" subject to a 10-pound lifting restriction. PX 6, p. 40.

Petitioner testified she felt "much better" after Dr. Oakey operated on her. The surgery relieved the shooting pain in her arm. The pain, numbness and tingling in her hand also improved. She still had issues but they were not as severe as prior to the surgery.

Petitioner testified that, as of Dr. Oakey's surgery, she started experiencing right carpal tunnel symptoms which she attributed to overusing her left hand. She underwent additional EMG/NCV testing which confirmed she had right carpal tunnel syndrome. [Dr. Trudeau performed EMG/NCV testing on May 28, 2015, following Dr. Fletcher's evaluation. He found the results to be indicative of severe median neuropathy at the right wrist, moderately severe median neuropathy at the left wrist, moderately severe ulnar neuropathy at the left elbow and mild left C5 radiculopathy. PX 6, pp. 21-30.]

On July 1, 2013, Dr. Oakey noted that Petitioner's left-sided complaints were continuing to improve but that she had a "small amount of loss of her left thenar muscle." He also noted that Petitioner reported experiencing burning pain in both hands with tasks requiring dexterity. He indicated that Petitioner would "ultimately require" a right carpal tunnel release but that she wanted to defer this due to her husband's upcoming surgery. He released Petitioner to full duty "at this point with the understanding that we will be doing a carpal tunnel surgery which will take her out of work activities in the fall." He directed Petitioner to return in two months. PX 6, p. 19.

On September 4, 2013, Petitioner returned to Dr. Oakey and reported increased pain in both hands secondary to placing TED hose on her husband's leg after his knee replacement. The doctor described the right-sided symptoms as "stable," noting "good APB strength. He

indicated that Petitioner planned to contact him when she wanted to proceed with the right carpal tunnel release. PX 6, pp. 15-17.

At Respondent's request, Dr. Kohlmann, an orthopedic surgeon, examined Petitioner on March 6, 2014. See further below.

Dr. Fletcher, an occupational medicine physician, evaluated Petitioner on April 16, 2015, at the request of Petitioner's attorney. See further below.

Petitioner returned to Dr. Oakey on July 15, 2015. The doctor noted ongoing bilateral symptoms. On re-examination, he noted 4/5 right thumb abduction and 4/5 left thumb opposition. He discussed right carpal tunnel surgery with Petitioner. PX 6, pp. 14-15.

Dr. Oakey performed a right carpal tunnel release on August 11, 2015. PX 6, pp. 7-8. On August 26, 2015, he described Petitioner as "thrilled" with the results of this surgery and "doing well with ROM exercises." He imposed a 10-pound lifting restriction. PX 6, pp. 11-13.

On September 28, 2015, Dr. Oakey noted that Petitioner was still experiencing "some sporadic issues in the small and ring fingers" following the right-sided release. He indicated it was "unclear" whether this was coming from a "more proximal etiology." He noted that Petitioner planned to pursue more care for her neck and would return to him as needed. PX 6, pp. 6-7.

Petitioner testified that, in July 2016, she came to understand that she had reached maximum medical improvement. At no point thereafter did Respondent offer her work. She requested vocational rehabilitation services but Respondent did not offer them to her. T. 85.

Dr. Fletcher testified by way of evidence deposition on November 18, 2016. PX 24. Dr. Fletcher identified Fletcher Dep Exh 1 as an accurate copy of his CV. He testified he is board certified in occupational and preventive medicine. Occupational medicine involves performing ergonomic assessments and making determinations as to factors causing or contributing to injuries and illnesses in the workplace. PX 24, p. 6. It also involves making determinations about individuals' capacity to work. PX 24, p. 7.

Dr. Fletcher testified he performs jobsite analyses to determine the frequency of a task, forcefulness, posture, exposure to vibration and awkwardness of positions. PX 24, p. 8.

Dr. Fletcher testified that Governor Rauner appointed him to the Commission's Medical Fee Advisory Board in January 2016. The board advises the Chairman about medical fees and access to care issues. PX 24, pp. 8-9.

Dr. Fletcher opined that Petitioner's claims involves a cumulative rather than acute injury. Before he first examined Petitioner, in April 2015, he reviewed voluminous medical records dating back to the early 2000s. He also reviewed Dr. Kohlmann's report and job

descriptions provided by both Petitioner and Respondent. He knows Dr. Kohlmann very well. Dr. Kohlmann is a surgeon, not an occupational medicine specialist. PX 24, pp. 10-11. Dr. Kohlmann is an "older mode" orthopedic surgeon who performed spine and extremity surgery. PX 24, p. 12.

Dr. Fletcher testified he disagrees with Dr. Kohlmann's report. He sees this claim as presenting a unique situation in that he "had a claimant who provided [him] a significant rebuttal to" Dr. Kohlmann's report.

Dr. Fletcher testified he first saw Petitioner on April 16, 2015. Petitioner is the spouse of one of his patients. He took care of Petitioner's husband for a long time. He saw Petitioner a second time on July 28, 2016. PX 24, pp. 13-14.

Dr. Fletcher identified Fletcher Dep Exh 4 as the job description Petitioner wrote. He has encountered only a few other individuals who have provided similarly detailed job descriptions. The description allowed him to have a better understanding of the tasks Petitioner performed. PX 24, p. 15. Petitioner performed her job for 20 years. In his opinion, her description provided a better sense of clarity than Respondent's "generic" description. Petitioner also provided some photographs. These photographs show a "poor ergonomic setup." The photographs of the task involving a magnifying glass also showed "sustained volar pressure on the wrist," which is a factor identified by the National Institute of Occupational Safety and Health [NIOSH] as a risk factor for developing carpal tunnel syndrome. PX 24, p. 17.

Dr. Fletcher testified that Petitioner did not originally allege right carpal tunnel syndrome. She underwent three left carpal tunnel procedures plus left cubital tunnel surgery and later, in 2015, underwent right carpal tunnel surgery by Dr. Oakey. Dr. Fletcher opined that the right carpal tunnel syndrome was a "complication of the treatment [Petitioner] underwent for her left hand." He has probably seen easily 5,000 cases of carpal tunnel syndrome in his career. With respect to her left hand, Petitioner had one of the worst surgical results he has ever seen. PX 24, p. 19. Petitioner's left hand was "basically butchered." He has photographs showing the scarring in that hand. Petitioner also has "horrible thenar atrophy present." Because she obtained such a poor surgical result, she started overusing her right arm. That is the basis of his causation opinion vis-à-vis the right carpal tunnel syndrome. PX 24, p. 19. It is not unusual for a person to start out with unilateral carpal tunnel syndrome and develop bilateral carpal tunnel syndrome secondary to overuse. PX 24, p. 20. The right carpal tunnel syndrome causally relates back to the June 14, 2010 accident because it is a complication of Petitioner's treatment. PX 24, p. 20. Fletcher Dep Exh 5 is a photograph he took of Petitioner's hands at the time of her initial examination. The photograph shows that Petitioner "has no thenar muscle eminence whatsoever." It also shows extensive scarring in the left lower wrist. Petitioner also has thenar atrophy in her right wrist but it is less severe. PX 24, pp. 20-21.

Dr. Fletcher opined that there is a causal relationship between the job duties Petitioner performed for 20 years and the development of her left carpal tunnel syndrome. The subsequent complications caused her to develop right carpal tunnel syndrome. Petitioner had

"no independent risk factor" for the development of carpal tunnel syndrome. Petitioner does not pursue hobbies that could have contributed. Nor is she diabetic. She does not have thyroid problems, does not smoke and is not obese. PX 24, p. 22. The only physical factor that lowered her threshold for developing left carpal tunnel syndrome was the fact that she had some proximal nerve compression in her neck. That is called "double crush syndrome." Petitioner had this prior to June 2010 but it was not recognized until she saw Dr. Lee. Eventually, Dr. Atwater performed a two-level cervical fusion in 2012. PX 24, pp. 21-22.

Dr. Fletcher did not find a causal relationship between Petitioner's repetitive work duties and her cervical spine condition. He views the cervical spine condition as degenerative. PX 24, p. 23.

Dr. Fletcher distinguished the jobsite analysis performed by Dr. Kohlmann from the kind of analysis he would perform as a board certified occupational medicine physician. In his view, it is critical to have the claimant present at the time of the analysis to determine factors unique to that person, such as height and wrist ratios. There is no evidence as to how much time Dr. Kohlmann spent at Respondent's facility. Nor is there evidence that he used tools Dr. Fletcher would typically use, such as strain gauges. PX 24, p. 24. Dr. Fletcher testified he is not sure whether Dr. Kohlmann, an orthopedic surgeon, is qualified to perform a jobsite analysis. During his career, he has seen orthopedic surgeons perform such analyses on only one or two occasions. PX 24, p. 24.

Dr. Fletcher testified he performs work for insurance carriers and defense firms. He also sees patients. Both sides call him to testify. He tries to be truthful. PX 24, p. 25. Respondent's firm has retained him in the past. PX 24, p. 25.

Dr. Fletcher did not find a clear causal relationship between Petitioner's repetitive work duties and her left cubital tunnel syndrome. The tasks Petitioner performed are not the typical tasks associated with cubital tunnel. PX 24, p. 27. If a person's wrist usage is limited, that could potentially put additional pressure on the rest of the arm. PX 24, p. 28. That Petitioner's cubital tunnel could have been a byproduct of the bad results she obtained from her first two carpal tunnel releases is a "reasonable theory." PX 24, p. 28. It is "probably" more than 50% likely that the poor surgical result caused the cubital tunnel. PX 24, p. 29.

Dr. Fletcher testified that, in late 1989, NIOSH came out with a list of factors playing into the development of carpal tunnel: forcefulness, pressure on the volar surface of the wrist, awkward positioning and vibration. "You don't necessarily have to have forcefulness if you have the other factors present." PX 24, p. 30. Petitioner's tasks were not only repetitive. They also involved "very abnormal awkward hand postures with radial and ulnar deviations" and "pressure on the volar surface of the wrist." PX 24, p. 30. Petitioner's work involved very fine detail, using a magnifying glass to look at seeds. This involved pressure on the volar surface of the wrist. He is relying on Petitioner's account of her job since he did not have an opportunity to visit Respondent's facility. PX 24, p. 31. Petitioner rebutted Dr. Kohlmann. Dr. Fletcher

testified he does not believe Dr. Kohlmann addressed all of the important risk factors. PX 24, pp. 31-32.

Dr. Fletcher opined that all of Petitioner's upper extremity surgeries are causally related to her injury of June 14, 2010. He further opined that the surgeries, therapy and EMG studies were reasonable and necessary. PX 24, pp. 32-33. Petitioner has not worked since the injury. Dr. Fletcher opined that Petitioner was disabled from work due to the severity of her condition up until the time he examined her. At that time, she still had impairment with respect to activities of daily life. Petitioner's Quick Dash score improved between April 2015 and July 2016, due to her right carpal tunnel release, but she still had atrophy and pain as of July 2016. PX 24, p. 34. Petitioner's hand dexterity is "very, very poor." She could not resume the kind of fine, intricate work she performed at Respondent. PX 24, p. 34. In his opinion, Petitioner is permanently and totally disabled. PX 24, p. 36.

Dr. Fletcher testified he has seen employees of Respondent but has never been in Respondent's facility. Respondent has sent employees to him. PX 24, p. 37.

Under cross-examination, Dr. Fletcher testified he is not an orthopedic surgeon, neurologist or neurosurgeon. He frequently refers patients to orthopedic surgeons. PX 24, pp. 38-39. He uses orthopedic surgeons who are tenants and he uses outside doctors as well. PX 24, p. 39.

Dr. Fletcher acknowledged that a note dated October 31, 2000 identifies Petitioner's employer as Norvat Seeds, not Respondent. PX 24, p. 40.

Dr. Fletcher testified he was not asked to address causation vis-à-vis the lumbar spine. Petitioner has degenerative disc disease at the cervical and lumbar levels. PX 24, p. 41. Aging and other factors, including microrepetitive trauma, excessive standing, vibratory exposure, smoking and trauma can contribute to degenerative disc disease. PX 24, p. 42.

Dr. Fletcher acknowledged that Petitioner is invested in her claim and is trying to present her side of the story. He is operating on the assumption she is being truthful. Dr. Kohlmann described her as reliable. PX 24, p. 43. If Petitioner misrepresented her job duties, that could affect his opinions. PX 24, p. 43.

Dr. Fletcher testified that early records from Dr. Love show Petitioner had a ganglion cyst in her wrist. Such cysts can develop spontaneously. They are potentially related to repetitive trauma but there is no good hard epidemiological evidence of that. PX 24, pp. 43-44. There is no relationship between Petitioner's ganglion cyst and her carpal tunnel syndrome. PX 24, p. 44. A ganglion cyst in the volar aspect could potentially cause compression but Petitioner's cyst was more in the dorsal area. PX 24, p. 44. Ganglion cysts can cause pain and swelling. The symptoms wax and wane. PX 24, p. 45.

Dr. Fletcher reiterated that Petitioner has no systemic risk factors for carpal tunnel, such as diabetes, smoking, thyroid issues or rheumatoid arthritis. She is female but gender is not as strong a risk factor as smoking, diabetes or thyroid problems. PX 24, pp. 45-46. Petitioner, like all people, uses her hands outside of work but her job involved unusual tasks, such as looking at and manipulating thousands of seeds. In terms of outside activities, Petitioner cared for her husband and a brother-in-law who had a stroke. He is unaware of Petitioner pursuing any hobbies such as knitting. Petitioner's husband had three surgeries while he was under Dr. Fletcher's care so Petitioner had to take him to the doctor. Petitioner's husband was never in a wheelchair. He was ambulatory but he could not drive. PX 24, pp. 47-48. Petitioner is actually older than most people who develop carpal tunnel. PX 24, p. 48. Petitioner had neck and back issues dating back to 2000. Petitioner's longstanding proximal nerve compression made her more susceptible to developing problems secondary to her work activities. Petitioner's non-work activities would not necessarily have had the same kind of impact, unless she was performing forceful or repetitive non-work activities. PX 24, p. 49. If Petitioner developed carpal tunnel as a homemaker, he would have asked her about her specific home activities. PX 24, p. 50. He asked Petitioner about these activities. PX 24, p. 50. He does not believe that those activities had any bearing on the development of her carpal tunnel. PX 24, p. 51.

Dr. Fletcher testified that the AMA Guides, Sixth Edition, are part of Illinois law since 2011. He considers the Guides authoritative. He used to give seminars on impairment ratings. He did this for the Illinois State Medical Society. After a couple of years, most people had learned what they needed to know. There wasn't much demand after that point. PX 24, p. 52. He performs about 40 to 50 impairment ratings per years. PX 24, p. 52.

Dr. Fletcher testified that some of the orthopedic surgeons who treated Petitioner felt there was a connection between her cervical spine issues and her left arm issues. PX 24, pp. 54-55.

Dr. Kohlmann testified by way of evidence deposition on January 27, 2017. Dr. Kohlmann testified he is a board certified orthopedic surgeon. He has been in practice since 1992. RX 8, p. 5. He is a general orthopedist. RX 8, p. 5. He has treated patients who have carpal tunnel syndrome. He has performed many carpal tunnel surgeries. An open carpal tunnel release involves making an incision at the base of the palm and releasing the transverse carpal and volar retinacular ligaments. He prefers to perform open releases but could perform an arthroscopic release. RX 8, p. 7. Some people have large carpal tunnels and others have small ones. The size is an "anatomical variation." RX 8, p. 8. Most commonly, people need releases because they develop flexor tenosynovitis. Carpal tunnel syndrome can also result from crush injuries or wrist fractures. Females develop carpal tunnel syndrome more frequently than men. RX 8, pp. 9-10. Some work activities would predictably result in carpal tunnel syndrome. Such activities would include using a screwdriver all day or repeatedly pinching hard with your thumb and index finger or thumb and middle finger. RX 8, p. 10. Use of vibratory tools could also cause the syndrome. Typing all day is repetitious but is not considered a cause. RX 8, p. 11.

Dr. Kohlmann testified he examined Petitioner on March 6, 2014, at Respondent's request. He needed to refer to his report (Kohlmann Dep Exh 2) while testifying. RX 8, pp. 11-12. Petitioner told him she worked for Respondent for 20 years and began having problems with numbness in her left thumb, index finger and middle finger sometime in 2010. Petitioner also told him that, after she underwent a left carpal tunnel release by Dr. Love, she woke up with terrible hand pain and numbness. Her symptoms did not resolve with physical therapy. RX 8, p. 11. She was off work so long she lost her job. Dr. Li ordered additional testing and then performed a repeat release but only some of her symptoms improved. Petitioner related she then underwent a cervical spine work-up and injections that "did not agree with her." RX 8, p. 14. After Dr. Atwater performed a two-level cervical spine fusion, her neck and radiating shoulder/trapezius pain improved but she continued to have pain in her arm, wrist and hand. She then saw Dr. Oakey, who performed an anterior subcutaneous ulnar nerve transposition and a revision left carpal tunnel release. RX 8, p. 14. Dr. Kohlmann testified that Petitioner remained symptomatic as of his examination. Petitioner told him she was still experiencing occasional left hand numbness, decreased bilateral hand grip strength, dizziness when looking up, loss of muscle mass in her forearm and weakness in both hands, to the point where she is unable to peel potatoes without experiencing bad pain and numbness in her right hand. She had been told she needed a right carpal tunnel release but was unsure whether she wanted to undergo that surgery. She also complained of longstanding low back pain and migraine headaches. RX 8, p. 15. She attributed her upper extremity problems to overuse at work. RX 8, p. 16.

Dr. Kohlmann testified that Petitioner described most but probably not all of the duties she performed at Respondent over the 20 years she worked there. RX 8, p. 17.

Dr. Kohlmann testified that Petitioner is right-handed. He testified that carpal tunnel syndrome usually develops in a person's dominant hand but can develop in the non-dominant hand. RX 8, p. 18. To him, it seems as if the dominant hand should be affected first. RX 8, pp. 18-19. Dr. Kohlmann testified that a ganglion cyst is fluid-filled. It can be found in the tendon sheath or the joint. He is not sure exactly why such cysts develop. RX 8, p. 19.

Dr. Kohlmann testified that cervical spine problems can cause symptoms that are similar to those caused by carpal tunnel syndrome. A person who undergoes carpal tunnel surgery could require revision surgery. RX 8, p. 21.

Dr. Kohlmann testified he went to Respondent's facility and saw the area where Petitioner worked. He saw various pieces of equipment and work stations. He was "walked through" the tasks Petitioner performed. He was allowed to perform the same tasks. RX 8, p. 22. He took instructions first. He was only in the lab. He did not go into the warehouse. RX 8, p. 23. In his opinion, the tasks Petitioner performed were "all very low force." He had to use his hands but the tasks did not require strenuous gripping, the use of vibratory tools or any unusual wrist positions. RX 8, p. 24.

Dr. Kohlmann then looked at the photographs that were made an exhibit at the time of Dr. Fletcher's deposition. He performed the function shown in the photograph at the 3:00 position. He did not have any sense that this task put stress on his hands, wrists or arms or required awkward positioning. RX 8, pp. 25-26. At no point during his site visit did he perform any tasks that were conducive to causing or aggravating carpal tunnel syndrome. He would reach the same conclusion even if the tasks were being performed during the busy season. RX 8, p. 27. Respondent did not hire him to perform a complete workplace evaluation. He does not perform such evaluations. RX 8, p. 28.

Dr. Kohlmann opined, to a reasonable degree of orthopedic certainty, that Petitioner's job duties, as he understood them, did not cause or aggravate her carpal tunnel syndrome. RX 8, p. 28.

Under cross-examination, Dr. Kohlmann acknowledged he saw Petitioner only once. Petitioner was never his patient. RX 8, pp. 28-29. He has no reason to dispute that Petitioner has carpal tunnel syndrome. RX 8, p. 29. He is familiar with the term "double crush." The theory goes that a person who has a cervical spine condition may be more likely to also development symptomatic peripheral nerve entrapment. RX 8, p. 30. He knows Dr. Love. She is no longer practicing medicine. RX 8, pp. 30-31. He never performed many independent medical examinations. He performs maybe one per month. RX 8, p. 31. He primarily performs examinations for insurance companies but some claimants' attorneys send examinees to him also. RX 8, p. 31. He has performed other examinations for Respondent's counsel's firm. RX 8, p. 32. He does not have any social relationship with Respondent's counsel or Mark Cosimini, another member of his firm. RX 8, p. 32. He is not friends with any of the owners or stockholders of Respondent. Before his site visit, he never went to Respondent's facility. RX 8, p. 33. He cannot recall when he made the site visit but he thinks it was after he examined Petitioner. RX 8, p. 33. He believes that, when he saw Petitioner, he did not know he would be visiting Respondent's facility. He reviewed records when he saw Petitioner but he does not have his file with him. RX 8, p. 34. He reviewed various X-ray images, an EMG/NCV study performed by Dr. Thatcher, Dr. Love's operative report and cervical spine MRI scans. He does not recall exactly how much time he spent with Petitioner. RX 8, p. 35. He spent time obtaining a history from Petitioner. He tries to write down exactly what the examinee tells him. RX 8, p. 36. He does not know where his notes are. It is possible he scanned the notes into the electronic health record. RX 8, p. 37. He does not know how much he charged for his report. His fee typically ranges from $800 to $2,300. He believes the hospital charges $1,000 per hour for his deposition time. RX 8, p. 38. His orthopedic practice is "very general" so it is "hard to say" how many carpal tunnel surgeries he performed in 2016. "It could be 5%" of the surgeries he performed. RX 8, p. 39. Respondent's counsel was present when he visited Respondent's facility. He cannot recall whether he prepared his examination report before he made this visit. RX 8, p. 39. He cannot recall whether he knew he would be making this visit when he examined Petitioner. RX 8, pp. 40-41. He does not know how much time he spent in total on Petitioner's claim. RX 8, p. 41. When he went to Respondent's facility, he met Respondent's counsel there. RX 8, p. 43. He spent half an hour to an hour at the facility. Petitioner was not present. A female employee was there and she was familiar with Petitioner's job. RX 8, p. 44.

He is not trained in occupational medicine. RX 8, p. 45. He has visited various workplaces, to help make adjustments, depending on what the employee's problem was, but he does not do this for a living unless asked. RX 8, p. 46. In the past, he saw patients at Dr. Fletcher's facility. RX 8, p. 46. He left the issue of work restrictions up to Dr. Fletcher. RX 8, p. 47. Dr. Fletcher is a well-qualified occupational medicine physician. He "knows what he's doing." RX 8, p. 47. He did not take any photographs at Respondent's facility. RX 8, pp. 47-48. The available photographs are still shots. The woman who guided them at Respondent's facility did not take them through every task that is listed in the job description attached to his report. RX 8, p. 48. She showed them some seed-related tasks and activities involving five-gallon jugs that had screw tops. There were "maybe certain parts that [he] didn't do." RX 8, p. 49. He never performed any task for an hour. He did not stay there eight hours or work there fifty weeks out of the year. RX 8, p. 49. He found no causal relationship between Petitioner's job and her carpal tunnel syndrome. He has been wrong at times during his career. RX 8, p. 50. Different physicians can render different opinions in matter such as this. RX 8, p. 50.

On redirect, Dr. Kohlmann testified it is possible he went to Respondent's facility before he examined Petitioner. He has no independent recollection of the timeline. RX 8, p. 51.

Petitioner testified she last worked for Respondent on August 18, 2010. She requested but never received workers' compensation benefits. She did receive short-term disability. Her employment by Respondent ended in February 2011. She had not planned to retire at that point. T. 93. She received a letter informing her that she had been terminated. If a Respondent employee is unable to resume working after receiving 26 weeks of short-term disability, he is officially terminated. T. 87. Since her termination, Respondent has not offered her work. T. 87.

Petitioner testified she has difficulty with intricate activities such as buttoning a button, zipping a zipper and tying shoes. When she takes a blouse off to wash it, she leaves it buttoned so she will not have to button it again. She now buys more leggings and pants that do not have have to be zipped up. She also buys slip-on shoes. She has learned to do things differently. She cannot cut meat or a steak because she lacks strength to put sufficient pressure on her hands to accomplish this. She continues to drive but travels less because gripping the steering wheel causes pain in her hands and wrists. T. 89. If she performs simple tasks such as this she can be up all night due to pain in her hands. She takes Gabapentin for her pain. T. 90. She can talk to someone via cell phone but usually uses the speaker function. She cannot hold a cell phone to her ear for more than two to three minutes because her hand goes numb. T. 90. She still does some gardening but not to the extent she did in the past. Her husband does a lot of the gardening now. T. 90-91. She can use pruners to snip plants with thin stems, such as roses, but lacks sufficient strength to grip the pruners hard enough to cut a plant that has diameter to it. She can pick vegetables but cannot carry a bucket. She cannot carry anything that is dangling from her hands. When she goes grocery shopping, she usually takes her husband or nephew along because she cannot carry bags that hang down from her hands. She can carry a gallon of milk only if she carries it up in her arms. T. 91. If she uses a computer for 10 or 15 minutes, her hands go numb from the typing. T. 92.

Petitioner testified she is currently receiving Social Security disability benefits. Her short-term disability carrier filed a claim on her behalf in October 2011 and Social Security awarded her benefits retroactively, finding that her disability began on August 17, 2010. T. 92.

Petitioner testified she was not present at Respondent when Dr. Kohlmann performed a job analysis. The doctor never observed her performing tasks at Respondent. To her knowledge, she never gave Dr. Kohlmann a complete description of her job duties.

Petitioner testified she continues to experience pain in her palms and wrists, along with numbness and tingling. Her symptoms vary in intensity depending on her activity level. When she performs yard work or cleans her house, she has to stop after 15 or 20 minutes to take a break and rest her hands. If she tries to perform any activity requiring gripping, such as mopping or sweeping, she has to stop because it causes a lot of pain in her hands. T. 94.

Petitioner testified she first met with Bob Hammond, a vocational counselor, in March 2017. Hammond discussed the job search process with her. She understood that she was supposed to contact prospective employers by making calls, visiting businesses and going online. She also understood she was supposed to present a positive outlook. She was supposed to tell employers what she could do with her hands rather than stress what she could not do. She was instructed to give Respondent as a reference and identify Kevin Kaiser as a contact person. T. 96.

Petitioner testified she believes she started looking for work in May 2017. She met with Bob Hammond on five or six occasions, over time, and also talked with him by phone. At one point, Hammond sent his assistant Kelly over to meet with her. She kept detailed records of the job contacts she made. She identified PX 20 as records she created to memorialize her job search between April 3, 2017 and June 24, 2019. T. 97. The records are complete and accurate. T. 97-98. While she was looking for work, she "applied for anything and everything," from clerical jobs to retail jobs to warehouse jobs. She participated in interviews but did not receive any job offers. She was either not qualified to perform the job or the job involved activities beyond her restrictions. T. 98-99.

Under cross-examination, Petitioner testified it would be difficult for someone to understand how complicated her job was if he did not perform it. During bin sampling, she might have to carry groups of small white bags weighing 30 pounds three or four times per day. T. 103. She frequently worked overtime. It was not unusual for her shifts to last 10 or 12 hours. T. 103. During bin sampling, she had to meet a quota each day. The seed handling and rolling involved fine dexterity but not forceful gripping. The seeds are small. T. 104. She had to forcefully grip to twist lids off jugs. T. 104-105. When she put the lids back on, she did not tighten them excessively because she would have to remove them again. T. 106. During a busy period of a month or a month and a half, she had one to two helpers. Otherwise, she worked alone in the lab. T. 106-107. During the period that she had helpers, the helpers performed the same tasks she performed. T. 107. She continued performing the pallet-related activities all

the way up until the time she stopped working for Respondent. T. 107. She has been married for 30 years. She owns a home. She cleans the home and performs all of the other household tasks, including laundry, dishes and vacuuming. She has a vegetable garden in the summer. She sometimes does canning. Her husband, an IDOT employee, was involved in a serious motor vehicle accident in approximately 2013. He had to undergo back surgery and have both knees replaced. T. 111-112. She helped care for him while he was recuperating. During that time, she hired people to perform yardwork because she could not do it all. T. 112. Before she underwent the first carpal tunnel release, she saw Dr. Hemmer at Tuscola Wellness. T. 113. Dr. Hemmer treated her neck and back. T. 114. RX 5. She kept track of all of the job contacts she made. She typed up those contacts each week. T. 115. She talked with Kevin on June 14, after she received the cock-up splint. She does not recall Bobbi being present during this conversation. She told Kevin she was having wrist problems due to her job duties. She worked for Respondent for 20 years and was familiar with Respondent's policies concerning accident reporting. Respondent required an injured employee to report the injury to a supervisor. Paperwork is usually completed but she did not complete any when she reported her injury to Kevin. T. 116. She initially chose not to turn in a claim to workers' compensation. She made this decision based on a prior experience years earlier. She later decided to pursue a workers' compensation claim. T. 117. When she met with Kevin a second time, in July, she again told him her condition was work-related. She did not contact anyone at Respondent at that point to complete paperwork for a workers' compensation claim. She has reviewed Hammond's reports. They are accurate. T. 119. Lou Rhodes, the person with whom she interacted in the past, was Respondent's plant manager. T. 122. Rhodes was not her supervisor as of the day she received the splint from Kilpatrick. T. 123.

On redirect, Petitioner testified the seeds she tested arrived at the lab in one-gallon jugs as well as bags. At the present time, her husband does most of the cooking because she has trouble lifting pots and pans and pouring things out of containers. Her husband also opens most of the jars and helps her seal lids during the canning process. T. 124. She does the dusting and lighter work while her husband helps with vacuuming and mopping. Before June 14, 2010, Respondent had an incentive-based safety program. If an employee did not have any recordable accidents, Respondent would take that employee out for a meal or give him a safety bonus. T. 125. When she made the decision to apply for short-term disability rather than workers' compensation, she feared that her job would be negatively affected if she pursued a workers' compensation claim. T. 129.

Under re-cross, Petitioner testified that, as of June 2010, she was sure her complaints were related to her job duties. Kilpatrick confirmed that belief. She told Kaiser she had a work-related injury but she chose to apply for short-term disability. T. 130-131.

Bob Hammond, a 67-year-old vocational consultant, testified on behalf of Petitioner. He obtained a master's degree in counseling from the University of Illinois. There are two major certifications available in the United States right now: CRC and ABVE. He was a member of the CRC for five years but let that lapse when he became a member of the American Board of

Vocational Experts, or ABVE. You have to undergo testing, obtain references and have a certain number of experiences to be certified as ABVE. T. 133-134.

Hammond testified his business is called Hammond Vocational Consultants. Most of the work he does involves Illinois workers' compensation cases. He has testified on prior occasions. He has been doing this kind of work for 31 years. T. 135. He has given over 300 evidence depositions. T. 136. He is familiar with the Act. T. 136. About 60% of the work he does is for respondents. He has done work for Respondent's law firm in the past. He is very familiar with Respondent's counsel, Terry Schroeder. Schroeder has hired him in the past. T. 137. In connection with his evaluation of Petitioner, he reviewed treatment records along with the depositions of Drs. Fletcher and Kohlmann. He issued four reports. T. 138-139. He met with Petitioner before preparing his initial report of March 27, 2017. After he submitted this report to Petitioner's counsel, Petitioner's counsel asked whether it would benefit Petitioner to look for work. He said yes. Dr. Fletcher opined that Petitioner is unable to return to work in the general labor market due to significant issues with dexterity. T. 142. Dr. Kohlmann, in contrast, did not discuss Petitioner's restrictions or capabilities in his reports or deposition. Dr. Kohlmann did not express the belief that Petitioner could resume her former occupation. T. 143-144.

Hammond testified he expressed some concerns about Dr. Kohlmann's opinions in his initial report. Dr. Kohlmann reached conclusions about Petitioner's job duties without addressing the issue of whether he and Petitioner are the same height and weight. T. 146. If he had only been presented with Dr. Kohlmann's opinions, he would have asked his referral source whether the doctor had reached conclusions about Petitioner's restrictions or whether the doctor was saying Petitioner was not subject to any restrictions. T. 147. Dr. Kohlmann is a general orthopedist while Dr. Fletcher is an occupational medicine specialist. He has interacted with Dr. Fletcher on numerous occasions. Dr. Fletcher has been at many jobsites and has an understanding of occupational requirements. T. 148.

Hammond opined that Petitioner is "severely limited in the ability to use her hands to do fine manipulations." Petitioner can make some gross motor movements but those are also limited because of the articulation of the fingers and wrists. T. 149. Petitioner is considered to be an individual of advanced or retirement age. From a vocational standpoint, she would have few, if any, transferable skills. T. 150. In his first report, he indicated that, if you follow Dr. Fletcher's restrictions and limitations, Petitioner is not employable in the labor market. T. 150.

Hammond testified he communicated with Petitioner a second time and instructed her how to go about performing a job search. He advised Petitioner what to say to prospective employers, in accordance with the Americans with Disabilities Act. He had Petitioner set up an E-mail account that was specific to her job search so he could access it and review her progress. T. 151. At their first meeting, Petitioner told him she was in so much pain she felt she would not be able to work. After further discussion, Petitioner came around to the idea of conducting a job search. T. 152.

Hammond testified he met with Petitioner around seven times. His job developers met with her three times. He also had eleven phone contacts with Petitioner. Between March 13, 2017 and June 2019, Petitioner made just shy of 1800 job contacts. In his long experience, this is only the second time that a person has made over 1500 contacts. T. 153. It is his opinion that Petitioner made a diligent job search. He reached this opinion after accessing Petitioner's E-mail account, talking with employers to make sure they received Petitioner's resume and reviewing the records Petitioner created. Respondent never formulated a vocational rehabilitation plan. T. 155. Nor did Respondent offer her restricted work. T. 155.

Hammond testified he charges $120 per hour. To his knowledge, he is the least expensive vocational counselor in his area. T. 156.

Hammond testified that generally he looks at a year's worth of job contacts, or somewhere between 700 and 900 contacts, before determining that there is no reasonably stable labor market for a particular individual. Petitioner made substantially more than 700 or 900 contacts. T. 157.

Hammond testified he viewed Petitioner as an "entry level person." He felt that telephonic jobs would be best for her because they would require less wrist and hand usage. He anticipated that Petitioner would be able to earn between $8.50 and $9.50 per hour.

Hammond opined that there is no reasonably stable labor market for Petitioner's services. He bases this opinion on the "abnormally" high number of contacts Petitioner made and the fact she applied for jobs even when there was only a remote possibility of being hired. "Nobody would hire her, nobody considered her and nobody brought her back for a second interview." T. 159. He believes Petitioner is totally disabled based on her diligent job search and because she cannot perform any services except those for which no reasonably stable labor market exists. T. 160.

Hammond testified he generated several bills along the way. T. 160-161. The last was in the amount of $4,031.27. T. 161.

Under cross-examination, Hammond testified that insurance carriers take varying views as to what constitutes a diligent job search. He looks to see if the person is spending about 32 hours per week looking for work, applying for a minimum of 15 jobs per week on the Internet and making 3 to 7 in-person contacts and "cold calls" per week. The term "diligent" is subjective. T. 163. Given Petitioner's upper extremity limitations, he would not send her to a construction company to hang siding or a warehouse to load cargo. T. 163-164. He counsels people how to go about looking for work within their restrictions but "sometimes we fall back into the familiar." In Petitioner's case, what was familiar was warehouse work and seed testing. That's what they went after because that is what she knew. Part of that is simply advancing the goal of getting an application in to an employer. T. 164-165. Some of the jobs Petitioner applied for were not physically suitable for her. T. 165. He does not know how many of

Petitioner's job contacts fall into this category. He has reviewed Petitioner's contacts. He has no idea how many follow-up contacts Petitioner made. T. 167.

Hammond testified he has known Dr. Fletcher for over 25 years. Dr. Fletcher is a very frequent participant in workers' compensation litigation. T. 169. He has met Dr. Kohlman once and has read a number of his reports. He is much less familiar with Dr. Kohlmann than Dr. Fletcher. T. 170. Petitioner is relatively tall but he has no idea how tall Dr. Kohlmann is. T. 171. It could be that Petitioner and Dr. Kohlmann are close to the same height. T. 171. He was not present when Dr. Kohlmann went to Respondent's plant and performed activities that he detailed in his report. He (Hammond) has never been in Respondent's plant. T. 171. He is not a physician. He has not performed the job that Petitioner performed. T. 172-173. An orthopedic surgeon who performs carpal tunnel surgery would have knowledge of the force that might be required to cause or aggravate that condition. T. 173. A board certified orthopedic surgeon could gauge whether an activity he performs could cause or aggravate carpal tunnel syndrome. T. 175.

Hammond testified that, in Petitioner's case, he performed about 130 follow-ups with prospective employers. T. 176. In his report of March 21, 2019, he noted that Petitioner had stopped looking for work due to increased pain levels. Based on the information he obtained from Petitioner's E-mail account, Petitioner stopped looking for work for about a year but restarted after he met with her. He would not consider taking a year off to be a diligent job search. T. 177.

On redirect, Hammond testified he looks at the combination of effort and time spent looking for work. He believes Petitioner has no physical capabilities with her hands. Under these circumstances, "you drop off the edge of all occupations unless you have education and a degree that you can follow that up with." T. 178-179. At the time of his initial report, in March 2017, he thought Petitioner was permanently and totally disabled. To make sure of this, he had Petitioner perform a job search. He would not go so far as to say it did not matter that Petitioner, at one point, stopped looking for work. Instead, what he would say is that, during the times Petitioner did look, she performed a diligent job search. Petitioner stopped looking due to pain and difficulty concentrating. T. 180. Between April 2017 and June 2018, Petitioner consistently looked for work each week. After she restarted, she again consistently looked for work. T. 180-181. Throughout his career, he has been aware of only one other person who applied for as many jobs as Petitioner did. T. 181.

Thomas Condron testified on behalf of Petitioner. Condron testified he worked as a tech at Respondent between 2006 and 2016. He worked in the tower, processing seeds and running seeds through machinery. He worked with Petitioner and observed Petitioner doing her job. T. 183-184. He brought samples in to the area where Petitioner worked. T. 185. He is aware that Petitioner began having problems with her hands around 2010. He was present at one conversation during which Petitioner discussed these problems with Kevin Kaiser, Respondent's plant manager. T. 187. He and Mike Thomas were in Kevin's office when Petitioner came in "with her hand in some gadget." At that point, Petitioner began conversing

with Kevin. Condron testified this conversation took place sometime around July 22, 2010. He does not know the exact date. T. 186. Petitioner said she had to have a carpal tunnel operation and she would be off work for a while. Petitioner did "not exactly" say the condition was work-related but he (Condron) "kind of figured she got it somewhere working in the lab." T. 188. Kaiser did not have much to say in response. Petitioner told Kaiser she was going to put it through her insurance rather than the company. Condron testified that, when he heard this, he called Petitioner a bad name. T. 189.

Condron testified that, at that time, Respondent's employees were "very safety conscious." In his department, they talked about safety all the time because they worked around moving machinery. T. 190-191. Respondent would provide a lunch once a quarter if no accidents occurred. If an employee filed a workers' compensation claim, "we would lose our incentive." T. 191. When his department reached five years with no accidents, they received T-shirts. After seven years, they again received T-shirts. The T-shirts commemorated years of safety. T. 192-193.

Condron testified that, when Petitioner said she was going to use her health insurance rather than workers' compensation, he called her an "asshole" right there and walked out of the room. In his opinion, "it should have been a workman's comp claim" but she was willing to forego that. T. 193.

Under cross-examination, Condron acknowledged he is not a doctor. He called Petitioner a bad name because, since she had carpal tunnel, he assumed it must be work-related. T. 194. He was present on only one occasion when Petitioner discussed her condition with Kevin Kaiser. T. 194.

Kevin Kaiser testified on behalf of Respondent. Kaiser testified he is site manager at Respondent in Tuscola. He held the same job in June 2010. He has worked for Respondent for just over 28 years. T. 197. If an employee reports a work injury at Respondent, he brings in his HSE manager, Bobbi Pierce, and begins the investigation process. He also takes it to the corporate level and brings in other regional HSE employees. An accident report is typically completed. T. 197-198.

Kaiser testified he does not recall the conversation that Petitioner testified to. He recalls seeing Petitioner wearing a brace on June 14, 2010. He and Bobbi Pierce talked with Petitioner about that. They are "drilled" to ask questions if an employee shows up at work wearing a brace or other device. T. 199. There are two reasons for that: Respondent does not want to cause the condition to worsen and needs to investigate whether there was an underlying injury. T. 200. He and Bobbi confronted Petitioner about the brace. Petitioner explained that she had been to the doctor. Petitioner showed them a cyst or knot on her hand. They asked Petitioner if she was subject to any restrictions and she said no. They told Petitioner to let them know if that changed. They also discussed the issue of whether the condition was work-related. Petitioner said it was not. "It was what [Petitioner] thought was a cyst." T. 203.

Kaiser testified that, during a subsequent conversation, Petitioner told him she was "going to have an additional surgery" and "additional time off." T. 204. He helped her initiate a claim for short-term disability. He completed the application form and sent it on to corporate. After that, he was "hands off" and "kind of in the dark" because the information obtained from doctors is protected by HIPAA. T. 205.

Kaiser identified RX 2 as a notice from Petitioner's law firm and an attached Application dated February 4, 2011. Kaiser testified that, before he received this document, he had no knowledge of Petitioner pursuing a workers' compensation claim. After he received RX 2, he passed it on to corporate. T. 206.

Under cross-examination, Kaiser acknowledged he does not hear very well. T. 207. He does not recall the exact date of the conversation he had with Petitioner. Respondent asked him about a conversation occurring June 14, 2010. T. 207. He does not know the meaning of the term "repetitive." He has "no clue" when he got up on June 14, 2010 or what he did that day. T. 208. He does not recall anything that occurred on June 14, 2010. T. 209. He likes to think his hearing was better on June 14, 2010. He does not wear hearing aids. He has had his hearing checked and has been told he has "slight hearing loss." T. 209. He did not file an occupational disease claim against Respondent. In June 2010, any accident investigation would have been conducted at the corporate level. T. 210. Bobbi Pierce was in his office when Petitioner came in. Pierce's office is 10 to 15 steps away from his. As of June 4, 2010 [sic], Pierce was Health Safety Environmental [HSE] manager. T. 211. At that time, about 30 individuals worked at Respondent. T. 211. Pierce had no other assigned duties outside managing safety. T. 212. When Petitioner entered his office, he went and got Pierce to show her the device Petitioner was wearing. T. 212. As soon as he saw Petitioner, he said, "let me go get Bobbi." As to whether he conversed with Petitioner outside of Pierce's presence, he "might have [said] hi." He "can't answer that question." T. 213. He immediately went to get Pierce. T. 214. He does not recall having any conversation of substance with Petitioner outside Pierce's presence. T. 215. He typically met with Pierce six times a day. Pierce does not report directly to him. They do not have any social relationship outside of work. T. 216. He has never had a specific protocol relating to repetitive trauma injuries. He thinks of an accident as a specific event such as a fall. T. 218. He would like to think he had a pretty good idea of what a repetitive trauma injury was as of June 2010. T. 218-219.

In an offer of proof, made after Respondent's counsel voiced relevancy and "beyond the scope" objections, Kaiser testified he has undergone training relating to ergonomics in the sense of evaluating work stations to make sure everything is at the proper level. T. 219-220. He did not undergo specialized training concerning notice of a specific trauma versus notice of a repetitive trauma injury. He did not talk to Petitioner before she went to the doctor. T. 223. If a doctor told Petitioner on June 14, 2010 that her carpal tunnel was work-related, he cannot explain why Petitioner did not tell him this. T. 223. The meeting he and Pierce had with Petitioner was brief. It lasted maybe 15 minutes. T. 224. Petitioner continued working up to the point of her left hand surgery. Before June 14, 2010, he had multiple daily interactions with

Petitioner. He was constantly in and out of the lab. T. 224. He does not recall Petitioner telling him that the surgery she was going to have was simple and she would be back to work in a few weeks. T. 225. He did not tell Petitioner she had two options in the sense she could use her health insurance or go through workers' compensation. T. 225. He only vaguely recalls the events of July 22, 2010. T. 226. He did not keep notes of either meeting with Petitioner. When they saw the brace, they asked Petitioner if she had hurt herself. Petitioner told them she did not know how it had happened. T. 227.

Arbitrator's Credibility Assessment

Petitioner's very lengthy tenure with Respondent weighs in her favor, credibility-wise.

The Arbitrator finds credible Petitioner's detailed description of her job duties. The Arbitrator also finds credible Petitioner's testimony as to the extra hours she put in during the busy season and the pace at which she was required to work. It is clear to the Arbitrator that Petitioner's job was not confined to the tasks outlined in Respondent's written description. Even so, that description reflects that the job involved "gripping" and making "precise finger movements" between one and four hours per day. RX 4. The description contains no mention of the rigorous pallet-related activities Petitioner periodically performed outside of the lab.

Respondent's plant manager, Kevin Kaiser, did not take issue with any aspect of Petitioner's testimony concerning her duties or the extra work she performed during the busy season.

Petitioner's notice-related testimony was also detailed and believable. Kevin Kaiser attempted to refute some of that testimony but the Arbitrator found him unconvincing. He initially stated that Respondent's safety director, Bobbi Pierce, was in his office when Petitioner came in, wearing a brace on her hand. He subsequently testified he was alone when Petitioner arrived and that he briefly spoke with her before going to get Pierce. The transcript reflects that Bobbi Pierce was present at the hearing. T. 200, 227. The Arbitrator finds it odd that Respondent did not call her as a witness, given the inconsistencies in Kaiser's testimony.

In his report of March 6, 2014, Respondent's examiner, Dr. Kohlmann, described Petitioner as a "very nice, warm person who was very believable." RX 7, p. 6. Kohlmann Dep Exh 2. In that same report, Dr. Kohlmann indicated he "performed a site visit requested by [Respondent]" and performed several seed-related and quality control tasks. He indicated that Petitioner described other non-seed related tasks, such as painting and handling pallets, to him and that he was already familiar with such tasks since he had performed them elsewhere.

At his 2017 deposition, Dr. Kohlmann was remarkably vague about his involvement in this claim. He could not recall whether he visited Respondent's facility before or after he examined Petitioner. He also had no recollection of the amount of time he spent with Petitioner or on the claim as a whole. He acknowledged he limited his visit to Respondent's lab. He did not perform any of the rigorous tasks Petitioner performed in the warehouse. He was

evasive about his billing. While he is an orthopedic surgeon, he conceded he has a general practice and that only about 5% of the surgeries he performs involve the carpal tunnel. He also acknowledged he does not perform jobsite analyses in the way that Dr. Fletcher does.

Overall, the Arbitrator did not find Dr. Kohlmann persuasive. He did not question Petitioner's diagnoses or treatment yet concluded that she requires no restrictions of any kind. In his report, he described Petitioner as having "very good function" in both hands yet went on to state "she can't make a fist and fully extend all the fingers." RX 7, p. 7.

Arbitrator's Conclusions of Law

Did Petitioner establish repetitive trauma injuries manifesting on June 14, 2010?

The Arbitrator finds that Petitioner developed left carpal tunnel syndrome secondary to repetitive trauma, with this condition manifesting on June 14, 2010. In so finding, the Arbitrator relies in part on Petitioner's credible testimony concerning the manual tasks she performed for Respondent and the time pressure she was under. The Arbitrator recognizes that Petitioner did not perform the same task all day, every day. "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. Industrial Commission, 356 Ill.App.3d 186, 193-194 (2nd Dist. 2005). In City of Springfield v. IWCC, 388 Ill.App.3d 297, 314 (4th Dist. 2009), the Appellate Court upheld a finding that bilateral carpal tunnel was causally related to the claimant's job where the claimant "routinely twisted wire, used pliers, handled small objects and performed frequent and repetitive hand usage throughout his work shifts." Petitioner testified along similar lines,

Did Petitioner provide Respondent with timely notice?

The statutory language relevant to the issue of notice reads: "Notice of the accident shall be given to the employer as soon as practicable but not later than 45 days after the accident." Notice may be given orally or in writing. No defect or inaccuracy of notice shall bar recovery "unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy."

The notice requirement applies to employees like Petitioner who suffer repetitive trauma injuries. Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1989). The date of accident from which notice must be given is the date when the repetitive trauma injury "manifests itself." Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 531 (1987). The statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. The purpose of the notice requirement is to enable the employer to investigate the alleged accident. Seiber v. Industrial Commission, 82 Ill.2d 87 (1980).

In the instant case, Petitioner alleged a manifestation date of June 14, 2010. This is the date she saw William Kilpatrick, a physician's assistant affiliated with the Christie Clinic. Kilpatrick examined her left wrist, discussed her work duties with her and placed her left wrist in a splint. Petitioner testified that, after she saw Kilpatrick, she understood she had left carpal tunnel syndrome and that this condition stemmed from the duties she performed for Respondent. T. 68. Petitioner further testified that she went to work the same day she saw Kilpatrick, showed her splint to Kevin Kaiser, Respondent's plant manager, advised Kaiser that she had been diagnosed with carpal tunnel syndrome and that this condition was work-related and indicated she was not yet subject to restrictions. Petitioner testified to having a second conversation with Kaiser on July 22, 2010, one day after receiving a referral to a surgeon. Petitioner testified she again told Kaiser her condition was work-related and that she would likely require surgery. Based on interaction she had had with a different plant manager in the past, and because she believed the surgery would not require much recovery time, she told Kaiser she intended to submit her bills to her group carrier and seek short-term disability under workers' compensation.

As indicated above, the Arbitrator finds credible Petitioner's testimony as to her interaction with Kaiser on June 14 and July 22, 2010. Both dates fall within the statutory 45-day notice period. Petitioner's testimony included two compelling details. She indicated that, after she told Kaiser she intended to pursue benefits under group rather than under workers' compensation, he asked her if she was sure, to which she replied "yes." In reviewing the transcript, one can almost hear Kaiser's sigh of relief at that moment. Additionally, it was Kaiser, and not Petitioner, who completed the paperwork. This factor differentiates the claim from White v. IWCC, 4-06-0566WC (4th Dist. 2007). White also involved repetitive trauma injuries, albeit injuries involving the shoulders and back. The claimant in that case stopped working on July 17, 2000, around the time he underwent right shoulder surgery. The following May, he completed a sickness/accident form on which a box was checked stating that his back and upper extremity conditions were not work-related. One year into his sickness and accident benefits, he received a letter from his employer indicating his benefits were running out and his job would be discontinued if he did not resume working. He retired when the benefits ran out. It was not until October 29, 2002, about two weeks after a doctor issued a written opinion linking his conditions to his laborer duties, that he filed an Application for Adjustment of Claim. In this pleading, he alleged an accident or manifestation date of July 17, 2000. The arbitrator found the claim compensable and awarded benefits. The Commission reversed on the grounds that the claimant failed to provide the employer with timely notice. The Appellate Court affirmed this result, noting that the claimant could have alleged a manifestation date of October 15, 2002, under the "flexible standard" espoused by the Supreme Court in Durand v. Industrial Commission, 224 Ill.2d 53 (2006), but failed to do so. The Court also noted that, given the manner in which the claimant completed the sickness/accident forms, the employer had no basis for knowing that an accident existed to investigate. In the instant case, in contrast, Petitioner openly characterized her condition as work-related when providing notice (on the same day she learned of the condition) but indicated her willingness to defer benefits under the Act as she knew Respondent would want her to do. Petitioner ceded control to Respondent in

that she left it to Kaiser to complete the paperwork. Respondent introduced no evidence indicating she ever asserted in writing that her condition was not work-related.

The Arbitrator finds that Petitioner provided Respondent with timely notice of her condition.

Did Petitioner establish causal connection?

As a preliminary matter, the Arbitrator notes that Petitioner is not claiming causation as to her cervical spine condition. Dr. Fletcher described this condition as degenerative in nature.

The Arbitrator finds that Petitioner established causation as to her current post-operative left carpal tunnel syndrome condition of ill-being. In so finding, the Arbitrator relies in part on the histories Petitioner provided to her treating physicians. The Arbitrator also relies on the causation opinions expressed by Dr. Fletcher. As noted above, the Arbitrator found those opinions more persuasive than those expressed by Dr. Kohlmann. Dr. Fletcher had a significantly better understanding of Petitioner's duties. Dr. Kohlmann did visit Respondent's facility, on one occasion, but his recollection of this visit was poor and he readily acknowledged he does not perform jobsite analyses in the way Dr. Fletcher does. The Arbitrator also notes the absence of other intrinsic risk factors. Petitioner is not diabetic or overweight, does not smoke, does not have rheumatoid arthritis and has no thyroid-related problems. Dr. Kohlmann never suggested that some non-work factor was the cause of her condition. The therapy records following the initial left carpal tunnel release reflect that Petitioner experienced increased symptoms when performing various household activities. That such activities might have slowed Petitioner's recovery does not bar her claim. Repetitive work activities need not be the sole causative factor, not even the primary causative factor, so long as they were a causative factor in the resulting condition. A claimant is not required to eliminate all other possible contributing factors. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

That Petitioner's underlying cervical spine condition might have predisposed her to developing carpal tunnel syndrome does not bar her from recovering benefits for that syndrome. In Illinois, it has long been held that an employer takes an employee as it finds her. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

The Arbitrator also finds that Petitioner established causation as to her current post-operative right carpal tunnel syndrome via an overuse theory. In so finding, the Arbitrator relies in part on Petitioner's credible testimony that she began experiencing carpal tunnel symptoms in her right hand around the time she came under Dr. Oakey's care, due to overusing that hand. There is really no dispute in this case that Petitioner obtained a very poor result from her initial left carpal tunnel release. Nor is there is any dispute that she required revision surgery. Her left carpal tunnel syndrome treatment was unusually protracted and she continued to experience symptoms even after Dr. Oakey performed a third procedure. It makes sense to the Arbitrator that she would rely on and overuse her dominant right hand due to her left-sided symptoms.

The Arbitrator further finds that Petitioner did not establish causation as to her claimed left cubital tunnel syndrome. Neither Dr. Thatcher nor Dr. Oakey addressed causation via this condition. On direct examination, Dr. Fletcher initially testified he did not clearly see any causal relationship between Petitioner's job and the left cubital tunnel syndrome. He indicated that the tasks Petitioner performed at Respondent were not those commonly associated with the development of this syndrome. After Petitioner's counsel pressed further, asking him whether the cubital tunnel could be linked with Petitioner's poor outcome from her initial carpal tunnel surgeries, he did not fully commit himself. He simply stated this was a "reasonable theory." The Arbitrator finds that Petitioner did not meet her burden of proof on the issue of causation vis-à-vis the claimed left cubital tunnel syndrome.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the medical expenses detailed in PX 21. These expenses relate to treatment Petitioner received for her left carpal tunnel syndrome, her left cubital tunnel syndrome and her right carpal tunnel syndrome. The Arbitrator has previously found that Petitioner established causation as to her bilateral carpal tunnel syndrome but not as to her left cubital tunnel syndrome. The Arbitrator views the carpal tunnel treatment as reasonable and necessary. Respondent's examiner, Dr. Kohlmann, did not question Petitioner's diagnosis or any aspect of her care. When he examined her, she had not yet had the right-sided release but was contemplating it. He did not suggest it was unnecessary.

The Arbitrator awards the expenses in PX 21 that relate to left and right carpal tunnel syndrome treatment, subject to the fee schedule.

Is Petitioner entitled to temporary total disability? Is Petitioner entitled to maintenance? Is Respondent liable for the cost of the vocational services provided by Bob Hammond?

Petitioner claims she was temporarily totally disabled from August 19, 2010 through July 28, 2016, when she reached maximum medical improvement. PX 24 at 33. The stipulated average weekly wage of $659.70 gives rise to a temporary total disability rate of $439.80.

The Arbitrator finds that Petitioner was temporarily totally disabled during two intervals: from August 19, 2010 through July 1, 2013 (the date Dr. Oakey released her to full duty) and from August 11, 2015 (the date of the right carpal tunnel release) through July 28, 2016. Dr. Oakey's note of July 1, 2013 reflects he was fully aware that Petitioner had ongoing bilateral hand symptoms yet he imposed no restrictions. PX 6, p. 19. Dr. Fletcher found Petitioner to be continuously disabled but it appears he was unaware of Dr. Oakey's release.

Petitioner claims she is entitled to maintenance from March 13, 2017, the date of her first meeting with Bob Hammond, through the hearing of July 16, 2019. The Arbitrator finds that Petitioner was entitled to maintenance during two periods: April 3, 2017 (the date of her first job search contacts, PX 20) through June 30, 2018 and April 15, 2019 through June 30,

2019. The Arbitrator relies on Bob Hammond's reports and testimony, along with Petitioner's very extensive job search records (PX 20), in making this finding. Hammond testified that Petitioner initially resisted the idea of looking for work, due to her pain level, and did not start looking until after he communicated with her a second time. T. 152.

In the Arbitrator's view, Respondent failed on all fronts insofar as the issue of vocational rehabilitation is concerned. Respondent did not even prepare a written vocational assessment, as required by Section 9110.10 of the Rules Governing Practice Before the Commission. In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207 (1st Dist. 2009), the Appellate Court emphasized that such assessments are required "even in circumstances where no plan or program of vocational rehabilitation is necessary." Regardless of its defenses, Respondent had an obligation to assess Petitioner's employability and vocational needs. Nevertheless, the Arbitrator declines to award maintenance between July 2018 and March 2019 based on the concession that Hammond made under cross-examination when asked about Petitioner's inactivity during this period. The Arbitrator recognizes that Respondent paid no weekly benefits under the Act at any point and that an unproductive job search can be discouraging but Hammond agreed that taking time off is not compatible with a diligent search for work.

The Arbitrator finds Respondent liable for Hammond's charges of $7,649.73 (PX 18). See W. B. Olson, Inc. v. IWCC, 2012 IL App (1st) 113129WC, 820 ILCS 305/8(a).

What is the nature and extent of the injury?

Petitioner seeks an award of permanent total disability under Section 8(f) of the Act. There are three ways for a claimant to establish entitlement to benefits under this section: "by a preponderance of the medical evidence, by showing a diligent but unsuccessful job search, or by demonstrating that because of their age, training, education, experience and condition, no jobs are available to a person in their circumstances." ABB C-E v. Industrial Commission, 316 Ill.App.3d 745, 750 (5th Dist. 2000). The Arbitrator finds that Petitioner established both that she is medically permanently totally disabled and that she falls into the "odd lot" category by virtue of her lengthy but ultimately unsuccessful job search. As for the medical aspect, Dr. Fletcher testified that Petitioner is totally disabled because of her hand condition. He characterized her dexterity as "very, very poor." PX 24, p. 34. Dr. Kohlmann, Respondent's examiner, did not comment directly on the issue of total disability but, in his report, conceded that Petitioner is unable to make a fist or close her fingers completely. RX 7, p. 7. As for the remaining component, Petitioner, via her own testimony and that of Bob Hammond, established she conducted a diligent but unsuccessful job search. During an initial period, Petitioner applied for approximately 1500 jobs. During a second period, prior to the hearing, she applied to 300 additional jobs. PX 20. She persisted in looking despite not receiving benefits or offers to interview. Hammond testified that, in his 31 years of experience, only one other individual had applied to as many jobs as Petitioner did. He also testified that, during the two periods in question, Petitioner diligently looked for work and there was no reasonably stable labor market for her.

Once Petitioner met her burden on the job search aspect, the burden shifted to Respondent to establish that there is a reasonably stable labor market for Petitioner's services and that Petitioner is employable in that market. Respondent offered no vocational evidence of any kind.

The Arbitrator awards permanent total disability benefits under Section 8(f) of the Act at the applicable minimum rate of $466.13 per week, beginning July 16, 2019 and for the duration of Petitioner's life.

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

DAVID FINK,

Petitioner,

vs.

NOS: 12 WC 003215
12 WC 11480

AC McCARTNEY FARM EQUIPMENT,

Respondent.

ORDER

This matter comes before the Illinois Workers' Compensation Commission for an order to allow Petitioner's attorney to disburse attorney's fees that were held in escrow since the approved Settlement Contract Lump Sum Petition and Order was entered by Commissioner Kathryn A. Doerries on March 11, 2021. At the time Commissioner Doerries approved the Lump Sum Settlement Contract Petition and Order on March 11, 2021, a contemporaneous Order was entered that mandated Petitioner's counsel hold the claimed attorney's fees ($140,000.00) in escrow pending an Order of the Commission for disbursement. Commissioner Doerries allowed Petitioner's counsel leave to provide an itemization of legal work performed. Upon receipt of the documents provided by Petitioner's counsel in support of the Petition for fees in excess of the statutory cap on attorney's fees for settlements pursuant to §16a(B), the matter was heard by Commissioner Kathryn A. Doerries on March 25, 2021, with both parties represented by counsel and with Petitioner present by Webex.

§16a(B) states in pertinent part:

> With respect to any and all proceedings in connection with any initial or original claim under this Act, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or his dependents, whether secured by agreement, order, award or a judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be

> allowed to the attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this Section. However, except as hereinafter provided in this Section, in death cases, total disability cases and partial disability cases, the amount of an attorney's fees shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in this Act unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees. *820 ILCS 305/16a*

In favor of the Petition, Petitioner's attorney submitted multiple documents including an Affidavit signed by Petitioner on March 1, 2021 (Comm'nXA) swearing that he was fully aware that his attorney's law firm, Ridge & Downes, is limited by statute to Attorney's fees of 20% or 364 weeks of compensation, unless a further fee shall be allowed by the Illinois Workers' Compensation Commission. In his Affidavit, Petitioner represented that he was aware of the law firm's Petition for a fee of 35%, or $140,000.00, and that based upon the time, quality of work and advice that they had given him over a period of 11 years, it was his desire that Ridge & Downes be allowed the fee. The work over the 11 years included securing an expert opinion from Vocamotive, Inc., that he was permanently and totally disabled. Petitioner's attorney then brought his case to trial before an Arbitrator on March 1, 2017, which resulted in an award for Petitioner of permanent total disability benefits. On appeal by Respondent, the Commission modified the Decision to an award of 50% loss of use of the man as a whole, or $78,000.00.

Thereafter, Petitioner's counsel sought review of the Commission Decision in the Circuit Court of Winnebago County and on July 16, 2019, was successful in having the Commission Decision reversed. The Petitioner signed an Addendum to Fee Agreement on June 29, 2020, (Comm'nXC) allowing a fee of 25% of the gross amount recovered if an appeal was taken to the Circuit Court and if an appeal was taken to the Appellate Court, then the attorneys' fees shall be 35% of the gross amount received.

Respondent sought review in the Appellate Court, which on October 13, 2020, affirmed the judgment of the Circuit Court setting aside the Decision of the Commission and reinstating the Decision of the Arbitrator finding permanent total disability in favor of Petitioner. After a number of offers had been conveyed and rejected, the Petitioner agreed to settlement of these cases for $400,000.00 plus a Medicare Set-Aside of $76,126.00. (Comm'nXA)

In further support of the Petition, Petitioner's attorney submitted, and Commissioner Doerries reviewed, the Attorney Representation Agreement, (Comm'nXB), the executed addendum to the fee agreement, (Comm'nXC), the case file notes beginning January 20, 2012, to the present, case law, the Circuit Court and Appellate Court briefs filed by the parties, the proceedings throughout the Appellate Court and the results obtained, those being an award of permanent and total disability and a lump sum settlement offer of $400,000.00 plus a Medicare Set-Aside agreement of $76,126.00. (T, 5-6, Comm'nXA)

After recitation of the documents reviewed, the Commissioner addressed the Petitioner and advised she had reviewed his signed Affidavit, and reviewed the substantive points enumerated therein, in pertinent part, that Ridge & Downes is petitioning the Commission for a fee of 35% rather than the statutory 20%, pursuant to the addendum to the Attorney Representation Agreement signed June 29, 2020. When asked if he remained in agreement that for the services rendered, his attorney should be allowed a fee of 35% or $140,000.00, Petitioner responded, "Yes, I do." (T, 6)

Based on the foregoing, the Commission is in agreement with the fee arrangement and disbursement of the attorney's fees held in escrow is allowed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's law firm, Ridge & Downes, is hereby allowed to disburse attorney's fees of $140,000.00 that have been held in escrow since the Settlement Contract Lump Sum Petition and Order pertaining to cases 12 WC 3215 and 12 WC 11480 was approved on March 11, 2021.

DATED: APR 7 - 2021

Kathryn A. Doerries

KAD/bsd
04/06/21
42

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

Steve E. Cluck,

Petitioner,

21IWCC0164

vs. NO: 18 WC 022337

Walgreens Family of Companies,

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 issue of medical 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. 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 2, 2020 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.

21IWCC0164

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CLUCK, STEVE E
Employee/Petitioner

Case# **18WC022337**

21IWCC0164

WALGREENS FAMILY COMPANIES
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4689 HASSAKIS & HASSAKIS PC
JOSHUA A HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

21IWCC0164

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Steve E. Cluck
Employee/Petitioner

v.

Walgreens Family of Companies
Employer/Respondent

Case # 18 WC 022337

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 **Herrin**, on **February 14, 2020**. 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? – **Total Knee Replacement by Dr. McIntosh**
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, September 21, 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*** 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 **$27,634.34**; the average weekly wage was **$727.22 (38 weeks)**.

On the date of accident, Petitioner was **57** years of age, 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 **$10,527.31** in TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$10,527.31**.

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

ORDER

Respondent shall have credit of $11,220.40 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 authorize and pay for the treatment recommended by Dr. McIntosh.

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

3/22/20
Date

APR 2 - 2020

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

21IWCC0164

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

STEVE E. CLUCK,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 22337
	)	
WALGREENS FAMILY OF COMPANIES,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 14, 2020. The parties agree that on September 21, 2016, Petitioner was a receiver/checker when he sustained injuries to his left knee which arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection and prospective medical care. All other issues are stipulated by the parties.

MEDICAL HISTORY

Petitioner provided a history of operating a stand-up fork truck when he attempted to exit the equipment and twisted his left knee and felt a "pop." He had an immediate onset of pain. On 9/28/16, Petitioner was examined by Dr. Houle at the Orthopedic Center of Southern Illinois for increased pain with range of motion and weightbearing and swelling. Dr. Houle noted pain at the joint line medially and overlying the left MCL, with a significantly uncomfortable McMurray's test. The initial assessment was a medial meniscus tear. Dr. Houle ordered an MRI, physical therapy, and took Petitioner off work.

The MRI demonstrated a complex tear of the posterior horn of the medical meniscus with a small meniscal flap, as well as a small horizontal tear of the body of the medial meniscus. It also showed a mild sprain to Petitioner's MCL, diffuse chondromalacia of the medial compartment, and moderate chondromalacia of the patella. Petitioner participated in physical therapy from 10/21/16 through 11/10/16 that did not improve his symptoms. On 1/17/17, Dr. Houle performed a resection of Petitioner's medial meniscus tear, chondroplasty of the medial femoral condyle, and chondroplasty of the patellofemoral compartment. Dr. Houle noted an "obvious tear of the posterior horn of the medial meniscus and some areas of grade 2 to 3 chondromalacia of the medial femoral condyle."

On 1/25/17, Petitioner reported 2 out of 10 pain and reported the sharp pain in the medial aspect of his knee was gone. He participated in physical therapy from 2/2/17 through 2/13/17. On 2/24/17, Petitioner reported

0 out of 10 pain, with difficulty going from squatting to standing, and advised Dr. Houle he would like to go back to work. Dr. Houle released Petitioner to return to work the following Monday and prescribed Mobic. Petitioner returned to Dr. Houle on 3/27/17 complaining of 3 out of 10 pain, difficulty descending stairs, and feeling a locking sensation stepping off the fork truck at work. Dr. Houle assessed persistent pain secondary to some degree of osteoarthritis from the time of surgery. On 5/1/17, Dr. Houle administered a cortisone injection which provided some relief.

Petitioner continued to follow up with Dr. Houle complaining of increased pain by the end of his work day. Dr. Houle recommended medications, injections, physical therapy, bracing and potentially knee replacement surgery. On 11/13/17, Petitioner reported severe flareups for which Dr. Houle stated Petitioner may require future cortisone injections.

Petitioner sought a second opinion with Dr. Jeffrey McIntosh on 2/20/18. Petitioner was experiencing sharp pain in the medial joint line and he was walking with an antalgic gait. Dr. McIntosh noted swelling and pain at the extremes of flexion and tenderness in the medial joint line. Dr. McIntosh reviewed an x-ray of Petitioner's left knee taken in 2014 when Petitioner sustained injuries to his *right* knee, with an x-ray taken by Dr. Houle after his 9/21/16 accident. Dr. McIntosh performed left knee x-rays on 2/20/18 which revealed an almost complete loss of joint space. Dr. McIntosh opined Petitioner was suffering from degenerative joint disease which significantly progressed over the last two years as "determined by radiographic evaluation." Dr. McIntosh recommended a total knee replacement.

On 5/21/18, Petitioner presented to Dr. Jason Young for a Section 12 examination at Respondent's request. Petitioner reported he had start up pain and aching in his left knee and that he was still working full duty. Petitioner reported the steroid injections provided temporary relief. Dr. Young noted Petitioner's previous right knee surgery in 2014. Dr. Young noted Petitioner walked with a slight limp favoring the left side, with noted medial and patellofemoral compartment pain of the left knee. Dr. Young stated x-rays were performed the day of the visit of Petitioner's bilateral knees that revealed medial joint space collapse with bone-on-bone arthritic changes. Dr. Young observed moderate patellofemoral arthrosis and superior osteophyte formation of the patella of the left knee and medial joint space collapse of the right knee which was also near bone-on-bone in severity. Dr. Young assessed severe left knee osteoarthritis which he felt clearly preexisted the work incident. Dr. Young opined chondromalacia was not something that occurred acutely, but was something which occurred over many years. He felt the work injury did not accelerate the underlying disease. Dr. Young noted Petitioner's progression was one of a natural variety and there had been no significant acceleration as a result of the meniscus tear. Dr. Young noted arthritic changes in the contralateral knee which were indicative of a genetic component rather than an acute traumatic component. Petitioner's arthritic progression was typical for the type and severity of the arthritis he had. There was no acute cartilage damage or chondral flap which would have been a result of a plant and twist mechanism, but rather a degenerative process when the cartilage was globally thin indicative of normal wear and tear over the course of Petitioner's life. Dr. Young opined the need for a left knee replacement was in no way related to the 9/21/16 work incident.

On 7/24/18, Petitioner complained that his *right* knee was bothering him and Dr. McIntosh aspirated the right knee and injected same with 40 mg. of Kenalog.

Dr. McIntosh authored a narrative on the question of causation. Dr. McIntosh reviewed and compared the radiographs from 2014, 2016, and 2018 related to Petitioner's left knee. He noted that the joint space in 2014 and

2016 were very similar in appearance. However, upon comparison of the 2018 films, Dr. McIntosh noted that, "[i]n comparison views of the right knee and the left knee from February 2018, there is a significant decrease in the joint space in the left knee compared to the right, which is notable." Had the injury and subsequent surgery not contributed to the worsening of his arthritis, Dr. McIntosh would expect the changes in the joint space to be equal, especially if it was a "genetic" predisposition as suggested by Dr. Young. He attributed the progressive change in the left knee to Petitioner's left knee surgery.

TESTIMONY

Petitioner testified he has worked for Respondent for twenty years. On the date of accident, Petitioner dismounted a fork truck and his left knee twisted and popped. He felt immediate pain and reported the accident. Petitioner testified that when he saw Dr. Houle on 2/24/17 he had 0 out of 10 pain with some difficulty squatting. That he returned to work shortly following that visit and his knee pain returned. He has worked full duty since 2/25/17. He treated with Dr. Houle several times after returning to work and received cortisone injections that provided temporary relief. Petitioner testified he has never had symptoms in his left knee prior to the accident. He testified he treated with Dr. Houle prior to this accident for a meniscal surgery on the right knee in 2014. Petitioner testified he did not have any pain in his right knee at the time of arbitration. He further testified that Dr. Jason Young did not take x-rays of his knees at the Section 12 examination as indicated in the report.

Dr. Jeffrey McIntosh testified by way of deposition. Dr. McIntosh maintained that subjectively, chronologically and objectively from comparison radiographic evaluation, Petitioner's deterioration of his left knee following his 9/21/16 incident and 1/17/17 surgery accelerated the deterioration of Petitioner's left knee joint space leading to the need for a total knee replacement. Dr. McIntosh opined that it was his opinion to a reasonable degree of medical certainty that Petitioner's need for total knee replacement is causally related to his work injury and the *sequela* from the subsequent meniscal surgery and chondroplasty. He understood that Petitioner had no problems with his left knee prior to his work accident. In reviewing the comparison studies from 2014 to 2016, Dr. McIntosh noted there was slight worsening of both knees, but they maintained equal space between the medial femoral condyle and the medial tibial plateau.

In comparing the 2016 to 2018 films, Dr. McIntosh noted that the accident accelerated the arthritis in Petitioner's left knee. He stated that there was a "significant difference" in the left knee compared to the right from 2016 and 2018. Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner merely had a genetic predisposition to arthritis as Petitioner's knee progression did not occur at an equal rate, but he developed arthritis at a faster rate in the left. He noted that when you change the anatomy of the knee, you change the weight-bearing of the knee by removing part of the cartilage or if there is damage to the cartilage that lines the bone that has the capacity to accelerate the development of arthritis in the knee. Even though the meniscal resection was undertaken with chondroplasty to improve the immediate symptoms, it put Petitioner at risk to develop arthritic changes which happened at a rapid rate.

Dr. McIntosh disagreed with Dr. Young's opinion that Petitioner was at MMI in February, 2017 in light of Petitioner's continued symptoms after returning to work. He noted that the aspiration of Petitioner's right knee in July, 2018 was secondary to Petitioner ambulating with an antalgic gait. Petitioner ambulating with an antalgic gait was documented in Dr. McIntosh's initial evaluation. Dr. McIntosh explained the torn meniscus was resected and when there is injury to the cartilage there is no real cure for that outside of replacing cartilage. The structural changes in Petitioner's left knee with his injury and repair, in combination with the accelerated rate of progression

in the left knee versus Petitioner's right knee, allowed Dr. McIntosh to opine that the incident and subsequent surgery led to the need for knee replacement surgery.

Dr. Jason Young testified by way of evidence deposition. He testified consistent with his written report. Again, he opined that Petitioner had severe left knee osteoarthritis and the work incident did not accelerate the underlying disease. Dr. Young testified arthritis can be severe in some patients yet they have no pain, and with others arthritic knee pain begins spontaneously meaning arthritis is not always associated with a particular event. He testified a knee surgery does not automatically equate to advancing of arthritic disease and many do just fine following surgery. He testified given the amount of arthritis Petitioner had, the arthritic progression was in the normal course. Dr. Young testified Petitioner reached MMI on 2/27/17 when he was returned to full duty work. He testified further treatment was related to the natural history of his underlying degenerative disease. He testified based on Petitioner's presentation and most recent radiographs, Petitioner was a candidate for a left total knee replacement. He testified he had no knowledge of any prior complaints of the left knee before 9/21/16, but stated it would not be surprising for someone to be functioning completely normal with a really degenerative advanced arthritic knee.

CONCLUSIONS OF LAW

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

The Arbitrator concludes that Petitioner's current condition of ill-being with regard to his left knee is causally related to his work accident of September 21, 2016. Petitioner testified credibly and the records support that prior to his accident, Petitioner did not have symptoms or receive treatment for his left knee. Petitioner sustained an acute accident on September 21, 2016 for which he felt immediate pain and symptoms resulting in a meniscal resection and chondroplasty in his left knee.

The opinions of treating physicians Dr. Houle and Dr. McIntosh are more credible than those of Dr. Jason Young. Dr. Houle and McIntosh compared and reviewed the x-rays of Petitioner's left knee from 2014, 2016, and 2018. Dr. McIntosh explained the comparison x-rays objectively show an accelerated collapse of joint space in Petitioner's left knee following his meniscal resection and chondroplasty. He noted a loss of all cushioning in Petitioner's medial joint line, which Dr. Young agreed.

Dr. Young maintained Petitioner's current state of ill-being was merely genetic; however, Dr. Young did not review Petitioner's MRI films, the arthroscopic photos from Dr. Houle's surgery, the comparison x-rays done in 2014 and 2016, or any imaging that predated the date of accident, including records from Petitioner's prior right knee surgery in 2014. Dr. young did not review Dr. McIntosh's narrative report of January, 2019 or Dr. Houle's treatment note dated March 27, 2017 when Petitioner's symptoms returned following surgery. Dr. Young agreed that in light of the fact he had not reviewed the 2014 and 2016 x-rays, he had no opinion about the interval changes demonstrated on those studies.

Further, it was Dr. Young's understanding that Petitioner's left knee was asymptomatic prior to the accident. Dr. Young could not identify, but for the September 21, 2016 incident, when Petitioner's left knee would have become symptomatic and opined it was coincidental that his underlying arthritis had become symptomatic at the time Petitioner sustained his accident. Despite Petitioner being immediately symptomatic following this accident, his meniscal injury, subsequent meniscectomy and chondroplasty, increase in symptoms immediately

upon returning to work, and the temporal relationship of his manifestation of symptoms to his injury, Dr. Young simply believed it was coincidental that his underlying arthritis was symptomatic. Dr. Young could not opine to any degree of medical certainty exactly when, but for the September 21, 2016 event, Petitioner's arthritis would have started causing him pain. In light of the above shortcomings in the foundation of Dr. Young's opinions, the Arbitrator gives little weight to his opinions on causation.

Aside from the direct opinions on the issue of causation by Dr. McIntosh and Dr. Houle, causation may also be shown by a chain of events which demonstrates a previous condition of good health, an accident and a subsequent injury resulting in disability. That scenario may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 69, 63-63 (1982). In the case at hand, Petitioner had no history of pain, treatment, disability or limitation with his left knee up until his twisting incident and subsequent meniscal resection and chondroplasty. Petitioner worked with Respondent for over 20 years. There was no medical opinion, record or testimony that Petitioner ever had difficulty ascending/descending stairs; getting up from a squatted position; standing for durations; stepping down from his forklift; or suffered from daily pain, locking and swelling. The medical records wholly support Petitioner continues to be plagued with difficulty with his left knee, which is well documented upon his return to work following his January 17, 2017 surgery. The records taken as a whole support a clear, well-documented onset of symptoms and a lack of longstanding improvement which began with the September 21, 2016 incident.

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

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury, and the credible opinions and/or testimony of Dr. Houle and Dr. McIntosh, the Arbitrator orders Respondent is liable for Petitioner's medical care, including a left total knee replacement as recommended by Dr. McIntosh and Dr. Young. Accordingly, Respondent shall authorize and pay for prospective medical care as recommended by Dr. McIntosh as provided in Sections 8(a) and 8.2 of the Act.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/22/20

DATE

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

Giovanni Cruz,

Petitioner,

21IWCC0166

vs.

NO: 19 WC 013786

Schilke Music,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability 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 22, 2019 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.

21IWCC0166

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CRUZ, GIOVANNI
Employee/Petitioner

Case# **19WC013786**

SCHILKE MUSIC
Employer/Respondent

21IWCC0166

On 11/22/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
ANDREW MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

21IWCC0166

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)

Giovanni Cruz
Employee/Petitioner
v.
Schilke Music
Employer/Respondent

Case # 19 WC 13786

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 **Chicago**, on **September 17, 2019 and October 9, 2019.** 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, **1/25/2019,** 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.

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

In the year preceding the injury, Petitioner earned ***$28,633.28***; the average weekly wage was ***$550.64***.

On the date of accident, Petitioner was ***30*** 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 ***$2,065.72*** for TTD, $***N/A*** for TPD, $***N/A*** for maintenance, and ***$1,822.97*** for other benefits, for a total credit of $***3,888.69***.

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

ORDER

Because Petitioner did not sustain an accidental injury which arose out of and in the course of his employment with Respondent, and because his current condition of ill-being is not causally-connected to the alleged incident, benefits are denied.

Respondent shall be given a credit of $2,065.72 for TTD, and $1,822.97 for medical benefits that have been paid, for a total credit of $3,888.69.

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

11-21-19
Date

ICArbDec19(b)

NOV 22 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GIOVANNI CRUZ, Petitioner,	)	
v.	)	19 WC 13786
SCHILKE MUSIC, Respondent.	)	

MEMORANDUM IN SUPPORT OF ARBITRATOR'S DECISION

Statement of Facts

On January 25, 2019, Petitioner, Giovanni Cruz, was an employee of Schilke Music. He makes parts for trumpets (Tr. p. 39). On the alleged incident date, he and an employee named Eric had to move a rack. Mr. Cruz said he had a bad hold on the rack. When he tried to reposition it, he felt a pain in his right wrist and a sort of "pop" feeling. He initially testified this occurred approximately 10:00 a.m. to 12:00 pm (Tr. p. 40). He described the rack as having a cloth wheel and a paper wheel. He said the rack was about 5 feet long. He would not be able to lift it by himself (Tr. p. 41).

When further describing the incident moving the rack, he testified "I felt it, I felt losing my balance. And when I reached – I turned my hand to grab it, that's when I -- all the weight was on my right hand and I felt it, like, a really bad pain and then, like, some kind of, like, pop vibration in my right hand" (Tr. p. 42-43). He did not yell out. The pain was on the outside of his right wrist (Tr. p. 43). When this happened, they let go of the rack and then tried to reposition to get it to move. They eventually got the rack into position. Mr. Cruz said he told Eric about what happened with his wrist but he does not think Eric heard him. He did not tell anyone else with the employer that day what had happened with his wrist. He said he did not report it because he assumed he pulled a muscle. He said this happened on a Friday and he felt maybe over the weekend he would heal and then he could just go back to work on Monday (Tr. p. 44).

Eric Zaragoza testified on behalf of the petitioner. He said that he and Mr. Cruz were moving a cloth dispensary back to its original location. He said the dispensary was 7 feet by 4 feet (Tr. pp. 12-13). Mr. Zaragoza said he was at the back of the dispensary and Mr. Cruz was in the front (Tr. p. 14). Mr. Zaragoza believes they had to move the dispensary maybe 20 feet. He said while they were carrying the dispensary it tilted forward and Mr. Cruz went to catch it. Mr. Zaragoza testified that as this was being done he saw Mr. Cruz tweak his hand or wrist. They set the rack down and eventually moved it back to its original location (Tr. pp. 14-15). Mr. Zaragoza testified that they had moved the rack 17 or 18 feet before setting it down. He said they took probably a 2 or 3 minute break before moving it the last few feet. He testified that they took the break until Mr. Cruz' wrist felt better. They then moved the dispensary the remaining 2 or 3 feet (Tr. pp. 28-29).

Video clip 1 shows the petitioner and Mr. Zaragoza first moving the rack at 6:04 am (Rx. 2). Mr. Cruz was facing and walking forward and Mr. Zaragoza was walking backwards. They slid the rack most of the way and then picked it up in order to not scratch the new floor (Tr. pp. 66-67). While watching clip 1, Mr. Cruz testified that he hurt his wrist at 6:04 am between the 13 and 19 second mark (Tr. p. 69-70). After moving the rack, Mr. Cruz tied his shoe. Mr. Cruz agreed that during the movement of the rack at 6:04 am that he and Mr. Zaragoza did not take a 2 or 3 minute break before completing the task (Tr. pp. 71-72).

Video clip 7 shows them moving the rack back at 11:21 am (Rx. 2). Again, Mr. Cruz was walking forward and Mr. Zaragoza was walking backwards. Mr. Cruz testified that while moving the rack they did not stop to take a 2 or 3 minute break, as described by Mr. Zaragoza. After moving the rack, Mr. Cruz pointed with his right to someone in the finishing room (Tr. pp. 73-75).

Mr. Cruz finished the workday, ending at 2:30 p.m. He was able to perform his duties throughout the remainder of the day as he said he took most of the load on his left hand. He said he struggled the whole day (Tr. p. 44-45).

Mr. Cruz testified he did not go to work on Monday and he called off. He believed he spoke to Chris on the phone, the manager at Schilke (Tr. p. 45). Brian Persaud, the petitioner's direct supervisor, said that Mr. Cruz arrived at work on Monday and said that he hurt his wrist and needed to see a doctor. Mr. Cruz did not say that he injured his wrist at work (Tr. pp. 104-105).

The petitioner first saw Dr. Bednar at Loyola on January 29, 2019. He told him he suffered an injury on the job. He initially told him the injury had occurred three days earlier. Petitioner clarified, saying he told him it happened a few days before. He testified that he told Dr. Bednar that it happened on Friday. According to Mr. Cruz, Dr. Bednar at the time said the date was not important (Tr. p. 45-46).

Dr. Bednar provided him with a wrist splint for his right wrist and gave him a 5-pound lifting restriction. Those restrictions were originally accommodated (Tr. p. 47). Brian Persaud testified that on February 12, Mr. Cruz told him that according to his doctor he needed complete rest. He asked Mr. Persaud if he was going to get paid for his time off-of-work because it was a work-related injury. This was the first time Mr. Persaud was aware that Mr. Cruz was claiming the injury was related to work (Tr. p. 106).

Andrew Naumann is the owner of Schilke Music. He first became aware that Mr. Cruz was claiming a work-related injury when he was notified by Brian Persaud on February 12 (Tr. p. 111-112). As Mr. Naumann was out-of-town at the time, he called the petitioner. The petitioner told him the event took place first thing in the morning on January 25 while moving a rack (Tr. pp. 112-113). Upon returning to town, he spoke with Mr. Cruz again about the

incident. At that time, the petitioner said he did not injure his wrist first thing when the rack was first moved. He injured it when he moved that rack back later in the morning (Tr. p. 114). Mr. Naumann described a surveillance system he has in the facility to observe activities in high traffic areas. He prepared Rx. 2, which is a disc that contains 25 clips of video. The clips show every time Mr. Cruz appeared on any of the cameras on January 25, 2019 (Tr. pp. 114-115).

Petitioner continued to treat with Dr. Bednar on March 5, 2019. Ever since March 6, 2016, he has not worked (Tr. p. 50). He had an MRI of the right wrist taken March 22, 2019. He had follow-up visits with Dr. Bednar on March 26, April 9 and April 30, 2019. Dr. Bednar prescribed surgery for the right wrist (Tr. p. 49).

Petitioner attended a Section 12 examination with Dr. Bryan Neal on September 5, 2019 (Tr. p. 51, Rx. 1).

Petitioner testified he was still having problems with his wrist. He cannot rotate it fully to the left. He said he wears the splint all the time. He still wants to undergo surgery (Tr. p. 55).

ARGUMENT

Findings of Arbitrator

As 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:

Petitioner did not sustain an accident that arose out of and in the course of his employment.

Petitioner testified that after the accident, he was able to work through the end of his workday because "I took most of the load on my left hand. But I struggled the whole day." (Tr. p. 45) This representation is not supported by his activity shown on surveillance video. In Respondent's Ex. 2, clip 8 (11:50 am), Petitioner is viewed vigorously moving the handle of the pallet jack up and down with two hands. He then continues this movement of the handle with only his right hand. He is then shown pulling the pallet jack with his right hand in this clip, continuing to do so in clips 9, 10, and 11 (11:51 am to 11:53 am) (Rx. 2). In clip 23 (1:56 pm), Petitioner is shown moving buckets and rolling up and carrying a rubber mat. He initially carries the rubber mat with two hands and then walks while carrying the rubber mat at his side with his right hand only (Rx. 2). Petitioner testified that the rubber mat may have weighed 5 pounds (Tr. p. 92). Andrew Naumann testified the mat was 6 foot long by 3 foot wide and it weighed at least 30-35 pounds (Tr. p. 119).

The Arbitrator notes additional activity exhibited by Petitioner after the alleged incident. In clip 12 (12:00 pm), the Petitioner is shown carrying his gloves with his right hand and moving his hands while speaking. In clip 13 (12:01 pm), he is shown gesturing with his hands. In clip 14 (12:49 pm), he is carrying a large roll of hand towels with his right hand. He is shown bending his right hand underneath the roll of towels. In clips 16 and 17 (1:13 pm), he is shown picking up a box with his right hand and breaking down the box using his right hand. In clip 22 (1:46 pm), he is shown cleaning the work area with a rag for 8 minutes and 29 seconds, often using the right

hand. In clip 24, (2:21 pm), he is shown pulling (with assistance) a 55-gallon tank. Clip 25 (2:30 pm) shows him punching out at the end of the day with the right hand (Rx. 2).

Not only do these clips fail to show him mostly taking the load with his left hand, and struggling the whole day, they fail to show any evidence of pain or problems with the right hand whatsoever.

The finding of no accident is based upon other discrepancies as well. At trial, and in discussions with Andrew Naumann, Petitioner wavered in saying whether the accident occurred when the rack was moved first thing in the morning, or when it was moved back between 10:00 a.m. and 12:00 noon. At trial, Petitioner initially testified on direct examination that the incident occurred between 10:00 am and 12 pm (Tr. p. 40). However, on cross-examination, after being shown the video clip of the rack first being moved, he testified he was injured at 6:04 am, somewhere between the 13 and 19 second marks (Tr. p. 65-70). After direct examination, Petitioner met with his attorney. On re-direct examination, he testified he injured his wrist when he was moving it back at 11:21 a.m. (Tr. p. 89).

Mr. Naumann testified that he initially spoke with Petitioner on February 12. During that conversation, Mr. Cruz told him he was hurt when he was moving the rack first thing in the morning (Tr. p. 113). After returning from out-of-town, he met with Mr. Cruz again. At that time, Mr. Cruz told him he had injured his wrist while moving the rack back, and not first thing in the morning (Tr. p. 114).

Another question is raised as to the reporting of the incident. While saying he did not remember being told that he was to immediately report any work injury regardless of how minor, he admitted there was language in the employee handbook about immediately reporting work injuries (Tr. p. 57). Brian Persaud, his direct supervisor, testified that Mr. Cruz had been instructed to immediately report any type of work injury to him (Tr. p. 104). Mr. Cruz

acknowledged at trial that he did not tell his employer that he was hurt at work on the incident date (Tr. p. 57-58). Mr. Persaud testified that he was not told by Mr. Cruz that his wrist injury was work-related until February 12, 2019 (Tr. p. 106).

Brian Persaud testified that on the January 25, 2019 alleged incident date, he observed no behavior on the part of Mr. Cruz to indicate he had injured his wrist. Mr. Cruz said nothing to him about injuring his wrist on that date.

The Arbitrator does not rely upon the testimony of Eric Zaragoza. Mr. Zaragoza said that after seeing Mr. Cruz "tweak" his hand or wrist, that they waited 2 or 3 minutes before completing the move of the cloth dispensary rack (Tr. pp.28-29). This break did not happen, as shown in the video and confirmed by Mr. Cruz (Rx. 2; Tr. pp. 71-75). While testifying he saw the "tweak" in the petitioner's face when it happened (Tr. p. 18). However, he also said that he was looking backwards as they were moving the dispensary and thus could not see where the petitioner's hands were placed on the rack (Tr. p. 28). The Arbitrator further notes that located between Mr. Zaragoza and the petitioner on the rack was a roll of cloth and a roll of paper. These rolls would have made it even more difficult to see the expression of Mr. Cruz described by Mr. Zaragoza.

For the foregoing reasons, the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent.

As to Issue F, Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

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

As discussed previously, the Arbitrator does not find Petitioner's testimony to be credible in many areas. The Arbitrator specifically notes the Petitioner's testimony at trial that he made it through the remainder of the workday by taking most of the load with his left hand and that he

had struggled the whole day (Tr. p. 45). This is clearly not the case, based upon the video clips submitted into evidence as Respondent's Exhibit 2.

In addition, the Arbitrator notes the report of Dr. Bryan Neal. Dr. Neal conducted an Independent Medical Examination on September 5, 2019. In addition, he had the opportunity to review the surveillance video (Rx. 2). Based on his review of the video in conjunction with his discussion with Petitioner and his examination, it was his opinion that the Petitioner's right wrist condition was not causally-connected to the alleged work incident. In discussing the video clips, Dr. Neal wrote:

> "No video clip shows the examinee or any individual pictured in any of the video to have either injured his wrist or to look like there is any injury complaint, problem or issue. Clip #1 and clip #7, the only clips where, based upon his history, the injury could have occurred, do not support any injury to the wrist as he described" (Rx. 1 p. 14).

The Arbitrator notes that the treating physician, Dr. Bednar, did not have the benefit of reviewing the surveillance video. As such, Dr. Neal is in a better position to assess the causation issue and the Arbitrator relies upon the opinion of Dr. Neal in this issue. The Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to the alleged work incident.

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

As Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and as Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Respondent is not liable for any medical treatment charges incurred by Petitioner.

As to Issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to prospective medical care.

As to Issue L, what temporary benefits are in dispute, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, Petitioner is not entitled to temporary total disability benefits.

As to Issue N, is Respondent due any credit, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner did not sustain an accident arising out of and in the course of his employment with Respondent, and finds that Petitioner's current condition of ill-being is not causally-connected to the alleged work accident, the Arbitrator awards a credit to Respondent for $2,065.72 for TTD paid and $1,822.97 for medical bills paid for a total credit of $3,888.69.

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

Demetrius Bell,

Petitioner,

21IWCC0167

vs. NO: 16 WC 019664

RJ 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 issues of accident, medical expenses, temporary total disability, permanent partial disability, other (intoxication) 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 17, 2019 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.

21IWCC0167

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,100.00. 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.

DATED: APR 7 - 2021
MEP/ypv
o020921
49

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BELL, DEMETRIUS
Employee/Petitioner

Case# **16WC019664**

21IWCC0167

RJ TRANSPORTATION
Employer/Respondent

On 1/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

21IWCC0167

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] 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

Demitrius Bell
Employee/Petitioner

Case # **16** WC **19664**

v.

R. J. Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 5, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did*** 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 $**29,505.32**; the average weekly wage was $**567.41**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**378.27**/week for **10** weeks, commencing **June 21, 2016** through **August 30, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $753.00 to Premier Occupational Health, $6,901.26 to Elmwood Park Same Day Surgery Center, $5,520.66 to Instant Care Equipment Leasing, $1,925.00 to Windy City Anesthesia, $11,135.00 to Athletico Physical Therapy, and $749.06 to Prescription Partners, for a total of $26,983.98, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**340.45**/week for **30** weeks, because the injuries sustained caused the **6**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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 Anthony C. Erbacci

January 14, 2019
Date

JAN 17 2019

FACTS:

On June 20, 2016, Petitioner was employed by the Respondent in "Quality Control" and "Replenishment", and he had been so employed for approximately one year. Petitioner testified that, on a daily basis, he was required to pick orders and take them to the correct areas in the warehouse for distribution. Petitioner testified that on June 20, 2016, he arrived at 6:30 a.m. for his regular 7:00 a.m. shift, in good health without any pain complaints. Petitioner testified that he had to pick orders that morning, which required him to maneuver pallets, some of which were empty, some weighing over 500 pounds. Petitioner testified that he needed to move a specific pallet, but was unable to do so without moving another pallet that was placed vertically on top of the pallet that he needed to move. Petitioner testified that the vertical pallet was stuck, and when pulling hard to free the pallet, he injured his low back. Petitioner testified that he immediately felt pain in his low back, with subsequent numbness and tingling in his legs. Petitioner testified that he had never felt such pain.

Petitioner testified that he reported his injury to his supervisor, and was sent to Premier Occupational Health for Medical treatment. In his "Injury Statement" that Petitioner was required to complete when arriving at Premier Occupation Health, Petitioner stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Prior to his physical examination, Petitioner willingly underwent drug and alcohol tests. Petitioner's drug screen was negative. On his alcohol test, Petitioner registered a blood alcohol content ("BAC") of .045 and .041. Petitioner testified that he was made aware of the positive test, that he was surprised of the result because he did not feel intoxicated, and that he would not have worked had he known he had alcohol in his system. Petitioner further testified that he spent the preceding day celebrating Father's Day with his family, and that he had consumed alcohol that evening.

Petitioner was examined by Dr. Gorovits, to whom Petitioner gave an identical accident description. During a physical examination, Petitioner described constant, sharp, and severe pain in his low back. Petitioner underwent an x-ray that revealed 2mm retrolisthesis at L5-S1. Petitioner was prescribed analgesic balm, naproxen, and given a lumbar brace. Dr. Gorovits returned Petitioner to work for a "[r]egular duty trial." Petitioner testified that he returned to work and sat in the breakroom until his employer informed him that he was terminated as a result of the failed alcohol test.

On June 21, 2016, Petitioner sought treatment at Elmwood Park Same Day Surgery Center, in Elmwood Park, Illinois. Petitioner was examined by Dr. Amit Mehta, and stated that he suffered a work injury the previous day. Specifically, Dr. Mehta noted that Petitioner "was pulling a pallet out of the racks which weighed approximately 30# when he felt sharp, 10/10 back pain." It was noted that Petitioner was also suffering from radicular symptoms going down the right leg that were triggered by "pulling the pallet as he was bending over pulling them out of the racks." Dr. Mehta prescribed physical therapy three times per week for four weeks, terocin cream, and disabled Petitioner from work. Dr. Mehta also opined that Petitioner's conditions and symptoms were casually connected to the mechanism of Petitioner's injury at work.

On June 23, 2016, Petitioner presented to Athletico Physical Therapy. In the initial treatment note, it is indicated that Petitioner was experiencing sharp back pain when lifting a pallet at work that radiated into his right toes and into the back of his leg.

On July 5, 2016, Petitioner returned to Elmwood Park following his sessions of physical therapy. Petitioner was experiencing low back and radicular symptoms in the right leg. During the

Petitioner testified that he thought physical therapy and the injection, along with the medication and cold compression machine, helped to relieve his pain and enable him to return back to work. Petitioner further testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. Petitioner testified that he did have a prior back injury in 2012, but that he had no back pain in the period of time before his employment with Respondent and during his employment with Respondent prior to the injury that he sustained on June 20, 2016.

The January 10, 2018 deposition testimony of Dr. Amit Mehta was admitted into the record as Petitioner's Exhibit 6. Dr. Mehta is a board certified Anesthesiologist and Pain Management Specialist who primarily treats patients with spine-related issues. Dr. Mehta testified that, to a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner's complaints were aggravated or caused by the mechanism of injury described. Dr. Mehta testified that he recommended physical therapy because it can help with any type of back injury, and is many times the first step in treating a patient prior to more invasive treatment. Dr. Mehta testified that he prescribed Naproxen and Terocin cream because Naproxin is an anti-inflammatory that can help with pain, and topical creams such as Terocin help to reduce localized back pain without any major side effects.

Dr. Mehta testified that Petitioner's positive right-sided "Slump Test" is indicative of disc and/or nerve irritation. Dr. Mehta testified that the Petitioner's MRI report indicated a right-sided disc protrusion at L5-S1 measuring 3-4 mm and a 2 mm bulge at L4-L5, and he opined that the pathology on the MRI was the cause of Petitioner's physical and subjective complaints. As a result of the disc protrusion causing low back pain and radiculopathy, and the medications and physical therapy providing minimal relief, Dr. Mehta testified that the next step in treatment was an epidural injection for diagnostic and therapeutic purposes. Dr. Mehta testified that the Petitioner's improvement in pain and radicular symptoms indicated that the injection was successful.

On cross examination, Dr. Mehta testified that the Petitioner's positive alcohol test indicating a BAC of .041 would not affect his causation opinion as the Petitioner's clinical history, physical examination, and imaging studies correlated to his subjective complaints, and that alcohol in his system did not change the fact that he had a disc protrusion and radiculopathy. Dr. Mehta further testified that, based upon Petitioner's subjective complaints, objective symptoms, and diagnostic reports, it was his opinion that Petitioner suffered an acute injury that was casually related to the mechanism of injury described by Petitioner.

The February 28, 2018 deposition testimony of Dr. Kern Singh was admitted into the record as Respondent's Exhibit 2. Dr. Singh testified that he examined Petitioner on September 8, 2016 and that Petitioner informed him that he hurt his back while pulling a pallet. Dr. Singh further testified that Petitioner had minimal back pain, no leg pain, and that the last epidural injection provided Petitioner significant relief. Dr. Singh opined that Petitioner was negative for back pain and demonstrated no symptom magnification with negative Waddell's findings. Dr. Singh testified that his impression of the Petitioner's MRI revealed an L5-S1 disc protrusion. Regarding causation, Dr. Singh testified that he felt Petitioner's injury was sustained during "his work-related event. . .".

When asked what treatment he would recommend for someone with an L5-S1 disc protrusion, regardless of whether it was acute or degenerative, Dr. Singh testified that he thought physical therapy, anti-inflammatories, prescription meloxicam, and an MRI would be appropriate and reasonable. Dr. Singh further testified that he recommends epidural steroid injections if a patient has

radiculopathy and nerve root distribution that correlates with an MRI. Furthermore, he testified that one epidural steroid would be a reasonable course of treatment for Petitioner. Finally, Dr. Singh testified that, based upon a reasonable degree of medical and surgical certainty, it was his opinion that Petitioner suffered an injury at work on June 20, 2016.

The March 22, 2018 deposition testimony of Dr. Jerrold Leikin was admitted into the record as Respondent's Exhibit 1. Dr. Leikin is a medical toxicologist and physician who teaches in the field of medical toxicology. He testified that in his specialty of medical toxicology, he has performed retrograde extrapolation in regards to alcohol content a person may have had in their system over a thousand times in the past 30 years. Dr. Leikin testified that he reviewed the breathalyzer test results from the day of the Petitioner's alleged accident, and that he performed a "retrograde extrapolation" of Petitioner's blood alcohol test. Dr. Leikin opined that, due to the Petitioner's blood level that was identified after the accident, the Petitioner was at increased risk from being involved in an accident at work and thus impaired due to alcohol intoxication. Dr. Leikin testified the he determined that Petitioner's blood alcohol level would have likely been between 0.056% and 0.076% at the time of the injury. When questioned further, Dr. Leikin opined that it was very possible for Petitioner's blood alcohol level to be 0.061% at the time of the injury, but could have been lower. At this level, Dr. Leikin testified that a person would be unable to concentrate or multi-task, and have problems judging time, space, and distance. Dr. Leikin opined that the neurological effects of a 0.046% or a 0.056% blood alcohol level could have contributed to Petitioner's injury.

CONCLUSIONS:

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, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by the preponderance of the evidence that he suffered an injury on June 20, 2016 that arose out of and in the course of his employment for Respondent.

In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Industrial Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have 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. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). Petitioner must show, through a preponderance of the evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 214 (2003). If an employee's intoxication is the proximate cause of his accidental injury, or the employee was so intoxicated that the intoxication constituted a departure from employment, then no compensation is owed to the employee by the employer. 820 ILCS 305/11 (2011). If, at the time of the injury, the employee's blood alcohol level was 0.08% or above, there is a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the injury. *Id.*

In the instant case, Petitioner's tested blood alcohol levels were 0.041% and 0.045% at the time he was tested. Dr. Jerrold Leikin opined that Petitioner's blood alcohol level was likely around

0.061 at the time of the accident. Because the tested and estimated levels of Petitioner's intoxication are below 0.08%, there is no rebuttable presumption that Petitioner's intoxication was the proximate cause of his injury.

Therefore, the Arbitrator finds that Petitioner was not required to overcome the rebuttable presumption that his intoxication was the proximate cause of his injury, and that such burden is on Respondent. Respondent offered no evidence that Petitioner's intoxication was the proximate cause of his injury. Petitioner testified that he felt no pain in his lumbar spine prior to the injury, gave a consistent history throughout his medical treatment, and was subsequently released from care after undergoing treatment that was reasonable according to both Dr. Mehta and Dr. Singh. Accordingly, the Arbitrator finds that Petitioner suffered an injury that arose out of and in the course of his employment with Respondent.

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 and concludes as follows:

The Arbitrator finds that Petitioner has met his burden of proof by a preponderance of the evidence that his lumbar spine injury was causally related to the accident at work.

To prove this element, Petitioner must show that his injury was caused by "some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 672 (2003).
The Arbitrator finds it significant that Petitioner was working full duty and testified that he had no prior complaints or treatment to his lumbar spine prior to the accident. Here, Petitioner testified that his job was to essentially pick orders and move product around the warehouse to ensure that the correct product was in the correct location for transport. He testified that he needed to remove a pallet off of a rack that had another pallet stood up vertically on the pallet he needed. When attempting to pull out the vertical pallet, he felt a sharp pain in his back that ultimately developed into numbness and tingling in his legs.

Petitioner was immediately sent to Premier Occupational Health, where he stated that he was "[r]emoving a pallet from the racks [and] hurt my lower back." Petitioner provided a nearly identical history throughout the rest of his treatment, including the independent medical examination with Dr. Singh. Furthermore, both Dr. Singh and Dr. Mehta opined that Petitioner suffered an injury at work.

Petitioner testified that he did suffer a back injury in 2012, but that he could not remember the last time he had treated for, or suffered pain from, that incident. Petitioner testified that he had worked for Respondent for approximately one year prior to the instant injury, and had no back pain prior to June 20, 2016. The Petitioner testified that he still suffers back pain as a result of the work injury, despite also having "good" days. Petitioner further testified that his back sometimes affects his sleep.

Relying on the above, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the injury that occurred on June 20, 2016.

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 and concludes as follows:

Petitioner has met his burden of proof by a preponderance of the evidence that the medical services provided were reasonable and necessary.

Petitioner immediately sought treatment for his injury at Premier Occupation Health. Petitioner subsequently sought treatment at Elmwood Park Same Day Surgery Center. He was prescribed physical therapy, which he underwent at Athletico Physical Therapy. Petitioner testified that he felt the physical therapy did help to relieve his symptoms. Furthermore, Dr. Mehta and Dr. Singh testified that physical therapy and non-opioid medications were a reasonable course of treatment. Petitioner also underwent an epidural steroid injection at L5-S1 while under anesthesia, and was provided with a cold/compression device post-injection. Petitioner testified that the injection and cold/compression device helped to relieve his symptoms.

The Arbitrator takes note of the testimony of both Dr. Singh and Dr. Mehta, who both opined that an epidural steroid injection was reasonable in the instant case. In addition, the medical records indicate that Petitioner had significant symptom relief following the injection and returned to work not long afterward.

Regarding payment for reasonable medical treatment, the Arbitrator finds that the medical bills introduced by Petitioner show unpaid charges for medical treatment in the following amounts:

Premier Occupational Health:	$753.00
Elmwood Park Same Day Surgery Center:	$6,901.26
Instant Care Equipment Leasing:	$5,520.66
Windy City Anesthesia:	$1,925.00
Athletico Physical Therapy:	$11,135.00
Prescription Partners:	$749.06

Respondent has not paid all appropriate charges. Therefore, Respondent is ordered to pay the aforementioned medical bills, totaling $26,983.98 pursuant to Section 8(a). The parties stipulated that the Respondent is entitled to credit for any medical bills paid by the Petitioner's group insurance.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he was owed temporary total disability benefits from June 21, 2016 to August 30, 2016, while he was disabled from work.

The Arbitrator recognizes that off work status notes were provided throughout Petitioner's treatment, until he asked to be released back to work.

Therefore, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of $378.27/week for a period of 10 weeks, commencing on June 21, 2016 through August 30, 2016, as provided by Section 8(b) of the Act.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no report of impairment compliant with the provisions of of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a material handler. The Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Arbitrator therefore gives some weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 46 years old at the time of the accident. The Arbitrator considers the Petitioner to be younger individual and concludes that the Petitioner's permanent partial disability will have less of a deleterious effect than it would on an older individual who would be otherwise less able to recover fully from such an injury. The Arbitrator therefore gives little weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that no evidence of any impairment to future earnings was offered into the record. The Arbitrator also notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. Because there is no evidence of any impairment to future earnings, the Arbitrator gives no weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner has returned to the same type of work for a different employer and he testified that his back condition is not a problem in performing the duties of that employment. The Petitioner testified that he currently continues to experience pain in his low back, but that he does have "good days," as well. These complaints are corroborated in the medical records as well as the testimonies of both Dr. Mehta and Dr. Singh. The Petitioner's complaints as supported by the

medical records, evidences some disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 6% disability to his whole person.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSARIO JIMENEZ,

Petitioner,

vs.

21IWCC0168

NO: 18 WC 13761

CHICAGO MARRIOTT OAK BROOK,

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

The Commission affirms the Arbitrator's decision with the following clarification:

On April 12, 2018, Petitioner was working as a banquet server for Respondent. She testified she was working in the VIP room and that she was directed by her supervisor to go to Starbucks to find lids for the coffee cups as there were none in the VIP room or storage. (T. 10) Petitioner went to Starbucks and obtained lids and some cups. Petitioner subsequently realized they were not the correct lids so she grabbed the lids, advised her supervisor that they were not the correct lids, and went to Starbucks for a second time. (T. 11)

On this second trip to Starbucks Petitioner was carrying the cups and lids she was going to return and as she was walking, she tripped. (T. 8) Her leg went to the side, her left knee popped and Petitioner was unable to continue walking. (T. 8-9) After advising her general manager and Human Resources, she was put in a taxi cab to go to the occupational health clinic for an examination. (T. 12-13)

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On April 12, 2018 the same day the accident occurred, Petitioner was examined at Advocate Occupational Health where she was taken off work, diagnosed with a left knee sprain and instructed to follow up with an orthopedic surgeon should problems persist. (Px1) She reported that the incident occurred while she was walking rapidly and felt a pop in her knee. (Px1) Petitioner followed up with orthopedic surgeon, Kevin Tu, M.D., on May 10 2018, at which time he ordered an MRI and placed Petitioner on restricted duty. (Px2) Petitioner described her accident as quickly walking and tripping over the junction between the hard floor and carpet. (Px2) Petitioner underwent an MRI on May 15, 2018 which showed a torn meniscus. (Px3) On May 24, 2018, Petitioner returned to Dr. Tu, at which point he recommended conservative treatment consisting of physical therapy. He continued restrictions. (Px2) Petitioner returned on June 28, 2018, at which point physical therapy was discontinued and surgery was recommended. Restrictions were again continued. Petitioner returned to Dr. Tu on August 9, 2018 and September 20, 2018, and authorization for the recommended surgery was still pending. Petitioner's restrictions remained in place. (Px2)

On cross-examination, Petitioner testified that she was walking very fast at the time she hurt her knee. She wasn't walking or jogging. (T. 18) She was walking fast because of customer's complaints. (T. 23) She didn't fall, but she tripped and then her foot got stuck and she couldn't move. (T. 27) Petitioner did not testify as to any defects in the floor.

The Respondent does not dispute that the evidence establishes that at the time the Petitioner sustained her knee injury she was at work – i.e. in the course of her employment. As the parties do not dispute that Petitioner's knee injury occurred in the course of her employment, the Commission will only address the second element that must be proved to find the case compensable --whether the Petitioner's knee injury arose out of her employment.

The *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (9/24/20) case provides the proper analysis to be applied in this instance. In *McAllister* at ¶60, the court held that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 (1989), stands for the proposition that an injury arises out of a claimant's employment for purposes of the Act if, at the time of injury, the claimant was performing an act that he might reasonably be expected to perform incident to his employment or causally connected to what the claimant must do to fulfill his assigned job duties, even if the act involves an everyday activity.

In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill.2d at 58; *see also The Venture - Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18; *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 204 (2003). "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." *Sisbro,* 207 Ill.2d

at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58) *see also Baggett v. Industrial Comm 'n*, 201 Ill.2d 187, 194 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury.").

A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987). To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶31; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152115WC, ¶38; *Baldwin v. Illinois Worker 's Compensation Comm'n*, 409 Ill.App.3d 472,478 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105 (2006).

Petitioner's knee injury arose out of her employment because at the time she injured her knee while in the process of retrieving coffee cup lids for customers, she was at work performing an act her employer might reasonably expect her to perform incident to her assigned job duties as a banquet server, and in fact, was directed to perform. Therefore, the knee injury was employment related, as it was caused by retrieving coffee cup lids for the customers in the VIP concierge room — an act that was incident to and causally connected to Petitioner's job duties as a banquet server. *Caterpillar Tractor*, 129 Ill.2d at 58; *Memorial Medical Center v. Industrial Comm 'n*, 72 Ill.2d 275, 280 (1978) (" 'to come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury' " (quoting *County of Cook v. Industrial Comm 'n*, 69 Ill.2d 10, 17 (1977))).

Sisbro and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill.2d at 203 (citing *Caterpillar Tractor*, 129 Ill.2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional evidence establishing that she was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once she has presented proof that she was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill.2d at 58.

In addition to proving accident, Petitioner met her burden that her current condition of ill-being is causally related to her work injury. Petitioner reported directly to occupational health, wherein she was diagnosed with a "sprain of unspecified collateral ligament of left knee." (Px1) She followed up with orthopedic surgeon Dr. Tu, who ordered an MRI and ultimately diagnosed that she had a torn medial meniscus. (Px2, 5/24/18 visit) On August 9, 2018, Dr. Tu opined that Petitioner's mechanism of injury was consistent with the development of a medial meniscus tear. (Px2) Respondent did not offer any medical opinion to refute this causation opinion.

Based on the finding of accident and causation, the Arbitrator appropriately awarded medical expenses as all were in furtherance of the treatment of Petitioner's knee injury. He also appropriately awarded prospective treatment in the form of left knee arthroscopic surgery and

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attendant care, as well as temporary total disability benefits from the day following the injury through the date of trial.

In addition to the foregoing, the Commission corrects a scrivener's error contained in the Arbitration Decision in the second to last sentence of the second paragraph on page 11. The Commission replaces the word "hear" with the word "heard".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020 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 $21,122.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O: 022321
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

JIMENEZ, ROSARIO
Employee/Petitioner

Case# **18WC013761**

21IWCC0168

CHICAGO MARRIOTT OAK BROOK
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2512 THE ROMAKER LAW FIRM
JASON BRISKI
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN A RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

21IWCC0168

STATE OF ILLINOIS)
)SS.
COUNTY OF Dupage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rosario Jiminez
Employee/Petitioner

v.

Chicago Marriott Oak Brook
Employer/Respondent

Case # **18** WC **13761**

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 **Wheaton**, on **October 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 12, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

On **April 12, 2018**, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On **April 12, 2018**, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent on **April 12, 2018**.

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

In the year preceding the injury, Petitioner earned $31,092.88 and the average weekly wage was **$597.94**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

ORDER

Accident

Petitioner was injured in a work related accident on April 12, 2018, while working as assigned for Respondent when she injured her left knee. Based upon Petitioner's consistent and credible testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu, the Arbitrator holds that Petitioner had an accident that arose out of and in the course of the employment by Respondent on April 12, 2018.

Is Petitioner's Current Condition of ill-being causally related to the injury?

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability (TTD) benefits of $398.62 per week for a Petitioner 27 and 5/7th weeks, commencing April 13, 2018 to the date of trial as provided in Section 8(b) of the Act. Total TTD owed is $11,047.35.

Medical Benefits

Petitioner's medical bills were admitted as Petitioner's Exhibits 1,2,3 and 4. The Arbitrator awards the medical bills in Exhibits 1,2,3 and 4. The Respondent shall pay the reasonable and necessary medical services of **$9,974.03** to Petitioner and The Romaker Law Firm as provided in Section 8(a) and 8.2 of the Act.

Prospective Medical Care

Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. Respondent has not provided any rebuttal medical evidence or testimony. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) 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.

Charles W Watts

Signature of Arbitrator

March 26, 2020
Date

APR 2 - 2020

21IWCC0168

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.
If you prefer, you may submit the front of this application form with the *Proof of Service* on a separate page.

I, **Jason Briski**, an attorney, affirm that I emailed and ☐ delivered ☐ mailed with proper postage in the city of **Chicago** a copy of this form at **5:00pm** on **November 15, 2018** to the Respondent listed on this application and to each additional party, if any, at the address listed below.

TO: Mr. Brian Rudd
Nyhan Bambrick Kinzie and Lowry
20 N. Clark Street, Suite 1000
Chicago, IL 60602
Via E-Mail to bar@nbkllaw.com

Arbitrator Charles Watts
Illinois Workers' Compensation Commission
100 W. Randolph
Chicago, IL 60601
Via E-Mail to charles.watts@illinois.gov

Signature of person completing *Proof of Service*

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rosario Jimenez	)	
	)	
Petitioner,	)	
	)	
vs.	)	Nos. 18 WC 13761
	)	
Chicago Marriott Oak Brook	)	
	)	
Respondent.	)	

FINDINGS OF FACT

The parties stipulated that on April 12, 2018, the Respondent, Chicago Marriott Oak Brook, was operating under and subject to the provisions of the Act, and that an employee-employer relationship existed between Respondent and Petitioner. (*See* Request for Hearing Form, Arb. Ex. 1,). The parties also stipulated that Respondent was given notice of the accident within the time limits stated in the Act. (*See* Request for Hearing Form, Arb. Ex. 1,). Additionally, the parties stipulated that Petitioner's average weekly wage to be considered is $597.94. (*See* Request for Hearing Form, Arbitrator's Ex. 1). Further, the parties stipulated that at the time of the injury Petitioner was 61 years old, married, with zero dependent child. (*See* Request for Hearing Form, Arb. Ex. 1). The Request for Hearing Form was entered as Arbitrator's Exhibit #1. (Tr. p 5). Petitioner's list of outstanding medical bills was attached to Arbitrator's Exhibit #1. (Tr. p. 6). The Application for Adjustment of Claim for the case was entered as Arbitrator's Exhibit #2. (Tr. p. 6). An interpreter was used for the hearing named Paula Riordan. (Tr. p. 7).

On October 23, 2018, Petitioner submitted Exhibits #1 through #4 and all Petitioner's Exhibits were admitted into evidence. (Tr. pp. 79-82). Respondent withdrew Exhibits #1, #2 and #3; and submitted Exhibits #4 through #8; however, Respondent's Exhibit #8 was rejected and not admitted into evidence. (Tr. pp. 82-86). Petitioner objected to Exhibit # 6(a) and 6(b) based on lack of foundation; however, the Arbitrator over ruled the objection and allowed the exhibit to be admitted. (Tr. pp. 83-85).

On October 23, 2018, Petitioner testified that she worked at Marriott International in Oak Brook as a banquet server for approximately 14 years. (Tr. pp. 7-8). Petitioner testified that she

injured her left knee on April 12, 2018. (Tr. p. 8). Petitioner testified that the injury occurred when she was walking very fast to Starbucks in the hotel while she was carrying some cups and lids (Tr. p. 8).

Petitioner testified that she as she was walking, carrying the cups and lids, she tripped on a carpet and her leg went to the side and she heard a popping sound. (Tr. pp. 8-9). Petitioner testified that she felt a sharp pain and was not able to walk anymore. (Tr. p. 9). Petitioner testified that she tried to take two steps but she could not move. (Tr. p. 9). Petitioner testified that the carpet she tripped on was a mat to clean feet at the entrance of the hotel. (Tr. p. 9).

Petitioner testified that she was going to Starbucks to return the cups and lids because they did not match the cups in the VIP room. (Tr. p. 10). Petitioner testified that the Starbucks was within the Marriott Oak Brook Hotel. (Tr. p. 10). Petitioner testified that she was working in the concierge room for people that have a key that are VIP to go into. (Tr. p. 10).

Petitioner testified that she went to the storage room looking for lids but could not find any and she had to go to other departments to get lids for the cups (Tr. p. 10). Petitioner testified that her supervisor Megan told her to go to Starbucks. (Tr. p. 10). Petitioner testified that she went to Starbucks and got some lids and cups but did not realize that the lids did not fit until customers started complaining about it. (Tr. p. 10). Petitioner testified that she spoke to her supervisor Megan again. (Tr. p. 11) Petitioner testified that Megan directed her to go back to Starbucks. (Tr. pp. 11-12). Petitioner testified that it was her second trip going back to Starbucks when she tripped and injured herself. (Tr. p. 12).

Petitioner testified that after she tripped she could not walk so she was looking around to see who could come and help her. (Tr. p. 12). Petitioner testified that she did not fall down and the clients at Table 15 saw her trip and asked if she was ok. (Tr. p. 12). Petitioner testified that she reported the accident and they took her to tell the general manager, Christina Duncan. (Tr. p. 12). Petitioner testified that HR was called and she spoke to Diana and was told they would write an accident report and she could go to the hospital. (Tr. p. 13). Petitioner testified that she was sent in a taxi for medical treatment. (Tr. pp. 13-14).

Petitioner testified that she was seen at Advocate Occupational Health on the same day that she hurt her knee. (Tr. p. 14). Petitioner testified that the occupational clinic kept her off work and told her to follow up with an orthopedic surgeon. (Tr. p. 14). Petitioner testified that she sought care from Dr. Tu, an orthopedic surgeon, on May 10, 2018. (Tr. p. 14). Petitioner

testified that Dr. Tu ordered an MRI of her left knee, which was performed on May 15, 2018. (Tr. pp. 15). Petitioner testified that Dr. Tu gave her work restrictions and she sent the restrictions to Respondent, however, Respondent did not offer her light-duty work. (Tr. p. 15). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and she began physical therapy. (Tr. p. 15). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. p. 16).

Petitioner testified that when she saw Dr. Tu at the end of June 2018, he recommended surgery for her left knee. (Tr. p. 16). Petitioner testified that she has continued to treat with Dr. Tu, but she has not been able to have surgery for her left knee because it has not been authorized by Workers' Compensation insurance. (Tr. p. 16). Petitioner testified that she has not received any Workers' Compensation disability pay. (Tr. pp. 16-17). Petitioner testified that she wants the surgery so she can go back to work (Tr. p. 17).

On cross-examination, Petitioner testified that she was claiming an accident dated April 12, 2018, and she began her shift at six o'clock in the morning. (Tr. pp. 17-18). Petitioner testified that she was working in the restaurant area near the Starbucks and she received customer complaints that coffee lids need to be restocked. (Tr. p. 18). Petitioner testified that she was walking fast, but she was not running or jogging. (Tr. p. 19). Petitioner testified that she went to Advocate Occupational Health and spoke to Dr. Piotrowski. (Tr. p. 19). Petitioner testified that she told Dr. Piotrowski that she was walking rapidly on carpet at work and felt a pop in her left knee. (Tr. p. 19). Petitioner was asked by Respondent's counsel if she tripped on a carpet or a mat and Petitioner testified that it was a mat but she was not sure what it was called. (Tr. pp. 19-20). The interpreter explained on the record that the Spanish word Petitioner was using, "Alfombra", can be a mat or a carpet used for either. (Tr. p. 20).

On cross-examination, Petitioner testified that x-rays of her left knee were taken and she did not break any bones or have any fractures. (Tr. p. 20). Petitioner testified that she was initially diagnosed with a left knee sprain. (Tr. p. 20). Petitioner testified that she sought treatment with Dr. Tu for the first time on May 10, 2018. (Tr.21-22). Petitioner testified that she gave Dr. Tu a description of her accident and told him that she was walking quickly between the floor and the carpet when she tripped over a junction between the carpet and the hard floor. (Tr. p. 21). Petitioner testified that she told her treating doctors that she tripped when she crossed from the floor to the carpet. (Tr. p. 22).

On cross-examination petitioner testified that she had a conversation with Respondent that was recorded. (Tr. p. 23). Petitioner testified that she told Respondent that customers were complaining about coffee lids and she was walking fast because of the customer complaints. (Tr. p. 23). Petitioner testified that her foot got stuck and she could not move anymore. (Tr. p. 23). Petitioner testified that she did not remember what she told respondent and she answered what Respondent asked her while she was in a lot of pain. (Tr. p. 26). Petitioner testified that she did not say that her foot simply got stuck and when she tripped it did get stuck. (Tr. p. 27).

On cross-examination Petitioner testified that her accident took place about 10 to 15 feet from the outside of the Starbucks. (Tr. p. 27). Petitioner testified that the hostess stand and computer were near where her accident occurred and she held on to it. (Tr. pp. 27-28). Petitioner testified that the hostess stand and computer were at the entrance door and by the door going to Starbucks. (Tr. p. 28). Petitioner testified that she did not know the distance from where the accident occurred to the hotel entrance door and restaurant Table 15 was ten to fifteen feet away. (Tr. p. 29).

On cross-examination Petitioner testified that she spoke with the general manager Christina, immediately after she was hurt, who called HR and then Cathy and Megan arrived. (Tr. p. 29). Petitioner testified that she told the HR person, Diane Wnek that she tripped on a mat near the exit door. (Tr. p. 29). Petitioner testified that when she hurt her knee she stumbled but did not fall to the ground. (Tr. p. 29).

On cross-examination Petitioner said she did not remember that well if the photograph marked Respondent's Exhibit 5E showed the floor by Table 15, but it appeared so. (Tr. p. 31). Petitioner said she walked on the floor many times and it was the floor that went to the hostess stand. (Tr. p. 32). Petitioner testified that she did not know if the carpet started after the wooden dividing wall and she did not know if the floor tiles were broken. (Tr. p. 33).

On redirect examination, Petitioner testified that there was carpeting on top of the tile floor and that was away from the area of the floor shown in Respondent's Exhibit 5E. (Tr. p. 34). Petitioner further testified that that the carpeting is what she tripped on. (Tr. p. 34). Petitioner testified again that she tripped on the carpeting after re-cross and re-direct examination. (Tr. p. 36).

The Market Director for Human Resources, Diane Wnek testified for the Respondent. (Tr. p. 38). Ms. Wnek testified that she oversees recruiting, talent management, performance

development, associate issues, disciplinary actions, terminations, hiring, Workers Comp, and other human resources situations. (Tr. p. 38).

Ms. Wnek testified that she has interacted with the Petitioner. (Tr. p. 38). Ms. Wnek testified that on April 12, 2018, she was working at the Chicago Marriott Oak Brook location and received a call at about 8:00 am from the general manager regarding an associate injury. (Tr. p. 39). Ms. Wnek testified that she spoke to Petitioner in the hallway behind the restaurant concierge lounge and Petitioner was sitting on a chair with ice on her knee. (Tr. p. 39). Ms. Wnek testified that Petitioner, general manager, Kristin Duncan and herself were present for the conversation. (Tr. p. 40).

Ms. Wnek testified that Petitioner told her it was very busy that morning, she was rushing around to get lids for to-go coffee cups for guests, and that while she was walking through the restaurant her knee gave out and began hurting her, and that she had made it as far as the mat where she could not continue any farther and that was where she stayed until she got assistance to move from that spot. (Tr. p. 40).

Ms. Wnek testified that her conversation with Petitioner was in English without an interpreter and she was able to communicate with the Petitioner in English. (Tr. p. 41). Ms. Wnek testified that it was her impression that Petitioner was capable of understanding and communicating in English. (Tr. p. 41). Ms. Wnek testified that Petitioner told her she was walking through the front portion of the restaurant which would have been on tile floor that goes past the hostess stand towards Starbucks when she hurt her knee. (Tr. p. 42). Ms. Wnek testified this is near an exit door that leads to the outside just outside the Starbucks entrance. (Tr. p. 42). Ms. Wnek testified that the exit door would be probably ten to fifteen feet away from where Petitioner said she hurt her knee. Ms. Wnek testified there is not carpeting or a mat in that area. (Tr. p. 42).

Ms. Wnek testified that there are walk off mats used at the hotel at the exits particularly during the winter months. (Tr. p. 43). Ms. Wnek testified the walk off mats are flat and they take moisture off guest's shoes as they come in and out the door. (Tr. p. 43). Ms. Wnek testified there is not any transition or junction between the tile and carpet in the area where she understood that Petitioner was walking. (Tr. p. 43). Ms. Wnek testified that the area where Petitioner hurt her knee was open to the public. (Tr. p. 43).

Ms. Wnek testified that the hotel has security cameras and as an HR representative she has access to the surveillance video. (Tr. pp. 43-44). Ms. Wnek testified that she reviewed the surveillance footage dated April 12, 2018, and saw Petitioner walking to the Starbucks, then she stops and catches herself and then continues walking to the Starbucks entrance where the mat was. (Tr. p. 44). Ms. Wnek testified that based on what she saw in the video the floor where Petitioner stumbled was tile. (Tr. p. 44). Ms. Wnek testified that there were not any mats in the area. (Tr. p. 45). Ms. Wnek testified that the camera was pointed down in the Starbucks and you can see the servers through the window. (Tr. p. 47). Ms. Wnek testified that Petitioner was seen stumbling through the window. (Tr. p. 49). Ms. Wnek testified that Petitioner caught herself in the video and then goes to the mat and stayed there. (Tr. p. 49). Ms. Wnek testified that she thought she saw Petitioner leaning on the door and her co-worker took her to the back. (Tr. p. 49). Ms. Wnek testified that the co-worker that helped Petitioner was named Marco. (Tr. p. 50).

Ms. Wnek then testified that the photograph marked Exhibits 5A showed the tile floor next to Table 15 along with Table 15, as it looked on April 12, 2018. (Tr. p. 54). Ms. Wnek testified that she took the photograph marked Exhibits 5A-5F after Petitioner was hurt. (Tr. p. 55). Ms. Wnek testified that photograph 5B was an accurate representation of the floor on the date of the accident. (Tr. pp. 55-56). Ms. Wnek testified that photograph 5C was the tile floor by the hostess stand on the date of the accident and photograph 5D was a photograph of the floor next to the hostess stand and towards the Starbucks. (Tr. p. 56). Ms. Wnek testified that photographs 5E and 5F show the floor by Table 15 on the date of the accident. (Tr. p. 57).

Ms. Wnek testified that a supervisor's accident report related to Petitioner's knee injury was drafted by Megan Orr, Petitioner's supervisor. (Tr. p. 58). Ms. Wnek said the only inaccuracy in the report is that it says Rosario (Petitioner) was seen by Megan talking to Marco immediately prior to her fall and fall is erroneous because Petitioner never said she fell but stumbled. (Tr. pp. 58-59).

On cross-examination, Ms. Wnek testified that she was responsible for performance management or performance appraisals employees. (Tr. p. 60). Ms. Wnek testified that safety is not part of the performance management system, but Marriott tracks safety incidents. (Tr. p. 61). Ms. Wnek testified that all the Marriott properties are measured against each other for safety incidents, lost time and restricted duty statistics. (Tr. p. 61). Ms. Wnek testified that five OSHA

recordable injuries have occurred at the Marriot Oak Brook in 2018. (Tr. p. 62). Ms. Wnek denied that high levels in the organization would ask about injuries if the properties she was responsible for started to have more OSHA reportables than the other properties. (Tr. p. 63).

On cross-examination, Ms. Wnek testified that she would normally use a translator for meetings with Petitioner and her co-workers if it was needed. (Tr. p. 64). Ms. Wnek testified that she did not speak Spanish, however, she felt that Petitioner was able to respond accurately to her questions about the accident. (Tr. p. 64). Ms. Wnek testified that Petitioner said she was very busy rushing to get lids. (Tr. pp. 64-65).

On cross-examination, Ms. Wnek testified there is not a camera by the entrance door to the hotel and the camera in Starbucks is the only camera in that area. (Tr. p. 65). Ms. Wnek testified that the exit door for the hotel is on the edge of the video frame. (Tr. p. 66). Ms. Wnek testified that a runner mat was located at the doorway. (Tr. p. 67)

On cross examination, Ms. Wnek testified that she did not recall if she took the pictures on the day of the accident or the next day, or a couple days later. (Tr. p. 69). Ms. Wnek testified that she did not take a picture of the pathway to the Starbucks because the Petitioner did not say the accident occurred in the Starbucks. (Tr. p. 69). However, Ms. Wnek testified that Petitioner did say she was walking towards the Starbucks. (Tr. p. 69). Nevertheless, Ms. Wnek testified that she did not take any pictures in the direction of the Starbucks. (Tr. p. 70). Ms. Wnek testified that the mats at the entrance doors are used during the wet months of the year; but she did not have knowledge of who maintains the mats or if they are changed periodically. (Tr. p. 70). Ms. Wnek testified that it is possible for the mats to move. (Tr. p. 70).

On cross-examination, Ms. Wnek testified that she did not talk to the customers at Table 15 that saw Petitioner injure herself. (Tr. p. 70). Ms. Wnek testified that she did not know why Megan Orr, Petitioner's Supervisor that completed the accident report was not present for the arbitration hearing, yet Ms. Orr still works for Marriott. (Tr. p. 71).

Ms. Wnek testified that she did not know why the question on page 2 of the accident report asking, "Was the person carrying anything when injured?" was not marked. (Tr. p. 72). However, Ms. Wnek testified that Petitioner told her that she was carrying lids. (Tr. p. 72). Ms. Wnek testified that she did not know why the accident report says that Petitioner was talking to Marco prior to her fall as an "unsafe work practice", although she previous testified that was incorrect. (Tr. p. 72). Further, Ms. Wnek testified that Petitioner was not talking to Marco in the

video shown. (Tr. p. 72). Ms. Wnek testified that the supervisor's accident report was marked yes for the question, "Did a time constraint, hurrying to complete a task, contribute to the injury?" (Tr. p . 73).

On cross-examination, Ms. Wnek testified that the accident report was marked yes for the question, "Did an unsafe work practice contribute to this injury?" (Tr. p. 73). Ms. Wnek testified that it was important to capture the information for the supervisor's accident report as part of the investigation to see if there was anything out of the ordinary or something that could be prevented. (Tr. p. 73). Ms. Wnek testified that if employees engaged in hurrying to complete something, it could increase the risk of an injury occurring. (Tr. p. 74).

On re-direct, Ms. Wnek testified that she took the photographs for Respondent's Exhibits 5A-5F after she spoke to the Petitioner to show there were no defects or an unsafe condition in the area. (Tr. p. 75). Ms. Wnek testified that the mats were in the proper location. (Tr. p. 75). Ms. Wnek testified that it was recommend that Petitioner practice safe walking, but she did not know what training took place besides that listed for 2017. (Tr. p. 76).

Ms. Wnek testified that it did not appear in the video that Petitioner was working or moving in a hurried manner. (Tr. p. 78). However, on cross-examination Ms. Wnek was asked how she could tell that it didn't appear that Petitioner was hurry although she was looking through a window on the video for a brief amount of time and Ms. Wnek testified that it was her interpretation that Petitioner was walking normally. (Tr. p. 78). Ms. Wnek testified that if there were not proper lids in the VIP rooms, it was an issue that needed to be corrected quickly. (Tr. p. 78-79).

Medical Treatment

Petitioner testified that she was sent by Respondent in a taxi to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI

performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2 at 5/24/18) Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

ISSUES

Based upon the Stipulation Sheet signed by the Parties, as amended, the matters in dispute are as follows:

(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?
(J) Were 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? TTD

(*See* Arbitrator's Exhibit 1, Request for Hearing form).

Regarding Issue (C)

Regarding the issue "Did an Accident Occur that Arose Out of and in the Course of the Employment by Respondent," Petitioner testified that she injured her left knee during the scope of her employment on April 12, 2018, the Arbitrator finds the following:

A. Petitioner's Testimony Was Consistent and Credible Proving That Her Employment Exposed Her To A Risk Greater Than The General Public

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The requirement under the Workers' Compensation Act that a compensable injury arise out of the employment concerns the origin or cause of the claimant's injury. Adcock vs. IWCC, 2015 Ill. App.2nd 130884WC citing Parro v. Industrial Comm'n, 167 Ill.2d 385, 393, 212 Ill.Dec. 537, 657 N.E.2d 882 (1995). Whether an injury arose out of and in the course of a claimant's employment is a question of fact to be resolved by the Workers' Compensation Commission. Adcock vs. IWCC, 2015 Ill. App.2nd

130884WC citing Illinois Institute of Technology Research Institute v. Industrial Comm'n, *314 Ill.App.3d 149, 164, 247 Ill.Dec. 22, 731 N.E.2d 795 (2000).*

For an injury to arise "out of" the employment, the injury must have occurred from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of the employment if, at the time of the incident or accident, the employee was performing acts he or she was instructed to perform by his or her employer, acts he or she had a common law or statutory duty to perform, or acts the employee might reasonably be expected to perform incident to his or her assigned duties. O'Fallon School Dist. No. 90 v. Industrial Commission, *313 Ill.App.3d 413729 N.E.2d 523246 Ill.Dec. 150 (2000).* In O'Fallon, Petitioner was a school hall guard and injured her back when she quickly twisted and turned to stop a student that ran past her. Id. Compensation was denied under the theory of common risk, but the Commission reversed its decision following a Circuit Court mandate. Id. The appellate court affirmed stating that the Petitioner was subject to enhanced risk inherent in her duties. Id.

In Nascote Indutries, compensation was awarded due to frequency of usage although there was no "defect." In that case, Petitioner was required to pick up bumpers, walk to her work station and step up onto a rack. Petitioner stepped down from the rack and her foot turned causing a fractured metatarsal. The court affirmed compensation because Petitioner's foot injury "arose out of the course of employment" based on increased risk to foot, despite employer's claim that there was nothing unusual about the premises which contributed to the injury, where claimant stepped on to floor off part of a machine or platform that she was required to load as part of her job duties, claimant's work was fast-paced and involved quick turnaround rate, and claimant had to keep pace with parts press. Nascote Industries v. Industrial Commission *353 Ill.App.3d 1056, 820 N.E.2d 531, 289 Ill.Dec. 755 (2004).*

The court addressed an unexplained fall down stairs that occurred while Petitioner was moving hastily for her job in William G. Ceas and Company v. Industrial Commission, *261 Ill. App. 3d 630, 199 Ill. Dec. 198, 633 N.E. 2nd 994 (1994).* The Commission found the claim compensable due to Petitioner's hurried departure to deposit packages at her supervisor's request. Id. However, the appellate court then reversed, but after a rehearing was allowed, the court reversed the earlier decision and opined that the employer's last minute assignment caused

her to descend the stairs in a hastily manner and therefore the risk of injury was increased as a result of her work duties. Id.

Additionally, Petitioner has the burden of proving, by a preponderance of the evidence, all the elements of her claim. O'Dette v. Industrial Commission, *79Ill. 2d 249, 253.* Preponderance is evidence which is of greater weight or more convincing that the evidence offered in opposition to it, evidence which as a whole shows the fact to be proved as more probable than not. Houck v. Nationwide Rail Service, *No. 11 I.W.C.C. 0249*, citing Kordrey Jones v. J. Rubin Co, *98 IL W.C. 7779.* Factors to consider in determining whether a Petitioner has sufficiently carried the burden is credibility. Id.

In the case before the Arbitrator, Petitioner was credible and consistent. Petitioner testified that on April 12, 2018, she was hurrying to Starbucks while carrying cups and lids, when she tripped on carpeting and twisted her left knee causing injury. (Tr. pp. 8-12). Petitioner testified that the carpet was a mat located at the entrances of the hotel. (Tr. p. 9). Petitioner testified that she was hurrying because the lids did not fit the cups for customers in the VIP room. (Tr. pp. 8-12). Petitioner testified that she had received customer complaints about the coffee lids. (Tr. p. 18). Petitioner testified that she when she tripped her leg went to the side , she hear a popping sound and she felt immediate pain and could not walk. (Tr. pp. 8-9). Further, Petitioner testified that the carpeting she was referring to was a mat used by the hotel entrances. (Tr. p. 9).

The Medical records show that Petitioner consistently gave the same mechanism for her accident and injury which was that she tripped on carpet. Petitioner gave the same history of accident to Respondent's Occupational Clinic and Dr. Tu. (PX1 and PX2) The Occupational Clinic records report the description of the accident as "walking rapidly on carpet at work when I felt a pop in my knee," and the work status form states, "severe left knee pain after tripping at work no fall reported." (PX1). The history in Dr. Tu's notes stated, "she was walking quickly in between the floor and she tripped over the junction on the hard floor and the carpet." (PX2). Respondent questioned Petitioner about the differences between the descriptions. Although the records have slight differences, the medical records were not prepared in anticipation of litigation and the differences are negligible. Both histories state that Petitioner was walking rapidly or quickly when she tripped.

In addition to Petitioner's testimony and treatment records, Respondent's Exhibit 4, the supervisor's accident report documented that Petitioner was walking in a hurried manner causing an unsafe work practice as testified to by Respondent's witness, Ms. Wnek. (Tr. pp. 72-73, RX4). Further, the report listed suggested training for Petitioner to prevent future accidents and safety concerns. (Tr. pp. 73-74, RX4). Respondent's witness acknowledged that employees that work in a hurried manner are more likely to suffer injuries. (Tr. pp. 73-74).

Respondent's witness, Ms. Wnek, was simply not credible when testifying about Petitioner's accident. First, Ms. Wnek did not witness the accident and only spoke to Petitioner following the injury occurred. (Tr. pp. 13,39). Additionally, Ms. Wnek testified that she does not speak Spanish and did not use a translator when she spoke to Petitioner about the accident (Tr. pp. 63-64). However, Ms. Wnek testified that she would use translators for important employee meeting with Petitioner and her co-workers. (Tr. pp. 63-64). Apparently Ms. Wnek did not feel that an accident investigation was important enough to have a translator for her discussion with Petitioner.

Further, Ms. Wnek testified that she did not take pictures of the walkway leading to the Starbucks submitted as Respondent's Exhibit 5, because it was not her understanding of where the Petitioner tripped. (Tr. pp. 69-70). This is not credible since the records from Respondent's Occupational Clinic list the description as walking rapidly on carpeting and Ms Wnek was listed as a company contact. Therefore, Ms. Wnek would have reviewed the Occupational Clinic records as part of the accident investigation. As the site HR Director, Ms. Wnek would have been aware after Petitioner's treatment at the Occupational Clinic on April 12, 2018, that Petitioner tripped on carpeting. However, Ms. Wnek choose to take photographs that were limited in scope, without providing a picture of the run off mat that she testified was at the entrance of the hotel. Further, Ms. Wnek could not accurately testify as to when she took the photographs, only that they might have been taken the day of, or the day after, or within a few days. (Tr. p. 69).

Additionally, Ms. Wnek's testimony regarding the surveillance video was not credible. The view was a downward angle inside Starbucks and Petitioner was only visible through a small window. On cross-examination, Ms. Wnek testified that based on her interpretation of the video, the Petitioner did not appear to be hurrying although Petitioner was only visible for a few seconds. (Tr. p. 78). The surveillance video provided a limited and brief view of the Petitioner.

In fact, the surveillance video does not even show the actual floor at the moment the Petitioner is seen tripping. (PX7). Therefore, it is impossible from the surveillance video to see whether there was a mat at the point where Petitioner tripped. (PX7).

Much of Respondent's argument against finding accident is that Petitioner gave conflicting statements about the nature of her tripping incident. Respondent is correct that all of the various accounts do not perfectly align in terms of words chosen, descriptions used, or exact location where Petitioner tripped. The Arbitrator finds, however, that this is an exercise in splitting hairs and will not let the perfect defeat what amounts to good evidence in Petitioner's favor. Petitioner claimed she was in a hurry and tripped in such a manner that she hurt her knee while going to fetch lids as part of her job. She reported the incident, was treated near in time to the injury and was in fact hurt. The vast majority of all evidence in the record aligns with Petitioner's account of what happened.

Petitioner's testimony at trial and the histories of the accident that Petitioner gave to Respondent, the Occupational Clinic and Dr. Tu where consistent and credible. Similar to the O'Fallon, Nascote Indutries and William G. Ceas cases discussed above, Petitioner was engaged in activity on behalf of the employer that increased her risk of injury beyond the risk to the general public. In this case, Petitioner was working in a hurried manner carrying cups and lids as was testified to by Petitioner and Respondent's witness. Moreover, Petitioner was engaged in activities directed by her supervisor. Further, Petitioner accident was documented in the Respondent's supervisor report as the result of working in a hurried manner.

Based upon all of the above, the Arbitrator finds that the Petitioner suffered a left knee injury that arose out of and in the course of her employment, as a result of the work related accident of April 12, 2018.

B. Respondent's Exhibits 6(a) and 6(b) Were Properly Admitted as Evidence By the Arbitrator As an Admission by a Party Opponent

Under the Illinois rules of evidence, proper foundation must be laid to show authentication and identification for audio recordings to be admitted as evidence. Geary & Graham's Handbook of Illinois Evidence 9th Edition. Sound recordings of voices are authenticated if a proper foundation is laid, including the identification of the speakers. Id. Further, a transcript of the sound recording may be admitted in evidence if a sufficient

foundation is presented establishing the accuracy of the transcript and the identity of the speakers. Id. Communications by telephone do not authenticate themselves; the person speaking must be identified. Id.

Relevant and material audio recordings are admissible "if a proper foundation has been laid to assure the authenticity and reliability of the recording." People v. Viramontes, *410 Ill.Dec. 221, 69 N.E.3d 446 (2017)* citing, People v. Aliwoli, *238 Ill.App.3d 602, 623, 179 Ill.Dec. 515, 606 N.E.2d 347 (1992).* A sufficient foundation is laid when "a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the tape accurately portrays the conversation." Id. citing In re C.H., *398 Ill.App.3d 603, 607, 339 Ill.Dec. 139, 925 N.E.2d 1260 (2010).*

In a recent case before the commission concerning proper foundation, Dinaz Ravji v. United Airlines, Inc., *No. 05 W.C. 54051, No. 12 I.W.C.C. 0094, (2012)* the Illinois Workers Compensation Commission ruled that the Arbitrator was in error to admit still photographs from surveillance video introduced as exhibits by Respondent. In Ravji v. United Airlines, Respondent argued that the foundation was laid when Petitioner identified herself in the video; however, the commission disagreed citing People v. Flores 406 Ill.App.3d 566, 941 N.E.2d 375 (2010).

The court in Flores found that the trial court improperly admitted a video. The court opined that witness testimony was sufficient foundation for admission of the videotape for use as *demonstrative* evidence, and the court cited M. Graham, Geary & Graham's Handbook of Illinois Evidence as follows: "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time [.]" [citation omitted] Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. However, the Flores court noted that foundation for admitting the tape to be used as *substantive* evidence, however, required "something more rigorous than the witnesses' testimony that the video in evidence truly and accurately depicted that which it purported to depict." 406 Ill.App.3d at 576, 941 N.E.2d at 384. The court indicated that, "visual recordings, when treated substantively, are real evidence requiring a proper foundation, including evidence that the proposed exhibit is substantially unaltered." Flores, 406 Ill.App.3d at 572, 941 N.E.2d at 381. The witness testified

that the copy he produced was altered because he omitted portions from the original tape. The court held that the trial court abused its discretion when it considered the tape as substantive evidence, and stated that "an adequate foundation must show that the original has been preserved without change, addition, or deletion and that, if a copy is introduced into evidence, there must be a cogent explanation of any copying such that the court is satisfied that during the copying process there were no changes, additions, or deletions." Flores, 406 Ill.App.3d at 577, 941 N.E.2d at 385.

In the present matter before the arbitrator, Respondent's Exhibits 6(a) and 6(b) are a recorded audio statement with a translator and a transcript. At the hearing on October 23, 2018, Respondent did not lay a proper foundation to admit the recorded statement, translation and transcript. Respondent did not provide a witness to testify to the authenticity and accuracy of the recorded statement. The speakers on the recorded statement were not identified. Respondent did not provide a witness to testify about the accuracy of the Spanish to English translation of the recorded statement or the transcript. Further, because Respondent did not have a witness, Petitioner was not afforded the opportunity to cross-examine the individuals responsible for creating the recorded statement. Additionally, Petitioner could not cross-examine the translator with respect to his or her qualifications.

Respondent argued at Arbitration that Petitioner testified that she gave a statement and therefore it was an admission by a party opponent. (Tr. p. 24) Further, Respondent's counsel argued at Arbitration that Petitioner admitted it was her on the recorded statement. (Tr. p. 84) The Arbitrator finds this admission by a party opponent sufficient to admit the recorded statement into evidence despite the lack of foundation testimony that was outlined in the discussion above.

Based upon all of the above, the Arbitrator finds that Respondent's Exhibits 6(a) and 6(b) were properly admitted at Arbitration and should not be stricken from the record.

Regarding Issue (F)

Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

For an injury to be compensable under the Workers' Compensation Act, it generally must occur within the time and space boundaries of the employment. Sisbro, Inc. v. Industrial

Comm'n,207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The "arising out of" component for obtaining compensation under the Workers' Compensation Act is primarily concerned with causal connection; to satisfy that 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.) Claimant need only prove some act or phase of his employment was a causative factor in the ensuing injury to recover benefits under the Act. He need not prove it was the sole causative factor, nor even that it was the principal causative factor of his injury. Republic Steel Corp. v. Industrial Comm'n, *et al.*, 26 Ill.2d at 45, 185 N.E.2d at 884 (1962).

Petitioner testified that on April 12, 2018, she was hurrying to the Starbucks in Respondent's hotel to get cups and lids for guests when she tripped on mat causing injury to her left knee. (Tr. p. 8). Petitioner testified that when she tripped, her left leg went to the side and she heard a pop followed by immediate pain. (Tr. pp. 8-9).

Petitioner testified that Respondent sent her by taxi to Advocate Occupational Health on the same day of the accident. (Tr. pp. 13-14). The records indicate that Petitioner was walking rapidly on carpet when she tripped injuring her left knee. (PX1). Petitioner testified that she went to Advocate Occupational Health and the treaters kept her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3). Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18). Petitioner testified that she has not been able to have the surgery because the insurance did not authorize it. (Tr. pp. 16-17).

Respondent offered no rebuttal testimony or medical evidence regarding Petitioner's need for left knee surgery as recommended by Dr. Tu.

Based upon the totality of the evidence, including medical opinions, and the witness testimony, the Arbitrator concludes that Petitioner has established a causal connection between the work accident of April 12, 2018, and Petitioner's current condition of ill-being of left knee injury. This is supported by the medical records and opinions of Petitioner's testimony at trial, the treaters at Advocate Occupational Health and Dr. Tu.

Regarding Issue J:

Were the Medical Services Reasonable and Necessary, The arbitrator holds the following:

For all the reasons stated above, Petitioner suffered a work related injuries on April 12, 2018. As a result of those injuries, Petitioner has the following unpaid medical bills:

Provider	Dates of Service	Balance
Advocate Occupational Health	4/12/2018	$387.00
Dr. Kevin Tu	5/10/2018 to 9/20/2018	$1,820.00
Premier Imaging & Open MRI	5/15/2018	$1,626.03
Total Rehab	5/29/2018 to 6/29/2018	$6,141.00
	Total outstanding:	**$9,974.03**

Petitioner had admitted medical bills from Advocated Occupational Health (PX1) that had a balance of $387.00, Dr. Kevin Tu (PX2) with a balance of $1,820.00, Premier Imaging and Open MRI (PX3) with a balance of $1,626.03, and Total Rehab (PX4) with a balance of $6,141.00. Petitioner's treatment at Advocate Occupational Health was at the direction of and authorized by Respondent. (PX1) Respondent's clinic directed petitioner to follow up with an orthopedic doctor, which is Dr. Tu. (PX1) The MRI for her left knee was ordered, by Dr. Tu, Petitioner's treating physician. (PX2) The physical therapy at total rehab was recommended by Dr. Tu. (PX4).

In sections C and F above, the Arbitrator found that Petitioner did suffer a work related injury and her condition of ill being is causally connected to that injury. Respondent did not produce any medical opinions or testimony. Therefore, based upon the totality of the evidence, including medical opinions, and witness testimony, the Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injury

and the Arbitrator awards the $9,974.03 of the medical bills listed above, as provided in Sections 8(a) and 8.2 of the Act.

Regarding Issue K:

Is Petitioner entitled to any Prospective Medical Care?

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid for. Plantation Manufacturing Co. v. Industrial Comm'n, 294 Ill.App.3d 705, 710, 229 Ill.Dec. 77, 691 N.E.2d 13 (1997).

The ability for the Commission to award and order prospective was also decided in Homebrite Ace Hardware v. Industrial Commission 351 Ill.App.3d 333, 814 N.E.2d 126 (2004), and the court relied on Bennett Auto Rebuilders v. Industrial Comm'n, 306 Ill.App.3d 650, 655–56, 239 Ill.Dec. 767, 714 N.E.2d 1064 (1999), the court held that the Commission's order directing the employer to provide written authorization for a prescribed surgery was proper.

In the current case before the Arbitrator, Petitioner's treating surgeons, Dr. Tu has opined that Petitioner requires surgery as a result of the work injury of April 12, 2018. (PX10). Respondent has not provided any rebuttal medical evidence or testimony.

The arbitrator found in sections C and F that an accident occurred on April 12, 2018, that arose out of and in the course of Petitioner's employment by Respondent and Petitioner's left knee injury and current ill-condition is causally related. Therefore, the Arbitrator concludes that Respondent shall authorize Petitioner's left knee surgery and related post-surgical medical treatment as provided in Sections 8(a) Act.

Regarding Issue L:

What temporary benefits are in dispute? The Arbitrator finds the following:

A claimant is entitled to TTD when a "disabling condition is temporary and has not reached a permanent condition." Manis v. Industrial Comm'n, 230 Ill.App.3d 657, 660, 172 Ill.Dec. 95, 595 N.E.2d 158, 160-61 (1st Dist. 1992) The time during which a claimant is

temporarily totally disabled is a question of fact for the Commission; and to be entitled to TTD, claimant must prove not only that he did not work but that he was unable to work. City of Granite City v. Industrial Comm'n, 279 Ill.App.3d 1087, 1090, 217 Ill.Dec. 158, 666 N.E.2d 827, 828-29 (5th Dist. 1996). The dispositive test is whether the condition has stabilized, because the Commission reviews the evidence to ascertain whether claimant has reached maximum medical improvement, *i.e.,* the condition has stabilized. Beuse v. Industrial Comm'n, 299 Ill.App.3d 180, 183, 233 Ill.Dec. 453, 701 N.E.2d 96, 98 (1998).

Petitioner testified that she was sent by Respondent to Advocate Occupational Health on April 12, 2018. (Tr. pp. 13-14). Petitioner testified that she went to Advocate Occupational Health, the treaters ordered her off work and referred her for orthopedic treatment. (Tr. p. 14, PX1).

Petitioner testified that she saw Dr. Tu for treatment on May 10, 2018, and Dr. Tu ordered a MRI for her left knee and gave her work restrictions. (Tr.15, PX2 at 5/10/18). Dr. Tu's notes indicate that he gave Petitioner restrictions of sitting 50% of the time and no lifting, kneeling or squatting activities. (PX2 at 5/10/18). Petitioner testified that she had the MRI performed for her left knee on May 15, 2018. (Tr.15, PX3).

Petitioner testified that Dr. Tu diagnosed her with a medial meniscus tear and had Petitioner begin physical therapy. (Tr. 15, PX2). Petitioner testified that she did physical therapy for approximately a month at Total Rehab. (Tr. 16, PX4). Petitioner testified that Dr. Tu recommended surgery for her left knee as reflected by the treatment records. (Tr. 16, PX2 at 6/28/18).

Petitioner's medical records from Advocate Occupational Health and Dr. Tu all demonstrate that Petitioner was kept off work or on restricted duty beginning April 12, 2018. (PX1, PX2). Petitioner testified that she faxed her restrictions to Respondent, but she was not offered light-duty work and she has not received any Workers' Compensation disability pay. (Tr. pp. 15-17).

The Arbitrator holds, for the reasons stated in the "Accident", "Causation" and "Prospective Care" sections and based upon all testimony and medical evidence, Petitioner is awarded temporary total disability (TTD) benefits from April 13, 2018, up to the date of trial or 27 and 5/7 weeks times Petitioner's TTD rate of $398.62 per week (AWW of $597.94 as stipulated, Arb EX1) for a total of $11,047.35 in TTD benefits due.

CONCLUSION

In conclusion, the Petitioner's testimony was credible and convincing. Petitioner's medical records and testimony corroborate that she injured her left knee working for Respondent on April 12, 2018. The Arbitrator finds that Petitioner was injured in the course of her employment with Respondent on April 12, 2018.

The Arbitrator finds that Petitioner proved that her left knee injuries were caused by the work accident of April 12, 2018. The Arbitrator holds that Respondent shall authorize Petitioner's recommended left knee surgery, post-surgery physical therapy and other related post-surgical medical treatment as provided in Section 8(a) Act.

The Arbitrator concludes that all of Petitioner's medical charges are reasonable and necessary to attempt to cure her left knee injuries and the Arbitrator awards the $9,974.03 of medical bills listed in Section J above, as provided in Sections 8(a) and 8.2 of the Act.

The Arbitrator finds that Petitioner is owed temporary total disability (TTD) benefits due and owing of $11,047.35 for the period of disability from April 13, 2018, up to the date of trial on October 23, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK TANTILLO,

Petitioner,

21IWCC0165

vs. NO: 12 WC 34352

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

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, benefit rate, wages, temporary total disability benefits 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 affirms the Arbitrator's award regarding causation and the duration of temporary total disability benefits. However, the Commission modifies the calculation of the average weekly wage as well as the amount of permanency and medical benefits awarded.

The Commission disagrees with the Arbitrator's finding that Petitioner's working overtime was mandatory. At no point did the Petitioner testify that overtime was mandatory, but only that he worked approximately 55 hours per week. (T. 18) Additionally, although the wage statements entered into evidence between December 16, 2011 and June 15, 2012 reflect some overtime in 21 out of 27 pay periods, the number of hours worked are not regular and vary significantly. (Px14)

In *Airborne Express*, the Appellate Court found, that overtime should not have been

included in the claimant's average weekly wage because, "Although the claimant consistently worked overtime he did not work a set number of overtime hours each week." *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n (Bronke)*, 372 Ill. App. 3d 549, 555, 865 N.E.2d 979, 985 (1st Dist. 2007).

The same rationale applies in the instant case. Although Petitioner may have worked *some* overtime based on the evidence presented, the hours were not consistent and no evidence was presented that overtime was mandatory. Therefore, the Commission finds that Petitioner's average weekly wage is $17.90 x 40 hours per week = $716.00.

Regarding the medical bills, Petitioner failed to prove that the Prescription Partners charges contained in Px21 were reasonable, necessary and causally related to the accident of June 2, 2012. Petitioner's claims include $5,079.35 in charges from Prescription Partners. However, there are several problems with the bill of Prescription Partners:

1) It lists a date of injury of June 1, 2013 – not the date of accident that is at issue in this case – June 2, 2012.
2) The first Date of Service listed is June 27, 2013.
3) It is for medication dispensed by Dr. Howard Freedberg at Suburban Orthopedics. There are no treating records from this provider in evidence.
4) This record only lists *total amounts* per date of service and *NOT an itemized list* of prescriptions that were dispensed. Therefore, there is no way to know how, if at all, these charges are related to Petitioner's work accident on June 2, 2012.

We next modify the Arbitrator's award of permanency. The following is our analysis of Petitioner's permanent partial disability under §8.1b(b) of the Act:

i) No AMA impairment rating was submitted so we give this no weight.

ii) The Arbitrator gave "significant weight" to Petitioner's testimony that that he "is not able to pursue higher paying jobs due to his medical condition." However, there is no evidence of this. Petitioner was released to full duty with no restrictions for both his cervical and right shoulder. The Commission therefore only gives this factor some weight.

iii) The Arbitrator gave "greater" weight to this factor and concluded that Petitioner was an older individual whose disability "will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations." Although Petitioner testified that he takes an occasional Meloxicam and rubs "horse liniment" on his shoulder and neck area "every couple days" in the winter (T. 41-43), most of his testimony focused on how his disability affected his outside hobbies. The Commission gives this factor some weight.

iv) The Arbitrator found that Petitioner's "earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting," the Arbitrator gave "greater" weight to this factor.

Petitioner was released with no restrictions. Petitioner testified that he currently works at a job where he does paperwork and doesn't drive very much. (T.44-45, 52) However, Petitioner failed to prove that his decision regarding where to work has been anything other than a personal choice. Petitioner testified:

> Q: How has your earning capacity been impacted by the shoulder and neck injury of 2012?
>
> A: Well, it hurt due to the fact that I can't pass a test to drive for Holland or UPS and they call me all the time because I have an excellent driving record.
> But I know I can't pass the physical capacity test and lift 140 pounds or lift 80.
>
> I am getting paid $24 an hour now.
>
> Q: What are they paying at UPS or Holland?
>
> A: I think it's $29.30 and XPO that's a non-union company, they're paying $30.45.

Petitioner testified that he "can't pass a test to drive", but no evidence was introduced regarding the requirements of said test. Assuming the "test to drive" refers to the DOT test, no evidence was presented regarding those test requirements. Since Petitioner was released without restrictions, this testimony does not support a finding of a reduction in earnings capacity. Petitioner's claim that he is presently earning $24 per hour but could possibly be earning $29+ elsewhere is self-serving speculation. The Commission therefore gives this factor little weight.

v) The Commission modifies the last paragraph of page 12 of 13 of the Arbitrator's decision regarding factor "(v)" as follows:

> The Commission adds the phrase "as per the opinions of Drs. Burra and Lorenz" to the first sentence after the word "accident".
>
> The Commission further modifies that paragraph and adds the following:
>
> Although Petitioner's cervical issues resolved as Dr. Lorenz noted at the time of Petitioner's office vision on April 8, 2013, Petitioner sustained a SLAP-type tear of the superior labrum with the tear extending into the proximal biceps tendon as corroborated by a high resolution MRI arthrogram performed on August 28, 2012. Notwithstanding the fact that the office visit note dated January 5, 2013 authored by PA David Tan indicates "the high field arthrogram study noted no full thickness rotator cuff tendon tears and we do not believe he would be a candidate for a shoulder arthroscopy at this time," said note also reflects that "the

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definitive treatment for him would be a total shoulder arthroplasty at some point in the future."

The remainder of the paragraph remains unchanged.

As the Commission finds that Petitioner sustained a SLAP lesion and not a rotator cuff tear, the Commission reverses that finding by the Arbitrator. The Commission further vacates the award of 20% loss of a person as a whole. Based on its finding that the Petitioner sustained an unoperated SLAP lesion, the Commission awards Petitioner 10% loss of a person as a whole.

Additionally, the Commission awards 2.5% loss of a person as a whole based on the unoperated cervical radiculopathy. Although Petitioner's first EMG on September 14, 2012 showed "marked abnormality with respect to the C5-6-7 roots," the second EMG on March 22, 2013, did "not reveal any active denervation in the Rt C5, C6 or C7 distribution. [P's] strength has significantly improved and his pain has improved in the Rt arm, although not totally so."

Based on the above, we find that Petitioner has sustained the loss of use of 12.5% of the person-as-a-whole under §8(d)2 of the Act. Since we have found that Petitioner's Average Weekly Wage (AWW) in the year preceding his injury was $716.00, his weekly permanent partial disability rate is $429.60.

Furthermore, the Commission modifies the award for medical expenses from $33,695.24 to $28,615.89 as the Commission finds that the Petitioner failed to prove the Prescription Partners bill was related to the accident of June 2, 2012.

In addition to the foregoing, the Commission corrects the following scrivener's errors contained in the Arbitration Decision:

1) In the first sentence of the sixth full paragraph on page 4 of 13, the Commission corrects the date to "July 26, 2012", from July 23, 2012.

2) In first sentence of the first full paragraph on page 10 of 13, the Commission corrects the date to "July 26, 2012", from August 22, 2012.

3) In the last sentence of the paragraph under issues (H) and (I), contained on page 11 of 13, the Commission deletes the word "not" in regard to Petitioner's marital status.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $477.33 per week for a period of 52 3/7 weeks, from September 1, 2012, through September 2, 2013, 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

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the sum of $429.60 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,615.89 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

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

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

DATED:

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 020921
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TANTILLO, PATRICK
Employee/Petitioner

Case# **12WC034352**

21IWCC0165

PTO SERVICES INC AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKER BENEFIT FUND
Employer/Respondent

On 1/3/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
ANTIA M DeCARLO
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0000 PTO SERVICES INC
1000 JORIE BLVD
SUITE 228
OAK BROOK, IL 60521

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

21IWCC0165

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

Patrick Tantillo
Employee/Petitioner

Case # **12** WC **34352**

v.

PTO Services, Inc. and the Illinois State Treasurer as Ex Offico Custodian of the Injured Worker Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 2, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,288.16**; the average weekly wage was $**967.08**.

On the date of accident, Petitioner was **58** 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.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**644.72**/week for **52 3/7** weeks, commencing **September 1, 2012** through **September 2, 2013**, as provided in Section 8(b) of the Act

Respondent shall be given a credit for any temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $**33,695.24**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**580.25**/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.

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

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

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

Arbitrator Anthony C. Erbacci

December 28, 2018
Date

JAN 3 – 2019

FACTS:

Petitioner filed an original Application for Adjustment of Claim on October 3, 2012 alleging an injury to his "right arm (shoulder) & neck" while working for his employer, P.T.O. Services, Inc. on June 2, 2012. The Application for Adjustment of Claim was mailed to the Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 on October 3, 2012. In response to that filing, Chilton, Yamber, Porter, LLP (hereinafter "Chilton") filed an Appearance on behalf of P.T.O. Services, Inc. with the Illinois Workers' Compensation Commission.

Petitioner filed a Stipulation to Substitute Attorneys on February 2, 2017 which was sent to Chilton, on behalf of P.T.O. Services, Inc. on March 1, 2017 (PX 2 & 3).

The Illinois Workers' Compensation Commission sent a Notice of Hearing to the employer Chilton, on behalf of P.T.O. Services, Inc. by mail on July 10, 2017. (PX4). The Notice contained the following language: "This is a legal notice informing you that the Petitioner has filed a case with the IWCC for workers' compensation benefits. Employers, forward this notice to your insurance carrier or attorney."

On June 15, 2017, Chilton filed a Motion to Withdraw as the Attorney of Record for P.T.O. Services, Inc. citing the reason: "Our firm filed an appearance in this case on behalf of and at the request of P.T.O. Services, Inc. to protect it against any potential workers' compensation exposures in this case. Per the attached exhibit #1, P.T. O. Services, Inc. voluntarily officially dissolved as a corporation with the Secretary of State on April 17, 2017 and no longer exists, and our firm has no client remaining." (PX5). Based on this Motion, Chilton obtained an Order allowing them to withdraw as the attorney of record in this matter.

On July 7, 2017 an Amended Application for Adjustment of Claim naming "State Treasurer & ex officio-custodian of the Injured Workers' Benefit Fund was filed with the Illinois Workers' Compensation Commission. (PX6). On July 11, 2017 Petitioner filed a Request for Information on Employer's Insurance Coverage which was returned 07/12/2017 an indicated that there was no insurance coverage on the date of accident. (PX 7).

On January 17, 2018, Petitioner filed a Request for Hearing before Arbitrator Erbacci on March 1, 2018, with notice to the Respondent, P.T.O. Services Inc at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX8). The case was set for trial on March 12, 2018 and Respondent P.T.O. Services, Inc. failed to appear on that date. That same day, the Arbitrator specially set this matter for Hearing on June 7, 2018. Due to a clerical error, the Arbitrator dismissed this matter that same day. The Commission issued a Notice of Case Dismissal on March 13, 2018, which was sent to P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521. (PX9).

On March 20, 2018, Petitioner sent a certified letter to Respondent, P.T.O. Services, Inc. at 1000 Jorie Boulevard, #228, Oak Brook, IL 60521 detailing that this matter is specially set for trial on June 7, 2018 along with a Motion to Reinstate the Case. (PX10 & PX11). These items were delivered to P.T.O. Services, Inc. on April 2, 2018. (PX10).

On the trial date, June 7, 2018 the Arbitrator reinstated the case. Petitioner and IWBF were present with their attorneys and Respondent PTO Service, Inc. failed to appear. This

matter was set for trial on 09/17/2018. Due to a clerical error notice was not sent to PTO Services and this matter was continued by Email to December 7, 2018.

On September 7, 2018 a letter was sent to PTO Services Inc at 1000 Jorie Blvd, #228, Oak Brook, IL 60521 advising of a trial date of December 7, 2018 by regular and certified mail. Both mailings were returned to sender. (PX 23). Further, on September 11, 2018, Petitioner filed a Notice of Motion Request for Hearing requesting the agreed trial date of December 7, 2018. Respondent P.T.O. Services, Inc. failed to appear on December 7, 2018 and the case proceeded ex-parte.

Petitioner presented a Certification from NCCI confirming that P.T.O. Services, Inc. did not have insurance on the date of accident, June 2, 2012. (PX 12).

Petitioner testified that he was an employed as a commercial truck driver with P.T.O. Services, Inc. on the date of accident, June 2, 2012. He submitted a copy of his job description obtained from P.T.O. Services, Inc. Driver Hiring Policy updated March 24, 2010. (PX13). This job description confirms that he was hired to "operate 26,000+ lb. trucks on interstate and/or intrastate routes: arrange, load, transport and unload freight." (PX13). Petitioner also submitted a compensation report from P.T.O. Services, Inc. for the period of October 23, 2011 to June 23, 2012. (PX14). Further, Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He also testified that he worked on average 48 hours every week. He worked overtime 21 of the 27 weeks prior to his accident and working overtime was mandatory.

Petitioner was driving his route as an employee of P.T.O. Services, Inc. on June 2, 2012 when he attempted to open the rear of his trailer. He was forced to use a crowbar in order to open the jammed metal doors. While prying the doors open he fell forward, striking his head and body on the open doors. He notified his supervisor, Tom, the same day, June 2, 2012.

Petitioner first sought medical treatment on June 5, 2012 with his Rheumatologist, Dr. Alnadjm. (PX15). Of note, Petitioner began treating with this doctor prior to this accident, on April 17, 2012. At that time, Petitioner complained of right shoulder pain, however the hand written notes seem to suggest the doctor believed there to be an issue with the biceps tendon. On June 5, 2012, the first visit following his work related injury, Dr. Alnadjm noted "R shoulder pain. Crowbar slipped at work on 6-2-12 and now has a hard area by neck." (PX15). That same day, he prescribed an MRI of the neck and shoulder. Further, it appears at the bottom of the hand written page the doctor administered a cortisone injection. Petitioner followed up with Dr. Alnadjm on July 23, 2012 and was referred to Southside Orthopedics. (PX15).

Petitioner went to Southside Orthopedics on July 23, 2012. He was diagnosed with severe degenerative joint disease of his right shoulder. Further, the doctor opined: "I think you can blame all his shoulder symptoms on these changes with some exacerbation from the crow bar incidences." The doctor noted that since Petitioner did not get much benefit out of the cortisone shot, he is probably at the end stage disease. Lastly, the doctor referred him to Hinsdale Orthopedics to explore the option of a total shoulder replacement. (PX16).

Dr. Alnadjm again prescribed an MRI to the shoulder on July 31, 2012. (PX15). An MRI was performed on the cervical spine, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative change in the cervical spine with multilevel disc disease.

2. At C2-3, left peridiscal posterior osteothytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C3 nerve root.

3. At C3-C4, 2 mm broadbased posterior disc protrusion with peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in bilateral neural foraminal enchroachment and abuts the exiting C4 nerve roots, more on the left side.

4. At C4-C5, 2 mm posterocentral disc protrusion with small peridiscal posterior osteophytes (hard discs). There is no central canal or neural foraminal stenosis.

5. At C5-C6, subtle diffuse posterior disc bulge and small peridiscal posterior osteophytes (hard discs). No central canal stenosis or neural foraminal stenosis.

6. At C6-C7, 4 mm broadbased posterior disc protrusion indents the thecal sac and abuts the cord. The disc protrusion with small peridiscal posterior osteophytes (hard discs) and facet hypertrophy results in left neural foraminal encroachment and abuts the left exiting C7 nerve root. (PX17)

An MRI was performed on the right shoulder, by Homer Glen Open MRI & Imaging, on August 1, 2012. (PX17). The findings were:

1. Degenerative disease of the glenohumeral and acromioclavicular joints with large effusion. Areas of marrow edema adjacent to these joints. Clinicopathological correlation is suggested to rule out possibility of infective etiology.

2. Supraspinatus tendinosis with no evidence of tear.

3. Type II acromion process with acromioclavicular joint arthropathy this results in impingement.

4. Collection in the subcoracoid and subscapularis bursa.

5. Diffuse degeneration of the glenoid labrum.

6. Biceps tendon tenosynovitis. (PX17)

Dr. Alnadjm reviewed the MRI on August 7, 2012 and released him into the care of an orthopedic surgeon. (PX15). Petitioner first treated with Hinsdale Orthopedics, at the request of Dr. Alnadjim, on August 22, 2012. (PX18A). Hinsdale details his history of accident as follows:

He is a right-hand dominant truck driver. He drives a spotting Jeep which essentially takes trailers and lifts them on hydraulics, and he as to position them into a dock and then open the doors. Of late, he has been handling the same Jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open these doors, and in the process of doing so, he has had a few injuries the most recent being a slipping injury where the crowbar slipped forward and his arm essentially

> impacts as it slipped and crashed against the shipping container. He described a series of 3 injuries which happened on March 24, 2012, June 2, 2012 and June 9, 2012. All of these are associated with these stuck doors when he was prying open with this crowbar. Consequent to this he has developed significant pain in his right shoulder. While he has had other problems on the rest of his body he had never had any for a problem with his right shoulder. He used to swim. He used to play recreational softball and baseball and other athletic activities without any problems and he has also been performing his job without any problems until this present situation. He does complain of some neck pain which appears to be resolving. At this point, he does not have any paresthesias or weakness on the right side. In the course of his development of symptoms he has also noticed that he is developing significant scapulothoracic pain and loss of range of motion. (PX18A).

Dr. Burra performed a complete examination including reviewing the MRI images. He noted a bulge at C3-4 with neural foraminal encroachment on the left; some changes at C4-5 and C2-3; and the most significant issue at C6-C7 with a 4 mm posterior disc protrusion that his encroaching on the left neural foramen. He noted the MRI of the shoulder revealed a significant amount of atrophy changes and streaking in the infraspinatus and osteophyte formation and chondral pathology was quite evident. Based upon same, Petitioner was diagnosed with a rotator cuff tear and glenohumeral arthritis. In order to confirm the rotator cuff tear, a high field MRI arthrogram was prescribed. Further, Dr. Burra noted that a total reverse total shoulder could be required. (PX18A).

The high field MRA was performed by Hinsdale Orthopedics on August 28, 2012 and found: "(1) SLAP type of superior labrum with the tear extending into the proximal biceps tendon. (2) Severe glenohumeral osteoarthritis with virtually complete absence of articular cartilage and subchondral cysts in the humeral head. (3) Supraspinatus tendinosis but no full thickness tears. (4) Inferiorly projecting AC arthrosis with an acquired type III acromion. (5) Degeneration of the inferior remainder of the glenoid labrum." (PX18A). At his follow up appointment on September 14, 2012, Dr. Burra diagnosed a partial-thickness tear of the supraspinatus with approximately 75% atrophy of the supraspinatus, a longitudinal tear of the biceps, a SLAP tear of the labrum and severe glenohumeral space narrowing with virtual absence of articular cartilage. In addition, an EMG with neurology consult was prescribed in order to determine if there is any neurological compromise to his supraspinatus which could be causing the atrophy. (PX18A).

Petitioner followed up with Hinsdale orthopedics on September 25, 2012. At that time, Dr. Burra reviewed his neurological consultation and EMG. The EMG revealed "evidence of right sided C5-6 radicular process. Based on the fact that there is some denervation of the tricep muscle, there may be some degree of C7 involvement as well. Not only are there findings of ongoing denervation corresponding to the described myotomes, but there is also evidence of chronic neurogenic change in these myotomes." Based upon same, Dr. Burra diagnosed "Disc Disease: Cervical" and prescribed "immediate spine consult before going forward with treatment for the right shoulder." He was again prescribed to be off work. (PX18A).

On October 17, 2012, Hinsdale Orthopedics noted complaints of fatigue and weight change. Petitioner was instructed to follow up with his PCP and remain off work. (PX18A).

Dr. Lipov from Oak Brook Surgical Center examined Petitioner on November 2, 2012 and diagnosed cervical radiculopathy with pain in the neck and right arm. That same day, he performed a cervical epidural steroid injection at C5-C6. (PX20).

On November 5, 2012, Dr. Burra again discussed the continuing right shoulder diagnosis of a SLAP lesion, bicep tendnitis, impingement, ACJ pain, PRCT with atrophy from neurological process, glenohumeral OA. However, he could not address the conditions with surgery until the neurological issues had been fully addressed. Petitioner was prescribed off work and to continue his spine and neurologic treatment. (PX18A).

Petitioner saw Dr. Lorenz at Hinsdale Orthopedics on November 21, 2012 and was diagnosed with: "1.Rotator Cuff Tear. 2. SLAP lesion. 3. Radiculopathy C5, 6, and 7 on the right which is really quite severe with nerve atrophy." Further, he was prescribed a myelogram and post Myelogram CT and to remain off work. (PX18A).

The CT of the cervical spine was performed at Hinsdale Hospital on December 7, 2012. It revealed: "broad based left paracentral disc protrusion at C6-C7 with resulting moderate spinal stenosis and broad-based central disc osteophyte complex at C3-C4 resulting in mild spinal stenosis. (PX19). Further, his final diagnosis from Hinsdale hospital that day was "brachial neuritis or radiculitis NOS." (PX19).

Dr. Lorenz reviewed the Myelogram on December 10, 2012 and noted "spinal stenosis most predominantly at C6-7 but also at C5-6 with fairly significant degenerative changes. L4-5 is only mild." Lorenz prescribed a decompression at C5-6 and C7; a second opinion with Dr. Franczak and continued off work. (PX18A).

Dr. Burra examined the shoulder again on January 5, 2013. Despite, Petitioner's reported improvement with strength and pain, the doctor noted that a total shoulder arthroplasty would be necessary at some point in the future. In an attempt to immediately address the pain, Burra performed cortisteroid injections to the primary pain generators in the biceps tendon and subacromial space, prescribed physical therapy and continued off work. (PX18A).

At Petitioner's follow up on April 9, 2013 with Hinsdale Orthpedics he reported 25% improvement of shoulder pain. His right shoulder diagnosis on that date was bicep tendinitis, impingement, ACJ pain and glenohumberal OA. Based upon his response to the injection, surgery may be appropriate to address the bicep, impingement and ACJ narrowing. However, Dr. Lorenz needs to provide clearance before proceeding with surgery. Lastly, he was again restricted from any kind of work. (PX18A).

Dr. Lorenz examined Petitioner on April 18, 2013 and noted that his cervical radiculopathy resolved and prescribed a functional capacity assessment to determine work limitations, if any, with the cervical spine. He further indicated the cervical issues were not an impediment to shoulder surgery by Dr. Burra. (PX18A).

On May 6, 2013, Dr. Burra addressed the right shoulder again. The best way to address his pain generators is to proceed with an arthroplasty of the right shoulder however Patrick does not want to proceed due to the potential effect on his ability to return to work. Dr.

Burra agreed with Lorenz' prescription for a functional capacity assessment to determine functional abilities and to remain off work until the results were reviewed. (PX18A)

On July 9, 2013 Petitioner returned to Dr. Burra for continued deep shoulder pain. As a result, a series of synvisc injections were prescribed, the first ultrasound guided injection on the right glenohumeral was performed on this day. Further, Petitioner remained off work and the FCA was put on hold until all three injections were performed. (PX18A).

The second ultrasound guided injection of the right subacromial space was performed on July 16, 2013 and the off work note was extended. The third and final viscosupplementation injection with Synvisc into his right shoulder on July 22, 2013. The doctor released him to return to modified duty on July 23, 2018. (PX18A). However, Petitioner testified that a light duty job was not offered at that time.

On August 8, 2013 the Functional Capacity Evaluation prescribed by both Dr. Burra and Dr. Lorenz was performed at Newsome Work Performance Center. The evaluation found: "This job specific evaluation was performed using a 100% kinesiophysical approach and Mr. Petitioner demonstrated the ability to perform 0.00% of the physical demands as a Truckdriver." (PX18A). However, Mr. Petitioner also "demonstrated the physical capabilities and tolerances to perform within the HEAVY physical demand level based on an occasional lift/carry of 80 lbs. and a frequent lift of 45 lbs. from floor to waist." (PX18A). Lastly, the evaluation concluded that Petitioner was putting for "maximum effort" during the testing. (PX18A). After reviewing the FCE, he was returned to work full duty, for his cervical condition on, August 14, 2013. It was specifically noted that he was not released to return to work for his shoulder condition. He returned to Hinsdale Orthopedics on August 27, 2013 and was returned to work full duty, for his shoulder condition. Specifically, it was noted that he continues to have limitations on range of motion. The doctor specifically noted Petitioner's motivation to return to work full duty. Further, the injections were expected to "work well for at least 6-8 months" but he "may be a candidate for a future series" depending on symptoms or "to postpone or avoid any total joint replacement." (PX18A).

Petitioner testified that he is currently employed as a truck driver but he is working in a supervisory capacity. He performs limited driving and no lifting in his position. His earnings are similar to what he was earning at the time of his accident. However, he did note that his earnings were impaired due to his lifting limitations. He is unable to pursue higher paying jobs as a truck driver due to his inability to lift and load cargo into the trucks.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (A.), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds and concludes as follows:

Petitioner testified that he began working for Respondent-Employer, P.T.O. Services, as a commercial truck driver in December 2011. He further testified that the Respondent-Employer was in the freight business stationed in Minooka, Illinois, and it delivered freight to various places all over the country. As a commercial truck driver, Petitioner drove trailers to various locations, then picked up

trailers from other locations. He also acted as a spotter, which involved opening shipping containers and moving the contents from one area of a shipping yard to another. Based upon the unrebutted testimony and other credible evidence, as well as the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

In Support of the Arbitrator's Decision relating to (B.), Was there an employee-employer relationship, the Arbitrator finds and concludes as follows:

The Arbitrator finds an employee-employer relationship did exist between the Petitioner and P.T.O. Services. The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties. While, the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. Roberson v. Indus. Comm'n, 225 Ill. 2d 159, 175 (2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Id.

Petitioner's testimony and other evidence established that he was employed by P.T.O Services. He was hired by Tom Wistlow in December 2011, and was paid by payroll check (PX 14). He clocked in and out daily, and received a ticket containing his duties for the day when he clocked in. P.T.O Services provided all of the equipment required to complete the job. As a commercial truck driver, Petitioner's work encompassed P.T.O. Services' general business as a freight distribution company.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 2, 2012 an Employee-Employer relationship existed between the Petitioner and Respondent-Employer P.T.O Services Inc.

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, and (D.), What was the date of accident, the Arbitrator finds and concludes as follows:

On June 2, 2012, Petitioner arrived at work and punched into a payroll clock. He obtained a ticket that laid out his "spotter" duties for the day. Petitioner was in the process of attempting to pry open a shipping container with a crow bar when something broke on the door, and he smashed his head in the door of the shipping container. Petitioner sat down on the ground due to experiencing head pain. Another employee walked by while Petitioner was sitting on the ground and asked Petitioner if he was ok. Petitioner's head and knuckles were bleeding. He immediately reported the accident to Tom Wistlow.

Petitioner sought medical attention on June 5, 2012 with Dr. Alnadkim. (PX 15). Petitioner reported that he was experiencing right shoulder pain after a crow bar slipped at work, and Dr. Alnadjim noted that Petitioner had a hard area by his neck. Id. Petitioner went to Southside

Orthopedics on June 26, 2012, where he reported that he was injured while pushing a crowbar at work. (PX 16).
Petitioner was subsequently referred to Dr. Burra at Hinsdale Orthopedics, who he saw on August 22, 2012. (PX 18). Id. Dr. Burra noted that Petitioner is a right-hand dominant truck driver, and he drives a spotting jeep which takes trailers and lifts them onto hydraulics, and he has to position them into a dock and open the doors. Id. Dr. Burra reported that Petitioner has been handling with same jeep shipping containers which have stuck doors and he has to manually use a crowbar to pry open the doors, and in the process, he has had a few injuries. Id. Petitioner reported that he injured himself at work on June 2, 2012 when the crowbar slipped forward and his arm impacted it, and, as it slipped, it crashed against the shipping container. Id. Petitioner was diagnosed with a right rotator cuff tear and glenohumeral arthritis, and a MRI arthrogram was ordered. Id.

Based upon the unrebutted testimony and other credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence that on June 2, 2012, he sustained an accidental injury which arose out of in the course of his employment by Respondent-Employer P.T.O Services, Inc.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The unrebutted testimony of the Petitioner established that Respondent-Employer was aware of Petitioner's accident. Petitioner testified that he informed his supervisor, Tom Wistlow, of the accident immediately after it occurred on June 2, 2012. When Petitioner was given authority to return to work light duty, he informed Mr. Wistlow, who told him there was no light duty work available.

Based upon the unrebutted testimony and credible evidence, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that he provided Respondent-Employer with timely notice of the accident as defined by the act.

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 and concludes as follows:

The unrebutted testimony of the Petitioner, as well as the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates establish that the injury of June 2, 2012 caused injury to the Petitioner's right shoulder and neck (cervical spine). The Petitioner, thereafter, commenced a continuous course of medical treatment for those injuries. The Arbitrator concludes that the Petitioner has proven by a preponderance of the evidence that his present condition of ill-being relative to his right shoulder and neck (cervical spine) is causally connected to his injury of June 2, 2012. This conclusion is based upon the unrebutted testimony of the Petitioner and an examination of the medical records from Dr. Alnadjm of Silver Cross Hospital, Southside Orthopedics and Hinsdale Orthopedic Associates.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

Petitioner alleges that his earnings from Respondent-Employer were $967.08 per week, or $50,288.16 per year. (Arb Ex 1). Petitioner submitted "compensation reports" dated November 1,

2011 through June 27, 2012. (PX 14). The compensation reports submitted show that Petitioner was paid a total of $18,615.80 over a 27-week period in "regular" pay, and $6,815.48 in "overtime" pay. *Id.*

Petitioner testified that he was paid $17.90 an hour for the 27 weeks prior to his injury on June 2, 2012. He worked overtime in 21 of the 27 weeks prior to his accident and he testified that working overtime was mandatory. Petitioner's earnings were $50,288.16 in the 52-weeks prior to his injury of June 2, 2012. The Arbitrator concludes that Petitioner has proven beyond a preponderance of the evidence that his average weekly wage was $967.08. The basis for this conclusion was the unrebutted testimony of the Petitioner and the wage statements admitted into evidence as PX 14.

With respect to Issue (H), What was the Petitioner's age at the time of the accident, and (I), What was the Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

The unrebutted testimony of the Petitioner as well as the emergency room records, established that the Petitioner's date of birth is January 26, 1954, making him 58 years of age on the date of accident. The unrebutted testimony of the Petitioner established that he was married and he had no children under the age of 18 on the date of injury. Based upon the unrebutted testimony and other credible evidence the Arbitrator finds that Petitioner was 58 years old on the date of accident and that that Petitioner was not married and had no children on the date of injury.

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 and concludes as follows:

The Arbitrator finds that the Petitioner has established by more than a preponderance of the credible evidence that the medical bills related to the treatment of the Petitioner's work injury of June 2, 2012are reasonable, necessary and causally related to the accident, and that the Respondent shall pay for those medical expenses under Section 8(a) of the Act and pursuant to the Illinois Fee Schedule. This conclusion is based upon the testimony of the Petitioner and an examination of the medical records. Respondent has paid no medical bills to date. As such, Respondent shall pay reasonable and necessary medical services of $33,695.24, as provided in Sections 8(a) and 8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner testified, and the medical records indicate that the Petitioner was off work as a result of his injuries from September 1, 2012 through September 2, 2013. Based upon the Petitioner's unrebutted testimony and the medical records admitted into the record, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from September 1, 2012 through September 2, 2013, a period of 52 3/7b weeks.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

In the instant case, the Petitioner suffered a rotator cuff tear, SLAP lesion, C5,6,7 radiculopathy on the right with nerve atrophy as a result of this accident. He was prescribed a shoulder replacement and a cervical decompression that he did not pursue due to his fear of the surgeries themselves. He received physical therapy and injections to work through the pain. Further he testified that he continues to perform home exercises every day in order to deal with these physical conditions. Petitioner testified to continued need to take over the counter medication and horse liniment depending on the weather. He testified to continued work as a truck driver, however earning less at a job requiring less physical lifting.

Because the Petitioner's work accident occurred after September 1, 2011, Section 8.1(b) of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

* The reported level of impairment based upon the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment;
* the occupation of the injured employee;
* the age of the employee at the time of the injury;
* the employee's future earning capacity; and
* evidence of disability corroborated by the treating medical records.

With regard to the reported level of impairment pursuant to Section 8.1(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. Thus, the Arbitrator gives no weight to this factor.

With regard to the occupation of the injured employee, the Petitioner's occupation is that of a truck driver, which the Arbitrator notes includes some heavy work. The Arbitrator notes that the Petitioner has been working in a position that requires limited driving and no lifting. Because of the testimony that petitioner is not able to pursue higher paying jobs due to his medical condition, the Arbitrator gives significant weight to this factor.

With regard to the age of the employee at the time of injury, the Arbitrator notes that the Petitioner was 58 years old at the time of the accident. The Arbitrator considers the Petitioner to be an older individual and concludes that because of his age the Petitioner's permanent partial disability will have more of a deleterious effect than it would on a younger individual who would be otherwise better able to adapt to his limitations. The Arbitrator therefore gives greater weight to this factor.

With regard to the employee's future earning capacity, the Arbitrator notes that his earning capacity has been diminished by the inability to perform continuous heavy lifting. Because of the limited jobs as a truck driver with limited lifting, the arbitrator therefore gives greater weight to this factor.

With regard to the evidence of disability corroborated by the treating medical records, the Arbitrator notes significant surgeries of a shoulder replacement and cervical decompression at three levels have been prescribed for the Petitioner as a result of this accident. The Petitioner credibly testified that he currently experiences a loss of strength in his arm as well as pain in his shoulder and neck. These complaints are corroborated in the medical records of the Petitioner's treating

physicians. The Petitioner's complaints as supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedent pursuant to Section 19(e). The Arbitrator gives significant weight to this factor.

The determination of permanent partial disability is not simply a calculation but an evaluation of all 5 factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, having considered the factors enumerated in Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that as a result of his accidental injuries the Petitioner has sustained 20% disability to his whole person.

In Support of the Arbitrator's Decision relating to (O.), Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner, and Was adequate and proper notice of hearing given to the Respondent-Employer the Arbitrator finds and concludes as follows:

This matter was heard on December 7, 2018. It proceeded *ex parte* against Respondent-Employer P.T.O. Services. The Injured Workers' Benefit Fund was represented by the Attorney General's office by Assistant Attorney General Danielle Curtiss. A review of the Illinois Workers' Compensation Commission records by Roguens Loriston failed to reveal any workers' compensation insurance coverage for the Respondent-Employer ASM Transport Services, Inc. on June 2, 2012. (PX 12).

On the hearing date, no one from P.T.O. Services was present, and the hearing proceeded *ex parte* against the Respondent-Employer. Petitioner introduced into evidence correspondence from Petitioner's attorney's office sent via certified mail to the Respondent-Employer's addresses including the addresses filed with the Secretary of State registered agent for P.T.O. Services (PX 8; PX 10; PX 11; PX 24).

Based on the above, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that the Injured Workers' Benefit Fund of Section 4(d) of the Illinois Workers' Compensation Act , applies and that the Injured Workers' Benefit Fund has been properly named as a Respondent in this matter. Further, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Respondent-Employer P.T.O. Services had adequate and timely notice of the hearing.

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 VRCHOTA,

Petitioner,

vs. NO: 13 WC 34611

DD&G DEVELOPMENT & RESTORATIONS, and State Treasurer as *Ex-Officio* Custodian of INJURED WORKERS' BENEFIT FUND,

Respondents.

21IWCC0169

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the January 8, 2020 Decision of the Arbitrator. Therein the Arbitrator found no employment relationship existed between Petitioner and Respondent DD&G Development & Restorations, and Petitioner failed to prove he sustained an accidental injury on October 9, 2013.

While the matter pended on Review, Respondent DD&G Development & Restorations ("DD&G") filed a Motion to Dismiss Petitioner's Review. Respondent Injured Workers' Benefit Fund subsequently joined the motion. The parties briefed the issue, and the matter was taken under advisement for ruling by the full panel. Notice having been provided to the parties, the Commission, after reviewing the record in its entirety, hereby dismisses Petitioner's Review for the reasons stated below.

In its Motion to Dismiss, DD&G noted, on April 9, 2020, Petitioner executed a settlement and release of his civil claim against DD&G for the injury at issue and a dismissal order was thereafter entered stating "said cause having been settled by agreement of the parties." Motion Exhibit B. DD&G further noted the dismissal order is a public record of a civil court case and therefore subject to judicial notice. DD&G argued, under Sections 5(a) and 11 of the Act and *Rhodes v. Industrial* Commission, 92 Ill.2d 467 (1982), Petitioner is now precluded from continuing his workers' compensation claim. The Commission agrees.

Initially, the Commission finds the April 29, 2020 Dismissal Order is subject to judicial notice. Illinois courts recognize that documents containing readily verifiable facts from sources of indisputable accuracy may be judicially noticed if doing so will aid in the efficient disposition of a case. *City of Centralia v. Garland*, 2019 IL App (5th) 180439, ¶ 10; *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 36. Public documents that are included in the records of courts and administrative tribunals are subject to judicial notice. *People v. Davis*, 65 Ill. 2d 157, 164 (1976); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009); *NBD Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520 (1993); see also *People v. Ernest*, 141 Ill. 2d 412, 428 (1990) (observing that trial court was authorized to take judicial notice of transcripts in underlying action); *In re McDonald*, 144 Ill. App. 3d 1082, 1085 (1986) (recognizing that trial court has authority to take judicial notice of hearing transcripts). While we do not believe judicial notice can be extended to the Release and Settlement Agreement itself, the Commission emphasizes the Dismissal Order states the civil claim "has been settled by agreement of the parties." Black letter contract law states there must be consideration in order to have a settlement.

The Commission further concludes *Rhodes* is dispositive of the instant matter. In *Rhodes*, the Supreme Court of Illinois held as follows:

> The legislative intention underlying section 5 of the Workmen's Compensation Act would obviously be frustrated if an injured employee could recover damages in a common law action and workmen's compensation benefits as well. If an employee initiates a common law action for his injury and receives payment from his employer as a result of such suit he is disqualified from obtaining an award under the Workmen's Compensation Act. The statute's design was to serve as a substitute for an employee's common law right of action and not as a supplement to it. 92 Ill.2d at 471. (Emphasis added).

The Commission finds the language of the Dismissal Order is sufficient to establish "the receipt of payment from the employer." Therefore, Petitioner "is disqualified from obtaining an award" under the Act, and his Petition for Review is hereby dismissed.

The Commission further notes, assuming *arguendo*, Respondent's Motion to Dismiss was denied and we reached the merits of Petitioner's Review, the Commission would affirm and adopt the Decision of the Arbitrator. The Commission finds the injury did not arise out of Petitioner's employment. We emphasize Mr. Kowalski credibly testified he works by himself, and on those occasions he needs assistance with flooring, he chooses the person; at no time would Mr. Schwager assign an assistant to him. As such, there is no credible evidence of an employment-related reason for Petitioner's use of the miter saw, and we find Petitioner was acting outside the scope of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review filed February 3, 2020, is hereby dismissed.

21IWCC0169

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2020 is final.

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

DATED:
TJT/mck
051
o020321

APR 13 2021

Thomas J. Tyrrell

Stephen J. Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on February 3, 2021, before a three member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and Thomas J. Tyrrell, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Commissioner Coppoletti on March 19, 2021, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the panel members in this case, I have reviewed the Decision worksheet showing how Commissioner Coppoletti voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VRCHOTA, WILLIAM
Employee/Petitioner

Case# **13WC034611**

DD&G DEVELOPMENT AND RESTORATIONS LLC & THE ILLINOIS STATE TREASURER AS EX-OFFICO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

21IWCC0169

On 1/8/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

4239 LAW OFFICE OF JOHN ELIASIK
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180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

0210 CANAN & SHAPIRO PC
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6285 ASSISTANT ATTORNEY GENERAL
DANIEL KALLO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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 Vrchota
Employee/Petitioner

v.

DD&G Development and Restorations, LLC

&

The Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund

Employer/Respondent

Case # **13 WC 34611**

21IWCC0169

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 **Chicago**, on **October 28, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10-09-13**, Respondent ***was not*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$5,541.00**; the average weekly wage was **$307.83**.

On the date of accident, Petitioner was **35** 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 **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

The Arbitrator finds Petitioner was not an employee of Respondent on October 9, 2013 and that Respondent was not subject to the Workers' Compensation Act. As such, all claims for benefits are denied.

The Arbitrator finds Petitioner did not sustain an injury arising out of his employment. As such, all claims for 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

01-07-20
Date

ICArbDec p. 2

JAN 8 - 2020

21IWCC0169

FINDINGS OF FACT

William Vrchota (hereinafter "Petitioner") alleges he sustained a work-related accident while employed by DD&G Development (hereinafter "Respondent") on October 9, 2013. Respondent disputes Petitioner was an employee and contends he was instead an independent contractor, and disputes Petitioner sustained a compensable work-related injury regardless of the employment relationship. Petitioner testified on behalf of himself. Dave Schwager, Respondent's owner, Kenneth Kowalski and Orian Phillips testified on behalf of Respondent.

MEDICAL RECORDS (PX 2 and PX 4)

The EMS notes contained within the certified records state Petitioner was found with lacerations to the arm. The records state his medications were Norco, Oxycodone and Meloxicam. Petitioner was also intravenously given Fentanyl and Midazolam.

Petitioner arrived at St. Alexius Medical Center by ambulance at 9:48 a.m. immediately following the accident. The past medical history was noted to be heartburn, drug abuse, sleep apnea and chronic back pain. Petitioner stated he was cutting wood with a saw when his forearm got caught and pulled into the saw. An x-ray of the arm was completed which showed an open comminuted fracture with the distal defect at the ulnar.

Dr. Thomas Fendon evaluated Petitioner. The record stated Petitioner narcotized but arousable and able to communicate. Dr. Fendon noted the significant laceration and recommended surgery, which Petitioner underwent that day. The surgery included a number of tendon and muscle repairs as well as a debridement and irrigation of the ulnar fracture. Petitioner was released from the hospital later that day.

Petitioner next presented to APAC Groupe Centers for pain management on October 17, 2013. Petitioner stated he had been cutting hardwood flooring and put his arm up to protect his chest from getting cut. He stated it was not a workers' compensation case. He did state the injury was aggravated by movement and had associated numbness and swelling. Petitioner was diagnosed with an arm injury and musculoskeletal deformity of the upper arm as well as an open wound of the upper arm with tendon involvement. He was instructed to begin 30-days OxyContin, though it was noted there would have to be an exit plan and the medications would be regulated by his wife. He was also instructed to continue his Norco for breakthrough pain and follow-up in one month to check on pain management.

Petitioner returned on November 26, 2013 for medication management. He stated his pain was aggravated by movement but alleviated by medications. Petitioner stated the pain was disabling. He was prescribed Norco and Morphine. The next visit was December 24, 2013 at APAC Groupe, and Petitioner's chief complaint was pain in his thoracic spine and arm pain. There was no explanation for the start of the thoracic pain. Petitioner stated he was not working and had no therapy ordered by the orthopedic surgeon in Elgin. Petitioner was instructed to begin therapy and follow-up in one month, as well as continue medications as directed. On January 28, 2014, Petitioner presented with lower back pain with numbness down the right leg. Petitioner stated he was now a vegetarian. He still was not working and described chronic ongoing disabling pain. Dr.

Pang noted the pain was self-limiting. The diagnoses were back pain, myalgia, current drug user and shoulder pain. The impression was chronic myofascial back pain, and it was noted he was three months out from the left upper extremity trauma. Petitioner stated he was reducing the dosage and he was to continue decreasing his Norco.

The last medical record is a drug screen which was collected on January 28, 2014. The drug test noted inconsistent results based on the presence of pregabalin, cocaine metabolic, ethyl glucuronide sulfate. It was noted pregabalin was detected but did not match any of the reported prescriptions and that cocaine is a schedule 2 controlled substance with limited pharmaceutical application.

Testimony of KENNETH KOWALSKI

Kenneth Kowalski was the first to testify in this case as he testified via evidence deposition on June 27, 2018 given he was, at the time, in the process of undergoing chemotherapy. Mr. Kowalski testified he was a laborer with safety and OSHA certification and used to be a part of the laborers union. Mr. Kowalski testified he performed handyman work such as carpentry, flooring and drywall. He testified he worked for himself, though not under any corporation. He secured most of his work by word-of-mouth or with customers calling him directly. Mr. Kowalski testified he had no financial interest in the claim, and was in fact losing money by appearing.

Mr. Kowalski testified he met Mr. Schwager about 20-years prior and had performed work for Respondent for five or six years as a handyman. To secure work with Respondent, Mr. Schwager would call Mr. Kowalski and advise he had a possible job for him. Mr. Kowalski would then review the job and provide Mr. Schwager with an estimate, or bid, for what the work would cost. Mr. Kowalski stated that if his bid was chosen, he worked as an independent contractor. He stated if he had to bring extra help in for the work, he would bring one of his kids, at his own discretion and cost. Mr. Kowalski stated he was paid by the job, not on an hourly basis. He testified taxes were not taken out of his checks and he himself was responsible for paying taxes. He testified he would bring his own tools, unless he did not have something in which case he would ask Mr. Schwager if he could borrow his tools. He testified he was not required to wear any clothing with Respondent's name on it. He was not required to keep his hours and could arrive at the jobsite at his discretion. While doing work for Respondent, he was allowed to have concurrent employment and set his own hours, and testified he sometimes told Mr. Schwager he would not be present if he had another job, and that there was no problem with Respondent when such issues arose. He testified he and Mr. Schwager both had the right to terminate the contract. He stated he was only responsible for the flooring, and that he had discretion over how to do the work. He testified Mr. Schwager was not present at all times watching over him and Mr. Schwager was only present once or twice on the whole job. He was not given any type of vehicle by Respondent.

Mr. Kowalski testified he was working October 9, 2013. Mr. Kowalski's services were retained by Respondent to install flooring for a remodeling job on a residential home. Mr. Kowalski stated the house was essentially a three level building. The garage was down a little from the main level of the house, then there was a second staircase going to the top second floor. At the top of the second flight of stairs, to the right, there was a bedroom where all the tools were kept. There was also a children's bedroom on the same side of the staircase, and a closet in a room on the left-hand side

of the staircase. Mr. Kowalski stated all of the power tools were kept in the bedroom on the second floor to keep them away from children living in the house.

He testified he was doing the flooring by himself, and arrived at about 7:20 a.m. or 7:30 a.m. No one was present when Mr. Kowalski arrived. He testified Petitioner showed up much later while Mr. Kowalski was in the garage. Petitioner and Mr. Kowalski briefly talked, and Petitioner told Mr. Kowaski he was there to clean up. Mr. Kowalski testified, after this discussion with Petitioner, he witnessed Petitioner walk over to a corner and "crushed up a pill, rolled up a dollar bill, snorted [the pill], and immediately became lethargic, started slurring his words, stumbling" (RX 7, pg 27) Mr. Kowalski was about 6 feet from Petitioner during these actions. After snorting the pill, Petitioner became lethargic and started slurring his words and stumbling. He started walking towards Mr. Kowalski and almost head butted Mr. Kowalski given how close he was, all characteristics Mr. Kowalski did not notice before he witnessed Mr. Vrchota snort the pill. Mr. Kowalski testified he instructed Petitioner to go home but Petitioner told Mr. Kowalski he was not his boss and therefore not to tell him what to do. Given Petitioner refused to leave, Mr. Kowalski returned to his own work and instructed Petitioner not to touch any tools. Mr. Kowalski testified he was measuring the inside of a closet, with his head inside, when he heard a "Bam" and a yell. He ran to the room from where he heard the noise and Petitioner was bleeding everywhere. He wrapped the injury and took Petitioner downstairs. He called 911 and stayed with Petitioner until the ambulance arrived.

Mr. Kowalski testified Petitioner was not working with Mr. Kowalski on of the flooring job. Mr. Kowalski testified the flooring was his own job and, to the best of his knowledge, Petitioner was not supposed to help or aid in doing the flooring work. He testified he did not ask Petitioner do any work for him, and prior to that date had not ever asked Petitioner to help them with any flooring work. He also testified there was no other carpentry work going in the house besides the flooring, or any other work in the house besides the flooring which would necessitate use of the saw.

The saw was present during the deposition of Mr. Kowalski. He testified it was a Bosch 12 inch circular compound miter saw, or sliding compound miter saw. He testified it was the same saw present at the job on October 9, 2013. Mr. Kowalski noted the blade had a guard over it, which was in place on October 9, 2013. He testified he had used the saw on October 9, 2013 before Mr. Vrchota did, and that there were no problems with the saw. He testified the blade worked fine and was not dull. He stated there were no alterations made to the machine and that the saw was new at the time of the accident, having been bought for a job right before the one in question. Mr. Kowalski stated he would likely use the saw even if the cover were off, but that he was certain the cover was not off on the date in question. Mr. Kowalski explained how to use the saw, noting one would put a piece of wood onto the plate and against a back guard. He noted the safety switch on the handle, and that the blade guard only raised when the blade went down. He stated the hand holding the wood would be kept a couple inches from the blade, and the blade would come straight down into the lumber. He noted the blade could not move left to right given the lock on it, which would have to be released in order to move it side to side. He also stated the plate itself cannot be moved.

Mr. Kowalski testified there were no problems with the locking of the machine. He also testified the back stop for the lumber not only keeps it straight but prevents it from launching backwards

when the blade enters the wood. He noted the wood would be pressed against the blade when cut, and that if there was an issue the wood would stall against the backstop. He testified based on the direction the blade moved it could not shoot the wood forward, only backward, which would then have it hitting the backstop. He opined it was physically impossible for the wood to have caught and pulled Petitioner forward because, at worst, if the blade was dull it would just bump and stop. He testified, based on where the lumber is held, it would be impossible for the cut like Petitioner's to have occurred as the wood can only be pulled backwards, not forwards, and there is a backstop to prevent the wood from actually moving.

On cross-examination, Mr. Kowalski confirmed he did not know what the actual pills were that Petitioner crushed and snorted. Mr. Kowalski testified he saw Petitioner come upstairs and walk past him, but did not stop him as he was there to do his own job. He testified the arrangements to do any particular job were generally verbally made with Mr. Schwager, and that they had a general agreement each year rather than one done before each specific job. He testified he was present during one of the first jobs Petitioner had with Respondents in which Petitioner provided an estimate for a painting job. He was also unaware how many jobs Petitioner had with Respondent. Mr. Kowalski was asked if the wood could slip one way or the other before the blade engaged with the wood, and Mr. Kowalski testified the wood could move before the blade engaged. He testified it was not possible for that to happen after the blade engaged. Mr. Kowalski again confirmed he had never use the saw with the blade cover off. On examination by the State, Mr. Kowalski confirmed the blade comes straight up and down and does not come at an arc.

Mr. Kowalski, on redirect, testified he instructed Petitioner to go home but had no reason to believe he would disobey the statement of not using the tools. He also testified there was no benefit to having the blade guard taken off. He testified it did not make the saw work quicker and there was no reason someone would take the blade off. He also testified the only difference between the blades on the date in questioned and at the deposition was that it was newer, but there were no other differences.

Testimony of PETITIONER

Petitioner testified on his own behalf at trial. Petitioner testified DD&G Development was his employer on October 9, 2013. Petitioner stated he had worked for Respondent for a few years. He testified he made $15.00 per hour and worked full time, sometimes six days a week. He testified he did plumbing, carpentry, and some general stuff like picking up supplies, driving the truck and cleaning up around a job site. He testified he never did painting for Respondent, but he had done flooring for them one or two times before the accident. He testified he was paid in cash and checks and was paid hourly, not by the job. He testified he kept track of hours on his phone and then compared them with Mr. Schwager, and would be paid for the hours worked. He stated Mr. Schwager was his boss. He testified he did not sign anything when he was first hired nor fill out an application. He also stated, when he first started, he drove a truck one day to pick up supplies and started doing general helping, but was eventually asked to sign the Independent Contractor agreement to continue working for Respondent. Petitioner testified Mr. Schwager appeared at a job site and said Petitioner had to sign the document to get paid. Petitioner testified he did not want to sign the form, but was told he would not receive his money for the week if he refused to do so.

Petitioner testified he had never worked under the name, owned a business or solicited business as Bill's Painting. He testified he was not familiar at all with the name Bill's Painting.

Petitioner testified that, in order to determine his job duties, Mr. Schwager would come in to the job site at the end of the day and tell him to be there the following day. He testified Mr. Schwager set his hours and he was basically instructed to appear at a specific time, generally around 7:30 or 8:00 a.m., and worked 8 1/2 or 9 hours per day. Petitioner testified he had no other jobs while working for Respondent. He testified he had done a little construction but mostly plumbing prior to working for Respondent and, when asked whether he could've taken other jobs, testified he did not have the time. Petitioner testified he was not allowed to come and go from job sites as he pleased, and would have to secure permission from someone else at the jobsite. Petitioner testified he and other workers would take lunch together but could do so whenever they wanted. He testified he did sometimes have to run errands for Respondent such as picking up supplies, at which point he would use a company credit card. He testified he would do this once or twice a day. Petitioner testified he did not bring his own tools, or in fact own any, as they would be provided by Mr. Schwager. Petitioner also testified Mr. Schwager had bought him some clothes given he was unhappy with the clothes Petitioner chose to wear to a job site.

Regarding the alleged date of accident, Petitioner testified he was working a hardwood floor job in Schaumburg. He testified he was supposed to cut the wood and bring it back and forth to Mr. Kowalski. He stated it was only the first or second day they had been on this job. Petitioner testified it was him and Ken working at the job site that morning. He testified Dave had been there briefly in the morning but left once the work started. Petitioner testified he was using the saw to cut a piece of hardwood and that the saw blade was older. He testified having said that they needed a new blade given the saw was not cutting properly. He also testified the safety guard on the blade was taped up because Mr. Schwager had said he and Mr. Kowalski were working too slow. Petitioner testified when he brought the saw down, the wood got bound up and pulled him forward, at which point he put his arm up to block his chest, and cut his arm on the blade. Petitioner testified the cut was on his left arm right above his wrist, and he did show the Arbitrator the cut during the trial. The Arbitrator noted the scar started at one part of the arm and sort of went around creating a Y shape at both ends. The Arbitrator does note pictures of the initial injury were entered into evidence as Petitioner's Exhibit 7. The Arbitrator noted he would not notice the scar from where he was sitting. He noted the scar was long and significant, but not prominent and that he would not have noticed a scar even if the sleeve had been rolled up as it was not a raised scar.

Petitioner testified after the injury he was rushed to the emergency room by ambulance where he underwent immediate surgery at St. Alexius. He reported he was released the same day of the surgery and was given pain medication immediately. He also testified he had been completely knocked out for the surgery. He testified he was supposed to have physical therapy but did not due to insurance issues. He testified he did follow up to treat with Dr. Peng for pain in his arm. He testified he wore an open cast for about a month and a half to two months. Petitioner testified he never returned to work for Respondent or anyone else given he could not use his arm properly. He testified he also got a staph infection in his leg that ate the skin off his shins, though clarified he was not alleging he injured his shins during the work accident. Petitioner testified he was receiving Social Security disability benefits since November of 2018. He testified to having difficulty

gripping items and that he did not have the same strength he used to. He also testified he still had pain in his arm which was at a seven at the time of the trial.

On cross-examination, Petitioner reviewed payment screens for his work with the Respondent. He noted they show payments to Bill's Painting and were not weekly or biweekly paid. He testified again he had never done any painting for Respondent. Petitioner also noted that, when Respondent had bought him clothes to wear, he had been wearing jeans and a Tupac shirt. He testified none of the clothes purchased for him had Respondent's name anywhere on the clothing. Petitioner testified he still had issues with the arm and was still treating for the issue every week or so, though he then clarified that it was actually for issues with his leg. He testified treatment for his arm went on for about a year or year and a half after the accident. Petitioner also testified he was not required to clock in or out, just to keep track of time. Petitioner testified he did not have any pay stubs. He testified Respondent had five or six employees, including himself, Mo, Bud (Orian Phillips) and Kenny, as well as Kenny's kids who were brought in sometimes.

Testimony of DAVID SCHWAGER

Dave Schwager testified first on behalf of Respondent at the trial. He testified he currently owns a company called Quality Building Renovation Services, which does general contracting. He testified on October 9, 2013, he was the sole owner of Respondent. He testified Respondent was an LLC, which also performed general contracting. He stated he started Respondent in 2004, but did not register with the State until 2008 or 2009. He testified the company is no longer in existence as it was dissolved in 2015 or 2016. Mr. Schwager testified Respondent did not have workers' compensation insurance on October 9, 2013 based on the way the business was set up as a general contractor. He stated he was the only person doing work for the Respondent, unless he retained other independent contractors. In that case, they would be required to carry their own insurance. He testified Respondent had general liability insurance based on discussions with his agent in which he inquired what insurance was needed as an LLC doing general contracting. His agent had instructed him he did not require workers' compensation given he was the only "employee" and would not be covered under workers' compensation policies. He testified he secured a balloon policy, which included workers' compensation coverage, after October 9, 2013 to protect himself and his company. He testified Respondent did a total of 30 or 40 jobs over the years he owned it, most of which were residential. The jobs all involved remodeling and most were small, such as kitchens and bathrooms, facelifts and painting, flooring and hardwood changes.

Mr. Schwager stated he would do most of the work himself, but if he needed assistance, he would usually find help with referrals from other contractors or some of his suppliers. Mr. Schwager testified anyone who did work for him was required to sign an independent contractor agreement, such as those signed by Mr. Kowalski, Petitioner and Mr. Phillips. Mr. Schwager specifically testified as to Respondent's Exhibit 1, which is the independent contractor agreement between Petitioner and Respondent. The top of the exhibit states the contract was entered into between Respondent and William Vrchota D/B/A Bill's Painting and Remodeling. There was writing on the front page which has both Mr. Schwager's and Petitioner's signatures, and the last page of the contract was signed by both parties. The contract was signed on March 1, 2013. Mr. Schwager testified he was present when Petitioner signed the contract. He testified anyone who did work for Respondent would have to sign a similar agreement. Mr. Schwager testified if someone had not

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done work for him in the year prior to a new job and wanted to do work, he would have them sign a new agreement. He testified that was why Petitioner's was signed March 1 despite having worked for Respondent before then. He testified the agreements were mostly the same, with some minor tweaks as the contracts were updated. Mr. Schwager testified he chose to use independent contractors rather than hiring employees because it was not often he needed other people to complete jobs for him and he generally preferred to do the work on his own. He also sometimes would need to bring in a licensed worker, for things such as plumbing or roofing, for which he would again use the independent contractor agreements.

In order to hire independent contractors, Mr. Schwager would call five or six different people and inform them he had a project coming up for which he would need help on. Of those, some sent a quote/bid for the job. Mr. Schwager would then pick the best bid. He would pay the independent contractors once the work was completed or once he got paid. He testified the contract would be paid per the bid, regardless of how many hours it actually took to do the work. Mr. Schwager testified Respondent did not take taxes out of payment for contractors. He testified anyone who did jobs for him would provide their own tools, though noted he would also have his tools present given he would generally also be working. He testified the bid would decide who provided materials as that would be part of the bidding process. He testified he did not instruct people when they had to appear, but he would give them a timeframe in which work would be allowed at a job site. He testified contractors could work for other companies while they were doing work for him as well. He testified he would be at most jobsites doing his own work, but had no say in how other workers did their jobs. He testified people could reject a job he offered them without repercussions and noted there were multiple instances when he had offered someone a job and they had rejected it, yet he had still called them later to offer more work. He testified his subcontractors could hire anybody they wanted as it had nothing to do with him. He testified people working for him did not wear any clothing bearing the Respondent's name or logo. He testified people who did work for him had no other benefits such as retirement or health insurance, and that there were times during the existence of Respondent in which they did not have work and no one was paid.

Mr. Schwager testified he was familiar with Petitioner as he met him several years prior through his sister. He testified Petitioner had performed work for Respondent doing one job in 2009 or 2010 when they first met. He testified they hired him to do some painting work, but that at the time it did not seem to be working and thus he did not bring him back for further jobs for some time. Mr. Schwager testified when they did hire Petitioner, they brought him in to do painting and cleanup work for light painting jobs, or for dry-walling and sanding. Mr. Schwager was asked on cross-examination why he would use Petitioner despite the fact he did not feel he was the best painter, and Mr. Schwager testified it was because Petitioner was cheaper.

Regarding the job on October 9, 2013, Mr. Schwager testified they had done some drywall work in the client's basement and were replacing all the hardwood floors in the upstairs of the house, as well as all the floor trim and quarter round in the house. Mr. Schwager testified Petitioner was called to paint and do clean up. He stated most of the hardwood had been done at that point. He testified he brought Petitioner to the job site on the first day he arrived to drop off hardwood given Petitioner lived nearby, and offered Petitioner the chance to do painting work. Petitioner provided Mr. Schwager with his estimation for how much the job would cost. Mr. Schwager testified he retained Mr. Kowalski to do the hardwood flooring, and Petitioner was the only other person on

the job. Mr. Schwager testified Petitioner had requested $300.00 to do the job, which Mr. Schwager had agreed to pay. Mr. Schwager testified this would have been how much Petitioner was paid regardless of how many hours it took to complete the work. Mr. Schwager also testified Petitioner had refused work from the Respondent in the past, yet was still offered this job. He testified the tools necessary for Petitioner's job would be sponge, broom, paintbrush, dustpan and tarp, all of which Petitioner would have brought in on his own. Mr. Schwager testified he had never retained Petitioner to do any carpentry job, either at this project or at prior projects. He testified he never provided Petitioner with a specific time to arrive, but did provide a time range when Petitioner could appear at work. Petitioner was never given a DD&G Development vehicle to drive, and did not have any direct supervisor watching his performance.

Mr. Schwager testified the saw present at the trial was the same saw on which Petitioner alleges he injured himself, which Petitioner confirmed at the Arbitrator's request was the same saw as well. He testified Mr. Vrchota did not require the use of the miter saw to perform his duties for his job, nor was he authorized to use the miter saw in the performance of his duties. He testified he was not aware of Petitioner having any training to use a miter saw. He testified he had purchased the saw possibly three weeks to a month before the alleged accident date, and that it was his saw. He testified he and Mr. Kowalski were both retained to do carpentry work, and that Petitioner was not retained to help or assist Mr. Kowalski in performing the carpentry work in any way.

Mr. Schwager testified October 9, 2013 was his birthday and he did not go to the job site at all that day. He testified both Mr. Kowalski and Petitioner were authorized to work without him present as they did not require his direct supervision. Mr. Schwager testified he first heard about the accident when he received a text from Mr. Phillips saying to call Mr. Kowalski. Mr. Schwager then went to the hospital where Petitioner was taken. Mr. Schwager testified he requested a drug test, which was never completed given the emergency room physician informed him they had already given him significant pain medications.

After leaving the hospital, Mr. Schwager returned to the job site, where he went to the room with the miter saw. He noted a little blood on the floor and another trail of blood leading outside. He testified no one had used the saw since the accident. He also testified he did not see any partially cut pieces of wood on which a blade had been caught. Mr. Schwager testified, given Petitioner's work had not been completed prior to the injury, he did have to bring someone in to complete the work. He brought in Mr. Phillips, his half-brother, who had a similar independent contractor agreement as Petitioner. He stated Mr. Phillips provided him with the cost of the job, but he did not take other bids given the job needed to be completed and he did not have time for such action.

The saw in question was in the hearing room during Mr. Schwager's testimony, which was confirmed by Petitioner. Mr. Schwager testified the only potential change was that the blade would have been replaced multiple times in the last few years. Mr. Schwager testified he never requested the blade guard be lifted as it made no sense and would not make cutting any faster. Mr. Schwager noted when the saw is in its initial position, the blade guard would cover the entire blade. He stated once someone started cutting wood, they would keep the blade in a locked position going straight down. He also testified there was an electric brake on the unit and two safeties. He stated the worker would have to pull a knob and then squeeze a trigger before the saw would turn on. As soon as the hand/thumb lifted from the trigger, the blade would stop immediately. He also testified,

given the power of the saw, that even a flat blade would still cut the wood and not pull the wood or person forward. Mr. Schwager testified the hardwood floor would have been about 3/4 inches thick and 3 inches wide. As such, the hand would be about three quarter inches above the plate and about 3 inches back from the backstop. Mr. Schwager testified, given the setup of the saw, it was irrelevant if someone was right or left-handed, but would hold the piece of wood with the left hand and bring the saw down with the right hand. He testified there would be no reason for an arm to be near the center region as the person cutting would keep the arm and hand holding the wood to the side while bringing the saw down. In overruling an objection regarding the demonstration of the saw, the Arbitrator noted he was hoping to see Petitioner go through the mechanism of the accident.

Mr. Schwager testified when he first started Respondent in 2004, he did have some people work for him, but that when he became an LLC in 2008, he only used independent contractors. He testified he never hired Petitioner, but he did contract him to do painting and cleanup, such as sweeping. He again noted the independent contract stated Petitioner would have been retained to do residential remodeling and painting services. He also testified if Petitioner did not secure an actual painting job, he could still bid to do some cleanup work instead, but it would still be done in the same general manner with a bid process for specific hours it would take him to complete the job. He stated the pay would be the same regardless of the amount of hours it took based on the bidding process. When asked how he discovered the business he believed to be Bill's Painting, he testified that was how Petitioner had presented himself, and that he provided business cards. Mr. Schwager was asked about a prior testimony from 2016 in which he stated he was unsure if he had received a business card from Petitioner, but stated had thought more and did remember he had in fact received a business card from Petitioner. He also noted the paystubs were made out to Petitioner, not Bill's Painting, which Mr. Schwager testified was a common practice. He also testified he did not always check whether independent contractors had insurance, but generally would only do so if it was a job in which he believed insurance might be necessary. He did not check Petitioner for insurance given he had only had them to painting and general cleanup, neither of which he believed were likely to involve injuries in his mind. Mr. Schwager testified Petitioner was known as a painter to the representatives at Sherman Williams and they had business cards of him on a board there as well.

Mr. Schwager testified he would be the one to generally discuss hours and other issues with the homeowner, but sometimes the other workers would have to discuss issues directly with them. Finally, he testified he did not understand how someone could accidentally sustain the injuries Petitioner had. He again testified Petitioner did not belong in the room with the saw, let alone use the saw itself. He was asked if the room with the saw was locked, and testified it might not have been given people had already appeared for work that day. On redirect, Mr. Schwager confirmed he had never hired any actual employees as DD&G Development and Restoration, LLC. He also confirmed that, if Petitioner worked less hours than had bid, he would still receive the full cost of the bid given he was not paid hourly.

Petitioner entered a prior deposition transcript of Mr. Schwager into evidence as Petitioner's Exhibit #5. The deposition was taken on May 3, 2016 for the civil claim also arising out of this accident, *William Vrchota v. DD& G Development*, 2014 L 005680. Without going into significant

detail, the Arbitrator notes Mr. Schwager maintained throughout this deposition Petitioner was an independent contractor, not an employee.

Testimony of ORIAN PHILLIPS

Mr. Phillips testified he was brought in to complete Petitioner's work after the injury on October 9, 2013. He testified he was brought in for the same job as Petitioner, and that at no point did these job duties require use of the miter saw. He was never asked to assist Mr. Kowalski in the wood cutting or carrying process. He testified his duties for the job involved just painting. He also testified he had an independent contractor agreement similar to the one signed by Mr. Kowalski and Petitioner. He testified he was paid by bid, not hourly, he set his own hours, and did not have any supervisor from Respondent overlooking his work.

Petitioner's Exhibit 6

Petitioner's Exhibit 6 is a payment screen for payments made by Respondent to Petitioner for his work from June 11, 2013 through August 12, 2013. The "original amount" and "paid amount" on all payments was equal. On 13 of the 18 payments, the memo line included Bill's Painting in some fashion. Finally, the Arbitrator notes the payments were not paid on a consistent biweekly or weekly schedule, with some payments being made on back to back dates, such as July 10 in July 11, 2013. Finally, the Arbitrator notes that Respondent made a total of $5,541.00 per the payment screens over the course of the payment period.

CONCLUSIONS OF LAW

Regarding issues (A) and (B), whether Respondent was under the Workers' Compensation Act and whether there was an employee-employer relationship between Petitioner and Respondent, the Arbitrator finds as follows:

No rigid rule of law exists regarding whether a worker is an employee or independent contractor. *Area Transportation Co. v. Industrial Comm'n,* 123 Ill. App. 3d 1096 (1984). In determining whether one is an independent contractor or employee, courts have considered several factors. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309 (1990). The single most important factor is whether the purported employer has a right to control the actions of the employee. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000). Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities and whether income tax has been withheld. *Wendholdt v. Industrial Comm'n,* 95 Ill. 2d 76 (1983). A factor of less weight is the label the parties place upon their relationship. *Earley.* When applying the facts of the present case to the factors set forth by the courts, the Arbitrator finds Petitioner was an independent contractor

The Arbitrator notes there are discrepancies in the multiple testimonies regarding a number of the factors. The Arbitrator finds the testimonies of Mr. Schwager, Mr. Kowalski, and Mr. Phillips more credible than the testimony of Petitioner. The Arbitrator finds the payment screens and check stubs particularly persuasive. Petitioner testified he worked 8 ½ to 9 hours a day, 6 days a week for Respondent making $15 per hour, but the payment screens show Petitioner averaged $307.83

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per week, which would only equate to about 20 hours per week. Petitioner never testified to having been underpaid by Respondent. Petitioner testified he never did painting jobs for Respondent, and that he had never heard the name Bill's Painting. The Arbitrator finds this unbelievable given Petitioner cashed at least 13 checks with a memo line of Bill's Painting, most of which were written before October 9, 2013, and he signed an Independent Contractor Agreement which specifically stated he would do painting. The Arbitrator notes the agreement was signed on March 31, 2013, well before the date of the accident, and indicated Petitioner would do painting and general labor. The Arbitrator also notes the payment screens do not show weekly or bi-weekly payments. Finally, the Arbitrator notes the memo lines on most of the payments contain a specific job (ie. Bill's Painting/Bosshart, Bill's Painting/Fisher, etc), which would indicate Petitioner was receiving payments for the specific jobs. The Arbitrator does not see any reason the jobs would be noted if Petitioner was an employee who was just paid by the hour.

Furthermore, Petitioner testified he had worked for Respondent for years prior to October 9, 2013 but, despite the fact he had not done any painting jobs, had only done 1 or 2 hardwood flooring jobs. Petitioner testified Mr. Phillips and Mr. Kowalski were both employees, but both testified they were independent contractors. Petitioner also testified he could not work for other companies because he would not have had the time, yet also did not deny he was working on another project for his ex-wife.

The Arbitrator finds the testimony of Mr. Schwager credible. He testified he did most of the work for Respondent, and that if he was unable to complete a job on his own, he would bring in independent contractors for help. He testified Petitioner was an independent contractor and verified the independent contractor agreement between Respondent and Petitioner. He testified he did not control Petitioner's work, his hours or the means by which he completed his tasks. He testified Petitioner was brought in to do painting, which was corroborated by the payment stubs (RX 2) and the payment screens (PX 6). He testified Petitioner could have rejected work and he still would have been offered jobs, and that Petitioner could have had concurrent employment while working for him. Mr. Schwager testified contractors would secure work via a bidding process, which Mr. Kowalski testified he witnessed happening between Petitioner and Respondent. He testified Petitioner was paid at the end of a job, which appears to be corroborated by the payment screens showing payments not made on a weekly or bi-weekly basis. Mr. Schwager also testified Petitioner would be paid the bid amount, regardless of whether he actually worked more or less hours than he bid.

The Arbitrator also notes Mr. Schwager's testified regarding the employment status for a civil claim (PX 5), throughout which Mr. Schwager maintained Petitioner was an independent contractor, despite the fact such testimony would have been against his interests in that case as owner of Defendant. The Arbitrator also finds Mr. Kowalski and Mr. Phillips were independent contractors based on their testimony regarding relevant factors, and the Arbitrator does not believe Petitioner would be the only employee of Respondent.

Based on the above testimony, the Arbitrator finds Petitioner was an independent contractor and was not an employee of Respondent. As such, Respondent did not sustain injuries which are compensable under the Workers' Compensation Act.

Regarding issue (C), whether an accident from an employment-related or neutral risk occurred that arose out of Petitioner's employment with Respondent, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Additionally:

Even assuming, *arguendo*, Petitioner was an employee, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment. Petitioner bears the burden of proving that his injury both occurred in the course of his employment and arose out of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). The fact that an injury occurred at Petitioner's workplace is not dispositive as it does prove the injury "arose out of" Petitioner's work activities. Instead, the arising out of question addresses whether "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." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193 (2003). There are three types of risk: employment-related, neutral and personal. Employment related risks exist when Petitioner is performing a task he was instructed to perform by the employer, one he had a common law or statutory duty to perform, or one the employer might reasonably expect Petitioner to perform incident to his assigned duties. The Arbitrator finds Petitioner's injury did not arise out of an employment-related risk given he was never assigned any work that required cutting wood, nor did his employer expect Petitioner, as a painter, to cut wood, especially given Petitioner had no specific training in carpentry.

The Arbitrator notes there is a significant discrepancy in the testimony regarding Petitioner's job duties. The Arbitrator finds Petitioner's testimony was not credible for the reasons laid out above. The Arbitrator finds Petitioner was hired to do painting and general labor, and was not hired to do carpentry. None of the witnesses, Petitioner included, testified the jobs of painting and general labor required the use of a miter saw. Instead, Petitioner testified he was hired to do carpentry, despite the fact he had no expertise in this field, unlike Mr. Kowalski, who was a former labor union employee. The Arbitrator also relies of the testimony of Orian Phillips, who testified he was brought in to the job after Petitioner's injuries. Mr. Phillips testified he never had to use the saw to complete the tasks Petitioner had been hired to do. Similarly, Mr. Kowalski testified he was hired to do the carpentry work, and did not ask Petitioner for help. He testified that if he ever needed help, he would bring one of his sons in to assist him, which Petitioner testified was also the case. Mr. Kowalski and Mr. Schwager both testified they did not believe Petitioner had any special training in carpentry work. The Arbitrator therefore does not see any reason Mr. Kowalski would have asked Petitioner to assist Mr. Kowalski or would have been hired to do any carpentry work. The Arbitrator notes the memo line in most checks contained "Bill's Painting", but none included anything about carpentry. For all these reasons, the Arbitrator finds Petitioner was not hired to do carpentry work, that he had no common law or statutory duty to perform carpentry work, and that Respondent had no reasonable expectation Petitioner would do carpentry work. As such, Petitioner's injuries did not arise out of an employment-related risk.

The next question is whether Petitioner's risk was neutral or personal. A neutral risk is one which has no particular employment characteristics, but is instead incidental to Petitioner's employment. The Arbitrator does not find this risk to be neutral as it is not a risk to which the general public is exposed. The Arbitrator again notes Petitioner had no valid reason for using the saw for any work-related purposes, and thus use of the saw was not even incidental to his employment.

The Arbitrator instead finds Petitioner's injuries arose out of a personal risk, and thus the injury is not compensable. In this regard, the Arbitrator notes the Petitioner's explanation of the accident was not credible for any legitimate use of the miter saw based on the description of the miter saw and demonstration of its use at trial. Petitioner testified he was cutting wood and the blade, which he testified was old and dull, stuck in the wood and pulled him forward. Petitioner testified he then reached out his left arm to protect his chest. Mr. Schwager testified the saw only turned on when someone pressed their thumb down on a button on the handle/lever, and he testified, undisputed, that the blade stopped immediately when the thumb released the button, as an emergency brake system. Mr. Schwager and Mr. Kowalski both testified the blade cover was on the blade on October 9, 2013, and both testified that lifting or removing the cover would not affect the speed in any way. The Arbitrator agrees with this testimony based on his examination of the saw, noting the blade cover automatically lifts when the blade is brought down to the wood. The Arbitrator also notes there is a backstop behind the wood which would prevent it from being thrown backwards, as Petitioner claims occurred. As the wood could not be thrown backward, Petitioner could not be pulled forward toward the blade.

The Arbitrator notes the saw held a 12-inch blade, which would mean 6 inches in diameter on the cutting end, and Petitioner was cutting a piece of wood 3 inches thick. The Arbitrator does not believe Petitioner could have brought his arm from holding the piece of wood, which would have been 3 inches in front of the blade, back around behind his chest and in front of the blade in less time than it took to remove his thumb from the emergency brake. The Arbitrator also notes Mr. Schwager and Mr. Kowalski testified the saw was fairly new on October 9, 2013, and thus does not believe the blade in question was dull. Finally, the Arbitrator notes the saw was present in the hearing room and Petitioner had a chance on rebuttal to demonstrate how his injury occurred, which the Arbitrator encouraged him to do, yet refused to do so. For all these reasons, the Arbitrator does not find Petitioner's explanation of the accident possible, and does not find Petitioner credible.

Based on the above, the Arbitrator finds Petitioner finds the testimony of Mr. Schwager, Mr. Kowalski and Mr. Phillips credible, and finds Petitioner was hired to do painting and clean-up work, none of which required use of the miter saw. The Arbitrator finds Petitioner was not employed to do any carpentry work, nor was he asked on to do any carpentry work or wood cutting on October 9, 2013. As wood cutting was not part of the job for which Petitioner was hired, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

Regarding issue (C), whether Petitioner was intoxicated to an extent he was considered no longer in the course of his employment, the Arbitrator finds as follows:

The Arbitrator finds Petitioner was not an employee of Respondent at the time of the accident. As such, the Arbitrator finds Petitioner did not sustain an accident arising out of his employment.

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Additionally:

Petitioner bears the burden of proving his injury occurred in the course and scope of his employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An employer may raise a defense of intoxication, though intoxication itself is not a complete bar against compensability. Instead, the employer must show that either (1) the intoxication was the sole cause of the employee's injury or (2) the intoxication was so excessive as to constitute a departure from the course of the employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468 (1989). A decision on compensability is one of fact, which involves a number of factors, and the Arbitrator notes neither the Workers' Compensation Act, the Commission nor the Appellate Courts have found a blood test necessary for an intoxication defense.

One way in which an employer can prove intoxication is by showing a significant difference in behavior before and after the intoxicating activity. Mr. Kowalski testified he was the first person to arrive on October 9, 2013. He testified Petitioner arrived a while later, likely around 8:30 or 9:00, at which time Mr. Kowalski and Petitioner had a short conversation. Mr. Kowalski testified Petitioner, during this conversation, was speaking in a normal tone, was standing normal, and did not look impaired in any way. Mr. Kowalski testified that after their conversation, Petitioner went to a corner of the garage, crushed up a pill, and snorted the pill. Mr. Kowalski testified Petitioner's eyes looked glassy after Petitioner snorted the pill, and that Petitioner started slurring his words. He testified Petitioner started swaying and stumbling, to the point he almost hit Mr. Kowalski with his head.

The Arbitrator notes Mr. Kowalski testified before Petitioner given he was deposed before the trial, and that Petitioner had an opportunity to respond to and deny the accusation he took drugs prior to the accident. The Arbitrator finds it compelling Petitioner never denied Mr. Kowalski's testimony that he crushed and snorted the pill, either during his case in chief or on rebuttal. As such, the Arbitrator finds the testimony of Mr. Kowalski to be undisputed and therefore accepts the factual basis of his testimony. The Arbitrator also notes Mr. Schwager testified he requested a blood test be done at the hospital, but that the hospital staff informed him Petitioner had already been given pain medications and it would therefore be impossible to determine what was in his system before the accident. The Arbitrator finds this claim is corroborated by the EMT records showing Petitioner was given pain medications in route to the hospital. The Arbitrator also notes the initial hospital records showed Petitioner had a medical history of drug abuse, and that the last medical record in the file is a drug test in which Petitioner tested positive for cocaine and another unprescribed medication. For all these reasons, the Arbitrator finds Mr. Kowalski's testimony regarding Petitioner's drug use more probable than not.

The Arbitrator also finds Petitioner's drug use either was the sole reason for Petitioner's injury or at least constituted a departure from the course of the employment. The Arbitrator finds, for reasons discussed above, Petitioner had no reason to use the saw as part of his employment, and that Petitioner's explanation for how his accident occurred does not make sense based on the demonstration of how the saw is used. The Arbitrator notes that the mitre saw present in the hearing room at trial, the Petitioner was invited to give a demonstration of how the accident occurred and declined to do so. The mechanism of injury remains a mystery. The Arbitrator ttherefore finds the

only way Petitioner could have injured himself as he did was because of his intoxication or intentionally operating the saw in an improper manner. The Arbitrator does not find Petitioner's testimony regarding the blade guard being taped up credible. He therefore can find no explanation for why the blade guard, which only raises a couple inches when the blade goes down, and would not expose the chest to the blade in any way, would not have protected Petitioner's arm from the blade if the accident happened as Petitioner alleges. The only reasonable inference to draw from the evidence presented is that Petitioner was intoxicated while using the miter saw or intentionally using the saw in an improper manner so much so that he was no longer in the course and scope of his employment.

Regarding issue (F), whether Petitioner's current condition of ill-being is causally related to Petitioner's work activities on October 9, 2013, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's condition of ill-being is not causally related to Petitioner's work activities on October 9, 2013.

Regarding issue (G), Petitioner's earnings in the year preceding October 9, 2013, the Arbitrator finds as follows:

The Arbitrator notes the only evidence in the claim regarding wages aside from testimony of witnesses was the wage information Petitioner himself entered as Petitioner's exhibit 6. The Arbitrator notes the wage information indicates, at the top, that it includes all payments made from January 2013 through December 2015. No ruling is made on this issue. The Arbitrator finds that Petitioner was an independent contractor, not an employee.

Regarding issue (J), whether medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, nor that Petitioner sustained an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner's did not incur any medical bills for which Respondent is liable.

Regarding issue (K), whether Petitioner is owed any TTD benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Respondent does not owe any TTD benefits as a result of Petitioner's activities on October 9, 2013.

Regarding issue (L), whether Petitioner is owed any nature and extent benefits as a result of the work accident, the Arbitrator finds as follows:

As the Arbitrator does not find Petitioner was an employee, and that Petitioner did not sustain an accident arising out of or in the course and scope of his employment, the Arbitrator finds Petitioner is not entitled to any nature and extent benefits as a result of his activities on October 9, 2013.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DELLA DOWNING,

Petitioner,

20IWCC0657

vs.

NO: 11 WC 9902

DELNOR COMMUNITY HOSPITAL

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission vacates the award of maintenance and strikes paragraph 2 of the Order section of the Arbitrator's Decision.

Additionally, the Commission replaces paragraph 3 of the Order section of the Arbitrator's decision with the following:

> Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.
>
> Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this

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credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Lastly, the Commission strikes paragraph 4 of the Order section of the Arbitrator's decision and replaces it with the following:

Respondent shall pay Petitioner permanent total disability benefits of $1,080.12 per week commencing on January 20, 2016, as provided in Section 8(f) of the Act. Commencing on the Second July 15th after the entry of this Award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act. Respondent shall pay Petitioner compensation that has accrued from January 20, 2016 through June 8, 2018.

Regarding page 6 of 22 of the Arbitrator's decision, the Commission strikes the second sentence of the first paragraph. Referring to page 17 of 22 of the Arbitrator's decision, the Commission strikes the last paragraph of Section (J) in its entirety, and replaces it with the following:

Respondent shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.

Respondent shall be given a credit for all medical benefits they have paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall further hold Petitioner harmless for any payments made by Medicare, Medicaid, Illinois Public Aid, and Illinois Department of Healthcare and Family Services relating to Petitioner's cervical issues. The measure of Respondent's liability is limited to the negotiated rate.

Referring to the last paragraph under Section (K) at page 19 of 22 of the Arbitrator's decision, the Commission strikes the last two sentences of said paragraph. The Commission also strikes page 22 of the Arbitrator's decision.

Lastly, in the fourth sentence of the last paragraph at page 13 of 22 of the Arbitrator's decision, the Commission corrects a scrivener's error and revises "board-based" to "broad-based".

Petitioner met her burden of proving that her current condition of ill-being regarding her cervical spine is causally related to injuries sustained in the work accident of August 29, 2010, and that this condition has rendered her permanently and totally disabled.

The award of permanent total disability is supported by a consistent and continuing course of treatment relating to Petitioner's cervical spine from the time of the initial 19(b) hearing on June 9, 2011, through the date of trial. The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies.

Following the 19(b) hearing, Petitioner continued treating with her neurosurgeon, Dr. Brayton, for her cervical spine condition (Px1), and at various pain clinics. (Px2, Px5, Px10) Petitioner continued these visits up through the date of trial. (Px10)

In February 2012, Petitioner underwent another cervical MRI, the prior one having been performed on February 9, 2011. The MRI study of the cervical spine performed on February 16, 2012 revealed: "the posterior disc protrusion at C5-C6 is slightly more broad-based with the presence of an annular tear." (Px2)

On March 2, 2012 Dr. Brayton reviewed the MRI results and noted "the slight progression in the C5-C6 along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal spine tenderness..." (Px1) However, as Dr. Brayton observed other findings requiring further explanation, he referred Petitioner to Dr. Santwani, a neurologist, for further testing.

In March 2012, Dr. Santwani diagnosed the Petitioner with multiple sclerosis. Significantly, Dr. Santwani also noted Petitioner's increased neck pain and arm paresthesias. (Px4) Petitioner makes no claim that her multiple sclerosis or treatment for same is related to the August 29, 2010 work accident.

Although Petitioner missed some of her appointments at the pain clinic between March and October 2012, she consistently continued to complain of neck and arm pain. By December 31, 2012, Petitioner was presenting with continued pain, worse in her neck and shoulders. (Px2) Through mid-2013 Petitioner continued to voice complaints and received treatment at the pain clinic for same. (Px2)

On May 28, 2013 Petitioner underwent an EMG/NCV of the upper extremities. This was an abnormal study indicating acute C5 radiculopathy on the right and C6 radiculopathy on the left. (Px4)

On May 30, 2013 Petitioner began treating at the pain clinic at Kishwaukee Hospital for chronic neck pain. History reflects the "pain began in August 2010 when she was lifting a patient." (Px5) She treated with Dr. Gregory Arnold at the clinic through 2013. (Px5) He diagnosed Petitioner with cervical radiculopathy, fibromyalgia syndrome and prescribed opioid therapy along with cervical trigger point injections. (Px5)

By the end of 2013, Petitioner switched pain management clinics as her insurance would no longer cover visits to Dr. Arnold and she began treating with Dr. Todd Hagle.

On December 26, 2013 Petitioner was seen by Dr. Hagle whose diagnosis included

chronic neck pain and at which time he noted "she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this." (Px10) Petitioner continued to see Dr. Hagle on a monthly basis with complaints of pain in her neck and into her arms ranging from 8/10 to 10/10. (Px10)

On February 10, 2014 Petitioner complained of pain in her neck, shoulders and arms. She noted the pain was "severe, chronic and disabling." (Px10)

An updated cervical MRI performed on February 25, 2014 revealed persistent multi-level degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annular tear as well as right paracentral C5-C6 disc protrusion. (Px1)

In August 2014 Dr. Brayton related Petitioner's "severe, unremitting neck pain and cervicogenic headaches" to the work injury. (Px1)

A repeat cervical MRI performed on August 1, 2014 revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (Px7)

On October 22, 2014 Petitioner underwent provocative discography ordered by Dr. Brayton resulting in a positive provocation discogram at C4-C5 and C5-C6. (Px8)

On December 29, 2014 Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Throughout 2015 Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications. (Px10)

On December 29, 2014 Dr. Neil Allen conducted a medical records review at the Respondent's request. He did not examine Petitioner on this date. Although Dr. Allen opined Petitioner's current state of ill-being was related to multiple sclerosis, even he related Petitioner's upper extremity pain and in the back of her neck to the work injury. (Rx1)

On February 12 ,2015 Dr. Brayton met with Petitioner to review the results of the provocative discogram, the last MRI and to discuss further treatment options.

At the time of this visit, Dr. Brayton noted Petitioner had sustained a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic changes at C4-C5 and C5-C6. (Px1) Dr. Brayton also noted Petitioner had been diagnosed with multiple sclerosis and had dysesthetic pain in both the lower and upper extremities. (Px1) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6 with a negative control level at C6-C7. The MRI revealed a progressive large, broad-based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which had progressed since her last imaging study. (Px1) There was also an increase in the annular bulge and ventral CSF effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5.

(Px1)

In terms of future treatment, among options discussed were surgical intervention involving a C4-C5 anterior cervical decompression and fusion including the risk of accelerated spondylitic changes at C6-C7. (Px1) Petitioner chose to defer surgery and continue with pain management.

On February 26, 2015 Petitioner was evaluated by Dr. Allen at Respondent's request. Dr. Allen included the "cowl-like discomfort she has over her shoulder" as part of Petitioner's current state of ill-being. (Rx1) Dr. Allen also conceded that the decrease in pin-prick to both upper extremities and the cowl of her shoulders was consistent with Petitioner's work injury. (Rx1, p. 73) Dr. Allen also referenced a cervical MRI Petitioner underwent specifically indicating an early annular tear at C4-C5 which he testified explained neck pain. Dr. Allen also testified annular tears are very painful and some people are actually confined to bed with annular tears. (Rx1, p. 23) Dr. Allen also acknowledged that he never reviewed the discogram of Petitioner's cervical spine as he didn't understand them, was never trained in them and has a hole in his knowledge. (Rx1, pp. 88-89)

On January 21, 2016 Petitioner saw Dr. Brayton who noted Petitioner "continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain and cervicogenic headaches." Dr. Brayton opined these conditions were caused by her work accident on August 29, 2010 and were conditions distinct from her multiple sclerosis. (Px1)

Dr. Brayton further noted cervical disc herniation persists at C5-C6 and had not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (Px1) Disc disease was noted at the C2 through C4 levels which he deemed permanent. (Px1)

Overall, it was Dr. Brayton's opinion that Petitioner had a permanent disc injury at C5-C6. Considering Petitioner's concurrent multiple sclerosis diagnosis, Dr. Brayton was not in favor of surgery given the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the cervical fusion needed at C5-C6. (Px1) Dr. Brayton cautioned that surgery remained a future potential need but presently, he would advocate against surgery.

Dr. Brayton further indicated Petitioner would require "comprehensive and procedural pain management, chronic pain control and permanent disability as a consequence to her injury." (Px1)

Dr. Brayton determined Petitioner was "permanent disability" and issued a script dated January 21, 2016 indicating "permanent work restrictions of no lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent." (Px1)

In May 2016 Petitioner underwent a second Section 12 exam by Dr. Martin Herman at Respondent's request. Dr. Herman opined Petitioner sustained a disc herniation as a consequence

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of the August 29, 2010 accident but it had been effectively treated and she was at maximum medical improvement subsequent to her return to work with restrictions issued by Dr. Brayton. He further opined that in May 2016 Petitioner was *not* capable of returning to work but related same to the multiple sclerosis and not the work-related injuries. (Rx2, pp. 47-48, 60)

Dr. Herman failed to review films of the MRIs Petitioner underwent on February 16, 2012, May 5, 2013, August 1, 2014, January 21, 2015 and December 3, 2015, and the discogram performed on August 20, 2014. (Rx2, pp. 30-31) Dr. Herman also acknowledged that Petitioner's condition was multi-factorial. (Rx2, p. 43)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2016, 2017, and 2018. (Px10) She has continued to complain of neck pain radiating into her arms, as well as tingling and numbness. (Px10)

An accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003) *citing Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d 123, 127 (1967).

Notwithstanding Petitioner's ability to return to restricted work at various times subsequent to the work accident, Petitioner's work-related cervical condition continued to gradually worsen both in terms of the severity of her symptoms and as confirmed by multiple diagnostic tests.

Given the totality of the evidence, the Commission finds Petitioner's work-related cervical spine condition was a contributory cause in rendering her permanently and totally disabled. The Commission further finds Petitioner was permanently and totally disabled commencing on January 21, 2016 based on Dr. Brayton's opinion of permanent disability rendered on said date.

Additionally, the Commission vacates the award for maintenance benefits. Having found Petitioner was permanently and totally disabled effective January 21, 2016, the issue of Petitioner's entitlement to maintenance benefits subsequent to that date is moot.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for a period of 169 1/7 weeks, commencing June 10, 2011 through August 11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2014 through January 20, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,080.12 per week for life commencing on January 20, 2016, as provided in §8(f) of the Act, for the reason that the injuries sustained caused the Petitioner to be permanently disabled. Commencing on the second July 15th after the entry of this award, Petitioner may

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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 shall pay Petitioner the reasonable and necessary unpaid medical expenses ($4,987.77) incurred for the cervical spine as identified in Px1, Px2, Px4, Px5, Px6, Px7, Px8, Px9, Px10, Px11, and Px12 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 12 2020

Maria E. Portela

Thomas J. Tyrrell

MEP/dmm
O:091520
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Dissent

I respectfully dissent from the majority. I would find that Petitioner has not sustained her burden of proving that she is permanently and totally disabled as a result of her August 29, 2010, accident. Rather, Petitioner's permanent total disability is because of her progressive multiple sclerosis (MS) disease, diagnosed after her work-related accident and after she had returned to work as a registered nurse. While I empathize with Petitioner's suffering, for the following reasons I would award permanency on the basis of §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7 with permanent restrictions.

Prior §19(b) Hearing and Award

Before the work accident of August 29, 2010, Petitioner underwent a cervical spine MRI on January 22, 2010, and was diagnosed with neck pain and right cervical radiculopathy secondary to a herniated disc at C5-C6 for which she treated with Dr. Brayton, a neurologist, and Dr. Cherala, in Respondent's pain management clinic. (ArbX2, 1, PX1) After a §19(b) hearing, the Arbitrator deemed the August 29, 2010, accident resulted in: 1) an *aggravation* of a pre-existing herniated disc at C5-C6; and 2) a new disc herniation at C6-C7. (ArbX2, 4) (emphasis added)

The Arbitrator's §19(b) Decision notes that Petitioner underwent a cervical MRI on February 9, 2011, at Dr. Brayton's recommendation, to determine whether the C5-C6 herniation had worsened. "The radiologist's impression was that there was little change from the previous MRI *with the possible slight decrease in size of the C5/6 right disc herniation.*" (ArbX2, 2) (emphasis added)

The Arbitrator's §19(b) Decision further notes Dr. Butler's second IME of Petitioner on February 17, 2011, which states, "[t]he MRI finding *had actually improved to some degree.* Her symptoms were primarily subjective in nature and there was no objective neurologic deficit." (ArbX2, 3) (emphasis added) In the §19(b) award, the Arbitrator noted the improvement detected by the cervical MRI of February 17, 2011, most notably at C5-C6.

The Arbitrator awarded physical therapy (P.T.) as reasonable medical treatment and specifically denied the epidural steroid injection (ESI) that Dr. Brayton recommended concluding that, "Petitioner failed to prove the ESI prescribed by Dr. Brayton are (sic) reasonable and necessary medical treatment. However, she has not reached MMI and is entitled to further treatment with Dr. Brayton....Dr. Brayton has prescribed P.T., which is reasonable treatment for Petitioner's exacerbation." (ArbX2, 4-5)

The §19(b) Decision was appealed to the Commission where it was later affirmed and adopted. (ArbX2)

Post §19(b) Medical Treatment and Return to Work

After the §19(b) award, Petitioner called Dr. Brayton on August 1, 2011, and requested a release to return to work. Dr. Brayton imposed work restrictions of no lifting greater than 10 pounds, and to avoid excessive pushing and pulling. (PX1) On August 10, 2011, Petitioner saw

Dr. Yang at Delnor for pain management to obtain a repeat ESI, despite the Arbitrator's denial of the ESI. (PX2) Dr. Yang reviewed the MRI from February 9, 2011, and noted a "C6-7 minimal disc bulge." There is no evidence that Petitioner ever attended the P.T. awarded by the Arbitrator intended to address her cervical issues.

Petitioner began working full-time as a nursing supervisor at Loretto Hospital on August 12, 2011. (T, 25-26)

Petitioner returned to Delnor pain management clinic on October 21, 2011, and saw Dr. Hanna where Petitioner's past medical history was positive for migraines, chronic neck and back pain, chronic bronchitis, DVT, asthma, sleep apnea, IBD, Crohn's disease, hypothyroidism, anxiety/depression, ADD, obsessive-compulsive disorder, fibromyalgia, and endometriosis. (PX10, 10/21/11). Review of systems on that same day reflects that Petitioner complained of some nausea, stress incontinence, and joint swelling. Dr. Hanna noted only her pre-existing cervical disc at C5-C6 on the right side, omitting any reference to the C6-C7 level. Dr. Hanna found that a large segment of her pain is also myofascial related. Thus, he administered trigger point injections to the bilateral levator scapular muscles. (PX2)

On November 9, 2011, Petitioner saw Dr. Hanna for an ESI and medication management. Dr. Hanna administered a cervical ESI at C7-T1 and trigger-point injection to her bilateral levator scapular muscles. On December 12, 2011, Dr. Hanna administered additional trigger-point injections at the same level. Dr. Hanna noted a new diagnosis of "Abnormal neurologic examination with clonus. And Dysphagia."

Petitioner continued working full-time as a nursing supervisor for Loretto Hospital. On February 15, 2012, Dr. Hanna noted Petitioner's dysphagia has been increasing, and she had to bend her head forward or tuck her neck to swallow and that Petitioner has an abnormal neurologic exam with clonus. Dr. Hanna recommended a repeat cervical MRI and administered trigger point injections. (PX2)

Petitioner underwent the cervical spine MRI scan on February 16, 2012. The findings at C5-C6 were as follows:

> "There is a posterior disc osteophyte complex an associated right paracentral small posterior disc protrusion. The overall posterior extent of this disc protrusion *has not significantly changed* although there is slight broadening at the base of the protrusion and presence of an annular tear now identified. Mild effacement of the ventral CSF space is again noted. There is slight right facet degeneration resulting in minimal thinning of the right neural foramen, stable." (PX2) (emphasis added)

The radiologist's impression states: "The posterior disc protrusion and at C5-C6 *is slightly more broad-based on the current exam than when compared to previous although the posterior extent of the protrusion is stable. Remainder of findings are unchanged.*"(PX2) (emphasis added)

Dr. Brayton authored a letter to Dr. Branshaw, Petitioner's PCP, dated March 2, 2012. He notes that she "[h]as an extensive history of pain and radicular symptoms after a work related

injury of her neck causing a C5-C6 disc herniation on August 29, 2010. ... concerning symptoms of swallowing dysfunction, increasing spasticity of her upper and lower extremities especially noted in her lower extremities.... There is also hyperreflexia at the patellar tendon including crossed adductor reflexes and distribution of reflexes. There is an exaggerated wrist extensor reflex as well as brachioradialis reflex in the upper extremities, again with distribution of reflexes. There is sustained clonus bilaterally. There is also Babinski sign." (PX1)

Dr. Brayton advised the cervical spine results showed, "the *slight* progression in the C5-C6 (disc) along with the pronounced annular tear explains some of her increased neck symptoms and pain. Increased facet arthropathy and inflammatory change of the MRI explains her focal spine tenderness but it certainly does not explain her pathologic reflexes, hyperreflexia, clonus, and Babinski signs. There is no evidence of intrinsic cord lesion on the presented cervical MRI scan, but I am concerned that *she has evidence of diffuse upper motor dysfunction.*" (PX1)

Dr. Brayton further wrote, "In summary, the patient's neck pain may be explained by the *relatively modest changes* of the C5-6 disk herniation which does not exert any further compression of the neural elements combined with the facet disease at C5-6 and C6-C7, but it certainly does not explain the patient's rather concerning finds consistent with diffuse upper motor dysfunction." (PX1) (emphasis added)

On March 2, 2012, an MRI of the brain confirmed a brain lesion at the right aspect of the pons and loss of the surrounding white matter material around the brain stem. Thereafter, on March 30, 2012, a spinal tap and lumbar puncture ordered by Dr. Santwani was performed because of the brain lesion, or abnormal mass in Petitioner's brain, the clonus and the increased reflexes. The spinal tap confirmed multiple abnormal bands consistent with a clinical diagnosis of MS. (RX1, 19-21, PX4)

During this work-up that diagnosed MS, Petitioner continued working full-time as a nursing supervisor. However, Petitioner was terminated from her position at Loretto Hospital for labor/union reasons unrelated to her physical condition on May 20, 2012. Petitioner testified that she continued to look for work in the nursing field. (T, 26, 33) The fact that the Petitioner was still looking for work at this juncture shows the work injury did not disable Petitioner from working at that time, and further, that her work-related condition was stable and not worsening.

On August 23, 2012, Petitioner advised Dr. Brayton she wanted to return to work and requested new, more lenient restrictions. Dr. Brayton assigned restrictions of lifting 50 pounds frequently and 100 pounds occasionally. (T, 31) Petitioner testified that essentially if she went into the doctor and said, "I feel like I can do this" they were willing to adjust her restrictions so she could take a job she located. (T, 66)

Petitioner underwent an EMG/NCV some nine months later, on May 28, 2013, which showed "evidence of a *trace*, acute, C5 radiculopathy on the right and a *mild,* acute C6 radiculopathy on the left. There is no definitive electrophysiological evidence of a brachial plexopathy or peripheral neuropathy affecting the upper extremities at this time." (PX4) (emphasis added) This is at the level of Petitioner's pre-existing C5-C6 disc herniation, and the findings are

the same or similar to the EMG/NCV of October 20, 2010. These objective tests do not explain Petitioner's ongoing symptoms and complaints.

In 2013, Petitioner applied for Social Security Disability Insurance (SSDI) benefits. (T, 67)

Petitioner began working full-time as a float nurse on September 9, 2013, at DuPage Convalescent Center. (T, 18) Petitioner continued to work until January 5, 2014, at which time Dr. Santwani provided an off-work slip excusing Petitioner from work through January 9, 2014, citing a flare-up of her MS condition or from multiple falls. Dr. Santwani further excused Petitioner from work on February 23, 2014, February 26, 2014, and February 27, 2014, and February 23 through March 9, 2014, again for flare-ups of her MS condition, or from multiple falls. No off work slips were related to her work-related cervical condition. (PX4, work status notes)

On February 25, 2014, Petitioner underwent a cervical MRI which showed her objective results were unchanged from previous scans. By that time, however, Petitioner was exhibiting symptoms of left foot drop. According to Dr. Allen, absent lumbar spine disease, which was confirmed by MRI on February 25, 2014, the lesion causing this symptom had to be above that level, at the neck or in the brain. In fact, she had findings both in the neck, but particularly in the brain, that would explain the foot drop. (RX1, 25)

Dr. Santwani released Petitioner to return to light duty work on March 12, 2014, after an MS flare-up. Petitioner was released to return to work *with no* restrictions on March 13, 2014. (PX4) (emphasis added) Thereafter, on March 30, 2014, April 2, 2014, and April 3, 2014, Dr. Santwani excused Petitioner from work after multiple falls attributable to her MS and unrelated to her cervical condition. She also received an off work note from Dr. Santwani on April 5 and April 6, 2014, again for MS exacerbation and severe falls. (PX4) On April 21, 2014, Petitioner reported to Dr. Santwani that she was hospitalized for an MS flare up. Petitioner reported that her legs were weak, she reported frequent falling and memory problems, increased dysphagia and choking on liquids, her vision was blurred, and her body was weak with generalized pain. (PX4)

Petitioner testified that she was terminated from her position at DuPage Convalescent Center in May 2014, "for missing work for medical reasons." When asked if she missed work because of issues regarding her cervical spine, Petitioner testified that she did. (T, 32) However, Dr. Santwani's off-work notes from January, February, March, and April 2014, indicate Petitioner missed work because of MS flare-ups or falls and not the work-related cervical condition. (PX4))

Petitioner testified that she looked for work in nursing management thereafter until she was awarded SSDI benefits in 2015. (T, 71) Petitioner never looked for work after her award of SSDI. (T, 67)

Petitioner had not seen Dr. Brayton in two years, since he wrote Dr. Branshaw in 2012 and referred her to Dr. Santwani at that time. On August 19, 2014, however, Petitioner returned to Dr. Brayton. After reviewing the August 1, 2014, cervical MRI, Dr. Brayton advised Dr. Branshaw that the continued herniation at the C5-C6 level *has not progressed much* and does not significantly compress the neural elements and suggested a provocative discography of the cervical spine both

at the C5-6 level and control levels. (PX1) He did not mention the disc at C6-C7. Dr. Brayton saw Petitioner only two more times, on February 12, 2015 and on January 21, 2016.

Petitioner underwent a discogram at Kendall Pointe Surgery on October 22, 2014. The discogram report states, "[a]t both the C4-C5 and C5-C6 discs, the patient experienced posterior bilateral cervical pain. (PX8) The pain experienced was equal at both levels. At the C6-C7 disc, the disc appeared normal, and no pain was produced." (PX8) On February 12, 2015, Dr. Brayton reviewed the discogram.

On December 2, 2014, Dr. Santwani ordered a functional capacity evaluation (FCE) to assess Petitioner's capabilities at that time. Petitioner never underwent the FCE to quantify her work capabilities.

Before trial, on March 28, 2018, Petitioner underwent another cervical MRI. The radiologist's impression states, "small central protrusion of the disc at C2-3 and C5-6 contributing to mild central stenosis; 2) multilevel degenerative disease of the cervical spine; 3) no abnormal signal or enhancement of the visualized spinal cord."

Dr. Allen's Medical Opinion

Petitioner was seen by Dr. Neil Allen at Respondent's request pursuant to §12. Dr. Allen authored two reports dated December 29, 2014, and February 26, 2015, and testified via evidence deposition on August 10, 2015. Dr. Allen is board certified in both internal medicine and neurology but also published and involved in presentation and research of MS for 15-20 years. (RX1, 8-9) He testified that he reviewed Dr. Brayton's medical records from 2002 noting that seven years prior to 2003, Petitioner was kicked in the head during a soccer game and had migraine type headaches including in the back of her head. (RX1, 15, 84) Dr. Allen reviewed the August 29, 2010, cervical MRI and confirmed the only new finding was the C6-C7 diffuse disc bulge. (RX1, 16)

Dr. Allen agreed with Dr. Brayton's assessment of her symptoms and that the February 16, 2012, cervical MRI showing that the C5-C6 protrusion was slightly more broad-based than on earlier examination and that the "MRI didn't explain her increased reflexes and clonus in her legs, difficulty walking, and problems swallowing." (RX1, 19) An MRI of the brain was performed on March 2, 2012, which showed a brain lesion at the right aspect of the pons which turned out to be a demyelinating area, an area of local inflammation, and loss of the surrounding white matter material around the nerves of the actual spinal—of the actual brain stem itself, consistent with MS. (RX1, 20) She underwent a spinal tap or a lumbar puncture because of the clonus in her ankles, the abnormal mass in the brain and increased reflexes. The puncture showed multiple abnormal bands, consistent with MS. (RX1, 21)

Dr. Allen opined that Petitioner's falling was from the lesion noted in the pons of the brain. Her increase in memory problems could be from the narcotic medications; the difficulty swallowing was likely from the lesion in the pons as was the occasional choking on liquids. Petitioner's problems finding words and lack of coordination were from narcotics and the MS. (RX1, 27-28, 34)

Dr. Allen also testified that lesions in the brain can be caused by the MS, migraines and encephalitis. (RX1, 37) Petitioner's hyperreflexia was caused by interruption in the transmission of impulses from the brain stem spinal cord to lower extremities. It is a manifestation of MS, the tumor, and a vitamin B-12 deficiency, which Petitioner had in the past. (RX1, 38) There was no evidence of myelomalacia (spinal cord damage) or spinal cord compression. The physical examination of February 26, 2015, revealed Petitioner complained of migraines dating to 1995 when she suffered a Grade 2 concussion. (RX1, 41-42, 84).

Dr. Allen's impression after the February 2015 examination was that her current condition of ill-being appeared to be a loss of balance, increased frequency of headaches, occurring two to three times a week, and the cowl-like discomfort she has over her shoulders secondary to the cervical spine injuries that have been previously adjudicated. It was his opinion that none of the conditions of MS, hyperreflexia in her legs or fibromyalgia were related to the work accident. (RX1, 50) He opined any work restrictions that she has at this time would be related to migraines and would not be related to her work accident. (RX1, 52)

Dr. Allen opined the only symptoms related to her work injury, were "[p]ain in her neck, pain in her arm, any numbness or weakness that she had in her upper arm as found by other examiners which I did not go into since that information had already been adjudicated." (RX1, p. 53) No lower extremity findings, headaches, intermittent and episodic dizziness, light sensitivity, sound sensitivity, nausea, her gait, spasticity of her lower extremities, weakness, lack of attention, and difficulty with memory are related. (Rx1, 53-56)

When asked if Petitioner was capable of working with regard to her injury which had been adjudicated in the §19(b) hearing, Dr. Allen opined that, "[i]t was documented that she returned to work subsequent to her neck injury in 2010, and she returned to work in 2011. She was performing her full duties as a nurse at Loretto Hospital when she did, in fact, return to work and was also capable of exercising up to three time per week. (RX1, 56) Dr. Allen testified that on August 23, 2012, Dr. Brayton released Petitioner to return to work with restrictions of lifting 50 pounds and occasional lifting of up to 100 pounds, consistent with the duties of a registered nurse and he was in agreement with those restrictions. (RX1, 23, 88)

Dr. Brayton's Medical Opinion

On January 21, 2016, Dr. Brayton opined that Petitioner continued to be disabled by pain requiring high-dose analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches, caused by her work injury which is a separate condition from her MS. He also opined that Petitioner's MS was triggered by her work injury and disc herniation. Dr. Brayton further stated that the cervical disc herniation persists at C5-C6 and has not healed or improved but does not progress. Dr. Brayton described her disc disease at C2-3 and C3-4 levels that are unrelated to the August 29, 2010, work accident. He advocated avoiding surgery. Dr. Brayton provided one work status note that was handwritten that states, "Permanent work restrictions no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment-permanent. He also provided a hand-written note on a prescription pad that documents, "Permanent Disability."

Dr. Brayton never testified regarding his January 21, 2016, opinions.

Dr. Herman's Medical Opinion

Petitioner underwent a second §12 exam by Dr. Martin Herman, a neurosurgeon, at Respondent's request in May 2016. Dr. Herman testified that Petitioner has three ongoing problems: 1) a pre-existing condition of long-standing neck pain since 1995 with cervical degenerative disease; 2) the disc herniation (C6/7) that occurred in 2010; and 3) progressive neurological abnormalities due to her MS. The pre-existing disc disease and the herniated disc did not prevent her from working as a registered nurse. The symptoms from the MS would prevent her from returning to work as a registered nurse. (RX2, 42-43) Dr. Herman opined that her (C6-C7) disc herniation was very small according to her reports and it is not possible to attribute the large number of not associated symptoms and signs that she's having to this disc herniation because people with disc herniations do not get loss of coordination, blurry vision, memory loss, or the kind of weakness she's describing. (RX2, 43-45) Dr. Herman testified that a 50-pound and a 100-pound restriction at medium duty, roughly two years after her injury was completely reasonable in regard to her work-related condition. (RX2, 22) He found that Petitioner had reached MMI when she was returned to work with the restrictions Dr. Brayton imposed of 50-pounds and 100-pounds occasionally. Petitioner did not need additional treatment for her work-related condition. (RX2, p. 17)

Analysis and Conclusions

The majority finds that, "The evidence shows a progressive worsening of Petitioner's condition both symptomatically and per the objective diagnostic studies." I disagree. The medical records show Petitioner's work-related condition was stable and this stable work-related condition did not prevent Petitioner from working. Also, the condition that was progressively worsening was her MS condition that Petitioner stipulated was not causally related to the work accident.

The sole new finding resulting from the work accident, the disc at C6-C7, was non-symptomatic. Moreover, the February 16, 2012, cervical MRI confirmed the pre-existing C5-C6 disc was almost completely stable and unchanged. Objectively, Petitioner's work-related conditions at C5-C6 and C6-C7 were stable some two years post-accident. Also, the May 28, 2013, EMG/NCV (6/8/18 Hearing, PX4) documents the same or similar results as the October 20, 2010, EMG/NCV. (6/29/11 Hearing, PX1)

Petitioner was able to return to work and did, in fact, return to work. Petitioner worked as a full-time registered nurse after the accident from August 12, 2011 – May 20, 2012. Shortly thereafter, in August 2012, Dr. Brayton updated his employability assessment imposing more lenient restrictions, 50-pounds frequently and 100-pounds occasionally. Petitioner was working from September 9, 2013 – January 5, 2014, until taken off by Dr. Santwani because of her progressively worsening MS symptoms that even required hospitalization. (PX4) Dr. Santwani's treatment from April 23, 2012, solely addressed Petitioner's progressing MS symptoms. The only condition that was progressively worsening both symptomatically and per the objective diagnostic studies was Petitioner's non-work-related MS condition not her work-related cervical condition.

It is noteworthy that only after the progressively worsening non work-related MS condition, did Dr. Brayton change her work restrictions and find she was unemployable.

The majority's reliance on *Sisbro* to award PTD benefits is misplaced. (citations omitted) The majority asserts that the Petitioner's cervical condition is a "contributing cause" to her permanent and total disability. It is the responsibility of the claimant to establish that he or she is entitled to permanent total disability benefits. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Comm'n*, 371 IllApp.3d 1117, 1129, 864 N.E.2d 838, 309 Ill.Dec. 597 (2007). A claimant is required to establish the elements of his right to compensation under the Workers' Compensation Act. *Certified Testing v. Industrial Com'n.*, 305 Ill.Dec. 797, 856 N.E.2d 602, 367 Ill.App.3d 938 (2006). In order to establish entitlement to PTD benefits, a claimant must establish that she is incapable of performing services except for those for which there is no reasonable stable labor market because of the effects of the work injury. *Federal Marine.*

The Appellate Court in *Alano v. Industrial Commission* stated:

> [T]he focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability, and 'if an employee is qualified for and capable of obtaining employment without seriously endangering his health or life, such employee is not totally and permanently disabled.' *Alano v. Industrial Com'n.*, 282 Ill.App.3d 531, 668 N.E.2d 21 (1996) citing *E.R. Moore Co. v. Industrial Com'n*. (1978), 7 Ill.2d 353, 361, 17 Ill.Dec. 207, 376 N.E.2d 206.

In this case, Petitioner's work-related medical disability is her cervical condition at C5-C6 and C6-C7. However, the C5-C6 disc was stable and did not prevent her from returning to work, albeit with restrictions, in 2011, 2012, 2013 or thereafter. In fact, Petitioner returned to work full duty at Loretto Hospital in 2011 until she was terminated in 2012, and also at DuPage Convalescent Center, until she was terminated in 2015. The condition of disability preventing Petitioner from gainful employment was the progressively worsening and debilitating non-work related MS condition. Petitioner has failed to show her work-related medical disability impaired her employability.

Dr. Brayton is the only doctor who opined that Petitioner is permanently and totally disabled as a result of the August 29, 2010, work injury. Dr. Brayton's credibility is tainted for a multitude of reasons. First, he allowed the Petitioner to dictate her work restrictions on multiple occasions. Second, Dr. Brayton did not testify and thus never provided the basis for his opinion, that the aggravation of a pre-existing herniated disc at C5-C6, which was stable or smaller on the cervical MRI on February 10, 2011, caused Petitioner's permanent disablement. Finally, Dr. Brayton's opinion on Petitioner's employability regarding her cervical spine restrictions, lacks foundation, and the purview of that opinion belongs to a certified vocational counselor. The Appellate Court specifically rejected a medical opinion regarding an injured employee's employability in *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 865 N.E.2d 342 (2007). In *Westin,* the court held:

> As far as we can tell, Dr. Coe had not ordered or reviewed any vocational or rehabilitative tests, conducted a labor-market survey on claimant's behalf,

> attempted to find claimant a position within his restrictions, or prescribed a functional capacity evaluation. In fact, Dr. Coe acknowledged on cross-examination that he never reviewed a job description for claimant's position, that claimant only told him "in general in his limited way" what his job duties entailed, and that he never ordered any vocational evaluation of claimant. Although Dr. Coe emphasized that claimant's limited knowledge of the English language restricted his ability to be rehabilitated in an occupation other than a painter, our supreme court has suggested that one's language skill is insufficient to support a finding of odd lot. *Valley Mould & Iron Co.*, 84 Ill. 2d at 548. [***41]

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 544-545, 865 N.E.2d 342, 358, (2007).

The evidence is clear Petitioner's work-related cervical condition had stabilized and she was able to return to gainful employment until her progressively worsening MS rendered her unable to do so. Therefore, Petitioner did not sustain her burden of proving that she was permanently and totally disabled as a result of the injuries caused by the work accident.

Therefore, I find that the opinions of Dr. Allen and Dr. Herman are more credible than Dr. Brayton's unsubstantiated opinion that Petitioner is permanently and totally disabled as a result of the work injury. Dr. Herman opined Petitioner sustained a disc herniation from the August 29, 2010, accident but it had been effectively treated and she was at maximum medical improvement with her return to work with 50/100 pound lifting restrictions imposed by Dr. Brayton in 2012, comporting with Dr. Allen's opinion. He further opined that as of May 2016 Petitioner was *not* capable of returning to work but because of the MS and not because of the work-related condition. (Rx2, 47-48, 60) Further, the off work notes provided by Dr. Santwani in 2014 for MS flare-ups are consistent with Dr. Herman's opinion that Petitioner could not work because of her MS, not her cervical condition.

Several Commission Decisions support the proposition that when a Petitioner is disabled from another medical condition(s) unrelated to the work accident, it is the Petitioner's burden to prove that she is entitled to an award of permanent and total disability for her work accident. See, *Hamilton v. A T & T*, 99 IIC1127, (Petitioner was diagnosed with carpal tunnel syndrome and she ultimately underwent bilateral carpal tunnel releases for her condition. Subsequent to her surgeries, Petitioner was diagnosed with left reflex sympathetic dystrophy and later with bilateral epicondylitis and fibromyalgia. Eventually Petitioner was diagnosed with sarcoidosis. In denying benefits, the Arbitrator found, and the Commission upheld, that Petitioner was taken off work completely due to an unrelated lung condition in February of 1997); *Tidemann v. Homes By Hemphill*, 09 IWCC 0330 (Commission reversed the Arbitrator's decision regarding permanent and total disability, finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent, however that Petitioner failed to prove a causal connection between her work related injuries of August 14, 1989, and her current condition of ill-being with respect to her nose, left hip, right and left feet, and pre-existing rheumatoid arthritis and awarded permanency on the basis of §8(d)2 and §8(e)); and *Karen McCurrie v. Grove Dental*

Associates 09 IWCC 0050 (Commission upheld Arbitrator's denial of permanent and total disability award, where Petitioner had a compensable accident on December 10, 2002, which did aggravate an underlying condition in her lower back. She also had prior to that work accident complaints of headaches and chronic fatigue among other symptoms, which eventually were diagnosed in 2005 as fibromyalgia and chronic fatigue syndrome. In reviewing the treating records following the accident of December 10, 2002, the Arbitrator/Commission held that Petitioner's condition of ill-being about her lower back was related to the accident of December 10, 2002, but her prior and subsequent and present complaints diagnosed as fibromyalgia, chronic fatigue syndrome, and headaches are unrelated to the accident of December 10, 2002. While the Petitioner may very well be unable to work at the present time, that inability to work is related to the non-work related conditions of fibromyalgia, chronic fatigue syndrome, and headaches.)

Based on a careful review of the evidence, I would award Petitioner permanency on the basis of loss of use of a person-as-a whole under §8(d)2, for an aggravation of her non-operated pre-existing herniated cervical disc at C5-C6 and a slight disc bulge/herniation at C6-C7, resulting in permanent restrictions. Therefore, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOWNING, DELLA
Employee/Petitioner

Case# **11WC009902**

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

20IWCC0657

On 8/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1876 CZAPLA LAW
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20IWCC0657

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ XXNone of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DELLA DOWNING
Employee/Petitioner

v.

DELNOR COMMUNITY HOSPITAL
Employer/Respondent

Case # 11 WC 9902

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Wheaton**, on **6/8/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/29/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$84,249.36**; the average weekly wage was **$1,620.18**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **3** dependent children.

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

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

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

ORDER

1. RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR 169 1/7 WEEKS, COMMENCING JUNE 10, 2011 THROUGH AUGUST 11, 2011; MAY 21, 2012 THROUGH SEPTEMBER 19, 2013; AND MAY 5, 2014 THROUGH JANUARY 20, 2016, AS PROVIDED IN SECTION 8(b) OF THE ACT.

2. RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $1,080.12/WEEK FOR 124 AND 1/7 WEEKS, COMMENCING JANUARY 21, 2016 THROUGH JUNE 7, 2018, AS PROVIDED IN SECTION 8(a) OF THE ACT.

3. RESPONDENT SHALL PAY PETITIONER THE REASONABLE AND NECESSARY MEDICAL EXPENSES INCURRED FOR THE CERVICAL SPINE AS IDENTIFIED IN PX.1., PX.2, PX.4, PX.5, PX.6, PX.7, PX.8, PX9, PX 10, PX.11, PX.12, PURSUANT TO SECTION 8 (A) AND 8.2 OF THE ACT AND SUBJECT TO THE MEDICAL FEE SCHEDULE.

4. RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $1,080.12/WEEK FOR LIFE, COMMENCING ON JUNE 8, 2018, AS PROVIDED IN SECTION 8(f) OF THE ACT. COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE RATE ADJUSTMENT FUND, AS PROVIDED IN SECTION 8(g) OF THE ACT. RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM 8/29/10 THROUGH 6/8/18, 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.

KSSteffen **July 28, 2018**

Signature of Arbitrator Date

AUG 10 2018

PROCEDURAL HISTORY

On June 9, 2011, a prior 19(b) Petition for Immediate Hearing was heard before an Arbitrator. The Arbitrator found that Petitioner's current condition was causally related to her undisputed work accident of August 29, 2010. Specifically, Petitioner was found to have sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator Ex.2) Petitioner was awarded temporary total disability benefits commencing September 10, 2010 through November 11, 2010; February 3, 2011 through February 4, 2011; February 27, 2011 through March 10, 2011; March 12, 2011 through March 16, 2011; and March 19, 2011 through the June 9, 2011 19(b) hearing. (Arbitrator's Ex. 2) The Arbitrator determined Petitioner had not reached maximum medical improvement and was entitled to further medical treatment with Dr. Brayton (Arbitrator's Ex.2).

The Arbitrator's 19(b) decision was affirmed and adopted by the Commission on August 2, 2012 (Arbitrator's Ex.2) A transcript of the 19(b) hearing was admitted into evidence. (Arbitrator's Ex.2)

On June 8, 2018, the matter was heard by the Arbitrator Ketki Steffen. The issues of accident, notice and causation were previously decided Petitioner stipulated that there was no claim for multiple sclerosis attributable to the August 29, 2010 accident at work.

Unpaid medical charges and unpaid lost time in the form of TTD and maintenance were alleged at hearing along with the request for a finding related to Nature & Extent if the Arbitrator were to agree that the evidence presented supports a finding of Petitioner having reached a state of Maximum Medical Improvement. Petitioner alleged odd-lot permanent disability applies in regard Nature & Extent.

Petitioner further stipulated that Respondent was entitled to a credit pursuant to Section 8(j) of the Act for any payment of Petitioner's medical expenses. Respondent's counsel acknowledged that he was not disputing Petitioner's claim for permanent total disability benefits pursuant to Section 8(f) of the Act.

FACTUAL HISTORY

Petitioner is a licensed nurse and had worked in that capacity at the time of her accident on August 29, 2010 when sustained a new disc herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6.

The following history entails the medical and other relevant facts after the prior 19B/8A hearing and decision:

On July 14, 2011 Petitioner telephoned Dr. Brayton complaining of left and right arm numbness and pain. (PX.1.) Dr. Brayton's August 1, 2011 office note reflects Petitioner "called in req release to work still has neck and arm SX but must RTW due to financial situation." (PX.1) Dr. Brayton released Petitioner back to work at her request with a 10-pound lifting restriction and no excessive pushing/pulling (PX.1.)

On August 12, 2011 Petitioner went to work at Loretto Hospital as a nursing supervisor. Petitioner worked full-time until May 20, 2012 when she was terminated. The nursing staff unionized and Petitioner lost her job.

Petitioner continued to experience radiating neck pain and was referred by Dr. Brayton to the Delnor Hospital pain clinic for a series of cervical epidural steroid injections. (PX.1.) Dr. Yang examined Petitioner on August 10, 2011 and noted Petitioner's neck pain radiating to her bilateral upper extremities (PX.2.) Petitioner complained of numbness in all 5 fingers on both hands. Dr. Yang reviewed the

February 9, 2011 cervical MRI which showed a C5-C6 right sided paracentral disc herniation, C4-C5 small disc protrusion and C6-C7 disc bulge. (PX.2.) Petitioner was diagnosed with cervical radiculopathy, secondary to spinal stenosis, cervical degenerative disc disease with overlying myofascial pain. (PX.2.)

On August 17, 2011 Petitioner received the first of a series of cervical epidural steroid injections at Delnor Hospital. Dr. Hanna prescribed Vistaril, Zanaflex and Norco for Petitioner's cervical pain. (PX.2)

On October 21, 2011, Dr. Hanna prescribed a Duragesic patch for Petitioner's cervical pain and Petitioner received trigger point injections to the bilateral scapular and a second cervical epidural steroid injection. (PX.2) On November 9, 2011, Petitioner received a third cervical epidural steroid injection and bilateral scapular trigger point injections. (PX.2.)

Petitioner returned to see Dr. Hanna on December 12, 2011, complaining of increasing neck pain. While Petitioner reported pain relief with the injections and Duragesic patch she continued to experience muscle spasms along the neck, upper shoulders and lots of right arm pain. (PX.2.) Dr. Hanna continued to prescribe Norco, Zanaflex, Vistaril along with the Duragesic patch for Petitioner's chronic neck pain and cervical radiculitis. (PX.2.) Petitioner received 5 trigger point injections to the scapula, trapezius and cervical paraspinal muscle.

Petitioner saw Dr. Hanna on February 15, 2012 complaining of *"worsening neck pain down both arms with numbness and tingling into the hands."* (PX.2.) Dr. Hanna refilled Petitioner's Duragesic patch, Norco, and Zanaflex. Petitioner received bilateral trigger point injections to the trapezius and levator scapula for her myofascial pain. (PX.2.)

MRI study of the cervical spine performed on February 16, 2012 revealed:

"The posterior disc protrusion at C5-C6 is slightly more broad based with the presence of an annular tear." (PX.2.)

Dr. Brayton reviewed the MRI results with Petitioner on March 2, 2012 and noted *"the slight progression in the C5-C6 disc along with the more pronounced annular tear explains some of her increased neck symptoms and pain. The increased facet arthropathy and inflammatory change of the MRI explains her (Petitioner) focal cervical spine tenderness, but it certainly does not explain her pathologic reflexes, hyperreflexia, Clonus and Babinski signs."* (PX.1) Petitioner was referred to Dr. Santwani, a neurologist, for electrophysiologic testing.

Dr. Santwani performed a number of tests including a lumbar puncture and spinal tap and ultimately diagnosed Petitioner with multiple sclerosis. (PX.4.) Petitioner stipulated at the onset of the hearing that treatment for the multiple sclerosis was unrelated to her August 29, 2010 injury at work.

Dr. Hanna continued to refill Petitioner's narcotic pain medications throughout 2012. (PX.2,3) Dr. Hanna noted on December 31, 2012 that the *"pain was severe with significant impact on functions and quality of life."* (PX.2.) Petitioner returned to Dr. Hanna on February 25, 2013 *"complaining of worsening pain in her fingertips, with neck pain across both shoulders, radiating down both of her arms with spasms on 9-10-out of 10 in severity, constant numbness and tingling into the arms."* (PX.2.) Dr. Hanna continued the narcotic pain treatment.

Cervical MRI study performed on May 5, 2013 revealed:
C4-C5 small central disc protrusion with minimal early annular tear;

C5-C6 disc desiccation and mild loss of disc height with broad-based central right paracentral disc protrusion which moderately indents the ventral sac with the associated central annular tear; and C6-C7 small lateral spurs.

Petitioner's last treatment with Dr. Hanna was May 13, 2013. Petitioner's insurance changed and she needed to switch to a pain physician in her network. Petitioner's medications were refilled and she was referred by her primary care physician, Dr. Branshaw, to Kishwaukee Hospital for pain management. (PX.2.)

On May 30, 2013, Petitioner presented to the pain clinic at Kishwaukee Hospital for her chronic neck pain. History reflects the *"pain began in August 2010 when she was lifting a patient"*. (PX.5.) Petitioner described the pain as aching, burning, constant, numb, pressure, radiating, sharp, squeezing, tingling, and tiring. Petitioner successfully underwent an opioid assessment to determine if she was an appropriate candidate for continued opioid therapy. (PX.5.) On June 12, 2013, Dr. Gregory approved long term opioid therapy and prescribed the Fentanyl Duragesic patch and Norco for breakthrough pain. (PX.5.)

Petitioner treated with Dr. Gregory at the Kishwaukee Pain Clinic throughout 2013. (PX.5.) He diagnosed Petitioner with cervical radiculopathy and fibromyalgia syndrome. On August 8, 2013, Petitioner received 4 cervical trigger point injections for her neck pain. (PX.5.) Patient reported that off of opioid medications she is not able to get out of bed and function, but with the medications, she is able to function. (PX.5.)

On September 20, 2013, Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was let go because of missing work.

On October 31, 2013, Dr. Gregory noted that Petitioner's pain has been worse since she has been back to work. (PX.5.) Dr. Gregory continued to prescribe the

Duragesic patch and Norco. In December 2013, Petitioner had to switch pain management physicians because of insurance coverage.

On December 26, 2013, Petitioner saw Dr. Todd Hagle for her chronic neck and back pain. (PX.10) Petitioner was referred to Dr. Hagle, a pain management anesthesiologist, by Dr. Branshaw. Dr. Hagle diagnosed Petitioner with chronic neck and back pain and noted *"she has clear signs of cervical radiculopathy and timing of an injury which seems to be the cause of this."* (PX.10) Dr. Hagle initially prescribed Lyrica and Baclofen for Petitioner's neck pain but she experienced side effects with Lyrica and it was discontinued. Thereafter, Dr. Hagle prescribed the Duragesic patch, Norco and Baclofen for Petitioner's neck pain. (PX.10)

Petitioner treated with Dr. Hagle on a monthly basis for her chronic neck pain. On February 10, 2014, Petitioner complained of pain in her neck, shoulders, and arms. Petitioner noted the pain was *"severe, chronic and disabling."* (PX.10) Dr. Hagle continued to prescribe the Duragesic patch, Baclofen and Norco for Petitioner's neck pain. Dr. Hagle's May 12, 2014 office note states ***"she*** (Petitioner) ***lost her job recently due to many falls/sick days."*** (PX.10)

A February 25, 2014 cervical MRI revealed persistent multilevel degenerative findings and disc bulges with no significant change in previously noted small central C4-C5 disc protrusion and annual tear as well as right paracentral C5-C6 disc protrusion. (PX.1.)

Petitioner returned to Dr. Brayton on August 14, 2014 to discuss the recent MRI findings. Dr. Brayton noted that while recovering from her cervical disc herniation she was diagnosed with multiple sclerosis. Petitioner complained of severe painful dysesthesias in her arms and legs as well as severe unremitting neck pain and

cervicogenic headaches. (PX.1.) Dr. Brayton noted Petitioner has persistent pain associated with her work injury causing a C5-C6 disc herniation. (PX.1.) Dr. Brayton ordered provocative discography at C5-C6 which was performed at Kendall Pointe Surgery Center on October 22, 2014. Discography demonstrated posterior bilateral cervical pain at C4-C5 and C5-C6. (PX.8.) Petitioner continued to see Dr. Hagle on a monthly basis to refill her pain medications.

An August 1, 2014 cervical MRI revealed a C4-C5 central disc protrusion and C5-C6 right paracentral disc protrusion. (PX.7.)

On December 29, 2014, Dr. Hagle noted Petitioner's persistent chronic neck and upper extremity pain secondary to cervical stenosis. Petitioner was also experiencing diffuse pain secondary to her multiple sclerosis. Petitioner continued to see Dr. Hagle on a monthly basis throughout 2015 to refill her pain medications. (PX.10)

Dr. Brayton discussed the results of the discogram with Petitioner on February 12, 2015. He noted at that time that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Dr. Brayton further noted that Petitioner had been diagnosed with multiple sclerosis and had dysethetic pain in the upper and lower extremities. (PX.1.) Discography revealed strongly positive concordant pain at C4-C5 and C5-C6. MRI revealed a progressive, large, broad based annular bulge at C5-C6 combined with a posterior vertebral body and uncovertebral joint osteophytes which have progressed since her last imaging study. (PX.1.) There was also an increase in the annular bulge and central CFS effacement at C4-C5 and modest spondylitic change of a left-sided uncovertebral joint osteophyte at C6-C7. It was Dr. Brayton's impression that Petitioner was experiencing persistent pain attributable to the C5-C6 injury with a

strongly positive concordant provocative discogram at C4-C5 as well as progressive changes at C4-C5. (PX.1.) Surgical intervention involving a C4-C5 anterior cervical decompression and fusion with plating was discussed including the risk of accelerated spondylitic changes at C6-C7. (PX.1.) Petitioner wished to defer surgery and continue with pain management.

Petitioner continued to refill her pain medications with Dr. Hagle on a monthly basis throughout 2015. (PX.10) Petitioner was awarded Social Security Disability benefits in 2015. MRI of the cervical spine completed on December 3, 2015 revealed no significant interval change.

Petitioner returned to Dr, Brayton on January 21, 2016 to discuss the MRI results. Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her M.S."* Examination revealed continued myelopathy with spasticity in both upper extremities. Cervical disc herniation persists at C5-C6 and has not healed or improved. There was ventral effacement of the canal, anterior CSF space and neural foramina. (PX.1.) There were also disc disease at C2-C3 and C3-C4 which is permanent. (PX.1.)

Dr. Brayton noted that *"overall it appears the patient has a permanent disc injury at C5-C6 I would favor against surgery given the concurrent diagnosis of MS and the potential for flare-up caused by surgical stresses as well as adjacent segment disease which may be caused to be progressive by the surgical fusion needed at C5-C6." (PX.1.)* Dr. Brayton further noted that Petitioner *"will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a*

consequence to her injury." (PX.1.) Petitioner was issued ***"Permanent work restrictions of no lifting, frequent breaks, with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent."*** (PX.1.)

Petitioner refilled her pain medications with Dr. Hagle throughout 2016. (PX.10.) A follow-up cervical MRI performed at Kishwaukee Hospital on November 23, 2016 revealed some mild degenerative changes at C5-C6. (PX.10)

Petitioner continued to refill her pain medications with Dr. Hagle throughout 2017 and 2018. (PX.10). On January 16, 2017 Dr. Hagle stated *"I don't have much I can help or offer Della if she doesn't want to consider interventional therapy in the form of CESI or medial branch blocks." (PX.10).* Dr. Hagle continued to fill Petitioner's prescription for Norco, Baclofen and the Fentanyl patch. (PX.10) MRI of cervical spine performed on March 26, 2018 revealed a small central protrusion of the disc at C2-C3 contributing to the mild central canal stenosis and a small board-based central disc protrusion and mild osteoarthritis at C5-C6. (PX.10) Based upon the new MRI findings and Petitioner's persistent headaches and chronic neck pain Dr. Hagle recommended a cervical epidural steroid injection to relieve Petitioner's inflammatory radicular pain. (PX.10) Petitioner received the C7-T1 injection on June 1, 2018.

FINDINGS/ANALYSIS

WITH RESPECT TO ISSUE (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING OF THE CERVICAL SPINE CAUSALLY RELATED TO THE AUGUST 29, 2010 INJURY AT WORK, THE ARBITRATOR FINDS AS FOLLOWS:

The Commission affirmed and adopted the Arbitration Decision and Findings that Petitioner's current condition of the cervical spine causally related to her undisputed work accident of August 29, 2010, having sustained a new herniation of C6/7 and aggravation of a pre-existing herniated disc at C5/6. (Arbitrator's Ex. 2.) Respondent does not dispute the causal relationship between Petitioner's cervical spine and the injury at work. However, Respondent denies that Petitioner's multiple sclerosis is causally related to the August 29, 2010 injury at work. Petitioner stipulated at the onset of the hearing that she was not making any claim relating to multiple sclerosis diagnosis and that her claimed injuries were confined to the cervical spine.

The Arbitrator notes that Petitioner has consistently sought medical treatment for her cervical spine through the June 9, 2011 19(b) hearing. The treating medical records admitted into evidence document Petitioner's chronic neck pain and bilateral cervical radiculopathy resulting from her August 29, 2010 injury at work. Dr. Brayton noted on February 12, 2015 that Petitioner had incurred a work injury on August 29, 2010 leading to a cervical disc herniation at C5-C6 followed by progressive spondylitic change at C4-C5 and C5-C6. (PX.1.) Discogram revealed concordant pain at C4-C5 and C5-C6 consistent with the MRI findings which demonstrate a progressive, large, broad based annular bulge at C5-C6, annular bulge at C4-C5 and continued spondylitic changes at C6-C7. (PX.1.)

On January 21, 2016, Dr. Brayton noted that Petitioner *"continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment, and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches. These are caused by her work injury which is a separate condition from her MS"* (PX.1.)

The Arbitrator has carefully reviewed and considered all medical evidence along with the credible testimony of the Petitioner. The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she sustained injury to her cervical spine which is causally related to the August 29, 2010 accident at work. It is undisputed that Petitioner injured her cervical spine lifting a patient at work. The Commission previously found that Petitioner sustained a disc herniation at C6-C7 and aggravation of a pre-existing herniated disc at C5-C6. (Arbitrator's Ex. 2) The medical records clearly document that progression of Petitioner's cervical disc disease which include permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.)

The Arbitrator finds the opinions of Dr. Brayton, a neurosurgeon, to be credible and persuasive. Moreover, the Petitioner credibly testified to the progression of her symptoms associated with her cervical disc disease. The Arbitrator finds it significant that Petitioner sustained no subsequent trauma to her cervical spine after the August 29, 2010 injury at work. Therefore, based upon the credible medical evidence along with Petitioner's uncontradicted testimony, the Arbitrator finds that the current condition of Petitioner's cervical spine is causally related to the August 29, 2010 accident at work. Additionally based on the testimony of Dr. Allen (RX.1.) and Dr. Herman (RX.2.), the Arbitrator finds that Petitioner's multiple sclerosis is not related to the August 29, 2010 accident at work.

The Arbitrator further finds that the lower back and any care related to the multiple sclerosis diagnosis, or any other diagnoses unrelated to the cervical spine condition is specifically determined to have no causal connection to the work injury alleged and awarded.

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

The Arbitrator having found that Petitioner's current condition of the cervical spine is causally related to the August 29, 2010 accident at work further concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment Petitioner received for her cervical spine was reasonably required to diagnose, treat, relieve and cure Petitioner from the effects of her cervical injuries and the medical services are causally related to her work injury. Respondent shall pay Petitioner all the reasonable and necessary medical services related to treatment of the cervical spine as contained in Petitioner's Exhibits No. 1, 2, 4, 6,7,8,9, 10, 11 and 12 (listed below), as provided in Section 8(a) and 8.2 of the Act, and subject to the medical fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall hold Petitioner harmless for any claims by any medical providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner's Medical Exhibits

- PX1-Neurosurgery and Spine Surgery Dr. Brayton--$0.00 per statement
- PX2-Delnor Hospital--$0.00 per statement

- PX4-Suburban Neurology Group--$1,699.42 total which includes $423.81 for 2012 codes 99215($145.71) & 99255($278.10); $707.79 for 2013 codes 95886(POC53.2=$148.96 x 2) & 95910(POC53.2=$308.03) & 99214($101.84); and $567.82 for 2014 codes 99213($67.02) & 99232($91.85 x 3) & 99254($225.25).
- PX6-Kishwaukee Hospital--$0.00 per statement
- PX7-Center for Diagnostic Imaging--$0.00 per statement
- PX8-Kendall Pointe Surgery Center--$1,478.49 for 2014 code 62291 ($490.82 x 3)
- PX9-Interventional Pain Specialists--$1,701.68 for 2014 code 62291($490.82), code 72285($837.20), code 77003($218.26), code 99144($81.11), & code 99202($74.29)
- PX10-APAC Centers for Pain Management—$108.18 for 2018 code 99214
- PX11-Fox Valley Medical Associates/Dr. Branshaw--$0.00 per statement
- PX12-Tri City Radiology--$0.00 per statement

In conclusion, $4,987.77 is awarded per Fee Schedule with regard to the exhibits entered into evidence in conjunction with the findings related to causal connection for cervical issues only.

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

Petitioner continued to be restricted from all work activities following the June 9, 2011 19(b) hearing. Respondent continued to deny Petitioner's weekly TTD benefits. Consequently, on August 1, 2011, Petitioner requested Dr. Brayton release her back to work with a 10 # lifting restriction and no excessive pushing/pulling. (PX.1.) Petitioner testified that she went to work for Loretto Hospital as a nursing supervisor on August 12, 2011. Petitioner worked full time until she was fired on May 20, 2012.

From May 21, 2012 through September 19, 2013, Petitioner remained unemployed and restricted to 10# lifting with no excessive pushing/pulling. Petitioner testified she looked for work as a nursing supervisor. On September 20, 2013 Petitioner went to work as a *"floating"* nurse at the DuPage Convalescent Center. Petitioner testified she worked there through May 4, 2014 when she was terminated for missing work. Dr. Hagle's May 12, 2014 office note states "**she lost her job recently due to too many falls/sick days.**" (PX.10) Petitioner has not worked since that time despite looking for a nursing supervisor position. Petitioner was awarded SSDI benefits in 2015.

On January 21, 2016, Dr. Brayton issued Petitioner the following permanent work restrictions:

"No lifting, frequent breaks with recumbency, high-dose narcotic pain meds all prohibit work/gainful employment – permanent" (PX.10)

Dr. Brayton wrote a script stating this was a ***"permanent disability".*** (PX.10)

Petitioner seeks temporary total disability benefits from June 10, 2011 through August11, 2011; May 21, 2012 through September 19, 2013; and May 5, 2016 through January 20, 2016. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized (i.e., whether the claimant has reached maximum medical improvement). Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132,142; 923 N.E.2d 266, 271; 337 Ill. Dec. 707 (2010). The Arbitrator notes that Respondent previously terminated Petitioner on May 7, 2011 and denied her claim for temporary total disability benefits.

Therefore, based on the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner's condition had not

stabilized and finds that Petitioner is entitled to temporary total disability benefits of $1,080.12 /week for 10 and 1/7 weeks commencing June 10, 2011 through August 11, 2011; 64 and 4/7 weeks commencing May 21, 2012 through September 19, 2013; and 89 3/7 weeks commencing May 5, 2014 through January 20, 2016.

Furthermore, the Arbitrator finds that Petitioner reached maximum medical improvement on January 21, 2016 when Dr. Brayton determined Petitioner was ***"permanent disability** as a consequence to her injury"* and issued her permanent work restrictions prohibiting her from gainful employment. (PX.10). Petitioner's subsequent demand for permanent total disability benefits pursuant to Section 8(f) of the Act was ignored by Respondent. (PX.13) Therefore, the Arbitrator finds that Petitioner is entitled to maintenance benefits of $1,080.12/week for 124 and 1/7 weeks commencing on January 21, 2016 through the date of the hearing.

WITH RESPECT TO ISSUE (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY AND ISSUE (O) Other §8(f) PTD BENEFITS, THE ARBITRATOR FINDS AS FOLLOWS:

Section 8(f) of the Workers' Compensation Act provides in part:

> *In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of a total permanent disability as provided in subparagraph 18 of paragraph e of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for Life. (820 ILCS 305/8(f))*

Therefore, a Petitioner is entitled to permanent total disability benefits where there is evidence of **"complete disability which renders the employee wholly and permanently incapable of work."** An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of

wages to him. A.M.T.C. of Illinois v. Industrial Commission, 77 Ill.2d 482,487 (1979). Thus, a Petitioner is entitled to permanent total disability benefits if there is medical proof to establish that he cannot work. Continental Drilling Co. v. Industrial Commission, 155 Ill.App.3d 1031, 508 N.E.2d 1246 (5th Dist. 1987).

It is undisputed that Petitioner injured her cervical spine lifting a patient at work on August 29, 2010 sustaining an aggravation of a pre-existing herniated disc at C5-C6 and a new disc herniation C6-C7. (Arbitrator's Ex. 2) The condition of Petitioner's cervical spine continued to progress and has led to permanent disc disease at C2-C3, C3-C4, and C4-C5. (PX.1.) Cervical fusion surgery was discussed with Dr. Brayton who believes the risk is too great considering Petitioner's MS and the potential for flare-up caused by the surgical stress. (PX.1.)

Petitioner continues to receive opioid therapy treatment for her chronic neck pain. On January 21, 2016 Dr. Brayton noted *"she continues to be disabled by pain requiring high-dose narcotic analgesics, procedural pain treatment and recumbency for alleviation of her neck pain, scapular pain, and cervicogenic headaches."*. (PX.1.) Dr. Brayton further noted that ***"She will need comprehensive and procedural pain management, chronic pain control, and permanent disability as a consequence to her injury."*** (PX.1.)

Dr. Brayton determined Petitioner was ***"permanent disability"*** and issued a written script along with ***"permanent work restrictions of no lifting, frequent breaks with recumbency, high dose narcotic pain meds all prohibit work/gainful employment – permanent".*** (PX.1.)

Thereafter, Petitioner requested permanent total disability benefits pursuant to Section 8(f) of the Act. (PX.13) Respondent failed to issue Petitioner's permanent total

disability benefits or prepare a written vocational assessment as required under Section 7110.10 of the Rules Governing Practice before the Industrial Commission.

Petitioner testified she continues to receive the Fentanyl patch along with Norco and Baclofen for her chronic and disabling neck pain. Petitioner sees Dr. Hagle on a monthly basis for her narcotic pain medications. Petitioner testified she experiences muscle spasms across the neck and top of the scapula (paraspinal spasms) on a daily basis. She has pain and stiffness in both arms with ongoing radiculopathy that causes numbness in all five fingers in both hands. Petitioner testified the neck pain *"affects her entire life".*

Petitioner testified she no longer cooks or performs household activities and relies on her husband and sons to do most of the housework. Petitioner is unable to work in the yard or perform any overhead activities. Petitioner testified she spends most of her time in a recumbent position and lives in her bedroom. Petitioner eats her meals in her bedroom, where she watches TV and can access her computer. Petitioner testified her daily pain level is 6 out of 10.

Therefore, based upon the medical evidence presented at trial along with Petitioner's credible testimony, the Arbitrator finds that Petitioner met the burden of establishing that she is totally and permanently disabled pursuant to Section 8(f) of the Act. This Arbitrator notes §8(f) of the Act provides that compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life. Respondent shall pay Petitioner permanent and total disability benefits of $1,080.12/week for life, commencing June 8, 2018, as provided in Section 8(f) of the Act.

With regard to the maintenance period of January 21, 2016 to present, the evidence presented does not support an award for maintenance due to the lack of qualification due to the stated lack of vocational effort.

Respondent shall have credit for amounts paid.

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

Tim Nyberg,

Petitioner,

vs. NO: 19 WC 730

Vine Industries,

Respondent.

21IWCC0170

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

I. CAUSAL CONNECTION

The Commission modifies the Decision of the Arbitrator with respect to the issue of causal connection. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005).

The Arbitrator ruled that the causal connection between Petitioner's injury and his current condition of ill-being terminated as of September 17, 2018, the date on which Petitioner reported to his treating physician, Dr. Brian Chilelli, that he was approximately "80-90% better overall." In so ruling, the Arbitrator accepted the opinion of Dr. Shane Nho, Respondent's Section 12 examiner. Given the facts and circumstances of this case as stated in the Decision, the Commission declines to find that the causal connection between Petitioner's accident and his condition of ill-being terminated on September 17, 2018 based solely on Petitioner's broad self-estimate on a single date, or broadly accept the opinions of Dr. Nho.

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More significant is the November 19, 2018 surveillance video, which shows Petitioner engaged in activities expected of Petitioner as an electrician during a period when his treating physician had placed him off work. The video occasionally depicts Petitioner favoring his right leg and keeping weight off the left leg, but more often shows Petitioner placing weight on the left leg to descend from the porch or back of his van. Similarly, the video occasionally shows Petitioner leaning against the ladder in a manner to keep weight off his left leg, but more often depicts Petitioner standing on the rungs of various ladders using both legs as support. The video also tends to show Petitioner with a normal gait. In short, the video recording submitted in this case confirms that Petitioner was able to perform the job duties of an electrician, whether with restrictions or without, as of November 19, 2018. Conversely, Dr. Chilelli's treatment records do not suggest that Petitioner ever informed him of these activities, which may have affected Dr. Chilelli's decision to keep Petitioner off work rather than impose work restrictions, and the speed at which Petitioner was advanced to return to work.

Accordingly, after considering the record as a whole, the Commission concludes that Petitioner established a causal connection between his injury and his condition of ill-being that terminated as of November 19, 2018.

II. MEDICAL EXPENSES

The Arbitrator denied Petitioner's claim for $935.00 in physical therapy expenses between April 24, 2019 and May 30, 2019 based on the Arbitrator's determination that Petitioner reached maximum medical improvement (MMI) on September 17, 2018. The Commission determines that Petitioner reached MMI as of November 19, 2018, but Petitioner's claim is for medical expenses after this date. Accordingly, the Commission affirms the Arbitrator's denial of unpaid medical expenses.

III. TEMPORARY TOTAL DISABILITY

The Arbitrator concluded that Petitioner was entitled to temporary total disability (TTD) benefits from June 14, 2018 through September 17, 2018, the date on which the Arbitrator found Petitioner to be at MMI. Given that Respondent paid Petitioner more than the amount due under this calculation, the Arbitrator also awarded Respondent a credit for the difference to be applied against the permanency award. The Commission concludes that Petitioner is entitled to TTD benefits for a period of 22 and 5/7ths weeks, from June 14, 2018 through November 19, 2018, the date on which the Commission has determined that Petitioner reached MMI. In addition, Respondent is entitled to a credit of $5,621.29 in TTD benefits already paid against the increased TTD award.

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IV. PERMANENT PARTIAL DISABILITY

The Arbitrator awarded Petitioner permanent partial disability (PPD) benefits representing a 10% loss of use of the left leg. The Commission agrees with the award but writes additionally to elaborate on our view of the weight of the factors we considered in reaching our conclusion.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, 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 2016). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i), as the Arbitrator correctly noted that neither party submitted an impairment rating. The Commission places significant weight on factor (ii) because Petitioner continues to work for Respondent as an electrician, a job involving squatting, stretching, and climbing ladders, activities which Petitioner testified can aggravate his lingering symptoms. The Commission places some weight on factor (iii) because Petitioner is 51 years old, suggesting that his condition will be a factor in his work life, which may be expected to be as long as 14 years. Regarding factor (iv), the Commission observes that no direct evidence was submitted regarding Petitioner's future earning capacity and that Petitioner has returned to his job with Respondent and works as close to eight-hour days as possible, leading us to place no weight on this factor. Lastly, regarding factor (v), Petitioner testified that he still experiences pain, stiffness and soreness in his hip after a few hours of a little exertion. He stated that if he spends time squatting near receptacles, he would get a really bad charley horse in his calf. He also stated that he needs to rotate his sleeping position three or four times nightly or the hip becomes stiff and awakens him. According to Petitioner, "It's not horrible. It's just an annoying little pain." He added that he lost a lot of muscle mass but was regaining it slowly. Petitioner's testimony finds support in his treatment records, which suggested improving left lower extremity strength and neuromuscular deficits. The Commission places the greatest weight on this evidence.

Considering the statutory factors as a whole, but particularly the magnitude of Petitioner's current disability, the Commission affirms the Arbitrator's award representing a 10% loss of use of the left leg.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his left leg is causally connected to the accident alleged in this case, as the causal connection terminated as of November 19, 2018.

IT IS FURTHER FOUND BY THE COMMISSION that Respondent has paid all

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reasonable and necessary medical expenses incurred through November 19, 2018.

IT IS THEREFORE ORDERED that Petitioner's claim for additional unpaid medical expenses incurred after November 19, 2018 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.33 per week for the period from June 14, 2018 through November 19, 2018, a period of 22 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is entitled to a credit of $5,621.29 in benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that that Respondent pay to Petitioner the sum of $264.00 per week for a period of 21.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for Penalties pursuant to §§19(k) and 19(l) of the Act, and Fees pursuant to §16 of the Act, 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 2, 2020 is hereby affirmed as modified herein.

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2021
o: 4/1/21
BNF/kcb
045

/s/ *Barbara N. Flores*
Barbara N. Flores

/s/ *Christopher Harris*
Christopher Harris

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NYBERG, TIM
Employee/Petitioner

Case# **19WC000730**

VINE INDUSTRIES
Employer/Respondent

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On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0340 LAW OFFICES OF JOHN W TURNER
209 S MAIN ST
2F
MT PROSPECT, IL 60056

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

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

Tim Nyberg
Employee/Petitioner

v.

Vine Industries
Employer/Respondent

Case # **19WC 00730**

Consolidated cases: _____

21IWCC0170

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 **8/22/19**. 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 _____

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FINDINGS

On **6/13/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**22,880.00**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **50** years of age, married with **no** dependent children.

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

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

Respondent shall be given a credit of $**5,621.29** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,621.29**.

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

ORDER

THE ARBITRATOR FINDS CAUSAL CONNECTION BETWEEN THE ACCIDENT OF JUNE 13, 2018 AND THROUGH SEPTEMBER 17, 2018, ONLY.

RESPONDENT HAS PAID ALL REASONABLE AND RELATED MEDICAL BILLS INCURRED THROUGH SEPTEMBER 17, 2018. CLAIMED FOR ANY FURTHER MEDICAL BILLS/BALANCES/OUT OF POCKET PAYMENTS AFTER THAT DATE IS DENIED.

PETITIONER WAS TEMPORARILY TOTALLY DISABLED FOR A PERIOD OF 13 6/7'S WEEKS BETWEEN JUNE 14, 2018 AND SEPTEMBER 17, 2018. HE IS ENTITLED TO A SUM OF $293.33 PER WEEK FOR THAT 13 6/7 WEEK PERIOD. NO FURTHER TEMPORARY TOTAL DISABILITY IS DUE.

PETITIONER SUSTAINED ACCIDENTAL INJURIES TO THE EXTENT OF 10% LOSS OF USE OF THE LEFT LEG, UNDER SECTION 8(E) OF THE ACT. HE IS THEREFORE ENTITLED TO THE FURTHER SUM $264.00 PER WEEK FOR A PERIOD OF 21.5 WEEKS.

RESPONDENT IS ENTITLED TO A CREDIT OF $1,556.58 IN OVERPAID TEMPORARY TOTAL DISABILITY. THIS AMOUNT IS A CREDIT TOWARD THE FURTHER BENEFITS DUE PETITIONER.

CLAIM FOR PENALTIES AND ATTORNEYS' FEES IS DENIED.

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

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

Signature of Arbitrator

December 31, 2019
Date

JAN 2 - 2020

Tim Nyberg v. Vine Industries
Case Number: 19WC 00730

21IWCC0170

Statement of Facts Petitioner was employed with Respondent, his father's company, as an electrician, working one day per week about 30 weeks per year. (T.29) He described his duties as climbing ladders, pulling wire, bending pipe, and installing lighting for commercial customers. (T.8) When not working, Petitioner did work around the house, took care of his son, quoted customers for Respondent's business, and worked a hobby farm where he had an orchard, grew sweet corn, vegetables, and tended bees for honey. (T.29, 30) Petitioner also operated Vine Aquatic Designs, building fountains and ponds, although in calendar year 2018 Vine Aquatic Designs reported no income. (T.31, Resp.Ex.#2)

On June 13, 2018 he was working for Respondent at a bowling alley. As he stepped off a ladder, his foot slipped on the waxed alley and he landed on his left side. (T.10) He called his father and went home. (T.11) Petitioner did nothing June 14. On June 15, a Friday, he and his wife went up to Wisconsin for the weekend. (T.12) Petitioner testified he didn't do much up there, and that whenever he stopped down on his foot he felt "ungodly pain. I figured I had torn a muscle." (T.12)

Petitioner called his primary care physician and was given an appointment with Dr. Chilelli for June 25, 2018. (T.13) Petitioner admitted he was full weight bearing between June 13 and June 25, 2018, and that he did not make any attempt to seek emergency room or urgent care. (T.36, 37) On June 25, 2018 Petitioner reported left hip pain following the June 13, 2018 incident. Petitioner reported he had been able to bear weight on the left leg but did have pain with walking, standing or climbing stairs. X-rays performed by Dr. Chilelli on this date were negative for any fracture. The doctor suspected a stress fracture, abduction tendon injury or "other process." He ordered a MRI of the left hip. (Pet.Ex.#6)

MRI testing performed June 26, 2018 showed significant edema in the femoral head, suggesting a subchondral stress or insufficiency fracture. Transient osteoporosis was noted to already be present. A tiny linear tear of the musculoskeletinous junction was noted. (Id.)

Dr. Chilelli reviewed that MRI testing on June 28, 2018 as showing transient osteoporosis or an insufficiency fracture. He prescribed non-weight bearing and Vitamin D. (Id.) Petitioner testified he was told to "use crutches until early October and don't do any work." (T.14)

When seen in follow-up on August 6, 2018 Petitioner reported less left hip pain. He was directed to continue taking Vitamin D, to remain on crutches for two more weeks, and to not to work until a next exam September 17, 2018. (Pet.Ex.#6)

When seen by Dr. Chilelli on September 17, 2018 Petitioner reported he was "80% to 90" better. He reported some continued "discomfort" in the hip but had no report of weakness. He was directed to begin physical therapy and follow-up in six weeks. (Id.) At

trial, Petitioner stressed that he was still on crutches and keeping his left leg elevated. (T.39)

Petitioner admitted he posts on Facebook. On October 23, 2018 Petitioner admitted he posted ". . . trying to get these people to let me start working again, hopefully in a few weeks. I'm already sneaking out and doing things." A friend responded, asking Petitioner to come work on his salt water tank. Petitioner responded he was "sneaking in slowly." (T.41; Resp.Ex.#3)

At trial Petitioner claimed he was referring to having gone out fishing. He testified he went out with a buddy to fish on the Fox River for about three hours, off an 18 foot Skeeter bass boat. Petitioner claimed he just sat in the front chair on the boat for three hours. He also admitted to having gone to Port Clinton for two days in October, 2018, out 16 hours on a fishing charter on Lake Erie. (T.41 – 44) The arbitrator takes judicial notice that getting onto and ambulating on a boat on even the calmest days does require balance and weight distribution through the legs and into both hips.

Petitioner testified he was not released to return to work in any capacity until March 6, 2019, at which time Dr. Chilelli directed him to work part time and avoid climbing 8 – 10 foot ladders. (T.15)

On direct exam Petitioner admitted to performing electrical work at his sister's house in Park Ridge. He recalled being at the property from 9:00 a.m. to about 2:30 p.m. on November 19, 2018. (T.17-18) He testified he had asked his doctor about returning to work. (T.19) There is no reference to this request or that Petitioner was indicating any ability to return to work in any capacity in Dr. Chilelli's records. (Pet.Ex.#6)

Petitioner described the work at his sister's house as a "favor" and so that he could "gauge where my leg was so I could tell my doctor . . . and the therapist what was going on." (T.19) Petitioner testified his total work hours on that date was 1 ½ to 2 hours, and that he had to go inside the house a couple of times to take break and get the weight off his leg. (T.20) He admitted to using 2, 4 and 6 foot ladders, but claimed he put weight on his right leg and used his left leg "just like another third support, just a temporary balance measure . . ." (T.21) He described sitting atop the ladder so as to not put weight on his legs, sitting in a chair or with his back to the wall. (T.21) He described that if he had more than 20% weight on his left leg "the muscles would start shaking again. It was a really bad balance time." (T.22)

On cross exam Petitioner admitted he arrived in and climbed into and out of a Ford F250 van multiple times. He walked back and forth to obtain equipment and supplies from the van. He climbed up and down the ladders, bent, stooped, and stood. When asked if he brought or used his crutches, he stated "No, because it was in November." (T.47 – 51) When asked why at the next visit with Dr. Chilelli on December 6, 2018 he did not make mention of his trying to work or what he had done on November 19, 2018, Petitioner then said "I actually told the therapist because they were the ones trying to get me better." (T.51)

Petitioner's first physical therapy visit was with Fox Valley Physical Therapy November 28, 2018. He described "not pain as much as lack of strength." He described that he was "self employed: has 4-5 guys working for him." The therapist noted a standing prescription for a total knee replacement that Petitioner was hoping to put off until age 55. (Pet.Ex.#6) There is absolutely no report of Petitioner describing what he was doing on November 19, 2018 to the therapist on this or any subsequent visit. (Id.)

The Arbitrator notes that while Petitioner testified to prior injections for his knees at Dr. Chilelli's office, he did not disclose a pending knee replacement surgery nor discuss any impact his pre existing knee condition would have on his gait, ability to bear weight, climb ladders or work as an electrician full time.

When seen by Dr. Chilelli on December 6, 2018 he did report he was 80% better. He advised the doctor for some reason he had not yet been to physical therapy although clearly had commenced those services about a week before. Dr. Chilelli again ordered physical therapy. (Id.)

On January 24, 2019 Dr. Chilelli documented Petitioner was "significantly better." Physical therapy was continued as well as a "no work" status. (Id.)

On March 7, 2019 Dr. Chilelli again documented Petitioner was "significantly better." He noted Petitioner was in physical therapy. He was happy with Petitioner's progress. He noted Petitioner was in no acute distress. Petitioner demonstrated 90° of flexion, 10° of extension, 30° external rotation, with some pain with rotation of the hip and some mild trochanteric tenderness only. Dr. Chilelli ordered continued physical therapy due to some reported weakness and muscle deficits. He first cleared Petitioner to return to work in any capacity on this date. (Id.)

Dr. Chilelli reiterated continued therapy and restricted work April 18. On June 3, 2019 he noted Petitioner "appeared well." He was in no acute distress. Petitioner's sensation was intact. He had normal motor function, reflexes and pulse. He allowed Petitioner to return to full duty for half days and return to see him in six weeks. (Id.) At trial Petitioner testified he has not sought further medical attention with Dr. Chilelli or elsewhere, to date. (T.15)

Petitioner testified that with a few hours of exertion he feels some pain in his left hip, described as "stiffness, soreness." If he spent any time squatting, he got a "bad Charley horse" sensation in the upper part of his left leg. He needs to stretch and rotate. He described it as "just an annoying little pain." (T.26)

Petitioner continues driving a Ford F250 van and a 2006 Toyota Tundra pickup truck. (Id.)

Petitioner testified he returned to work for Respondent in May, 2019. He testified to working one job every week or two, on 8 hour jobs. (T.53) He described one at a

Bowlero in Glendale Heights, where he put a 50 foot, 4 head light atop a parking lot pole reached using a bucket lift. (T.53-54) He described a second job at Hosiden, where he installed a light fixture over a door while on a stepladder, after which he replaced LED lightbulbs in the ceiling of a hallway while on a six foot ladder. (T.55-56) He repaired a hot tub filter pump in his father's basement, cutting old PVC pipe, replacing and rewiring the pump. (T.56) Lastly, he climbed up two stairs and replaced a diesel transfer pump at another location. (T.57)

Gregory Spelson testified he is a private investigator working for Robison Group and hired by Respondent's carrier. He conducted and obtained surveillance of Petitioner on November 19, 2018. He positively identified Petitioner as the individual he shot surveillance of, at trial. (T.73-75)

On November 19, 2018 he followed Petitioner from his home in West Chicago to a gas station, obtained video at the gas station, followed Petitioner to a Menard's where he likewise obtained several minutes of video, then followed Petitioner to a private residence where he obtained several hours of video. T.76 – 79)

A highlight of the video shot by Mr. Spelson was viewed by the parties, at trial. (Resp.Ex.#5a). The full surveillance video was introduced into evidence and has now been viewed by the Arbitrator. (Resp.Ex.#5b) In pertinent part, the Arbitrator notes the following activities performed by Petitioner on November 19, 2019:

9:38 through 9:41 a.m. stands outside work van pumping gas. Ambulates without any obvious limp or difficulty.

10:26 a.m. walks from the van, across the street and to the Park Ridge address. Appears initially to have a bit of "drag" or limp in his step, but what appears to be even weight-bearing by the time he walks across the yard and steps up about 2 – 2 ½ feet onto the porch.

10:27 a.m. walks back to the work van, now without any noticeable limp or pause in his step.

10:29 a.m. walks back from van again, without obvious limp, climbing dirt incline up to left side of porch to hand off tools.

10:29 through 10:31 a.m., stands below porch level, appearing to be receiving instructions from an older gentleman (identified at trial as his father).

10:31 a.m. appears to try front door and finds it locked.

10:31 a.m. steps down from height of porch to ground with left leg first.

10:34 through 10:36 a.m. stands on porch discussing work with father.

10:36 a.m. steps down from 2 ½ foot porch height to ground on left leg first, walks to work van.

10:37 a.m. seen in back of van pulling out various pieces of equipment, stepping onto back bumper and then down with left leg to street level.

10:39 through 10:40 a.m. stands on smoke break outside porch, then walks across street to work van. Drives away.

10:54 a.m. walks across Menard's parking lot without limp.

10:59 a.m. inside Menard's store pushing cart, walking in rapid fashion without limp.

11:02 a.m. walks across Menard's parking lot carrying small bag, walking without limp.

11:18 a.m. back at Park Ridge home at ground level, bending forward and working with equipment/supplies.

11:19 a.m. standing on porch.

11:20 a.m. climbs ladder up four steps and begins working overhead on porch. Remains on ladder until 11:22 a.m., then climbs down.

11:23 a.m. bends forward to pick up small items and box from ground level, bending at knees and hips.

11:24 a.m. climbs a second ladder up three steps, using both feet to elevate self, then works overhead, remaining on ladder with arms extended overhead using tape measure until 11:25 a.m. when then descends ladder, bearing weight evenly on both legs as climbs down.

11:26 a.m. re-ascends same ladder, up three-rungs, using both feet and bearing weight evenly to again work overhead.

11:28 a.m. climbs down ladder, ambulating across porch with even gait.

11:29 a.m. again climbs up ladder with both feet, even weight-bearing.

11:33 a.m. ascends a third step ladder up 2 to 3 rungs, with both feet, to again work overhead. For next several minutes continues climbing and descending the ladders, to perform overhead work without break or interruption until 11:53 AM when walks back across street to van, walking with even gait and no obvious limp or disability.

Beginning at 11:55 a.m. seen bending forward while standing on porch, grabbing pieces of conduit and bending them, handing them to older gentleman on ladder. Continues with this activity until 12:05 p.m. when ascends up second step of step ladder to begin working overhead with conduit himself.

12:05 p.m. climbs three steps with left foot first and full weight bearing on left foot for some seconds before right foot placed on step ladder step. Then some seconds later climbs three steps back down, likewise with weight on left foot before right leg comes down on to step.

12:06 p.m. enters house with father, comes back out at 12:33 p.m.

12:35 p.m. walks on uneven ground in yard of property, descending from porch level to street level with even gait and no observable limp.

12:44 p.m. begins work up on ladder again.

Between 12:45 and 1:05 p.m. stands on porch observing and taking smoke break. At 12:59 and 1:01 p.m. steps down from height of porch about 2 ½ feet onto right foot, with all weight on left foot

1:03 p.m. begins bending conduit, bending forward, using right foot to step on conduit to bend with all body weight on left foot; repeats at 1:06 p.m., 1:12 p.m., 1:14 p.m.

Beginning at 1:13 p.m. seen bending forward at waist to porch floor to measure conduit, pick up equipment.

Continues in these activities until 2:22 p.m.

Petitioner was examined at Respondent's request by Dr. Nho on June 10, 2019. Dr. Nho was provided copies of medical records and the surveillance video. At the time of the examination Petitioner appeared in no apparent distress. He walked with non-antalgic gait. He demonstrated 5° loss of flexion in the left hip, a positive subspine but negative trochanteric pain, and a painful arc from 1 to 3 o'clock. He had normal strength, abduction and adduction, no tenderness and was neurovascularly intact. (Resp.Ex.#6)

Three x-rays taken on June 11, 2019 and personally reviewed by Dr. Nho showed no evidence of fracture, dislocation or acute abnormalities. Prior x-rays taken June 25, 2018 likewise showed no evidence of fracture, dislocation or acute bony abnormalities. The MRI of the left hip performed June 25, 2018 was personally reviewed and showed extensive bone marrow edema in the femoral head extending into the neck with a stress fracture of the femoral neck. (Id.)

Petitioner reported a dull achy pain rated 1 out of 10. He denied radiating pain. He reported pain worse with squatting, standing and working. Dr. Nho diagnosed a left hip

stress fracture with extensive bone marrow edema in the femoral head. He believed the work incident of June 13, 2018 resulted in that condition. He suggested Petitioner would have required a "no work" status for 12 weeks following the injury, but that Petitioner demonstrated he was capable full duty as the appointment with Dr. Chilelli September 17, 2018 when Petitioner reported 80 to 90% improvement.

Dr. Nho reviewed the surveillance of November 19, 2018 and concluded Petitioner demonstrated he was capable of working full duty per the activities demonstrated on the surveillance. Dr. Nho concluded Petitioner did not require work restrictions or treatment following September 17, 2018 when he reported he was 80 to 90% better and having little to no symptoms.

Conclusions of Law

Regarding F) is Petitioner's condition of ill being causally related to the injury, the Arbitrator finds the following:

Petitioner sustained an injury to his left hip when he slipped and fell while coming down a ladder on June 13, 2018. He did not require or seek immediate medical attention, accepting an appointment for June 25, 2018 with Dr. Chilelli's office. He continued weight bearing, climbing and walking on the left leg for that 15 day period. X rays taken June 26, 2018 and again June 11, 2019 failed to show any outright fracture; Dr. Chilleli diagnosed a subcondral stress or insufficiency fracture in the femoral head of the left hip per the MRI. Petitioner was directed to remain off all work duties until March 6, 2019, to be non weight bearing for at least three months following the injury and to participate in physical therapy he began November 28, 2018 and continued until May 30, 2019.

While Petitioner reported he was 80 – 90% better by September 17, 2018, he clearly did not disclose his outside activities or capabilities to either Dr. Chilelli or Fox Valley Physical Therapy at all. While on October 23, 2018 he provided on Facebook he was "trying to get these people to let me start working again," there is nothing to suggest he was making that request to any of his medical providers. He also confided in that same posting he was "already sneaking out and doing things."

Petitioner admitted to going out fishing with a friend on the Fox River, and on a two day, 16 hour fishing charter on Lake Erie.

While he admitted to doing a few hours' work at his sister's house on November 19, 2018, he claimed to have to go inside for breaks, and to sit or lean when performing work. The surveillance demonstrates Petitioner standing, walking and climbing while working for several hours, with only one half hour break. He was seen walking without a limp, stepping on and off a an approximately 2 ½ foot high porch, climbing up and down ladders with full, uncompromised weight bearing on his left leg, walking on uneven ground, bending to the floor to retrieve items, and bearing weight on his left leg while using his right foot to bend conduit. The Arbitrator concludes Petitioner demonstrated no evidence of any disability or inability to work by this date.

While noting treating physician Dr. Chilelli continued in his "no work" and therapy recommendations for the next several months, there is no evidence he was ever aware of Petitioner's actual activities and capabilities, and thus, those recommendations can be discounted.

Dr. Nho examined Petitioner at Respondent's request, reviewed all of the medical records, and viewed the surveillance. He concluded that Petitioner was actually at maximum medical improvement and capable of full duty by September 17, 2018, when Petitioner was demonstrating no continuing evidence of injury, to quote Dr. Chilelli just "discomfort" but "no weakness, and was reporting he was "80 – 90%" better.

The Arbitrator therefore finds causal connection through September 17, 2018 only, based on the fully informed opinions of Dr. Nho.

Regarding J) what medical bills are due, the Arbitrator finds the following:

Petitioner claimed $935.00 in medical bills incurred and paid by Petitioner for therapy between April 24 and May 30, 2019. Having found Petitioner at maximum medical improvement by September 17, 2018, claim for these medical charges is denied.

Regarding K) what temporary total disability benefits are due, the Arbitrator finds the following:

Petitioner is entitled to a sum of $293.33 per week for a period of 13 6/7's weeks, from June 14, 2018 – September 17, 2018, adopting the findings of Dr. Nho in this regard.

Regarding L) what is the nature and extent of the injury, the Arbitrator finds the following:

No impairment rating was offered by either party. Petitioner testified he is back to full duties for Respondent, working one day per week as he did before his injury. He is currently 51 years old. There is no showing the injury will result in any impact on his earning capacity. He testified to stiffness, soreness, an occasional Charley Horse sensation in his calf, and what he described as a "little, annoying pain."

The Arbitrator therefore finds Petitioner entitled to the sum of $264.00 per week for a period of 21.5 weeks, as the injury resulted in permanent partial disability to the extent of 10% loss of use of the left leg.

Regarding M) whether penalties and attorneys' fees should be imposed on Respondent, the Arbitrator finds the following:

Per the payment screen Respondent continued paying temporary total disability until November 7, 2018. Respondent continued paying medical bills incurred by Petitioner until mid December, 2018. (Resp.Ex.#1) Respondent received the surveillance

suggesting Petitioner was working as of November 19, 2018. Respondent notified Petitioner of suspension of benefits based on that information December 6, 2018. (Pet.Ex.#2) Respondent obtained Dr. Nho's exam finding Petitioner not entitled to temporary total disability or in need of medical care after September 17, 2018, thus solidifying the denial of further benefits.

For the foregoing reasons, claim for penalties and attorneys' fees is denied.

Regarding N) is Respondent due any credit, the Arbitrator finds the following:

Having found Petitioner entitled to $293.33 per week in temporary total disability for 13 6/7's weeks through September 17, 2018, a total of $4,064.71 would have been due. Petitioner was paid $5,621.29, and Respondent therefore has a credit of $1,556.58 toward the permanency due.