STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eric Plawecki,

Petitioner,

vs. NO: 18 WC 13354

20IWCC0433

Bull Moose Tube Co.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the decision of the Arbitrator to find that Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious, and that the imposition of penalties was unwarranted under the circumstances. The Commission notes that issues of fact and law existed between the parties throughout the pendency of this matter, and that Respondent offered a legitimate defense at arbitration on the question of accident. The record also shows that Respondent conducted a proper investigation following the alleged accident and had to subpoena out-of-state medical records, both of which required time and commensurate follow up. As a result, the Arbitrator's award of additional compensation pursuant to §§19(l) and 19(k) of the Act is hereby vacated. Furthermore, while Petitioner had also requested attorneys' fees pursuant to §16, the Arbitrator failed to address same. In light of

20IWCC0433

the Commission's finding as to the reasonableness of the Respondent's conduct in the defense of this matter, Petitioner's request for attorneys' fees under §16 of the Act is likewise denied.

In addition, the Commission corrects the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 4/21/18 through 6/19/18 (not 6/20/18), for a period of 8-4/7 weeks, given that the evidence shows Petitioner returned to work on 6/20/18.

The Commission also corrects a clerical error in the second full paragraph at page 3 of the addendum to the Arbitrator's decision to show that on 6/20/18 Petitioner returned to work for a new employer, Dutch American (not Bull Moose Tube Co.).

Finally, the Commission notes that the Arbitrator failed to rule on the admission of two exhibits submitted by Respondent – namely, RX8 and RX12. Along these lines, the Commission sustains Petitioner's objection to both exhibits, based on a lack of foundation and the fact that insufficient evidence was submitted to show that either exhibit fell within the business record exception to the hearsay rule. Accordingly, both RX8 and RX12 are hereby rejected.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 3/21/19 is modified as stated herein., and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $621.74 per week for a period of 8-4/7 weeks, from 4/21/18 through 6/19/18, 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 reasonable and necessary medical expenses in the amount of $6,731.50, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of additional compensation as provided in §§19(l) and 19(k) of the Act is hereby vacated and Petitioner's request for attorneys' fees pursuant to §16 is hereby denied.

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.

20IWCC0433

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 - 2020
o:6/30/20
TJT/pmo
51

Deborah L. Simpson

Deborah L. Simpson

Maria Elena Portela

Maria E. Portela

PARTIAL DISSENT

I dissent in part to the majority's decision in this matter. I concur to the extent that Petitioner proved that he sustained accidental injuries arising out of and in the course of his employment on 4/11/18 and that his current condition of ill-being is causally related to said accident. I also concur as to the majority's decision to correct the period of TTD to conform to the evidence as well as the rejection of RX8 and RX12, for the reasons given. However, I disagree with my colleagues' decision to vacate the award for penalties, for the reasons set forth below.

I believe that Respondent unreasonably delayed the payment of benefits in this case, and as such the Arbitrator's award of additional compensation pursuant to §§19(l) and 19(k) of the Act was entirely justified under the circumstances. Furthermore, I believe attorneys' fees under §16 were likewise warranted and should have been awarded. More to the point, I do not believe Respondent offered a legitimate defense in this matter especially in light of the fact that its own §12 examining physician, Dr. Palacci, agreed that the work activities on the date in question as described could have aggravated Petitioner's condition and caused his inguinal hernia to become symptomatic. (PX5, pp.27-28).

As a result, I would have awarded penalties in the form of additional compensation pursuant to §§19(l) and 19(k) as well as attorneys' fees pursuant to §16 of the Act.

Thomas J. Tyrrell

Thomas J. Tyrrell

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

PLAWECKI, ERIC
Employee/Petitioner

Case# **18WC013354**

BULL MOOSE TUBE COMPANY
Employer/Respondent

20IWCC0433

On 3/21/2019, 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:

0391 MARTIN J HEALY JR & ASSOC LTD
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

20IWCC0433

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Eric Plawecki
Employee/Petitioner

v.

Bull Moose Tube Company
Employer/Respondent

Case # **18 WC 13354**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **November 29, 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. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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, **4/11/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**48,495.98**; the average weekly wage was $**932.62.**

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**2,666.68** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**2,666.68**.

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

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of **$621.74**/week for **8 4/7** weeks, for the period of 4/21/18-6/20/18, as provided in Section 8(b) of the Act.

Medical benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of Community Healthcare System for $6,481.50 and Indiana Surgical Associates for the amount of $250.00 totaling **$6,731.50**, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay all reasonable and necessary prospective medical services related to the inguinal hernia surgery prescribed by Petitioner's treating physician.

Penalties
Respondent shall pay to Petitioner penalties and fees of **$4,697.01**, as provided in Section 19(k) of the Act; and $**6,690.00**, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

03/19/19
Date

ICArbDec19(b)

MAR 2 1 2019

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on November 29, 2018 in Chicago, Illinois. The submitted records have been examined and the decision rendered by Arbitrator Kay.

STATEMENT OF FACTS

The parties proceeded to hearing on November 29, 2019, with disputed issues as to whether Mr. Eric Plawecki (hereinafter "Petitioner") sustained injuries that arose out of and in the course of his employment with Bull Moose Tube Company (hereinafter "Respondent"), whether Petitioner provided notice of the accident within the time limits stated in the Illinois Workers' Compensation Act (hereinafter "Act"), whether Petitioner's current condition of ill-being is causally connected to this injury, and whether Respondent is liable for several enumerated unpaid medical bills. With regard to medical expenses and prospective medical treatment, Respondent further advised that its dispute was based on the accident/causation defense and that it did not dispute the reasonableness and necessity of the past or prospective medical treatment for this claim. Also, in dispute is whether Petitioner is entitled to TTD for the periods of 4/11/18 through 6/20/18 representing 10 weeks, whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, and whether Petitioner is entitled to Section 8A medical surgery/prospective care. (Arb.X1)

The parties stipulated that Petitioner and Respondent were operating under the Act on April 11, 2018. (Arb.X1) The parties stipulated that the date of the accident was April 11, 2018 and that Petitioner and Respondent had a relationship of employee and employer, Petitioner was 44 years of age on the date of the accident and married with 0 dependent children. (Arb.X1) The stipulated average weekly wage, calculated pursuant to Section 10 of the Act, was $932.62. (Arb.X1)

On the date of the accident, Petitioner was employed by Respondent as a mill assistant/mill helper, for the past three years. (T.9) Petitioner testified that his job duties included stacking pipes and tubing into honeycomb bundles. He also was responsible for banding them together in order to be transported by the forklift drivers. (T.10) Petitioner entered into evidence a job description that further explained, mill helpers band metal tubing in square shaped bundles. (P.X5, Ex. 4). They are responsible for lifting a 47 lb. bander to wrap the metal tubes every 3 feet and lift the 100-pound bundles weekly. (P.X5, Ex. 4). The job requires frequent bending and squatting, in addition to pushing and pulling to line the metal tubes up. (P.X5, Ex. 4)

On April 11, 2018, Petitioner was loading steel tubes on a turnstile. (T.11) Petitioner testified that on that date he had no physical issues, such as abdominal pain. (T.12) Petitioner testified that the turnstile got stuck on the floor, which it did often, and he tried to proceed to push it with his hands. (T.13) Petitioner testified that the concrete on the floor around the turnstile "is busted up pretty bad from many years, and it got stuck, the steel wheels of the turnstile got stuck in the chips, cracks and breaks in the floor." (T.26) Petitioner testified that he was unable to get it to move, so he used his hands and left foot to try and push it. (T.13) However, as he tried to push is he couldn't get it to move. Petitioner testified that he felt a pop in his abdominal area/lower

pelvis area and was unsure whether he had pulled a muscle or a hernia. (T.13) Petitioner testified that he noticed a small knot in his groin and a shooting pain down his leg. (T.14) Which is when he testified that he went to the office to report the accident. (T.14) Petitioner testified that on the day of the accident he notified Mr. Rick Bisson of the accident. (T.13)

On April 21, 2018, Petitioner sought treatment at St. Mary Medical Center Emergency Department. (PX1). Petitioner complained of left sided abdominal pain since an incident at work in which he was pushing an item with his leg and felt a pop in his left groin. (PX1). In addition, he complained of pain and swelling in the area and an ability to press the area and it moved. (P.X1) The presence of a hernia was confirmed in the left inguinal area. (P.X1) On April 25, 2018, a CT scan was done that demonstrated scattered diverticula, a tiny fat-containing umbilical hernia and a small fat-containing left inguinal hernia with no abdominal or pelvic process. (P.X1, P.X5) Petitioner was prescribed pain medication and referred to Dr. Jonathan Patterson (hereinafter "Dr. Patterson"). (PX1). Petitioner was told not to return to work until his visit with Dr. Patterson. (P.X1)

Petitioner testified his employer denied authorization for Petitioner to see Dr. Patterson. After Petitioner filed a §19(b)/8(a) petition, Respondent authorized an evaluation by Dr. Patterson. (PX6, T.16)

On August 21, 2018, Petitioner was evaluated by Dr. Patterson of Indiana Surgical Associates. (PX2). Dr. Patterson's history revealed Petitioner felt a pop in his groin while pushing a turnstile at work 4 months ago. (PX2). Physical examination revealed a soft, incarcerated left inguinal hernia with tenderness to deep palpation. (P.X5) Dr. Patterson diagnosed Petitioner with an incarcerated left inguinal hernia and tobacco use. (P.X2) Dr. Patterson prescribed a left inguinal hernia repair surgery to repair Petitioner's hernia. (PX2). Petitioner expressed his wishes to proceed with surgery. (P.X2)

On September 20, 2018, Petitioner was examined by Dr. Liana Gavvrilov Palacci (hereinafter "Dr. Palacci") at the request of the Respondent for an Independent Medical Examination (hereinafter "IME") subject to §12 of the Act. Petitioner presented the testimony of Dr. Palacci by evidence deposition. (PX5). Dr. Palacci performed an examination, reviewed a job description, reviewed a video of the turnstile (RX4), and reviewed medical records from St. Mary's, including both CT scan reports and records, from Dr. Patterson. (P.X5, pgs. 9-10, 12). Dr. Palacci generated a report on September 20, 2018 from her examination of Petitioner. (P.X5)

Dr. Palacci's September 20, 2018 report noted that Petitioner denied any prior history of abdominal or inguinal pain or trauma. The physical examination of Petitioner revealed no evidence of an umbilical hernia, but he did have a tender, yet reducible left-sided inguinal hernia. (P.X5) Dr. Palacci's diagnosis was a symptomatic left inguinal hernia that was consistent with Petitioner's complaints. (PX5, pg. 18). In regard to the umbilical hernia, Dr. Palacci opined that the hernia predated the April 11, 2018 work injury and developed over time. Dr. Palacci stated that Petitioner did not require any further testing or treatment for that condition. (P.X5) Dr. Palacci went on to report that none of Petitioner's hernias were caused by the April 11, 2018 work accident. However, Dr. Pallaci stated if the

turnstile was "stuck" as Petitioner stated it was, then the increased intra-abdominal pressure could reasonably aggravate his condition. (P.X5)

On October 23, 2018, during Dr. Pallaci's deposition, she confirmed that the work accident caused Petitioner's pre-existing asymptomatic condition to become symptomatic and necessitated surgical repair. (P.X 5, pgs. 27-28, 32).

Petitioner testified that shortly after the incident at work he was fired by Respondent. On June 20, 2018, Petitioner began to work for another company, Bull Moose Tube Co. Petitioner testified that he was hired as a blender operator.

ARBITRATOR'S SUMMARY OF TESTIMONY

Respondent presented Mr. Richard Bisson (hereinafter "Mr. Bisson") as its first witness on behalf of the Respondent. Mr. Bisson testified that at the time of Petitioner's accident he was the production supervisor and had worked for Respondent in that position 3 years. (T.34) Mr. Bisson testified that Petitioner provided him notice on April 11, 2018 that he was injured on the job. (T.42) In addition, Mr. Bisson testified to the condition of the turnstile and floor. (T.55) Specifically, when asked about the condition of the floor he stated that "it's an older facility, so the floor is uneven and pockmarked." (T.55)

Respondent presented testimony from Mr. Mark Mlymarczyk (hereinafter "Mr. Mlymarczyk"). Mr. Mlymarczyk testified that he was a plant manager for the Respondent and that he was involved in the investigation of this incident. Additionally, it was his job to oversee some of the maintenance manager responsibilities. (T.71) He testified that he was not present at the time of the accident. (T.70) He provided a description of the turnstile as well as a video. (R.X4) Mr. Mlymarczyk testified that there had been no reported issues, injuries, or breakdowns associated with the turnstile. (T.71) He testified that there are no moving parts that could really break down and stop the turnstile from spinning. (T.71) He testified that "its just the initial like 5 to 10 pound leaning into it to start the momentum of spinning it and then trying to pull it a little bit to stop it from spinning and inserting wedge blocks under the wheels to prevent it from spinning again." (T.71) Mr. Mlymarczyk testified that the Respondent operates on a metric incentive system that monitors any nonscheduled or scheduled delays on their tube mills. (T.72) He testified that he ran a report for the last 3 months, including the date of accident, and there were no delays reported on that mill or equipment. (T.72, R.X12) On cross examination, Mr. Mlymarczyk testified that the delay codes are input by mill operators. (T.88) In addition, the codes can be changed by production supervisors or overridden by himself. (T.89) In addition, he testified about a video that was taken by cell phone, mimicking the exact same weight, bundles and customer tags, as the day of the accident. (T.75, R.X4) It was established that the video was not a video taken the day of the incident. (T.75) This video was provided to Respondent's IME examiner on September 20, 2018.

Respondent presented a subpoenaed testimony from Mr. Mike McCullum (hereinafter "Mr. McCollum"). Mr. McCullum testified that he was a previous employee of

the Respondent, a maintenance technician, from approximately August 2016 through September 2018. (T.99) Mr. McCollum testified that he worked with Petitioner during the time of his reported accident. (T.101) He testified that around January 17, 2018 Petitioner told and showed him a hernia "a bulge" in his groin region. (T.102) Mr. McCollum testified that since he had also had a hernia he asked Petitioner about his. Additionally, he testified that Petitioner told him that "he would use it against the company if and when he left the company." He also testified that Petitioner did not tell him he was in any pain from the hernia on that date. (T.126) Mr. McCollon testified that he did not report the hernia to anyone at Respondent. (T.103) After Petitioner reported his accident in April, Mr. McCollon testified that he then went forward to tell Respondent about his prior knowledge of Petitioner's hernia. (T.119) He was asked by his maintenance foreman to give a statement about his prior knowledge of the Petitioner's hernia. (T.103-104) Mr. McCollum also testified that the ground below the turnstile was chipped and cracked but not too uneven. (T.114) Mr. McCollum also testified that on the date of the accident Petitioner told him that he was hurting. (T.123)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment:

The Petitioner, Mr. Eric Plawecki, was the only witness to testify on behalf of the Petitioner at trial. The Arbitrator finds the overall testimony of Petitioner to be truthful, credible and otherwise unrebutted in regard to his past medical history, mechanisms of injury, course of medical treatment and current subjective complaints.

The Respondent had three witnesses testify on behalf of the Respondent. The first witness was Mr. Richard Bisson (hereinafter "Mr. Bisson"). The Arbitrator finds the overall testimony of Mr. Bisson to be truthful, credible and otherwise unrebutted in regards to his knowledge of the incident as well as the condition of the plant equipment and area where Petitioner was injured.

The second witness, on behalf of Respondent, was Mr. Mark Mlynarchzyk (hereinafter "Mr. Mlynarchzyk"). The Arbitrator finds the overall testimony of Mr. Mlynarchzyk to be overall truthful, credible and otherwise unrebutted in regard to his knowledge of the plant operations. The Arbitrator notes that Mr. Mlynarchzyk testified that he was not present at the time of the accident. (T.70)

The third witness, on behalf of Respondent, was Mr. Michael McCollum (hereinafter "Mr. McCollum"). The Arbitrator finds the overall testimony of Mr. McCollum to be unrebutted. However, he did have issues with remembering some specific dates and not remembering others. As well as issues with remembering details regarding the date of the injury, conversations he engaged in regarding the injury and whom he spoke to regarding said event.

With respect to issue (C) whether an accident occurred that arose out of and in the course of employment with Respondent and (F), whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the Petitioner proved by a preponderance of the evidence that her current condition of ill-being related to his inguinal hernia is causally connected to his April 11, 2018 work accident.

The Petitioner testified that on April 11, 2018 he sustained a compensable injury while working for the Respondent. On the date of the accident, Petitioner was at work loading steel tubes on a turnstile. (T.11) Petitioner testified that the turnstile got stuck on the floor, which it did often, and he tried to proceed to push it with his hands and left foot/leg. (T.13) However, as he tried to push is he couldn't get it to move. Petitioner testified that he felt a pop in his abdominal area/lower pelvis area and was unsure whether he had pulled a muscle or a hernia. (T.13) Petitioner testified that on the day of the accident, he went to the office, and notified Mr. Bisson of the accident. (T.13) Mr. Bisson also testified that Petitioner provided him notice on April 11, 2018 that he was injured on the job. (T.42) Petitioner testified that prior to the accident, on that date of the accident, he had no prior physical issues, such as abdominal pain. (T.12)

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or, principal cause, of his injury. Alderson v. Select Beverage, Inc., 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. Id. The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. Id.

Proof of an employee's state of good health prior to the time of injury and change immediately following the injury is competent to establish that the impaired condition was due to the injury. Hopkins v. WSNS Telemundo, 02 IIC 0946, 99 W.C. 42128 (2002). Furthermore, a causal connection between the accident and injury may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. Darling v. Indus. Comm'n, 530 N.E.2d 1135, 1140 (1986).

Here, Petitioner sought treatment at St. Mary Medical Center Emergency Department where the treating physician confirmed the presence of a hernia in the left inguinal area. (P.X1) On April 25, 2018, a CT scan was done that demonstrated scattered diverticula, a tiny fat-containing umbilical hernia and a small fat-containing left inguinal hernia with no abdominal or pelvic process. (P.X1, P.X5) On August 21, 2018, Petitioner was evaluated by Dr. Patterson, who diagnosed Petitioner with an incarcerated left inguinal hernia. (P.X2) Dr. Patterson prescribed a left inguinal hernia repair surgery to repair Petitioner's hernia. (PX2). On October 23, 2018, during Dr. Pallaci's deposition regarding her IME report from September 20, 2018, she confirmed that the work accident caused Petitioner's pre-existing asymptomatic condition to become symptomatic and necessitated surgical repair. (P.X 5, pgs. 27-28, 32).

The Arbitrator finds, consistent with medical records and the testimony of Respondent's §12 examiner, that Petitioner's inguinal hernia became symptomatic and necessitated surgery as a result of the April 11, 2018 incident. Given the above, the Arbitrator finds Respondent responsible for the prospective hernia surgery prescribed by Dr. Patterson.

With respect to issue (E) whether Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the Petitioner proved by a preponderance of the evidence that notice was given of the accident with the time limits stated in the Act to Respondent. Specifically, Petitioner testified provided unrebutted testimony that on the day of the accident he notified his supervisor, Mr. Rick Bisson, of the accident. (T.13) Respondent later presented testimony from Mr. Bisson, production supervisor of Bull Moose, who confirmed that Petitioner notified him of his injury that occurred on April 11, 2018. (T.42) Mr. Bisson confirmed that Petitioner told him he thought he popped a hernia. Therefore, the Arbitrator finds that appropriate notice was given within the time limits stated in the Act.

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

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary to cure his condition of ill-being related to his accident on April 11, 2018. Petitioner entered into evidence medical expenses incurred on April 21, 2018 from Community Healthcare System/ St. Mary's Medical Center when he was first seen in the ER for the amount of $6,481.50. (P.X3) In addition, Petitioner submitted an expense from August 21, 2018 when he was seen by Dr. Patterson from Indiana Surgical Associates for the amount of $250.00. (P.X4) Respondent authorized the evaluation by Dr. Patterson. (PX6, T.16)

The Arbitrator notes that the Respondent noted on the record that with regard to the medical expenses and prospective medical treatment, Respondent advised that its dispute was based on the accident/causation defense and that it did not dispute the reasonableness and necessity of the past or prospective medical treatment for this claim.

The Arbitrator finds Respondent responsible for the aforementioned medical expenses in the amount of $6,731.50.

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

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator found that the Petitioner's current condition of ill-being relative to his inguinal hernia is causally related to his accident at work for Respondent on April 11, 2018. In result, the Arbitrator also finds that Petitioner is entitled to the recommended inguinal surgery recommended by Dr. Patterson and Dr. Palacci. The Arbitrator bases her finding on the Petitioner's credible testimony related to his hernia, his prior medical records and opinions from his treating physicians and Respondent's IME report.

On August 21, 2018, Dr. Patterson diagnosed Petitioner with an incarcerated left inguinal hernia. (P.X2) Dr. Patterson prescribed surgery to repair Petitioner's hernia. (PX2). Petitioner expressed his wishes to proceed with surgery. (P.X2) On September 20, 2018, Petitioner was examined by Dr. Palacci for an IME. Dr. Palacci's diagnosis was a symptomatic left inguinal hernia that was consistent with Petitioner's complaints. (P.X5, pg. 18). Furthermore, on October 23, 2018, during Dr. Pallaci's deposition, she confirmed that the work accident caused Petitioner's pre-existing asymptomatic condition to become symptomatic and necessitated surgical repair. (P.X 5, pgs. 27-28, 32). Petitioner testified that his abdominal pain has become much worse. (T.19) In addition, the hernia went from the size of a quarter to as big as a softball. (T.19) Therefore, the Arbitrator orders that Respondent authorize and pay for the recommended inguinal surgery for Petitioner's hernia.

With respect to issue (L), whether the Petitioner is entitled to TTD for the period of 04/11/18 to 06/20/18, representing 10 weeks, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Consistent with the Arbitrator's findings as to causation and medical expenses, the Arbitrator finds Petitioner is entitled to temporary total disability benefits regarding his injury on April 11, 2018.

Following the work incident of April 11, 2018, Petitioner was fired by Respondent. At the time of his discharge from St. Mary Medical Center Emergency Department on April 21, 2018, Petitioner was told not to return to work until he was evaluated by Dr. Patterson. Due to Respondent's refusal to provide temporary total disability benefits and delay in authorizing a visit to Dr. Patterson, Petitioner returned to work with a new employer on June 20, 2018. The Arbitrator finds that Respondent is responsible for temporary total disability benefits in the amount of $621.74 per week for 8 4/7 weeks. Respondent is given a credit for previously paid temporary total disability benefits in the amount of $2,666.68 resulting in an outstanding amount of $2,662.52.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

Section 19(k) of the Illinois Workers' Compensation Act states that "(i)n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act states that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "(w)henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

On April 21, 2018, St. Mary Medical Center Emergency diagnosed Petitioner with the presence of a hernia which was confirmed in the left inguinal area. (P.X1) In addition, a CT scan was done that demonstrated a left inguinal hernia. (PX1) Petitioner was prescribed pain medication and referred to Dr. Jonathan Patterson. (PX1). Petitioner was told not to return to work until his visit with Dr. Patterson. (P.X1) Petitioner testified his employer denied authorization for Petitioner to see Dr. Patterson. After Petitioner filed a §19(b)/8(a) petition, Respondent authorized an evaluation by Dr. Patterson. (P.X6).

Respondent entered into evidence an email dated May 18, 2018, sent to Petitioner's counsel notifying him of Respondent's new representation and a request for all medical records and a description of the work injury. (R.X1) Respondent's counsel stated he was requesting the information in order to conduct an investigation. (R.X1)

Petitioner received authorization to see dr. Patterson. On August 21, 2018, Petitioner saw Dr. Patterson and was with an incarcerated left inguinal hernia. (P.X2) Dr. Patterson prescribed surgery to repair Petitioner's hernia. (PX2). On September 20, 2018, Respondent's §12 examiner Diagnosed Petitioner with a symptomatic left inguinal hernia that was consistent with Petitioner's complaints. (P.X5, pg. 18). On October 23, 2018, during Dr. Pallaci's

deposition, she confirmed that the work accident caused Petitioner's pre-existing asymptomatic condition to become symptomatic and necessitated surgical repair. (P.X 5, pgs. 27-28, 32). On December 13, 2018, the date of trial, Petitioner had still had outstanding TTD payments and unpaid medical bills.

The Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $4,697.01 (50% of outstanding TTD of $2,662.52 + 50% of outstanding medical of $6,731.50). In addition, a delay in payment of 14 days or more creates a presumption of unreasonable delay. 820 ILCS 305/19(l). In this case, Respondent has not met its burden to show that the delay in paying TTD was reasonable. Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $6,690.00.

Signature of Arbitrator

03/19/19
Date

ICArbDec19(b)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT CLUFF,
Petitioner,

vs. No. 16 WC 31391

20IWCC0434

VILLAGE OF WHEELING,
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 duration of TTD, post-April 6, 2017 medical expenses, PPD benefit rate, and nature and extent, 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.[1]

I. FINDINGS OF FACT

Petitioner testified that he was employed as a firefighter/EMT on July 30, 2016, when he stepped from the fire engine into a hole, twisting his left knee. Although in significant pain, he was able to complete his work shift. He reported his accident, obtained medical advice from Medcor, and continued to work full duty. On August 23, 2016, Petitioner sought treatment at

[1] The Commission notes that this case was consolidated with 16 WC 30632, which related to a January 1, 2014 accident in which Petitioner suffered a left knee strain. The sole issue in that case was nature and extent, and the Arbitrator awarded Petitioner 1% loss of use of the left leg. Neither party appealed that award.

NorthShore Omega on referral from Medcor. He was assessed as having a possible meniscal tear and was advised to rest, wear a knee sleeve and begin a home exercise program.

On August 28, 2016, Dr. Susan Piazza at NorthShore Omega assessed Petitioner with a left MCL strain and placed him on light duty work. A September 1, 2016 MRI revealed a complex tear of the medial meniscus and tricompartmental chondromalacia. Petitioner was referred to Dr. Steven Levin, an orthopedic surgeon at NorthShore Orthopedics, and remained on light duty with sedentary work restrictions. Respondent accommodated Petitioner's restrictions.

Dr. Levin performed a left knee partial medial meniscectomy/synovectomy on September 30, 2016. Petitioner returned to work at light/sedentary duty on October 5, 2016 and continued post-operative physical therapy through December 29, 2016. Petitioner continued to complain of knee pain and was diagnosed by Dr. Levin as having patellofemoral syndrome and prepatellar bursitis. A cortisone injection provided temporary relief, and the doctor ordered another MRI. The January 12, 2017 MRI showed a complex multidirectional tear of the medial meniscus, a new deep chondral fissuring of the femoral trochlea, and moderate joint effusion with synovitis. Dr. Levin recommended a microfracture procedure, debridement, and a possible bio-cartilage implant. This procedure was never performed due to Respondent's refusal to authorize surgery. Petitioner was taken off work on or about February 25, 2017.

At Respondent's request, Dr. Joshua Alpert performed a §12 exam on February 27, 2017. Dr. Alpert found Petitioner's first surgery was appropriate but opined that his ongoing complaints were consistent with pre-existing articular cartilage changes (probably arthritis) and not due to the work injury. He disagreed with Dr. Levin's plans for a microfracture procedure and recommended instead injections and physical therapy. Dr. Alpert did not believe Petitioner would be able to return to his job as firefighter/EMT due to his pre-existing arthritis. He opined that Petitioner could return to work for desk work and walking activities only, while he received a cortisone injection and two weeks of physical therapy. At that point, Dr. Alpert believed any work restrictions would be due to arthritis and not his work injury.

Respondent terminated Petitioner's TTD payments as of April 20, 2017. Petitioner then began receiving sickness and accident benefits. Petitioner was referred by his primary care physician to Dr. Steven Gross for a second opinion.

Dr. Gross evaluated Petitioner on May 24, 2017. He reviewed Petitioner's MRIs, determined that the meniscal tear had not been fully resected in the prior surgery and proposed a revision arthroscopic surgery. On July 10, 2017, Dr. Gross performed a partial medial meniscectomy and shaving chondroplasty. He found damaged cartilage and femoral trochlea and a large meniscal tear, which he believed was the source of Petitioner's ongoing knee pain. Petitioner's pre-operative pain resolved by July 25, 2017, and Dr. Gross released him to return to work light duty on August 29, 2017.

Dr. Michael Hanna performed a return to duty evaluation of Petitioner on September 12, 2017 and found him ready to return to full duty work, but Petitioner chose to retire on September 13, 2017.

20 IWCC0434

II. CONCLUSIONS OF LAW

A. Temporary Total Disability

The Arbitrator awarded Petitioner temporary total disability benefits of $1217.94 per week commencing July 10, 2017, the date of his second surgery, through August 29, 2017, the date he was released to light duty. On appeal, Petitioner argues that he is entitled to benefits from April 21, 2017 through August 28, 2017, with the disputed period being between April 21, 2017 and July 10, 2017 totaling 11 and 4/7ths weeks. The Arbitrator found no evidence in the record indicating whether Petitioner did or did not work light duty during the disputed time period.

Evaluating the record, the Commission finds that Petitioner has established entitlement to additional TTD benefits. Respondent's Exhibit 7 is Petitioner's timesheet which indicates he was off work during the disputed time period and through August 29, 2017. Therefore, the Commission concludes that Petitioner proved that he was temporarily totally disabled from April 21, 2017 through August 29, 2017, a period of 18 and 5/7ths weeks. The Commission modifies the award to reflect the appropriate period ordering that Respondent shall pay Petitioner temporary total disability benefits commencing April 21, 2017 through August 29, 2017.[2]

B. Post-April 6, 2017 Medical Bills

The Arbitrator determined that Respondent had paid all reasonable and necessary medical expenses with no further liability as to outstanding bills. However, several medical bills incurred after April 6, 2017 remain unpaid by Respondent. Respondent contends that it has paid all reasonable and necessary charges and that the Arbitrator's decision regarding the medical bills should be affirmed. The Commission views the evidence differently and notes that the Arbitrator specifically concluded that Petitioner's second surgery was reasonable, necessary and related to his accident. He also awarded TTD benefits through August 29, 2017. The Commission agrees that the second surgery was reasonable, necessary and related to Petitioner's work accident.

The Commission also notes that prior to arbitration, the parties submitted their request for hearing form at which point Petitioner claimed that Respondent was liable for all outstanding medical bills listed on Petitioner's Exhibit 1b with the exception of five treatment dates that Petitioner admitted were not related. Respondent checked the box for "Respondent agrees." Arbitrator's Exhibit 2.

Although Respondent's counsel later stated on the record that he was disputing all post-April 6, 2017 medical expenses, the request for hearing form was not amended at the time of the hearing. Section 9030.40 of the Commission Rules provides that the request for hearing "shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case." 50 Ill. Adm. Code §9030.40. Representations made on the request for hearing are binding on the parties. *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1088 (2004).

---

[2] The parties did stipulate to a $10,000.00 advance by Respondent, and the Arbitrator properly acknowledged that Respondent was entitled to a credit for that amount applicable only in this case.

20 IWCC0434

Respondent is bound by its agreement with Petitioner's claim of its liability for all related medical expenses.

Based on all of the foregoing, and under §§8(a) and 8.2 of the Act, the Commission finds that Respondent is liable for all related medical expenses, including all related post-April 6, 2017 expenses, all medical bills paid any group health insurer,[3] and all Petitioner's payments to medical providers listed in Petitioner's Exhibit 1B.

C. PPD Rate

The Arbitrator awarded Petitioner PPD at $755.22, which he believed was the statutory maximum for the date of injury. However, the actual statutory maximum rate was $775.18. Thus, the Commission modifies the award to reflect the correct rate of $775.18.

D. Permanent Partial Disability

The Arbitrator awarded Petitioner 20% loss of use of the left leg (43 weeks at $755.22 per week). As discussed above, the Commission finds that the PPD rate should be $775.18 and has so modified the award. Petitioner seeks further, alternative relief from the Arbitrator's permanency award: (1) a combined award of 25% loss of use of the left leg for the two consolidated cases at the PPD rate of $775.18; or (2) 20% loss of use of the left leg at $775.18 per week for 43 weeks for 16 WC 31391 and 1% loss of use of the left leg at $721.66 per week for 2.15 weeks for 16 WC 30632.

As noted previously in this opinion, the Arbitrator's Decision in 16 WC 30632 was not appealed. Therefore, the Commission may not consider any objections to that decision or modify that decision in any way. The Commission affirms the Arbitrator's award of 20% loss of use of the left leg at the modified rate of $775.18.

In all other respects, the Commission affirms and adopts the Decisions of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 5, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,217.94 per week commencing April 21, 2017 through August 29, 2017 totaling 18 and 5/7ths weeks, as provided under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability of 20% loss of use of the left leg is modified as to the rate only. Respondent shall pay to Petitioner the sum of $577.18 per week for a period of 43 weeks, as provided in §8(e) of the Act.

---

[3] The Arbitrator found that Respondent failed to provide a sufficient basis on which to award credit under Section 8(j).

20IWCC0434

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the reasonable and necessary medical expenses incurred for treatment, including the post-April 6, 2017 treatment, all sums paid by any group health insurer, and Petitioner's out-of-pocket expenses as documented in Petitioner's Exhibit 1B and as provided under §§ 8(a) and 8.2 of the Act and subject to the medical fee schedule.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. The parties have stipulated to a $10,000.00 advance paid by Respondent to Petitioner.

Pursuant to §19(f)(2) of the Act, every county, city, town, township, incorporated village, school district, body politic or municipal corporation against whom the Commission shall have rendered an award for the payment of money shall not be required to file a bond to secure the payment of the award and the costs of the proceedings in the court. Therefore, no appeal bond is set in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 - 2020

Marc Parker

Barbara N. Flores

Deborah L. Simpson

o-07/09/20
mp-dak
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CLUFF, SCOTT
Employee/Petitioner

Case# **16WC031391**

16WC030632

VILLAGE OF WHEELING
Employer/Respondent

20IWCC0434

On 8/5/2019, 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 2.03% 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:

0728 LAW OFFICES OF THOMAS W DUDA
330 W COLFAX ST
PALATINE, IL 60067

2436 KLEIN THORPE & JENKINS LTD
CARMEN P FORTE JR
20 N WACKER DR SUITE 1660
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Scott Cluff
Employee/Petitioner

v.

Village of Wheeling
Employer/Respondent

Case # **16** WC **31391**

Consolidated cases: **16 WC 30632**

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **May 21, 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 **July 30, 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 $**94,999.84**; the average weekly wage was $**1,826.92**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**10,000.00** for an advance of benefits made to Petitioner.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act because of the lack of evidence to support the statutory requirements of 820 ILCS 305/8(j).

ORDER

Temporary total disability benefits

Respondent shall pay Petitioner temporary total disability benefits of $1217.94 per week commencing July 10, 2017 through August 29, 2017.

Permanent partial disability

Based on the factors in Section 8 .1b(b) and the record taken as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% (43 weeks at $755.22 per week) loss of leg pursuant to Section 8(e) of the Act.

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

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

Signature of Arbitrator

8/5/19
Date

AUG 5 - 2019

Scott Cluff v. Village of Wheeling, Nos. 16 WC 30632; 16 WC 31391

Preface

The parties proceeded to hearing May 21, 2019, on Requests for Hearing in both of these consolidated cases. The parties, at the beginning of the hearing, indicated the following disputed issues. In 16 WC 30632, what is the nature and extent of the injury. Scott Cluff v. Village of Wheeling, No. 16 WC 30632; 16 WC 31391 (cons.) Transcript of Proceedings on Arbitration at 4. In 16 WC 31391: whether Respondent paid $21,159.38 in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act; whether Petitioner is entitled to temporary total disability from April 21, 2017, through August 29, 2017; and what is the nature and extent of the injury. Cluff at 5; Arbitrator's Exhibit 2.

Findings of Fact

Scott Cluff (Petitioner), a 48 year old male at the time of the injury in 16 WC 30632, and 51 at the time of injury in 16 WC 31391, testified that on January 1, 2014, he was working for the Village of Wheeling (Respondent) as a firefighter with additional duties as a paramedic. On that extremely snowy day, he responded to a call early in the evening. At the conclusion of the call, with a patient in an ambulance, the ambulance became stuck in the snow. While trying to push the ambulance out of the snow, his left leg slipped out from underneath him and he fell to the ground. He was helped up, in pain, and walked back to his vehicle. Cluff at 14, 16, 20-22; see Petitioner's Exhibit 12; Petitioner's Exhibit 13.

Petitioner testified he sought medical care. The records of Northshore Omega indicate Petitioner saw Dr. Susan Piazza January 8, 2014, complaining of persistent left knee pain. An x-ray revealed no joint effusion or fracture/dislocation and mild degenerative changes. Piazza thought it was a left knee MCL strain, and likely a medical meniscal injury. Petitioner was put on restricted duty. An MRI of January 10, 2014, revealed a full thickness cartilage defect of central and lateral femoral trochlea with degeneration, and small oblique tear of the medial meniscus; and a ganglion cyst; and mild edema of the patellar facet, likely degenerative. Petitioner was referred to orthopedics and restricted to no active firefighting, no work on ladders, and given a lifting limit of 20 pounds. Cluff at 22-25; Petitioner's Exhibit 4 (unpaginated).

Petitioner testified he saw Dr. Steven Levin. The records of Dr. Levin reflect a note/letter of January 16, 2014, from Levin to Piazza, indicating Petitioner said his knee feels fine, but needed a formal workup. He wanted to return to work. Levin noted x-rays showed mild degenerative changes and a small signal in the meniscus, very thin effusion. Levin's impression was a knee strain. He indicated Petitioner could resume work as tolerated and follow up of symptoms arise. Dr. Piazza's notes indicate an addendum of January 17, 2014, reflecting an evaluation by Levin with regular duty recommended, and she agreed. Petitioner simply testified he continued working full duty the rest of 2014, all of 2015, and into 2016. Cluff at 25, 26; Petitioner's Exhibit 5b (unpaginated); Petitioner's Exhibit 4 (unpaginated).

While back at work with Respondent, on July 30, 2016, Petitioner testified he responded to a call in the evening and as he got out of his fire engine, stepped in a hole, twisting and

hyperextending his knee. He said he fell and got up with help from other members of the engine crew. He said he was in severe pain and could not easily walk. He was able to finish his shift. He testified he sought medical care. Cluff at 27-29, 29-31, 32-33; Petitioner's Exhibit 2; Petitioner's Exhibit 3.

The records of Northshore Omega indicate Petitioner sought treatment almost a month later, August 23, 2016. An Advanced Practice Nurse noted Petitioner was working full duty; assessed a possible meniscal tear, and instructed Petitioner to rest, wear a knee sleeve, use ice, and begin a home exercise program. Five days later, Petitioner saw Dr. Susan Piazza, complaining of left knee pain. She assessed a left MCL strain, replaced the sleeve and placed Petitioner on restricted duty, with seated work, no prolonged walking or standing, no work on ladders and no active firefighting. An MRI done September 1, 2016, of the left knee indicated a complex tear of the medial meniscus and tricompartmental chondromalacia. On September 6, 2016, Dr. Michael McCormick noted Petitioner's left knee pain 80% better and referred him to an orthopedic surgeon. Petitioner continued on sedentary work. Petitioner's Exhibit 4 (unpaginated).

Petitioner testified he sought treatment from Dr. Steven Levin. The records of Dr. Levin indicate he saw Petitioner September 8, 2016, and noted the MRI showed a complex medial meniscus tear. Levin thought Petitioner was best served with surgery, physical therapy and then return to work. An x-ray of Petitioner's left knee indicated no acute fracture or subluxation and mild degenerative changes. On September 30, 2016, Dr. Levin performed a left knee partial medial meniscectomy, synovectomy. Cluff at 37; Petitioner's Exhibit 5b (unpaginated).

Petitioner testified he did physical therapy at Praxis Physical Therapy. His initial physical examination was October 6, 2016, and he was discharged from therapy December 29, 2016. Dr. Levin returned Petitioner to work October 5, 2016, with restrictions for desk duty. By January 9, 2017, Petitioner was in pain and Dr. Levin was uncertain of its etiology. He suggested another MRI and that Petitioner get a second opinion. Petitioner had an MRI January 12, 2017, that showed a complex multidirectional tear of the medial meniscus, similar to the prior examination; a new deep chondral fissuring of the femoral trochlea; and moderate joint effusion with synovitis. Dr. Levin discussed a microfracture procedure, debridement and a possible biocartilage implant with Petitioner on January 16, 2017, noting he was quite symptomatic. Cluff at 40; Petitioner's Exhibit 7; Petitioner's Exhibit 5; Petitioner's Exhibit 5b.

Petitioner submitted to an independent medical examination by Dr. Joshua Alpert on February 27, 2017. Alpert testified by means of an evidence deposition. He had no disagreement with the first meniscectomy as being proper. Alpert diagnosed Petitioner with a hyperextension injury to the knee, meniscus tear, grade IV chondromalacia underneath the kneecap, the trochlea and medial femoral condyle; status post left knee arthroscopy and partial meniscectomy with ongoing complaints of pain and swelling consistent with preexisting articular cartilage changes. He was of the opinion that continued complaints in the knee were consistent with arthritis and grade IV articular cartilage lesions not due to the work injury. He did not think having recommendation for microfracture was reasonable or necessary, it was not related to the work injury. Alpert recommended injections and physical therapy. Alpert admitted he did not document any physical examination of Petitioner. Alpert testified he did not think Petitioner

would be able to return to work as a firefighter due to complaints of knee swelling and articular cartilage defects in the knee due to preexisting degenerative conditions. He then admitted it would be difficult to return as a firefighter, but possible. Respondent's Exhibit 1 at 7, 13, 14, 15, 17, 19, 25, 21, 26.

Petitioner testified that from his surgery, presumably September 30, 2016, until the spring of 2017, he was on light duty. He testified he went to his primary care physician, who recommended Dr. Steven Gross for a second opinion. He saw Dr. Gross May 24, 2017. Cluff at 45, 46; Petitioner's Exhibit 10 at 8; Petitioner's Exhibit 8 (unpaginated); Petitioner's Exhibit 11.

Dr. Gross testified via evidence deposition. He said he saw Petitioner May 24, 2017, who was referred by Dr. Jeong, his primary care physician. He reviewed Petitioner's three prior MRIs and Petitioner's meniscus tear was not completely addressed or fully resected in the prior surgery. He diagnosed Petitioner's pain as coming from ongoing tearing of the medial meniscus, and recommended repeat knee arthroscopy. He performed surgery July 10, 2017, left knee arthroscopy with partial medial meniscectomy and shaving chondroplasty. He found damage to cartilage and femoral trochlea and a large tear in the medial meniscal. He testified that corresponded with Petitioner's pain. He said the accident was the cause of the problem. Dr. Gross testified Petitioner's preoperative pain resolved by July 25, 2017, and he released him to light duty August 29, 2017. Petitioner's Exhibit 10 at 8, 11, 13, 14-15, 16, 17, 20, 19, 22.

Gross did not think a microfracture procedure was warranted and disagreed with Levin and Alpert based on Petitioner's history, physical examination and imaging. During surgery, he identified and visualized the tear. He said Petitioner enjoyed a successful recovery. Petitioner's release to light duty August 29, 2017, included restrictions on lifting 20 pounds maximum, ground level work only, and no crawling or running. Petitioner's Exhibit 8 (unpaginated); Petitioner's Exhibit 11.

Petitioner testified upon his return to duty, he took a fitness for duty exam. Dr. Michael Hanna conducted a return to duty evaluation on Petitioner September 12, 2017. Hanna reviewed Petitioner's treatment notes, the imaging reports, took a history and conducted a physical examination of Petitioner. He noted Petitioner had been on light duty since August 28, 2017, and had been cleared by his surgeon to return to work. Petitioner was found ready to return to full duty. Petitioner's Exhibit 6 (unpaginated); Cluff at 10.

Petitioner testified he was eligible for retirement and submitted a retirement request. His application noted he was on duty for slightly over 18 years and withdrew his request for line of duty disability pension and requested a standard pension September 13, 2017. Cluff at 51; Respondent's Exhibit 8.

Conclusions of Law

16 WC 30632, date of accident January 1, 2014

Disputed issue **L** is, what is the nature and extent of the injury. I find as a conclusion of law, Petitioner sustained a left knee strain and possibly medial meniscal injury that was treated

conservatively for less than three weeks. Here, any permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, I note Petitioner went back doing the job of firefighter/paramedic with no restrictions. I give this factor no weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 48 years old at the time of the accident. He had some time left to work in a strenuous job. I give this factor some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, this Arbitrator notes the absence of evidence that Petitioner's future earnings capacity was adversely affected by the accident. I give this factor no weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, there was no testimony on this by Petitioner and modest treatment for a short period of time. I give this factor no weight in determining the level of disability.

Based on these factors and the record taken as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 1% (2.15 weeks) loss of leg pursuant to Section 8E of the Act.

16 WC 31391, date of accident July 30, 2016

Disputed issue **K** is whether Petitioner is entitled to temporary total disability benefits from April 21, 2017, through August 29, 2017. To be entitled to a temporary total disability award under the Act, an injured worker must prove not only he did not work, but that he was unable to work. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. Ap. 3d 710 (1993). Such award exists from the time the injury incapacitates him from work until such time as he is recovered or restored as the permanent character of the injury will permit. Mount Olive Coal Company v. Industrial Commission, 295 Ill. 429 (1920).

A methodical review of both Petitioner's testimony and the testimony of Dr. Alpert and Dr. Gross, as well as the records submitted regarding the accident of July 30, 2016, find no evidence in support of Petitioner's not working beginning April 21, 2017. The evidence points to light duty at full pay while Petitioner was restricted to light duty. However, Petitioner did have a second surgery July 10, 2017, so it is no stretch to say he was incapacitated at least from that day until his release by Dr. Gross to light duty August 29, 2017. The evidence indicates Petitioner was on light duty from August 30, 2017, to September 12, 2017, the day before he retired. Respondent's Exhibit 7. Liability under the Act cannot rest upon imagination,

speculation or conjecture, but out of facts established by a preponderance of the evidence. Lyons v. Michigan Boulevard Bldg. Co., 331 Ill. App. 482, 501 (1947). Based on the evidence submitted at hearing, I find as a conclusion of law, Petitioner did not and could not work from July 10, 2017, through August 29, 2017. Petitioner is entitled to temporary total disability benefits of $1,217.94 per week beginning July 10, 2017, to August 29, 2017.

Disputed issue **L** is, what is the nature and extent of the injury. I find as a conclusion of law Petitioner sustained a torn medial meniscus that took two surgeries to repair. Here, any permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, I note Petitioner returned to full duty as a firefighter/paramedic with no restrictions following a Return to Duty Evaluation September 12, 2017. He retired the next day. I give this factor no weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 51 years old at the time of the accident and will not heal as quickly as a younger man. I give this factor some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, this Arbitrator notes the absence of evidence that Petitioner's future earnings capacity was adversely affected by the accident. I give this factor no weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, I note Petitioner testified his knee is sore, but functioning and hurts with a change in weather. He said he is not able to do prolonged kneeling or crawling. His return to duty evaluation indicated Petitioner's strength was intact and he demonstrated squats, lunges, and elevated treadmill walking without difficulty. Subsequent to retirement, Petitioner saw Dr. Gross because of knee pain and inflammation. I give this factor weight in determining the level of disability.

Based on these factors and the record taken as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% (43 weeks) loss of leg pursuant to Section 8(e) of the Act.

Disputed issue **N** is, is Respondent due any credit. Respondent claims it paid $21,159.38 in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act. Petitioner simply disputes that claim. If an injured employee receives medical, surgical or hospital benefits under a group plan covering nonoccupational disabilities contributed in whole or part by the employer, that should not have been paid if the right of recovery existed under this Act, the amount so paid shall be credited to or against compensation payment for

temporary total incapacity for work or any medical, surgical or hospital benefits to be made under the Act. 820 ILCS 305/8(j). The right to credits, which operates as an exception to liability created under the Act, is narrowly construed. World Color Press v. Industrial Commission of Illinois, 125 Ill. App. 3d 469, 471 (1984).

It is incumbent on Respondent to present proof that benefits were received by Petitioner under a group plan contributed in whole or part by Respondent. Failure to do so results in a rejection of the claim.

Here, Respondent's Exhibit 5 is a CCMSI Medical bill payment form indicating $21,159.38 in paid transactions for Petitioner on a loss date of July 30, 2016. There is no indication payment was made under a group plan contributed in whole or part by Respondent. The only potentially related testimony came from Petitioner, who said he thought Dr. Gross was paid through BlueCross BlueShield, and he had no out of pocket expenses. Cluff at 68. That is not enough.

In the face of Petitioner's dispute of the claim and Respondent's lack of proof necessary to satisfy the statutory requirements of the right to such credit, I find as a matter of law, Respondent is not entitled to such credit.

Thomas J. Cole
Arbitrator

8/5/19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

☐ 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

Darrel Sexton,
Petitioner,

vs. No. 18 WC 000273

20IWCC0435

State of Illinois/Secretary of State,
Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner testified that on November 13, 2017, he was employed by the Illinois Secretary of State as a chief engineer. He had previously served as a stationary engineer and then assistant engineer for the State. His duties included operating and maintaining multiple buildings, including the refrigeration systems, heating units, and water pumps. As chief engineer, 85% of his day was spent supervising other workers and 15% in performing engineering labor, using vibratory tools, pipe wrenches, and hammer drills. Petitioner alleged that he suffered repetitive stress injuries, bilateral carpal and cubital tunnel syndrome, as a result of his work in building maintenance.

Dr. Christopher Wottowa at Springfield Clinic diagnosed Petitioner with bilateral carpal and cubital tunnel syndrome and performed surgical carpal and cubital releases on February 8, 2018 (left) and March 6, 2018 (right). Petitioner enjoyed excellent resolution of his symptoms and a rapid recovery. However, he estimated that he lost 50% of his grip strength in his bilateral hands

20 IWCC0435

and 50% of his bilateral arm strength as a result of his injuries and surgeries. He feels pressure on his ulnar nerves when he rests his elbows on tabletops and feels tingling down into his pinkies and ring fingers. His hands ache with overuse, and he tries to protect them by scheduling his work so that he doesn't do too much at once. He also pads his hands by double-gloving or placing something between the tool he's using and his palms.

In his award of permanent partial disability, the Arbitrator considered the five factors required by Section 8.1b of the Act:

1. AMA ratings: Neither party provided ratings. No weight was given to this factor.
2. Occupation: Petitioner was promoted from Assistant Chief to Chief Engineer shortly before he filed this claim. His manual workload decreased significantly at that time and he now spends the majority of his shift supervising others. The Arbitrator gave this factor some weight.
3. Age: Petitioner was 57 at the time of his injury. He has several work years left during which he will suffer with overuse of his hands and weakness of his grip and arm strength. The Arbitrator gave this factor some weight.
4. Earning capacity: This was not affected, and the Arbitrator gave it no weight.
5. Evidence of disability: Although Dr. Wottowa found that Petitioner enjoyed excellent results from his carpal and cubital tunnel releases, Petitioner testified that he had to be careful not to overuse his hands. He believed his grip and arm strength was only 50% of what it had been prior to his injury, and he needed to cushion his palms when using tools at work. The Arbitrator gave this factor considerable weight.

After due consideration of the factors discussed above, the Arbitrator awarded Petitioner 7.5% loss of use of each hand for carpal tunnel and 7.5% loss of use of each arm for cubital tunnel.

The Commission agrees with the weight assigned by the Arbitrator to each of the factors. However, in consideration of the entire record, the Commission finds a more appropriate award to be 12.5% of the dominant right hand and 12.5% of the dominant right arm, 7.5% of the left hand and 7.5% of the left arm.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 17, 2018, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards of permanent partial disability of 7.5% loss of use of the right hand and 7.5% loss of use of the right arm are vacated. Respondent shall instead pay to Petitioner, as provided in §8(e) of the Act, the sum of $790.64 per week for a period of 23.75 weeks for the reason that the injury caused 12.5% loss of use of the dominant right hand and for an additional period of 31.625 weeks for 12.5% loss of use of the dominant right arm.

20 IWCC0435

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards of 7.5% loss of use of the left hand and 7.5% loss of use of the left arm are affirmed. Respondent shall pay to Petitioner, as provided in §8(e) of the Act, the sum of $790.64 per week for a period of 14.25 weeks for the reason that the injury caused 7.5% loss of use of the left hand and for an additional period of 18.975 weeks for 7.5% loss of use of the left arm.

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

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

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

DATED: AUG 3 - 2020

o-07/23/20
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SEXTON, DARREL
Employee/Petitioner

Case# **18WC000273**

STATE OF ILLINOIS/SECRETARY OF STATE
Employer/Respondent

20IWCC0435

On 1/7/2020, 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.

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

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 S 6TH ST
SPRINGFIELD, IL 62703

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0514 ASSISTANT ATTORNEY GENERAL
RICHARD C GLISSON
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9355

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

JAN - 7 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0435

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Darrel Sexton
Employee/Petitioner

Case # **18** WC **000273**

v.

State of Illinois/ Secretary of State
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 **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **March 26, 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 present condition of ill-being causally related to the injury?

G. ☐ What were Petitioner's earnings?

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

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

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

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

L. ☒ What is the nature and extent of the injury?

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On **November 13, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **107,969.44**; the average weekly wage was $ **2,076.44**.

On the date of accident, Petitioner was **57** years of age, *married* with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $ **790.64**/week for **66.45** weeks, because the injuries sustained caused **7.5% loss of use to the right and left hand and 7.5% loss of use of the right and left arm** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **November 13, 2017** through **March 26, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $ **47,062.98** for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

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

JAN 7 - 2020

20 IWCC0435

ATTACHMENT

In support of the Arbitrator's findings with regard to all issues in dispute, the Arbitrator finds the following facts:

The Respondent stipulated that Petitioner sustained a repetitive trauma accident to his right and left hand on November 13, 2017. Petitioner also claims that he sustained injuries to his right and left elbows as a result of the same accident. However, Respondent disputed that Petitioner's right and left cubital tunnel elbow injuries were causally related to the accident of November 13, 2017, instead claiming that the left cubital tunnel syndrome was caused by a motorcycle accident sustained approximately 35 years before the date of accident.

Petitioner was employed by Respondent as a Stationary Fireman-Assistant Chief from 2004 through September 1, 2017 when he was promoted to Chief Engineer.

Petitioner testified that as an Assistant Chief, about 85% of his work day involved using his arms and hands in performing the duties of a Stationary Fireman, alongside the Stationary Fireman that he supervised. Petitioner stated the other 15% of his day was spent in preparing paper work and supervision.

As a Stationary Engineer-Assistant Chief, Petitioner maintained large heating and cooling systems in multiple buildings housing Respondent's offices. Petitioner described that the systems he and his Stationary Engineers operated and maintained included 1000-ton refrigeration systems, or chillers, heating units, large air handlers, cooling towers, sewage ejectors, water pumps and anything it would take to operate a building.

The tools Petitioner used in maintaining these units and systems included wrenches, cheater bars, hammers, power washers, hammer drills, torque wrenches, drills, circular saws, Sawzall's, pipe benders, tubing cutters and flaring tools.

Petitioner explained that using the tools and performing his job required a lot of his strength. Petitioner described that he has to turn large 14-inch valves on steam lines and the valve handles are big and cannot be turned without using a pipe wrench or a 3-foot-long cheater bar to pull and hold the valve.

Many of the power tools Petitioner used, including the Sawzall's, hammers, chiller tube brushes, power washers and hammer drills, were vibratory tools.

20IWCC0435

At the request of Petitioner's treating doctor, Petitioner prepared an extensive written job description of the physical activity involving his arms and hands required of his job as a Stationary Fireman-Assistant Chief which was admitted as Petitioner's Exhibit 10, Dep Ex 3. Petitioner stated that he did not perform each of the tasks listed in the job description each day as some of the tasks would take days to complete. Petitioner stated that although the tasks varied, all of the tasks involved the use of his hands and arms. Petitioner's job description stated that 85% of his day is spent in performing equipment service and maintenance involving his hands and arms. (PX 10, Dep Ex 3)

The job description prepared by Petitioner illustrates how he used his hands and arms in working on various equipment and performing service to equipment. The services and equipment include: 1. Heating and cooling handler service; 2. Chiller Tube Brushing; 3. Cooling Tower service and cleaning; 4. VAV Servicing; 5. Air cooled condenser cleaning; 6. Trench drain cleaning; 7. Humidifier Service; 8. Roof Cleaning; 9. Duplex pump service; 10. Water pump service; 11. Lawn irrigation; 12. Boiler work; and, 13. Other general duties. (PX 10, Dep Ex 3)

Petitioner described that servicing or working on the equipment required use of both his hands and arms in lifting, pushing, forceful gripping of hand tools, saws, pry bars, pipe cutters, hammers, hack saws, drills, grinders, and hand augers, among others. Petitioner also described that the servicing of equipment required squeezing, forceful twisting with his hands and arms, forcefully gripping and manipulating tools and pry bars, scrubbing by hand, shoveling waste and leaves, digging with a shovel, sawing, lifting himself into and out of trenches, pushing and pulling. (PX 10, Dep Ex 3)

The Arbitrator notes that the 5-page single spaced job description prepared by Petitioner, establishes that Petitioner used his hands in performing a number of activities maintaining the building systems describe above. Petitioner's description includes detailed descriptions of the physical activity required by Petitioner to perform his job duties. The description notes that 85% of Petitioner's day involved extensive forceful gripping, repetitive movements and forceful use of his arms in accomplishing the tasks required of a Stationary Fireman.

20 IWCC0435

Respondent offered no evidence to rebut the accuracy of the Petitioner's written job description, but did offer the State of Illinois "Position Description" for a Stationary Engineer-Assistant Chief, as did Petitioner. (PX 4, RX 2)

The Position Description prepared by the State of Illinois lists the activities that a Stationary Engineer-Assistant Chief performs on an "occasional" (33% of the time), Frequent (34-66% of the time) and "Continuous" (over 66% of the time) basis.

The Stationary Engineer-Assistant Chief Position Description is less detailed than Petitioner's written job description and does not describe the manner in which Petitioner might use his hands and arms in performing specific tasks as in Petitioner's job description. Instead, the Position Description lists vague physical activities which might be performed. The Position Description in the "Summary" portion states the work activities performed include, among other things: 1. Using hand tools "valving;" 2. Use power/hand tools; 3. Sweep, shovel, lift and climb; 4. Perform "sustained, hard work at times during adverse conditions;" and, 5. Operate 2-wheel dollies, pallet jacks, tip 600-pound barrels, carts, etc. up to and including 100 pounds. (PX 4, RX 2)

The Physical Ability portion of the Stationary Engineer-Assistant Chief position states that such workers "frequently," or 34 to 66% of the day, are required to perform physical activity including bending, twisting, stooping, kneeling, reaching above the head, reaching forward, "repeating the same hand, arm or finger motion many times," climbing on ladders, perform hand activity requiring grip strength, manual dexterity, finger dexterity, lifting 0 to 50 pounds from floor to waist, shoulder to overhead and waist to shoulder, and carrying material weighing 2 to 75 pounds longer than 50 feet. The Position Description also notes that "frequently" Stationary Engineer-Assistant Chiefs are required to work in temperatures below freezing and above 100 degrees. (PX 4, RX 2) A Stationary Engineer-Assistant Chief will also occasionally lift and carry material weighing up to 90 pounds for longer than 50 feet. (PX 4, RX 2)

Respondent offered the evidence testimony of Dr. Anthony Sudekum, an orthopedic surgeon based in St. Louis, Missouri, and his deposition was admitted into evidence as Respondent's Exhibit 1.

20 IWCC0435

Dr. Sudekum examined Petitioner for the first time on May 15, 2018, after Petitioner underwent the surgeries discussed below. (RX 1, p. 7) Therefore, Dr. Sudekum was the last doctor to examine Petitioner after his surgeries and release from care. (RX 1, p. 7, Dep Ex 2)

Dr. Sudekum's physical examination confirmed that even after his release from care Petitioner had continued pain with palpation over the bilateral medial elbow scars and positive bilateral elbow Tinel's with tapping over the cubital tunnels. (RX 1, Dep Ex 2) Dr. Sudekum stated that Petitioner's grip and pinch strengths were reduced bilaterally, but he did not have any pre-injury measurements to which he could compare the grip strengths. (RX1, p.47-50, Dep Ex 2)

Dr. Sudekum charged $5,500.00 for the IME report he performed in this case. (RX 1, p. 32) Dr. Sudekum also charged Respondent $785.00 for plain x-rays he performed on Petitioner. (RX 1, p. 32) Dr. Sudekum was also paid $2,000.00 for his deposition testimony. (RX 1, p. 32) Respondent paid Dr. Sudekum more than $8,000.00 for his Section 12 report and deposition. Dr. Sudekum testified that he only performs one IME per week over the past year. (RX 1, p. 32) Dr. Sudekum admitted that he was deposed in September of 2007 and testified that he performed 5 to 6 IMEs per month and two per month for Respondent here. (RX 1, p. 33)

The Arbitrator notes that in Dr. Sudekum's testimony there are numerous instances on cross examination by Petitioner's counsel in which Dr. Sudekum was evasive and had to be asked the same question two to three times before a responsive answer was given, often deflecting the questioner by alluding to matters which were not responsive to the question. Additionally, Respondent's counsel interrupted Petitioner's counsel's questions repeatedly without stating a valid evidentiary objection in order to coach Dr. Sudekum as to the answer he should provide to the questions I posed. (RX 1, p. 28-29, 37, 42-44, 47-50)

Dr. Sudekum stated that he felt Petitioner's work accident could have been an aggravating factor in bringing about Petitioner's bilateral carpal tunnel syndrome. (RX 1, p. 10)

Dr. Sudekum was of the opinion that Petitioner's left cubital tunnel syndrome was not causally related to the Petitioner's work accident and repetitive work activities, but resulted from a motorcycle accident the Petitioner sustained in 1985. (RX 1, p. 12-13) Dr. Sudekum stated that Petitioner had an intraosseous screw implanted in his proximal ulna near the olecranon and

20 IWCC0435

Petitioner had a broken tension band wire which was "extremely close to the cubital tunnel." (RX 1, p. 15) Dr. Sudekum stated that the wire was 1 centimeter away from the ulnar nerve. (RX 1 p. 16)

Dr. Sudekum also noted that Petitioner's hobbies included yard work and woodworking though he did not ask how much time was spent in those activities. (RX 1, p. 19)

Petitioner's job description was provided to Dr. Sudekum after he examined Petitioner, but it did not alter his opinions. (RX 1, p. 25) Dr. Sudekum stated that Petitioner had other co-morbidities that could have contributed to his cubital tunnel syndromes including that he was 58 years of age, "obese" and that his left elbow sustained a significant injury as well as his hobbies of yard work and woodworking. (RX 1, p. 27) No evidence was offered by Respondent proving that the yard work or woodworking was performed on a repetitive basis or in a frequency which might prove contribution.

On cross examination, Dr. Sudekum admitted that he was not provided with any medical records showing Petitioner had ever sought treatment for his left elbow between 1985 and when Petitioner began seeking treatment for this injury in November 2017. (RX 1, p. 31) Dr. Sudekum admitted that Petitioner told him that 90% of his work activities involved mechanical labor activities and that Petitioner stated it was strenuous. (RX 1, p. 31)

Dr. Sudekum admitted the Stationary Engineer-Assistant Chief Position Description he received from the Respondent indicated Petitioner would have to lift 100 pounds, that Petitioner would have to use his hands and arms to make adjustments to valves; that he would have to push and pull a two-wheel dolly and a pallet jack; and, tip 600 pound barrels and carts up to and including 100 pounds occasionally. (RX 1, p. 35)

Dr. Sudekum admitted the Stationary Engineer-Assistant Chief Position Description provided by the Respondent did not state the way in which Petitioner would have to use hand tools, the type of hand tools he would use, or the manner in which Petitioner would have to handle and maneuver the tools using his hands and arms except in relatively broad terms. (RX 1, p 38-39) Dr. Sudekum, however, admitted that the Stationary Engineer-Assistant Chief Position Description provided by Respondent did state that Petitioner's work activities involved reaching,

gripping, grasping, grip strength and lifting, but did not mention the equipment Petitioner worked on. (RX 1, p. 39-40)

Dr. Sudekum admitted that using wrenches requires torque, applying a force, but the Position Description provided by Respondent did not indicate the force required, although Petitioner's job description did. (RX 1, p. 401) Dr. Sudekum also admitted that he did not utilize Petitioner's job description in preparing his report. (RX 1, p. 43)

After being interrupted by Respondent's counsel without stating a valid objection and coaching Dr. Sudekum, Dr. Sudekum finally admitted that the Stationary Engineer-Assistant Chief Position Description provided by the Respondent did not contain any descriptions of specific work tasks. (RX 1, p. 44)

Dr. Sudekum was asked by Petitioner's counsel whether he had a pre-injury baseline measurement regarding grip strength, range of motion and pinch strength, to compare the measurements he made of the same. (RX 7, p. 47-50) Dr. Sudekum again evaded the answer, alluding to matters which were non-responsive until the question was rephrased several times and he admitted that he had no medical records of any kind which would show Petitioner's pre-injury baseline measurements for those factors. (RX 1, p. 47-50)

Dr. Sudekum also admitted, after first evading the question again, that in reviewing Dr. Wottowa's operative report of the left cubital tunnel syndrome, Dr. Wottowa did not mention encountering the hardware related to Petitioner's 1985 motorcycle accident. (RX 1, p. 57)

Dr. Christopher Wottowa testified by way of deposition and his deposition testimony was offered as Petitioner's Exhibit 10.

Dr. Wottowa diagnosed Petitioner with bilateral carpal and cubital tunnel syndrome. (PX 10, p. 7) Dr. Wottowa noted Petitioner had told him his symptoms had worsened over the previous year or two. (PX 10 p. 34) Dr. Wottowa stated that the medical records attached to this deposition contained his opinions to a reasonable degree of medical certainty as to the diagnosis, treatment and cause of Petitioner's condition to a reasonable degree of medical certainty. (PX 10, p. 7)

Dr. Wottowa agreed that Petitioner first went into detail in describing his work activities when he provided him with a copy of the job description he prepared on May 19, 2018. (PX 10,

20 IWCC0435

p. 17) However, Dr. Wottowa's records indicate that he and his office sought treatment for Petitioner's condition under the auspices of Respondent's workers' compensation coverage from the first date of treatment as indicated by an "Authorization to Release Information for Workers' Compensation & Purchased Service" form indicating the date of accident, or discovery of illness, was November 13, 2017 and completed on December 18, 2017, the first date that Dr. Wottowa examined Petitioner for these injuries. (PX 10, Dep X 2) The second page of the "Authorization to Release Information for Workers' Compensation & Purchased Service" includes a section titled "Workers' Compensation Accident Report/Special Billing" form signed by Petitioner on December 18, 2017 and indicates Petitioner was claiming his condition of ill being arose from "repetitive use of both hands." (PX 10, Dep X 2)

On December 21, 2017, Dr. Wottowa completed a "Tristar" document titled "Initial Workers' Compensation Medical Report," for a date of accident of November 13, 2017, indicating that Dr. Wottowa was seeking workers' compensation authorization to treat Petitioner's diagnosed conditions of left carpal and cubital tunnel release. (PX 10, Dep X 2)

The Arbitrator infers from the aforementioned documents that Petitioner informed Dr. Wottowa from the outset that he was claiming workers' compensation coverage for his bilateral carpal and cubital tunnel syndromes.

Dr. Wottowa noted that coverage for surgeries was denied by Respondent. (PX 10, p. 9) Dr. Wottowa reviewed the job description prepared by Petitioner and the Position Descriptions prepared by the Respondent for a Stationary Fireman and a Stationary Fireman-Assistant Chief. (PX 10, p. 9-10)

Dr. Wottowa stated that it was his opinion that the work activities did not cause the bilateral carpal and cubital tunnel syndromes but aggravated those conditions. (PX 10, p. 11-12, 18) Dr. Wottowa did not feel that Petitioner had any systemic conditions which may have been predisposing factors in the development of his bilateral carpal and cubital tunnel syndromes. (PX 10, p. 12-13) Dr. Wottowa noted that Petitioner's job duties involved forceful grip, and extended and flexed positioning which met the criteria for aggravation. (PX 10, p. 12) Dr. Wottowa stated on cross examination that he did not consider there to be an issue that Petitioner's bilateral carpal tunnel syndrome was aggravated by his work activities. (PX 10, p. 16-17) The Arbitrator infers

20 IWCC0435

from Dr. Wottowa's testimony that he did not believe that the causal relationship between Petitioner's work accident and his bilateral carpal tunnel syndrome was any longer in dispute.

Dr. Wottowa did not feel Petitioner's weight was a predisposing factor and Petitioner was a non-smoker without a history of diabetes, rheumatoid arthritis, pregnancy or blood pressure. (PX 10 p. 13) Dr. Wottowa stated that in order for weight to be a predisposing factor there must be an overlying metabolic condition that goes along with the weight. (PX 10, p. 19)

Dr. Wottowa stated that it would be conjecture to state that the motorcycle accident Petitioner sustained in 1985 could have contributed to the left cubital tunnel syndrome because Petitioner did not have loss of range of motion or swelling in the elbow when he examined him. (PX 10 p. 13) Dr. Wottowa further stated that if Petitioner had signs of post traumatic arthrosis from the left elbow motorcycle injury he would have expected to see swelling intraoperatively around the nerve. (PX 10, p. 13) Dr. Wottowa did not note any swelling about the elbow in his operative report. (PX 8, 10, p. 39) Dr. Wottowa testified that if the motorcycle accident injured Petitioner's left ulnar nerve then he would have expected Petitioner to have symptoms beginning in 1985. (PX 10, p. 24) In fact, Dr. Wottowa explained that his surgery did not go near Petitioner's hardware from the 1985 motorcycle fracture. (PX 10, p. 25) Dr. Wottowa stated that the ulnar nerve was an inch and a half away from where Petitioner's 1985 left elbow fracture occurred. (PX 10, p. 25)

Petitioner testified that after recovering from the motorcycle accident he never experienced ongoing symptoms. Petitioner further stated that before November 13, 2017 he had not sought treatment for his left elbow and had no problems with it.

Dr. Wottowa did not have a response to Dr. Sudekum's concerns about the left elbow motorcycle fracture, but stated that when Dr. Wottowa examined him Petitioner had full range of motion of the elbow and no elbow pain and only had ulnar nerve symptoms. (PX 10, p. 26) Dr. Wottowa did not address Petitioner's left elbow in relation to the motorcycle accident because Petitioner had no elbow pain and had full range of motion when he examined him on December 18, 2017. (PX 10, p. 26) Dr. Wottowa noted the findings on exam that he felt to be abnormal were positive elbow flexion testing and positive Tinel's over the ulnar nerve, and positive Tinel's

and Phalen's over the median nerve. (PX 10, p. 26) Dr. Wottowa stated that Dr. Trudeau's EMG/NCV studies confirmed his diagnosis of cubital and carpal tunnel syndrome. (PX 10, p. 30)

The Arbitrator notes Dr. Sudekum did not examine Petitioner before his surgery and so has no knowledge of Petitioner's left elbow condition before the surgery.

Dr. Wottowa conceded that even if the motorcycle accident contributed to Petitioner's left elbow condition, the Petitioner's work duties were also a contributing factor. (PX 10, p. 39)

Dr. Wottowa stated that the accident to the left elbow would have no impact on his right cubital tunnel syndrome. (PX 10, p. 13) Dr. Wottowa stated that the fact that his left side was worse would not be unusual since Petitioner's job required that he use both hands and arms. (PX 10, p. 20-21)

The Petitioner underwent left carpal and cubital tunnel releases on February 8, 2018 and right carpal and cubital tunnel release on March 6, 2018. (PX 8) Petitioner was removed from work for a short period of time after both surgeries. (PX 8) The records reflect that Petitioner told Dr. Wottowa that he could be released to return to work without restrictions after surgery as he had been promoted to the Chief Engineer position two months before his work accident and his new position did not require that he perform the same work activities as a Stationary Fireman-Assistant Chief. (PX 8) Petitioner confirmed that he was able to modify his duties after being released to return to work.

Petitioner did not receive temporary total disability benefits during the time he was held off of work and used his accrued sick days. Petitioner waived his right to claim temporary total disability benefits.

The medical records and testimony of Dr. Wottowa and Petitioner confirm that the surgeries relieved the pain and numbness Petitioner complained of before the surgery. Dr. Wottowa released Petitioner from his care on April 30, 2018.

Petitioner is right handed and continues to notice weakness in his hands with gripping and if he pushes on things with his hands, he gets pain. Petitioner will wear two sets of gloves on each hand to cushion his hands. Petitioner also notices that when he uses wrenches and it presses on his palms, he experiences pain. Petitioner estimates that he has lost 50% of his bilateral arm strength and 50% of his bilateral grip strength. Petitioner also notices sensitivity in his elbow and

20 IWCC0435

when he rests his elbows on something or pushes something at work, he will feel a tingling going down to his ring and small fingers.

Petitioner submitted his unpaid medical expenses as Group Exhibit 9 as follows:

Memorial Physician Services, 1/25/18	$ 918.00
Dr. Edward Trudeau, 11/13/17	$ 3,898.00
Memorial Medical Center, 11/13/17	$ 2,138.00
Memorial Medical Center, 1/25/18	$ 160.00
Memorial Medical Center, 1/25/18	$ 10.98
Springfield Clinic, 12/18/17-3/6/18	$39,938.00
Total:	**$47,062.98**

Findings of Fact and Conclusions of Law:

The Arbitrator finds Petitioner testified credibly and that the job description he prepared at Dr. Wottowa's request is the more reliable and detailed description of Petitioner's repetitious, forceful hand and arm work activities. The Arbitrator further finds that Respondent's Position Descriptions do not refute Petitioner's testimony, but further confirm that repetitious, forceful and heavy use of the arms and hands was required of Petitioner as a Stationary Engineer-Assistant Chief on a "frequent" basis.

The Arbitrator finds Petitioner has carried his burden of proving that his employment dating from October of 2004 required repetitive and forceful use of his hands and arms resulting in the work accident of November 13, 2017.

The Arbitrator notes that Respondent stipulated that Petitioner sustained the work accident alleged on November 13, 2017 and that Petitioner's bilateral carpal tunnel syndromes were causally related to the work accident. The Respondent disputed Petitioner's bilateral cubital tunnel syndrome as being causally related to the accident. Respondent relied on the testimony of Dr. Sudekum and Petitioner's 1985 motorcycle accident as the basis for its dispute in causation.

The Arbitrator finds that Dr. Sudekum's opinions are not credible in light of Petitioner's job description and the Position Description prepared by Respondent. The Arbitrator further discounts Dr. Sudekum's opinions based on his evasiveness and repeated refusal to answer questions directly. Finally, the Arbitrator notes that there is no factual foundation to Dr. Sudekum's opinion that the Petitioner's motorcycle accident contributed to Petitioner's left or

20IWCC0435

right cubital tunnel syndrome since there was no evidence Petitioner sought treatment for his left elbow in the 32 years since he sustained the left elbow fracture to establish that the left elbow fracture was symptomatic.

The Arbitrator notes that Petitioner testified that after his motorcycle accident in 1985 he had a two-month period of recovery and rehabilitation and never had any ongoing problems resulting from that accident. Respondent failed to demonstrate in any credible manner that the left elbow fracture sustained in the 1985 motorcycle accident was even a contributing factor to the Petitioner's left cubital tunnel syndrome. Respondent offered no evidence that Petitioner ever sought treatment for any condition related to elbow pain at any time including here. Petitioner's left elbow symptoms were limited to those resulting from ulnar neuropathy only. Additionally, Dr. Wottowa testified that he found no clinical findings that Petitioner's left elbow fracture was causing any problems which might be expected such as swelling or loss of motion.

Dr. Wottowa testified credibly that Petitioner's work activities could have aggravated Petitioner's bilateral ulnar neuropathy and cubital tunnel syndromes.

The Arbitrator finds Petitioner has carried his burden of proving that his bilateral cubital tunnel syndrome was causally related to the work accident of November 13, 2017.

Under the amended Illinois Workers' Compensation Act the Arbitrator notes that the Commission shall base its Decision on five enumerated factors. All of the factors need not be present to award permanent partial disability.

(i) the reported level of impairment;
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of injury;
(i) the employee's future earning capacity;
(ii) Evidence of disability corroborated by medical records.

Therefore:

With regard to (i) of Section 8.1(b) of the Act:

20 IWCC0435

Neither party offered an impairment rating according to the 6th Edition of the AMA Guides to the Evaluation of Permanent Disability. The Arbitrator does not give any weight to this factor.

With regard to (ii) of Section 8.1(b) of the Act:

Petitioner was promoted to Chief Engineer two months before his work accident and Petitioner continues to work for Respondent. The physical activity required of Petitioner has been reduced to approximately 15% of his day and 85% of his day is spent in non-physical work duties. The Arbitrator places some weight on this factor

With regard to (iii) of Section 8.1(b) of the Act:

The Petitioner was 57 years old at the time of injury. The Arbitrator notes that the Petitioner has remaining work life and Petitioner's testimony indicates that even though he was released without restrictions some work tasks cause pain, numbness and tingling in his hands and fingers. Petitioner stated that he uses double gloves when using hand tools to cushion his hands. The Arbitrator places some weight on this factor.

With regard to (iv) of Section 8.1(b) of the Act:

The Arbitrator concludes Petitioner's earning capacity has not been permanently impacted by his injury.

With regard to (v) of Section 8.1(b) of the Act:

Petitioner testified that he continues to experience loss of strength in both hands and arms. Petitioner estimates that he has lost approximately 50% of his strength. However, Dr. Wottowa's records contradict this statement on February 21, 2018 when Petitioner told him, "he absolutely loves his left side. All the numbness and tingling has been relieved. He has no numbness and tingling to his hand. He says he is about 95% better on the left." Later, after the right carpal tuneel and cubital tunnel surgery, Dr. Wottowa wrote, "He is the poster child for cubital tunnel and carpal tunnel release. All his symptoms have gone away. He is 99% back to normal. He is back to work full duty. He has had a very, very excellent result." Despite, this Petitioner testified

that notices he has lost grip strength. Petitioner has to wear two pair of gloves to cushion the palms of his hands if he is using a hand tool like a wrench.

As noted above Dr. Sudekum was the last physician to examine Petitioner's hands and arms. Dr. Sudekum's Section 12 report confirmed Petitioner's subjective complaints and loss of strength in the "Current Complaints and Symptoms" and the "Physical Examination" sections of his report. (RX 1, Dep Ex 2)

Based on the totality of the evidence, the Arbitrator finds that as a result of the accidental injury of November 13, 2017 the injuries Petitioner sustained caused **7.5% loss of use of each hand and arm** as provided in Section 8(e) of the Act.

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

MARILYN BESHEARS,

Petitioner,

20IWCC0436

vs. NO: 14 WC 39099

KLN ENTERPRISES,

Respondent.

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

Petitioner worked as a regional sales manager for Respondent. Her job responsibilities involved considerable travel both by air and by car, as well as attendance at food shows. She set up and dismantled booths for these shows. Petitioner testified that she would be on her feet most of the day when traveling and would be on her feet all day while attending food shows.

Petitioner asserted in her Application for Benefits that she sustained a stress fracture to her left foot while working for Respondent on September 14, 2013. Petitioner submitted no medical records or medical bills at trial. Respondent did submit medical records and bills.

Petitioner consulted her primary care physician, Dr. Tibor Kopjas on September 20, 2013 for a regularly scheduled follow-up appointment. Her medical records reveal she has a history of chronic pain in her left hip and leg. On September 20, 2013 Petitioner reported left hip pain and persistent left foot pain. She did not report a history of accident or acute onset of the foot pain. An x-ray of the left foot was performed on September 20, 2013 that described mild degenerative

changes but no acute osseous abnormality. Review of Dr. Kopjas' records reveals that Petitioner's September 20, 2013 medical appointment was a regular follow-up that had been scheduled at the time of her prior visit on March 15, 2013 and did not appear to have been occasioned by an acute problem with her left foot.

On September 23, 2013 Petitioner was seen by Dr. Lawrence Huels at Alton Podiatry Clinic and she reported left foot pain of 2 weeks duration. The documentation does not contain any description of accident or acute onset of her left foot pain. Dr. Huels administered a cortisone injection, and recommended rest and a short air boot. Petitioner continued care with Dr. Huels through January 2014. An MRI of Petitioner's left foot was performed on December 3, 2013 that showed a non-displaced spiral oblique fracture of the of the 2nd metatarsal. Dr. Huels recommended continued conservative treatment. Petitioner was in a fracture boot for 15 weeks on recommendation of Dr. Huels.

On September 19, 2013 Petitioner called her supervisor Katherine Bridgeman and advised her that she was unable to walk on her left foot due to severe pain, and that she had a medical appointment the following day. Petitioner testified that on September 23rd she again called Ms. Bridgmen and told her that she would be unable to travel to a food show in Dallas that was scheduled for September 24-26, 2013. There is a factual dispute as to whether Petitioner at that time described the left foot pain as resulting from a work injury. According to Petitioner she described an acute onset of foot pain while she was traveling and that it was her expectation that Katherine would notify the Human Resources Department. Petitioner testified that Ms. Bridgeman required that Petitioner continue her travel activities in a walking boot until December when she was permitted to work from her home office. Petitioner traveled to a national sales meeting in December 2013.

At hearing Katherine Bridgman testified that she did not recall being informed of a work injury and that if it had occurred, she would have expected it to be documented in the detailed weekly reports that Petitioner was required to submit documenting her daily activities. Ms. Bridgeman testified that had she been informed of a work- related injury a report would have been made to Human Resources. No Incident Report was made until March 24, 2014.

In January 2014 Petitioner submitted FMLA paperwork related to the condition of her left foot. Christie Jennen, a human resources assistant employed by Respondent, testified that on January 9, 2014 Petitioner told her that she was not sure where the foot injury had occurred and that Petitioner did not report it as a work injury. The FMLA paperwork submitted did not document a work injury.

On January 7, 2014 Petitioner was seen by Dr. Metzler, an orthopedic surgeon who placed her in a non-weightbearing cast for 3 weeks followed by a weight-bearing cast. The attempts at conservative treatment were not successful and Dr. Metzler referred Petitioner to Dr. McCormick, an orthopedic specialist at Washington University.

20 IWCC0436

Nancy Belka, the Director of Human Resources testified on behalf of the Respondent. She testified to a conversation with Petitioner on March 20, 2014 at which time she advised Petitioner that she had exhausted her FMLA leave. She testified that at that time Petitioner told the witness that her injury could have happened at work when she was travelling but that she did not report it.

On March 21, 2014 a telephone discussion occurred between Suzanne Berube, the benefit coordinator for Respondent and Petitioner. Ms. Berube documented that Petitioner's comment to Ms. Belka on March 20th was the first information Respondent had that Petitioner was alleging a work injury.

Petitioner first completed an Injury/ Incident Report on March 24, 2014 and stated that the injury occurred between "9/4/13 and 9/20/13" and that the location was uncertain. Petitioner did not respond to the inquiry on the form that requested the date the report was made. The First Report of Injury was prepared on March 24, 2014.

On March 30, 2014 Petitioner filled in an Orthopedic History at Washington University in St. Louis in conjunction with a consultation that took place with Dr. Jeremy McCormick on April 2, 2014. She reported that the left foot pain began 6 months prior, "somewhere between 9/4/13 and 9/20/13." She further reported that she was uncertain "…when or where this happened. Traveling for work/shows/sales meetings during same time frame this happened." She reported that she was uncertain whether the problem started at work.

In his charting Dr. McCormick characterized the problem as being gradual in onset and not related to an injury. There was no description of Petitioner's job duties in this medical record and no statement attributing the left foot fracture to Petitioner's job duties.

Dr. McCormick performed surgery on Petitioner's left foot on May 1,2014 utilizing a bone graft from her hip. She subsequently had an additional surgery with Dr. McCormick in December 18, 2014 to excise a granuloma. Petitioner was placed off work postoperatively.

Petitioner was examined by Respondent's Section 12 orthopedic expert Dr. Craig Aubuchon on September 18, 2014. At the time of examination Dr. Aubuchon took a history from Petitioner and reviewed her prior medical records from Anderson Hospital, Dr. Huels, Dr. Metzler and Dr. McCormick. Dr. Aubochon testified at deposition that Petitioner reported to him that she experienced the onset of pain in her left foot in September 2013. Petitioner did not report an injury to him nor did her medical records contain a report of trauma. Petitioner did not attribute her foot pain to her job in her discussion with Dr. Aubuchon nor was that reflected in her medical records.

In June 2015 Petitioner had a nerve release surgery with Dr. McKinnon. In July 2015 Dr. McCormick performed an additional surgery to insert a larger plate Dr. McCormick last saw Petitioner on December 12, 2016 at which time he determined that she had achieved MMI.

20IWCC0436

Petitioner asserts that she sustained a stress fracture of the left second metatarsal as a result of the demands of her employment which required significant walking and extended time on her feet associated with travel and attendance at day long food shows. She asserts that her injury was produced by repetitive trauma.

At trial Petitioner testified that she traveled 3 days per week and that two days per week she worked from her office preparing for food shows. Her pattern was to work in her office on Monday, travel Tuesday through Thursday, and work in her office on Friday. Some travel was via automobile for trips that were 5 hours or less. The remaining travel was by air and involved walking through airports and standing in lines.

Petitioner testified that food shows were generally conducted in venues with concrete floors and that the booths did not have seating. No testimony was offered by Petitioner that she spent 12 to 18 hours per day standing. The first and only time Petitioner related that she was required to be on her feet for such prolonged periods was in a statement to Dr. McCormick during a post-operative appointment when return to work was being contemplated in August 2014.

Dr. Jeremy McCormick testified via evidence deposition that in his opinion a stress fracture occurs as an accumulation of events over time and is not associated with one specific moment of injury. Dr. McCormick did not recall reviewing any of Petitioner's outside records prior to his initial evaluation. His understanding of Petitioner's work duties as reported by Petitioner was that her job required her to be on her feet 12 to 18 hours a day. Dr. McCormick stated the opinion that based upon Petitioner's job description, her work contributed to the development of her stress fracture. It is the view of the Commission that Petitioner's testimony concerning the number of days per week, or hours per day spent on her feet failed to provide the evidentiary predicate necessary to support Dr. McCormick's causation opinion. Petitioner did not testify at trial that she is on her feet for extended time periods on a daily basis, nor did she testify that she was on her feet 12 to 18 hours per day when working at food shows.

Dr. Aubuchon testified that stress fractures of the second metatarsal are common in the general population and occur ten times more frequently in women than in men .He stated that in his practice stress fractures occur secondary to activities of daily living and are caused by upright ambulation on a repetitive basis. He opined that Petitioner's stress fracture was not due to a work injury. He based his opinion on his education, training, experience, his review of Petitioner's medical records and detailed records of daily activities that Petitioner submitted to her supervisor.

In the Commission's view Petitioner failed to prove by a preponderance of the evidence that her stress fracture was more likely than not the result of repetitive stress related to her work activities versus the normal activities of daily living. Petitioner failed to introduce any evidence that supports Dr. McCormick's opinion that Petitioner was required to be on her feet 12 to 18

20IWCC0436

hours per day. Petitioner did not give testimony to that effect nor was there any documentary evidence introduced that the Commission can rely on to establish the factual basis necessary to support causal connection. For the foregoing reasons the Commission denies Petitioner's claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2019 is hereby reversed and Petitioner's claim is denied.

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

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

DATED: AUG 3 - 2020

Stephen Mathis

o-6/23/2020
SJM/msb
44

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BESHEARS, MARILYN
Employee/Petitioner

Case# **14WC039099**

KLN ENTERPRISES INC
Employer/Respondent

20IWCC0436

On 8/29/2019, 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 1.84% 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:

2346 CHATHAM & BARICEVIC
GARY CHATHAM
107 W MAIN ST
BELLEVILLE, IL 62220

0560 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

20 IWCC0436

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

- [ ] 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

Marilyn Beshears
Employee/Petitioner

v.

KLN Enterprises, Inc.
Employer/Respondent

Case # **14** WC **39099**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **7/23/19**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **2/10/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**85,000.00**; the average weekly wage was $**1,634.61**.

On the date of accident, Petitioner was **54** 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 $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**12,599.96** for nonoccupational indemnity disability benefits, for a total credit of $**12,599.96**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $179,563.45, as set forth in PX 5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,089.74/week for 138 weeks, commencing 4/20/19 through 12/12/16, as provided in Section 8(b) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of $**721.66**/week for **58.45** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **35% loss of the left foot.**

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

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

Michael K. Nowak, Arbitrator

8/27/19
Date

AUG 29 2019

FINDINGS OF FACT

Petitioner testified that her job duties included servicing 13 individual states as a regional sales manager for KLN Enterprises. She further explained that she would often travel to those 13 states for food shows, sales meetings and sales calls. Her job was such that she was required to be on her feet for extended periods of time on hard concrete surfaces, as she traveled and even when she worked out of her office

Petitioner testified that she kept detailed notes of her daily activities due to the requirements of her direct supervisor Katherine Bridgeman (See Petitioner's Exhibit 9). She further explained that there were no details of her injury in those reports due to Ms. Bridgeman's requirement that daily notes were to only include work details and to exclude any medical discussions.

Petitioner testified that during the month of September 2013, she traveled to Nashville TN on two different trips for 4 days, Sandestine FL for two days and San Antonio TX for two days. While performing her duties as a regional sales manager in San Antonio TX at a food show, the pain in her foot became increasing unbearable. She testified that she could not hardly put pressure on her foot, and that she could hardly walk through the airport. By the time she got home the pain in her foot reached a pain level of 10 out of 10.

Petitioner testified that she contacted her direct supervisor on September 19, 2013 the day after she got back from the San Antonio trip to notify Ms. Bridgeman of her workplace injury. (See Petitioner's Exhibit 10 & 11). Petitioner further testified that she specifically remembers contacting Ms. Bridgeman to tell her about a September 20, 2013 doctor's appointment.

Petitioner testified that she specifically canceled a Dallas Food show/sales meeting from September 24-26, 2013 due to her workplace injury (See Petitioner's Exhibit 7). Petitioner further stated that she called her direct supervisor again on September 23, 2013 to verify that she would not be able to travel to Dallas due to her workplace injury (See Petitioner's Exhibit 10 & 11).

Medical records were submitted involving Petitioner's workplace injury. These records indicate Petitioner initially treated with her personal physician Dr. Kopjas on September 20, 2013 due to her injury.(RX 2) Dr. Kopjas referred Petitioner to a podiatrist, Dr. Huels, who recommended non-operative treatment that involved multiple injections into her foot and sixteen weeks in a boot. (RX 1) Once that treatment failed Petitioner was treated by an orthopedist, Dr. Metzler, who placed her in a non-weight bearing cast for three weeks and a weight bearing cast for an additional three weeks. Once that treatment plan failed Petitioner was referred to Dr. McCormick, an orthopedic surgeon.

Petitioner testified that she worked half days with no travel from September 2013 through February 10, 2014. She was then contacted in March of 2014 and instructed to go back to work. She testified she complied but could not continue due to pain in her foot and last worked in mid-April of 2014. This date is consistent with Respondent's wage records (RX 8) The Arbitrator finds is significant that Petitioner was accommodated by Respondent from September 2013 through February 10, 2014.

Petitioner indicated she first reported the injury to Ms. Bridgeman in September of 2013. Numerous witness who testified on behalf of Respondent indicated that no such notice was provided until March 24, 2014.

Petitioner first visited Dr. McCormick on April 2, 2014. He testified that Petitioner complained of a gradual onset of pain that began in September of 2013. Dr. McCormick went on to explain that stress fractures occur from an accumulation of events as opposed to one specific moment of injury. After discussing petitioner's job activities, her lengthy course of non-operative care, the fact that the fracture had not healed as a result of the non-operative care, petitioner decided to have surgery. Dr. McCormick performed surgery on May 1, 2014 to stabilize the fracture of her left second metatarsal due to a non-union of that fracture. On November 5, 2014, Petitioner and Dr. McCormick discussed the need for an additional surgery due to scar tissue forming in the top of her foot causing her a consistent source of pain. As a result, surgery was performed on December 5, 2014 to remove the soft tissue mass excision.

On April 29, 2015, Petitioner followed up with Dr. McCormick to discuss continued burning pain to her left foot. As a result, Dr. McCormick referred Petitioner to Dr. MacKinnon, who is a nerve surgeon. Dr. MacKinnon performed surgery on Petitioner's left foot on 6/2/2015 for decompression of her deep peroneal nerve. Due to persisting pain over the dorsum of her foot, Petitioner had a second surgery performed by Dr. MacKinnon on 12/09/2015.

On March 23, 2016, after the second surgery performed by Dr. MacKinnon, petitioner complained of continued pain to Dr. McCormick. Dr. McCormick ordered a CT scan and eventually treated Petitioner with an injection to the second tarsometatarsal joint. After the injection Petitioner continued to complain of radiating symptoms and swelling in her foot and discussed the possibility of a surgery to fuse the joint at issue.

On May 11, 2016 Petitioner continued to complain of pain to Dr. McCormick who offered surgery as an option to more definitively address her pain. Surgery was subsequently performed by Dr. McCormick on July 1, 2016 to fuse Petitioner's second tarsometatarsal joint.

Dr. McCormick testified that Petitioner's injury was related to her employment, was permanent in nature and that she would be in need of future medical care and treatment. Dr. McCormick eventually placed Petitioner at Maximum Medical Improvement on December 12, 2016.

Petitioner explained that her understanding of her injury became apparent after discussing her injury and job details in depth with Dr. McCormick. Petitioner reported that she spoke in detail with Dr. McCormick regarding her job responsibilities, job description and how long she was on her feet during work hours. Petitioner testified that she spoke to Dr. McCormick about these details for a half hour to an hour.

Petitioner visited Dr. Aubuchon on September 18, 2014 for a section 12 examination on behalf of the respondent. Petitioner testified that the examination took no more than 15 minutes and she was not asked specific questions about her job activities or how the specifics of her job could cause a stress fracture. Pursuant to Dr. Aubuchon's deposition, he was told by Petitioner that she injured her foot on or about September 4, 2013-September 20, 2013. Dr. Aubuchon did not indicate whether he specifically asked Petitioner whether she was working during those months, however he was specifically given work notes by Respondent's counsel that showed she was on the road for a significant portion of September 2013 (See Petitioner's Exhibit 9).

Dr. Aubuchon further stated in his deposition that Petitioner specifically complained of a gradual onset of pain instead of an acute injury, which is consistent with a stress fracture to the second metatarsal. Dr. Aubuchon

also indicated that denying a specific trauma, which resulted in foot pain would be consistent with repetitive trauma.

Dr. Aubuchon stated that simply walking upright at work would cause stress to the second metatarsal and lead to a stress fracture. He also stated that Petitioner had a fracture to her second metatarsal and that all treatment received was reasonable and necessary. Dr. Aubuchon relied on Petitioner failing to pinpoint a specific date of injury in denying causation to a work injury. However as stated earlier, Dr. Aubuchon indicated that denying a specific trauma, which resulted in foot pain would be consistent with repetitive trauma.

Petitioner testified that her date of injury occurred on or about September 4, 2013-September 20, 2013 (See Petitioner's Exhibit 15). She further clarified that when she filled out her injury accident report, she put "September 4-September 20" as the date of injury due to her absence of knowledge of stress fractures on March 24, 2014 (See Petitioner's Exhibit 15).

CONCLUSIONS

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

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

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center,* 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

The Appellate Court in *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066 (4th Dist., 2009) issued a favorable decision in a repetitive trauma case to a claimant whose work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *Id.* "While [claimant's] duties may not have been 'repetitive' in a sense that the same

thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

In this case, the evidence shows that Petitioner be on her feet, either standing or walking, extensively during the performance of her job duties for Respondent. Further, the Arbitrator finds the opinions and testimony of Dr. McCormick much more persuasive than those of Dr. Aubochon in this case.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met her burden of establishing that she sustained accidental injuries which arose out of and in the course of her employment with Respondent and that her current condition of ill-being is causally related to the employment.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates in repetitive trauma claims. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand,* N.E.2d at 927. Claimants are not charged with filing a claim as soon as they believe they may have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. The Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court also recognized that claimants would have had difficulty proving injury with a sketchy and equivocal understanding of the cause of their symptoms. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do not "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.

In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination, setting the manifestation date on the date of surgery, or the date the employee could no longer work. Compensation was awarded to a claimant, despite his full knowledge that his condition was work-related well before he filed a claim, because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount*, the Court held the manifestation date of claimant's injury was the date "petitioner first learned that his condition of ill-being was work related." (*Id.*, 556 N.E.2d at 265) The Court went on to caution "[a]lthough our finding that the injury in this case 'manifested itself' on July 10, rather than August 10, does not affect the Commission's ruling in petitioner's favor, we emphasize that the peculiar facts of each case must be closely analyzed in repetitive-trauma cases to be fair to the faithful employee and his employer as well as to the employer's compensation insurance carrier." (*Id.*)

The Supreme Court in *Durand* noted that the manifestation date is typically set on the date the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand,* 862 N.E.2d at 929. The law also allows Petitioner to select a manifestation date that coincides with discovery of injury and its relation to work after medical consultation. See *Steven Beal v. Town of Normal,* 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commissio*n, 374 Ill.App.3d 907, 873 N.E.2d 388, 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

In *Linda Peters v. Village of Caseyville*, the Commission gave the most weight to when the claimant possessed a "confirmed diagnosis" of her condition in setting the manifestation date. *Linda Peters v. Village of Caseyville*, 14 I.W.C.C. 0796 (2014). The Commission stated:

> The Commission finds that the manifestation date of Petitioner's right carpal tunnel syndrome was March 1, 2012. Although the parties had stipulated to an accident date of September 1, 2010, we find that it is within our discretion to change the accident date to conform-to the evidence. *See Beal v. Town of Normal*, 10 IWCC 380 (2010). The medical records are clear that the first mention of any correlation between Petitioner's right carpal tunnel syndrome and her work duties is the March 1, 2012, office note of Dr. Mirly. Although Petitioner's report of injury on March 2, 2012, indicates a date of accident of "Sept 2011," we find that this is not an appropriate manifestation date in this case because Petitioner did not have a confirmed diagnosis at that time. Based on our determination of the date of accident, we find that Petitioner provided timely notice of her accidental injuries. *Id.*

In this case Petitioner testified that in early September 2013 she began experiencing pain in her left foot. She further testified that during the month of September 2013, she traveled to Nashville TN on two different trips for 4 days, Sandestine FL for two days and San Antonio TX for two days. While performing her duties as a regional sales manager in San Antonio TX at a food show, the pain in her foot became increasing unbearable.

She testified that she could not hardly put pressure on her foot, and that she could hardly walk through the airport. By the time she got home the pain in her foot reached a pain level of 10 out of 10.

Petitioner testified that she contacted her direct supervisor on September 19, 2013 the day after she got back from the San Antonio trip to notify Ms. Bridgeman of the pain she was having in her left foot due to prolonged standing and walking. Petitioner further testified that she specifically remembers contacting Ms. Bridgeman to tell her about a September 20, 2013 doctor's appointment. Petitioner further testified that she specifically canceled a Dallas Food show/sales meeting from September 24-26, 2013 due to her foot pain. Petitioner further stated that she called her direct supervisor again on September 23, 2013 to verify that she would not be able to travel to Dallas due to her foot pain.

Petitioner testified that she worked half days with no travel from September 2013 through February 10, 2014. The Arbitrator Petitioner to be forthright and credible. The Arbitrator also finds is significant that Petitioner was accommodated by Respondent from September 2013 through February 10, 2014. The facts support the conclusion that Respondent was aware in September 2013 that Petitioner was suffering from left foot pain that was related to standing and walking while working regular duty.

The Arbitrator finds the Petitioner began experiencing symptoms related to standing and walking at work in early September 2013 and passed this information on to her direct supervisor in late September when the pain became excruciating.

Even assuming arguendo, that proper notice was not provided until March 24, 2014 as Respondent claims, February 10, 2014 is an appropriate manifestation date as that was the last date Petitioner was allowed to work modified duty and was unable to work full duty.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that February 10, 2014 is an appropriate manifestation date under the Act. Petitioner has met her burden of establishing her date of accident and further has provided proper notice as required by the Act.

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

The Arbitrator notes that while Respondent disputed medical expenses it did so based upon its assertion that there was "no accident/no timely notice/not causally related." (AX 1) Although Petitioner did not submit any individual medical bills, she did offer into evidence Petitioner's exhibit 5 which was a list of medical bills totaling $179,563.45. Respondent did not object to admission of the exhibit and, as indicated above, disputed liability for related medical expenses based upon three issues which the Arbitrator found in Petitioner's favor.

In addition, Respondent's section 12 examiner found the treatment received by Petitioner, at least up to the time of his evaluation, to have been reasonable and necessary.

Based upon the foregoing and the record taken as a whole the Arbitrator finds Respondent is liable for payment of all related medical expenses pursuant to the fee schedule.

Issue (K): What temporary benefits are in dispute?

Petitioner claims entitlement to TTD benefits from 9/14/13 through the date of hearing. However, the Arbitrator notes Petitioner worked consistently from September 2013 through February 10, 2014. At some point in March 2014 she attempted to work regular duty and her pay records reflect she last worked in the week ending April 19, 2014. The Arbitrator further notes that Petitioner was released at MMI on December 12, 2016.

Based upon the foregoing and the record taken as a whole, the Arbitrator is entitled to TTD benefits in the amount of $1,089.74 per week for 138 weeks from April 20, 2014 through December 12, 2016.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a regional sales manager for Respondent. She is currently unemployed. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of her injuries. Petitioner has diminished healing capacity and a low threshold for future injury as a result thereof. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. As a result of her extended standing and walking during the course of her employment Petitioner suffered a stress fracture in her left foot. Dr. McCormick, who was the treating physician, and performed 3 surgical procedures on Ms. Petitioner. His diagnosis was that Petitioner sustained a permanent work-related injury and that she may be in need of future medical care and treatment. In addition Petitioner underwent 2 surgical procedures from Dr. Mckinnon. The fusion in her foot has caused her to have limited motion in that area. because of her injury, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35 % loss of use of left foot pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Przemyslaw Zatorski,

Petitioner,

vs. No. 15 WC 42380

Yellow Cab/Elston Twelve LLC 4328 TX,

20IWCC0437

Respondent.

DECISION AND OPINION ON REVIEW

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

On December 29, 2015, Petitioner filed an application for adjustment of claim alleging that August 2, 2015, he injured his left arm, mid back and cervical spine when his cab was struck by another vehicle. On March 2, 2017, Petitioner amended his claim to add an injury to the lumbar spine. In the request for hearing form, the parties stipulated to a leasing relationship, with Respondent providing workers' compensation coverage. The parties further stipulated to accident and notice. Petitioner did not claim any temporary disability benefits. Following a hearing on December 18, 2018 and January 24, 2019, the Arbitrator found that Petitioner's lumbar spine condition is not related to the work accident. We disagree.

Petitioner, who was 52 years old at the time of the accident, testified that he used to work as a cross-country over the road truck driver until 2000/2001, when he went to work as a cab driver for Respondent. Petitioner denied prior problems with his neck, left shoulder or low back. He also denied any prior difficulty performing his job duties as a cab driver.

On August 2, 2015, the front of Petitioner's cab was struck by a small passenger car, which caused the cab to spin into the left lane, where it was struck on the driver's side door by another car. The impact, which was "very heavy," caused Petitioner to strike his head and left shoulder on the inside of the cab. Petitioner felt discomfort in his jaw and back. A few minutes later, he noticed pain in the left shoulder. On cross-examination, Petitioner acknowledged his airbags did not deploy.

An ambulance took Petitioner to Northwestern Memorial Hospital, where he was treated and discharged. The following day, Petitioner felt much worse—his back, neck and left shoulder were really painful. Petitioner returned to work and drove through the pain. Petitioner then consulted Dr. Ann Mianowski (a/k/a Mianowska a/k/a Mia), who prescribed physical therapy and ibuprofen because Petitioner continued to work and could not take narcotic pain medication. Petitioner underwent 16 sessions of physical therapy and was discharged by Dr. Mianowski in late September of 2015.

Petitioner testified his low back and neck failed to improve, and he consulted Dr. Mark Sokolowski on November 20, 2015. Petitioner added that approximately seven or eight weeks after the accident, he developed radicular-type symptoms in his legs. Dr. Sokolowski obtained MRIs of the neck, low back and left shoulder, and prescribed non-narcotic medication, a TENS unit and a back brace. He also recommended injections. Petitioner underwent three injections into the low back. The injections helped only temporarily, and Dr. Sokolowski discussed surgery. During that time, Petitioner continued to work. At some point, Petitioner was involved in a "fender-bender," which he indicated was minor. Petitioner denied his symptoms changed after the fender-bender.

At Respondent's request, Petitioner was examined by Dr. John Cherf. The initial examination focused on the left shoulder and neck. The second examination focused on the back. On March 16, 2016, Petitioner underwent a functional capacity evaluation (FCE). After the second examination by Dr. Cherf, Petitioner underwent electrodiagnostic studies on September 6, 2016. Dr. Sokolowski continued to recommend surgery.

Petitioner testified that he suffers from significant low back and radicular symptoms and wishes to proceed with the surgery. Petitioner has only occasional symptoms in his neck and no residual symptoms in his left shoulder.

Turning to the medical records in evidence, an ambulance report states the impact was to the front driver's side. Petitioner complained of jaw pain and abdominal pain, and denied neck or back pain. He was transported to Northwestern Memorial Hospital. Emergency room records from Northwestern Memorial Hospital contain a triage note stating: "[P]t comes in c/o lower back pain and jaw pain s/p MVC. Pt states he was driving 30 MPH and the other car 10 MPH. 'He just started going.' Pt denies hitting his head, denies LOC/neck pain." High blood pressure was noted. Petitioner denied spinal tenderness. The attending physician noted the following history and complaints: "[The patient] presents with jaw discomfort, neck soreness, and back stiffness following MVC." Petitioner had a normal range of motion in his jaw, neck and back. The attending physician did not believe Petitioner suffered any fractures. Petitioner was observed and discharged with NSAIDs for muscle stiffness.

The medical records from Dr. Mianowski/Medart Institute show that on August 13, 2015, Petitioner presented with complaints of pain in the abdomen, low back, left shoulder, neck and head after the accident. He rated the low back pain a 7/10 and neck pain an 8/10. Dr. Mianowski prescribed

physical therapy. In follow-up, Petitioner complained of pain in the neck and back. Dr. Mianowski prescribed medication. Petitioner underwent physical therapy at Medart Institute. The physical therapist noted complaints of pain in the left shoulder, neck and low back. The symptoms gradually improved. On September 24, 2015, Petitioner rated the pain a 1/10, and was discharged from physical therapy. Petitioner last saw Dr. Mianowski on September 29, 2015. Dr. Mianowski noted a near normal range of motion in the neck and shoulder and normal range of motion in the back. She instructed Petitioner to perform home exercises and follow up as needed.

On November 20, 2015, Petitioner consulted Dr. Sokolowski, a spine surgeon, with complaints of lumbar pain with radiation to the buttocks, neck pain with radiation to the periscapular regions, and left shoulder pain. He attributed the problems to the accident. Dr. Sokolowski saw Petitioner "at request of Dr. Ann Mia." Petitioner rated the back and neck pain a 3-4/10 and the buttocks and shoulder pain a 6-7/10. Physical examination was consistent with Petitioner's complaints. Dr. Sokolowski ordered MRI studies and fitted Petitioner with a semirigid lumbosacral orthosis he could use while driving.

On December 29, 2015, Petitioner followed up reporting unchanged pain in the neck and back, and greatly improved symptoms in the buttocks and shoulder. "He reports that he was using Ibuprofen regularly to control his collision-related symptoms, but he has been advised *** to limit his overall Ibuprofen dose in light of his significant hypertension." Dr. Sokolowski interpreted the lumbar MRI as showing a disc herniation and stenosis at L5-S1, the left shoulder MRI as showing tendinitis without a cuff tear, and the cervical MRI as showing "relative kyphosis maximal at C5-6 with disc pathology from C3-7 with resultant overall canal stenosis and foraminal stenosis." Dr. Sokolowski recommended cervical and lumbar epidural steroid injections. Regarding pain medication, Dr. Sokolowski recommended alternating between ibuprofen and Dendracin, a topical nonnarcotic antiinflammatory.

On January 6, 2016, Dr. Cherf, an orthopedic knee and sports medicine specialist, examined Petitioner at Respondent's request with respect to the cervical spine and left shoulder, concluding: "[The claimant] appears to have sustained work-related sprain/strain of his cervical spine and sprain/strain and possible contusion to his left shoulder as a result of a motor vehicle [accident] on August 2, 2016 [*sic*]. This injury appears to be independent of preexisting conditions; however, [the claimant] has some degenerative changes in his cervical spine. * * * It is unlikely that [the claimant] sustained any permanent aggravation of any preexisting condition of his cervical spine or left shoulder." Dr. Cherf declared Petitioner at maximum medical improvement.

On January 7, 2016, the day after Dr. Cherf's section 12 examination, Petitioner saw Dr. Sokolowski. "He called today for an urgent appointment and we accommodated his request. He reports his collision-related back pain has increased to 8/10 with radiation to his buttocks at 7/10. He has ongoing neck pain also which has increased to 8/10. He reports driving is particularly aggravating his symptoms. Nonetheless, he is highly motivated to continue working as he seeks additional relief." Dr. Sokolowski continued to recommend injections.

On February 29, 2016, Petitioner followed up after undergoing a lumbar epidural steroid injection on January 23, 2016. "Although the injection did not diminish his back pain, he does report it diminished the magnitude of his radicular symptoms. He rates his back pain and neck pain today as 7-8/10. He rates his leg pain as 6/10 and his left shoulder pain as 7-8/10." Dr. Sokolowski reviewed Dr.

Cherf's report and recommended an FCE "to objectively delineate the patient's capabilities." Dr. Sokolowski opined Petitioner required ongoing pain management.

On April 11, 2016, Petitioner reported significantly increased symptoms after the FCE, which took place on March 16, 2016. Dr. Sokolowski noted the FCE limited Petitioner "to sitting for 60 minutes at a time, with a total of five to six hours of sitting each work day." Dr. Sokolowski recommended a repeat lumbar epidural steroid injection.

On April 13, 2016, Dr. Cherf issued an addendum report after being asked to opine on Petitioner's back condition. Dr. Cherf reviewed additional medical records, but did not reexamine Petitioner. Dr. Cherf stated: "The medical records available for my review indicate a chief complaint 'back pain' and the diagnosis of 'lumbago' at the time of the office visit from Medart Institute on August 13, 2015. The Medart Institute medical records from August 18, 2015, August 22, 2015, September 3, 2015 and September 29, 2015, do not include a chief complaint of 'back pain' or any complaints regarding the lower back nor any diagnosis involving the lumbar spine to include a diagnosis of 'lumbago.'" Dr. Cherf summarized some additional medical records, concluding: "Based solely on my review of the medical records as it relates to [the claimant's] lumbar spine, I do not identify a medical indication for the prescribed lumbosacral orthotic when considering the lumbar spine and the work-related injury on August 2, 2015."

On May 20, 2016, Petitioner followed up with Dr. Sokolowski after undergoing a lumbar epidural steroid injection on April 22, 2016. "[T]he injection significantly improved his pain for a short period of time, but his symptoms have since returned. Back pain is 8-9/10 with right leg and buttock pain as 7-8/10. Neck pain is 8-9/10. He reports he cannot walk more than a couple of blocks before his right leg pain becomes severe. *** He has difficulty completing each workday as a taxi driver due to pain." Dr. Sokolowski recommended a third lumbar epidural steroid injection.

On June 27, 2016, Petitioner reported the injection, which took place on June 3, 2016, did not help. "Back pain is 7-9/10 today. Neck pain is 7-9/10. Right leg pain and arm pain are 8-9/10." Petitioner indicated the lumbar pain was most problematic. Dr. Sokolowski recommended a laminectomy and discectomy at L5-S1.

On July 13, 2016, Dr. Cherf examined Petitioner with respect to his low back condition and reviewed additional medical records. Dr. Cherf opined: "Based on [the claimant's] history of not having any lumbar symptoms prior to the work-related motor vehicle accident on August 2, 2015, there appears to be a temporal and causal relationship between the injury in question and his current symptoms. The etiology of the findings of the MRI of the lumbar spine and potential correlation with the injury in question are unclear. * * * I am unable to determine if the L5-S1 disc pathology documented on this MRI was a preexisting condition and predated the injury in question or is a result of the injury in question." Dr. Cherf continued: "It is possible that [the claimant] has a temporary exacerbation of preexisting disc pathology in his lumbar spine. It is unlikely that the accident in question caused a permanent aggravation of any pathology of the lumbar spine." Dr. Cherf opined the epidural steroid injections were reasonable and necessary. "However, there is a question of the efficacy of epidural steroid injections in patients such as [claimant]." Dr. Cherf's examination of Petitioner's lumbar spine "was really unremarkable with negative tension signs." Dr. Cherf was "reluctant to recommend a laminectomy and discectomy, as [the claimant] seems to be getting along fairly well and

is working full-time, full duty with no restrictions and wants to continue to work." Dr. Cherf recommended electrodiagnostic studies.

An electrodiagnostic report dated September 6, 2016, concluded: "Low amplitude H reflex with mildly prolonged latency on both sides is consistent with the clinical diagnosis of L5/S1 radiculopathy. There was no active denervation in the muscles tested."

On September 26, 2016, Petitioner followed up with Dr. Sokolowski. "His back pain is 8-10/10 today, his neck pain is 8/10, and his right leg and buttock pain is 7/10." Dr. Sokolowski noted the electrodiagnostic findings and continued to recommend surgery. In the interim, he prescribed a TENS unit, in addition to alternating ibuprofen and Dendracin.

On October 17, 2016, Dr. Cherf issued an addendum report after reviewing the electrodiagnostic report. Dr. Cherf stated: "Given [the claimant's] level of function, the mechanism of injury, and no abnormal unilateral EMG findings that can be correlated with an injury 13 months prior, I cannot recommend L5-S1 laminectomy and discectomy."

Thereafter, Petitioner periodically followed up with Dr. Sokolowski through January 7, 2019, complaining of persistent symptoms. Petitioner reported being involved in a fender-bender the Friday before the visit on October 20, 2016. Dr. Sokolowski continued to recommend surgery.

On March 6, 2017, Dr. Sokolowski detailed: "Physical examination is consistent with radiculopathy. Right sided straight leg raise is ipsilaterally positive (highly sensitive) and left sided straight leg raise is contralaterally positive (highly specific). Sensation is decreased in his right L5 and S1 dermatomes. *** Exam and symptoms are also consistent with MRI. He has a disc herniation at L5-S1 with impression upon the thecal sac. *** Furthermore, EMG completed by an independent neurologist demonstrates low amplitude H-reflex with prolonged latency consistent with the clinical diagnosis of L5-S1 radiculopathy. H-reflex changes are an electrodiagnostic marker of lumbar radiculopathy affecting the L5 and S1 nerve roots. [The patient] is fortunate he does not yet have active denervation in the muscles tested. *** Without surgery, his symptoms are likely to persist, and may expand to involve both legs (consistent with the EMG). He will be permanently functionally limited."

Among other things, Respondent disputed prescription bills. A utilization review report dated October 5, 2018, non-certified Dr. Sokolowski's prescriptions of Dendracin, ibuprofen and Medrox patches. With respect to Dendracin and Medrox patches, the report states: "[D]ocumentation failed to reveal that the injured worker had any contraindications to oral NSAIDs. There was also no documentation that the injured worker has trialed all oral medications." Ibuprofen was denied because "the request does not specify as to a quantity." Dr. Sokolowski appealed the non-certification. An appeal review report dated October 10, 2018, states the reviewer, Dr. Alfred Mitchell, certified ibuprofen only. In support of non-certification of Dendracin and Medrox patches, Dr. Mitchell stated: "There is no high quality, evidence based literature or guideline support for the prescribing of these unproven, expensive, and superficial topical agents for the claimant's structural spine injury upon review of the medical record and completion of peer discussion." On the other hand, Dr. Mitchell, who is an orthopedic surgeon, "agreed that surgery appeared necessary but indicated the purpose of [his] review was support for the various compounded creams, patches and ibuprofen orally that was prescribed." On January 22, 2019, Dr. Mitchell retracted his statement that surgery appeared necessary as outside the scope of his review.

The Arbitrator found that Petitioner sustained a sprain/strain of his cervical spine and left shoulder, which resolved by December 2, 2015. The Arbitrator found Petitioner's lumbar spine condition is not related to the work accident. We disagree and find, based on the chain of events, that Petitioner's lumbar spine condition is causally connected to the undisputed work accident. Regarding the disputed prescription medications, we give greater weight to the medical expertise of Dr. Sokolowski, who prescribed these medications with the goal of enabling Petitioner to continue to work as a cab driver. Accordingly, we award the medical and prescription bills in evidence and prospective medical care in the form of the lumbar spine surgery recommended by Dr. Sokolowski.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the medical and prescription bills in evidence pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the surgery and further treatment recommended by Dr. Sokolowski, pursuant to §§8(a) and 8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

AUG 3 - 2020

DATED:
o-06/17/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

20 IWCC0437

DISSENT

I find Petitioner failed to prove the need for additional medical treatment is causally related to his accident. As such, I would deny the requested medical care. Therefore, I respectfully dissent.

On August 2, 2015, Petitioner, a taxicab driver, sustained injury as a result of an undisputed motor vehicle accident. As the Majority noted, at trial, the parties stipulated to a lessee/lessor relationship. The Workers' Compensation Act requires proof of an employee/employer relationship. Despite no finding by the arbitrator on this requisite issue, Respondent conceded at oral argument such issue was not in dispute.

Petitioner testified, following the collision, he was trapped in his vehicle as the door was jammed due to significant damage to the car. T. 23. According to the Petitioner, the Fire Department of Chicago arrived and used a crowbar in order to remove Petitioner from his vehicle. T. 25. In direct contrast to Petitioner's testimony, the records from the City of Chicago Fire Department evidence Petitioner was ambulatory at the scene upon their arrival. The time interval recorded of 1:12 a.m. when paramedics reached Petitioner and 1:22 a.m. when the ambulance carrying Petitioner departed the scene spans ten minutes. Moreover, the record memorializes Petitioner denied neck or back pain and refused a cervical collar and a back board. Minor damage to the vehicle was noted, and the airbags did not deploy. PX1.

As the Majority noted, immediately following the accident, Petitioner complained of neck and back pain albeit with a normal examination while at Northwest Memorial Hospital emergency room. After waiting approximately two weeks, Petitioner sought treatment from his primary care physician, Dr. Mianowski, who prescribed conservative treatment including physical therapy. Petitioner attended physical therapy throughout August and September of 2015. On September 24, 2015, Petitioner was discharged from physical therapy with 100% range of motion in his back achieved. PX3. On September 29, 2015, Dr. Mianowski performed a physical examination and noted Petitioner's back range of motion was 100% as well as his walking pattern and posture improved. As such, Dr. Mianowski discharged Petitioner from care. *Id.*

On November 20, 2015, almost two months after Petitioner's discharge from medical care, Dr. Sokolowski evaluated Petitioner who presented with low back pain among other complaints to his neck and shoulder with an additional new complaint of radiating pain into his buttocks. Dr. Sokolowski noted bilateral positive straight leg testing for radicular pain. Of note, Petitioner provided a history of the motor vehicle accident wherein he was struck with significant force. PX4. Presently, Dr. Sokolowski is recommending additional treatment for Petitioner's low back specifically surgery.

"An expert opinion is only as valid as the reasons for the opinion." *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC. Dr. Sokolowski predicates his opinion regarding Petitioner's need for surgery on an inaccurate history provided by Petitioner. At trial, Petitioner testified to a serious vehicle collision which left him trapped in his car requiring the fire department to extricate him. Petitioner testified he provided this same history to Dr. Sokolowski. T. 39. Simply put, this history is not true. The City of Chicago Fire Department records tell a vastly different account of the accident. Petitioner was not trapped in his car when the paramedics arrived but was ambulatory outside of his car. Only minor damage was noted to the vehicle, and the airbags did not deploy. Moreover, the entire encounter from initial evaluation of Petitioner at the scene to transportation to the hospital took only ten minutes.

Petitioner provided faulty information to Dr. Sokolowski as to the severity of the collision. More importantly, Petitioner never once complained of radicular symptoms until his evaluation with

Dr. Sokolowski almost four months after his accident. During this four-month period, Petitioner was evaluated numerous times by Dr. Mianowski and underwent 16 physical therapy sessions during which time there are no documented complaints of radicular pain. At the conclusion of physical therapy, Petitioner was virtually pain free notwithstanding his testimony at trial, and his back range of motion had returned to 100%.

I find Petitioner suffered strains to his left shoulder, cervical spine, and lumbar spine which resolved as of September 29, 2015, the date Petitioner reached maximum medical improvement as found by Dr. Mianowski. I find Petitioner's current condition of ill-being and need for medical care is unrelated to his accident of August 2, 2015. Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

ZATORSKI, PRZEMYSLAW
Employee/Petitioner

Case# **15WC042380**

ELSTON TWELVE LLC 4328TX
Employer/Respondent

20IWCC0437

On 4/1/2019, 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 2.41% 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:

2234 CHEPOV & SCOTT LLC
MASHA CHEPOV
5440 N CUMBERLAND AVE #150
CHICAGO, IL 60656

4751 LAW OFFICE OF DEBORAH SCHAEFER
154 W PARK AVE
SUITE 865
ELMHURST, IL 60126

20 IWCC0437

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Przemyslaw Zatorski
Employee/Petitioner

v.

Elston Twelve LLC 4328TX
Employer/Respondent

Case # **15** WC **042380**

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **December 18, 2018 and January 24, 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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **August 2, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer or lessee-lessor 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 partially causally related to the accident.

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

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

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

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

ORDER

Medical benefits

Respondent shall pay directly for reasonable and necessary medical services to Medart, subject to the fee schedule for services rendered from August 13, 2015 to and including September 29, 2015.

Respondent shall pay directly for reasonable and necessary medical services, two MRI's, to Edgebrook Open MRI done on November 30, 2015.

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

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

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

Signature of Arbitrator

April 1, 2019
Date

ICArbDec19(b)

APR 1 - 2019

Przemyslaw Zatorski v. Elston Twelve, LLC 4328TX, No. 15 WC 042380

Preface

The parties proceeded to hearing December 18, 2018, and January 24, 2019, on a Request for Hearing indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to the injury; whether Respondent is liable for certain unpaid medical bills; and whether Petitioner is entitled to prospective medical care. The hearing proceeded on a Petition for an Immediate Hearing under Section 19(b) of the Act. The parties did not place at issue Petitioner's earnings or average weekly wage. No transcript was ordered. Petitioner was the only witness. There was no medical testimony, and although certain medical records were admitted into evidence, they are not conclusive proof of the matters therein. 820 ILCS 305/16. Petitioner's Exhibit 11 was excluded pursuant to Illinois Rule of Evidence 803(8) and People v. Grant, 216 Ill. App. 3d 348, 357 (1991) (written police reports not admissible because they contain conclusions or are hearsay). Arbitrator's Exhibit 1; Arbitrator's Exhibit 2.

Findings of Fact

Przemyslaw Zatorski (Petitioner), a 52 year old male, testified that on August 2, 2015, he was a cab driver and had been one since 2001. Although there was no testimony for whom Petitioner drove, the parties have stipulated Petitioner's and Respondent's relationship was one of lessee and lessor. Petitioner testified he was struck by a small passenger car that ran a red light in the intersection of Randolph and Dearborn in Chicago. He then was pushed into another car. Petitioner told Dr. John Cherf the vehicle that hit him was a taxi. Petitioner testified it was a heavy impact, that he had to be pried out of the taxi by the fire department. He said he hit his head and shoulder. Petitioner also testified he was wearing a seatbelt. Arbitrator's Exhibit 1; Respondent's Exhibit 1 at 1.

Petitioner testified the fire department arrived. The records of the Chicago Fire Department indicate EMS arrived at Randolph and Dearborn to the scene of a motor vehicle collision. Petitioner was not wearing a seatbelt and was not entrapped. He was ambulatory at the scene and refused an IV, cervical collar, or backboard. They found minor damage to the taxi. Petitioner complained of jaw pain and abdominal paid. He *denied pain to his neck or back.* Petitioner was taken to Northwestern Memorial Hospital. Petitioner's Exhibit 1 at 1.

Petitioner testified that while at Northwestern, he told the truth to doctors. The records of Northwestern indicate Petitioner's language was English and required no assistance with communication. The records of Northwestern are conflicting on two matters. They indicate at one point, Petitioner denies neck pain and in another, he has soreness behind his neck. In another, they indicate Petitioner complained of jaw pain and in another place, the jaw is not painful, and in another his chief complaint was jaw pain. The only seemingly consistent things

that can be gleaned from these records are that: Petitioner now denied abdominal pain; Petitioner had back stiffness; and was diagnosed with an MVC and high blood pressure. The notes indicate spinal injury is unlikely, given a lack of tenderness. Petitioner was told to follow up with his primary care physician or community health clinic and discharged. Petitioner's Exhibit 2 at 2, 6, 3, 4, 5, 11, 17.

Petitioner testified he went to work the next day. As will be discussed, Petitioner has never been off work since the accident. Petitioner testified he saw Dr. Anna Mianowski, finding her in the Polish Yellow Pages. The records of Medart Institute indicate Petitioner saw Dr. Mianowski August 13, 2015, *two weeks* after the accident. There was no evidence presented of Mianowski's education, training, certifications, licenses, experience, or specialty submitted by either party. The records of Medart indicate Petitioner complained of abdominal pain, abnormal urination, weakness, neck pain, back pain, left shoulder pain, headaches and dizziness. No history was noted by Mianowski. Her diagnosis was obscure, to say the least: MVC; other unspecified injury to unspec site; other unspec injury to face and neck; other unspec injury to shoulder and upper arm; abdominal pain, unspec site; and lumbago [an older medical term often used to describe chronic low back pain]. Her plan was to treat Petitioner with Tylenol and educate him on over the counter medication and proper diet. She planned lab tests but did not indicate what tests or why they were needed. Notably, she sought no diagnostic testing or indicated she was aware of his treatment at Northwestern or saw those records. Petitioner was referred for physical therapy. Petitioner's Exhibit 3 at 12, 14. Respondent's Exhibit 1 at 2. The physical therapy notes are largely illegible.

Petitioner saw Mianowski three more times: August 22, 2015; September 3, 2015; and September 24, 2015. Petitioner testified he was discharged September 2015, but the notes of Medart of September 29, 2015, simply indicate a return to office as needed. The diagnosis for abdominal pain and lumbago evaporated, and treatment included education for sprains and strains. Petitioner was prescribed 600 mg of Ibuprofen and Dyazide [used for high blood pressure] and physical therapy. The prescription for Ibuprofen seemingly rebuts the note of December 29, 2015, of Dr. Sokolowski that "[Petitioner's] physician advised him to avoid regular use of Ibuprofen in light of his hypertension." By Petitioner's last visit, Mianowski noted his neck ROM at 98%, shoulder ROM at 89%, and back at 100%. She recommended a home exercise program. No diagnostics were ever performed. Petitioner was never off work or advised to take off work. Petitioner's Exhibit 3 at 9, 5, 1, 11, 7, 3; Petitioner's Exhibit 4 at 11.

What is uncommon is, in the medical records of Medart are pages of accident information, a narrative of the accident, and a police report. These do not show medical treatment given to Petitioner and are contrary to the purpose of Section 16 of the Act. I disregard them entirely. Moreover, in light of the exclusion of Petitioner's Exhibit 11, one would not expect Petitioner to quietly leave the report buried in Petitioner's Exhibit 3 without apprising Respondent or the Arbitrator.

Petitioner testified he continued to work and performed home exercises.

Two months later, after continuing to work as a taxi driver, and undergoing no medical treatment, Petitioner testified he sought out Dr. Mark Sokolowski. Petitioner told Dr. John Cherf he self-referred to Sokolowski, based on the recommendations of a friend. The records of Sokolowski indicate Petitioner was seen in consultation at the request of Dr. Mianowski. There are no notes of Mianowski of a consultation with Sokolowski. Respondent's Exhibit 1 at 2; Petitioner's Exhibit 4 at 4-5; Petitioner's Exhibit 3 at 3. In my view, this sharply impacts the credibility of both Petitioner and Sokolowski. Like Mianowski, there was no evidence presented of Sokolowski's education, training, certifications, licenses, experience or specialty submitted by either party.

The records of Sokolowski state Petitioner was first seen November 20, 2015. Petitioner misrepresented that he was a seatbelt wearing driver in an accident. Sokolowski had no records from either Northwestern or Mianowski, or any imaging studies. Sokolowski acknowledged Petitioner continued to work. Petitioner testified Sokolowski told him to take off work, but nowhere in his records is there any such recommendation. In fact, the Work Duty Status Reports in the records all indicate no restrictions, full duty. Sokolowski never diagnosed Petitioner, but merely gave an assessment/plan, clearly written for use in litigation, indicating a radical expansion of Petitioner's complaints: cervical pain; cervical radiculopathy; left shoulder rotator cuff tendonitis; possible tear; lumbar pain, lumbar radiculopathy. He recommended various MRI's and fitted Petitioner for a semirigid lumbosacral orthosis. Petitioner's Exhibit 4 at 4-5, 6, 12.

Three MRI's were done on Petitioner: one of the lumbar spine December 3, 2015; one of the cervical spine November 30, 2015; one of the left shoulder November 30, 2015. As to the lumbar spine, the impression was: at L5-S1, 3-4 mm broad based subligamentous posterior disc herniation with mildly extruded nucleus pulposus, noted to elevate the posterior longitudinal ligament and indent the ventral surface of thecal sac. As to the cervical spine, the impression was: at the C3-C4, C4-C5, and C5-C6 as well as C6-C7, levels 2-3 mm, 3-4 mm, 3-4 mm, and 2-3 mm subligamentous posterior disc protrusions/herniations respectively are noted to indent the ventral surfaces of thecal sac with mild spinal stenosis and bilateral neuroforaminal narrowing seen at C4-C5 and C5-C6 levels. As to the left shoulder: the rotator cuff was intact; rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon. Petitioner's Exhibit 5 at 1, 3, 6.

The records of Sokolowski state Petitioner was seen December 29, 2015. Sokolowski indicates he has reviewed the MRI of lumbar spine and states there is a disc herniation at L5-S1 with stenosis. He states an MRI of the left shoulder demonstrates tendonitis without cuff tear. He states an MRI of the cervical spine demonstrates relative kyphosis maximal at C5-6 with disc pathology from C3-7 with resultant overall canal stenosis and foraminal stenosis. Sokolowski's assessment is the same except for abandoning a cuff tear. He recommended steroid injections to the lumbar spine with "an independent pain physician." That proved to be fiction, as he referred Petitioner to the physician. Despite acknowledging Petitioner's physician, presumably Mianowski, telling him to avoid regular use of Ibuprofen, Sokolowski prescribed 600 mg of Ibuprofen and also Dendracin, an anti-inflammatory. There is no explanation of what the MRI's

mean for Petitioner, and no explanation why Petitioner's prescriptions might have been filled by a Florida business of undetermined connection to Sokolowski or Petitioner. Petitioner's Exhibit 4 at 10-11; Petitioner's Exhibit 8 at 1; Petitioner's Exhibit 6.

Petitioner submitted to an independent medical examination on January 6, 2016, with Dr. John Cherf, a board certified orthopedic surgeon and Chief of Orthopedic Surgery at Advocate IMMC. He has practiced for almost 30 years. Petitioner was scheduled for an evaluation of the cervical spine and left shoulder. Cherf did a physical examination of Petitioner, took a history, reviewed the records of Medart and Sokolowski. He also reviewed the MRI's of Petitioner's cervical spine and left shoulder. Petitioner told Cherf he works full time as a cab driver, full duty with no restrictions. He had not missed work. Petitioner's chief complaint was pain in raising his left arm and a noise with movement of his neck. At five foot eight inches and 249 pounds, Cherf considered Petitioner obese. Cherf concluded Petitioner sustained a work related sprain/strain of the cervical spine and sprain/strain and possible contusion to the left shoulder. He said it was possible Petitioner experienced temporary exacerbation of degenerative changes fin the cervical spine, but no temporary exacerbation of a preexisting condition of the left shoulder. Cherf believed the treatment Petitioner received for his cervical spine and left shoulder was somewhat prolonged and should not require any active treatment at this time. He considered Petitioner at MMI not later than December 2, 2015. Respondent's Exhibit 1 at 1, 3, 4, 5; Respondent's Exhibit 1a.

Evidently prompted by the examination by Dr. Cherf, Petitioner called Sokolowski for an "urgent appointment," and saw him January 7, 2016. Petitioner had told Cherf he had no follow-up appointments with Sokolowski. Respondent's Exhibit 1 at 2. Sokolowski's records state "... his collision related back pain increased..." Petitioner reported dramatic increase in pain to his back (not indicating cervical or lumbar) and neck. While saying driving was aggravating his symptoms, Petitioner continued to drive. Sokolowski recommended a lumbar injection and continued full duty. Petitioner's Exhibit 4 at 22.

Despite telling Dr. Cherf he was concerned about getting injections, Petitioner underwent a lumbar epidural steroid injection at L5-S1 on January 23, 2016, with the "independent pain physician" who was really referred by Sokolowski. The notes of Dr. Neema Bayran of Illinois Back & Neck Institute state "He [Petitioner] states that his back pain is much worse than his back pain." Bayran, in reciting the history given him by Petitioner, stated "the patient state that the car passive road light and hit him on the passenger side." Respondent's Exhibit 1 at 2; Petitioner's Exhibit 8 at 1.

Petitioner returned to Sokolowski February 29, 2016. Sokolowski's records state the injections did not diminish Petitioner's back pain. Although Petitioner told Bayran his left shoulder pain was much better, Sokolowski said it was 7-8/10. Sokolowski indicated he reviewed the IME, and seemingly cherry picked portions for inclusion in his notes. Despite the fact Petitioner has worked consistently, at full duty, full time since the accident, Sokolowski inexplicably recommended an FCE. He did so despite never indicating Petitioner should be off work, or work with restrictions at all, even in the face of Petitioner's telling him during the

"urgent appointment" that driving was aggravating his symptoms. Petitioner's Exhibit 4 at 26-27; Petitioner's Exhibit 8 at 2.

The records of ATI Physical Therapy indicate Petitioner had a Functional Capacity Assessment March 16, 2016. His occupational physical demand level, as a cab driver, was medium. Petitioner's demonstrated physical demand level was medium. Petitioner's Exhibit 9.

Petitioner returned to Sokolowski April 11, 2016, eight months post accident. Sokolowski grossly misstates the FCA, stating "He is limited to sitting for 60 minutes at a time, with a total of five to six hours of sitting each work day." His recommendations try to modify the FCA and suggest Petitioner really cannot do his job. He prescribed another lumbar injection. Petitioner's Exhibit 4 at 29-30; Petitioner's Exhibit 9 at 27.

On April 13, 2016, Dr. Cherf issued an addendum to his IME of January 6, 2016, in which he found no medical indication for the orthotic given Petitioner by Sokolowski. Respondent's Exhibit 2 at 2.

Petitioner underwent another lumbar epidural steroid injection at "L5-S!" [*sic*] with Dr. Bayran on April 22, 2016. Bayran acknowledged being referred by Sokolowski. Bayran's notes state "He states his back pain is much worse than his back pain." Petitioner's Exhibit 8 at 3.

Petitioner again returned to Sokolowski May 20, 2016, who noted a short period of improvement with a return of symptoms. Sokolowski referred to an MRI but did not identify the date it was taken. He began the notion Petitioner was a candidate for lumbar laminectomy and discectomy. Petitioner's Exhibit 4 at 31-32.

Petitioner underwent a third lumbar epidural steroid injection at "L5-S!" [*sic*] with Dr. Bayran. Contrary to Sokolowski, Bayram stated Petitioner "reports significant relief after his second injection." Petitioner's Exhibit 8 at 5.

Petitioner again returned to Sokolowski June 7, 2016. Sokolowski noted the third injection did not significantly improve Petitioner's pain. Sokolowski states Petitioner wants surgery. Petitioner's Exhibit 4 at 34-35.

Petitioner submitted to another Independent Medical Examination on July 13, 2016, with Dr. John Cherf. This was scheduled for an evaluation of the lumbar spine. Cherf reviewed additional medical records of: Sokolowski; MRI's of the left shoulder and lumbar spine; Dr. Bayran; and the FCA. Cherf also examined the lumbar spine. He noted Petitioner is working full time, full duty with no restrictions, and worked the day of the examination. Cherf found the etiology, the cause, of the findings of the MRI of the lumbar spine and *potential* correlation with the injury in questions was unclear. He could not determine if the disc pathology in the MRI of December 3, 2015, was preexisting or the result of the injury. He thinks it is *possible* Petitioner had a temporary exacerbation of a preexisting disc pathology. He thought the epidural injections were reasonable under the circumstances but questioned the efficacy in patients like Petitioner. Cherf noted Petitioner was working full duty and could continue to work. He said his examination of Petitioner's lumbar spine was really unremarkable with negative tension signs. He would not recommend surgery because Petitioner was getting along fairly well and working

full time. Completely contrary to Sokolowski's notes, Petitioner told Cherf he prefers not to have spine surgery. Respondent's Exhibit 3 AT 1, 3, 4, 5.

Petitioner again returned to Sokolowski September 26, 2016, who stated Petitioner had undergone an EMG. Sokolowski states the EMG was dated September 6, 2016. A Nerve Conduction and EMG report authored by Dr. B. Shahan noted "low ampliture H reflex with mildly prolonger\d latency on both sides inconsistent with the clinical diagnosis of L5-S1 radiculopathy." How Shahan was aware of that clinical diagnosis is left unexplained. Sokolowski stated Petitioner was a candidate for L5-S1 laminectomy and prescribed and dispensed a home TENS Unit. Petitioner's Exhibit 4 at 36-37; Petitioner's Exhibit 10.

Dr. Cherf prepared an addendum to his previous independent medical examinations, finding the EMG, done 13 months post injury, had no abnormal unilateral findings that could be correlated with the injury. He further found the indication, use, and efficacy of the TENS Unit unclear, as well as the lack of clarity of the condition for which is was provided. Respondent's Exhibit 4 at 1, 2.

Petitioner returned to Sokolowski seven more times, with the last visit January 7, 2019, over three years from his motor vehicle accident. He had a new motor vehicle accident, which he testified was a fender bender. During those visits, Sokolowski stated Petitioner's symptoms were intolerable, that he couldn't stand, walk or sleep, that he was incapable of tolerating his symptoms, that his pain was nearly unbearable, and that his symptoms were nearly unbearable. Sokolowski stated on January 7, 2019, a UR reviewer, Dr. Mitchell, agreed surgery was unnecessary. That is blatantly untrue. Dr. Alfred Mitchell stated he could not weigh in on whether or not the surgery requested by Dr. Sokolowski was medically necessary, he did not review a request for surgery or medical records related to a surgical request. Petitioner's Exhibit 4 at 39-40, 42-43, 46-47, 48-49, 50, 51; Respondent's Exhibit 10A.

While Sokolowski was stating the intolerable, unbearable conditions of Petitioner, Petitioner was working full duty, full time as a taxi driver and, as he testified, signed up as a driver for Uber. Sokolowski never put any restrictions on Petitioner or kept him off work.

A thorough review of the records of Sokolowski reveal all he did to Petitioner was refer and recommend. He prescribed Ibuprofen, which he said Petitioner's physician cautioned him from taking, and that it was not medically necessary; and Dendracin that was not medically necessary. He gave Petitioner a lumbosacral orthosis without a medical indication for doing so. He prescribed a home TENS Unit without clear reasons. The lumbar injections failed and the FCA indicated what was already happening—Petitioner could do his job.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish the elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and employment. Navistar International Transportation Corporation v. Industrial Commission

(Diaz), 315 Ill. App. 3d 1197, 1202-1205 (2002). A claimant must prove that some act or phase of employment was a causative factor in the injury. Vogel v. Illinois Worker's Compensation Commission, 345 Ill. App. 3d 780, 786 (2005).

In this case, I find as a conclusion of law, Petitioner sustained a sprain/strain of his cervical spine and left shoulder, which resolved by December 2, 2015, which is when Petitioner should have reached MMI. I find no causal connection between Petitioner's lumbar symptoms and the motor vehicle collision of August 2, 2015.

I rely on the records of the Chicago Fire Department and Northwestern Hospital, which found a back injury unlikely. I also rely on the records of the Medart Institute and the treatment there of Petitioner, as musculoskeletal sprains and strains. I further rely on the examination of Petitioner by Dr. John Cherf and his finding of a sprain/strain of the cervical spine and left shoulder. I do not rely on his equivocal speculation Petitioner had a possible contusion to his left shoulder or possibly exacerbated degenerative changes in his spine. He could not tell if the findings of Petitioner's MRI of his lumbar spine was preexisting or a result of the injury, nor did he find a correlation with the injury. I do not rely on his equivocal speculation Petitioner possibly had exacerbation of preexisting dis pathology in his lumbar spine.

There is a two month gap between Petitioner's being released by Mianowski and his murky finding of Sokolowski. Sokolowski's records are not conclusive proof of their contents. He appears to be merely a conduit, and I give him no weight on this issue for the reasons referred to above.

Disputed issue J is whether Respondent is liable for certain unpaid medical bills reflected on the attachments to the Request for Hearing. An employer shall pay, according to a fee schedule or negotiated rate, all necessary first aid, medical services and hospital services incurred reasonably required to cure or relieve from the effects of an accidental injury. 820 ILCS 305/8a.

Petitioner claims he is entitled to $1,914.00 for Medart and Dr. Mianowski. The problem with the "bills" submitted in Petitioner's Exhibit 3 is that there are no discernable bills, only health insurance claim forms, which offer no explanation of the charges, and certainly not the amount claimed. I award payment by Respondent to Mianowski, subject to the fee schedule, of unpaid bills for services rendered Petitioner from August 13, 2015, to and including September 29, 2015. Respondent shall pay these directly.

Petitioner claims he is entitled to $6,325.00 for Dr. Mark Sokolowski. I find none of whatever Sokolowski sought to do was reasonable or necessary and Respondent not liable for that amount.

Petitioner claims he is entitled to $2,400.00 for Edgebrook Open MRI. I find that the MRI for cervical spine and left shoulder could have and should have been done by Northwestern or Medart, and concern the injuries sustained by Petitioner. No award is made for the December 3, 2015, MRI of the lumbar spine done after Petitioner should have reached MMI. The problem with the submissions in Petitioner's Exhibit 5 is that there are no discernable bills, only Health

Insurance Claim Forms which offer no explanation of the charges and are directed to the law firm. Respondent shall pay directly, subject to the fee schedule, for the MRI's done November 30, 2015.

Petitioner claims he is entitled to $27,300.60 for Prescription Partners. I find no evidence in the records of any treating physician of a connection to Prescription Partners, certainly none in Sokolowski's records. Petitioner's Exhibit 6 contains only Health Insurance Claim Forms, which are not bills. Because of the findings on causal connection and in reliance on Respondent's Exhibits 8 and 10, no award is made to Prescription Partners. I note no testimony by the Petitioner was offered regarding this entity or how or where he received any prescriptions.

Petitioner claims he is entitled to $18,082.75 for Illinois Back and Neck. Again, Petitioner's Exhibit 7 contains only Health Insurance Claim Forms, which are not bills. They reference no doctor or discernable services. It appears Petitioner references them to the injections done by Bayram. No award is made for those services because of the finding on causal connection.

Finally, Petitioner claims he is entitled to $2,594.88 for ATI Physical Therapy, which is the FCA. Such claim is denied. I rely on the finding on causal connection. I find a complete lack of medical necessity or any coherent explanation for such assessment in circumstances where the Petitioner had worked continuously for almost a year and had never been advised to be off work or do only light duty. The finding of the FCA speaks to the uselessness of the assessment. Such claim is denied.

Disputed issue K is, is Petitioner entitled to any prospective medical care, specifically, a recommendation for lumbar laminectomy and discectomy. I find as a conclusion of law, he is not. I rely on my findings on causal connection and also the opinion of Dr. Cherf. Petitioner's lumbar problems were not caused by the motor vehicle accident.

Arbitrator

4-1-19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASEY MEYER,

Petitioner,

vs. NO: 18 WC 28592

ARAMARK,

20IWCC0438

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causation, but attaches the Decision of the Arbitrator, which is made a part hereof, for the Findings of Fact with the modifications noted 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 finds that Petitioner failed to prove that her current left hand and wrist condition is casually related to her stipulated accident on August 21, 2018. Petitioner testified that she began working for Respondent in June 2018. *T.14.* Her first injury (left hand/wrist) occurred on August 21, 2018. She continued to work with restrictions for the left hand and sustained the second injury (right hand/wrist) on September 5, 2018. That accident is addressed in our decision issued in case number 18 WC 28966. Petitioner argues that causation is established by a chain-of-events analysis because "prior to dates of injury, Petitioner's hands and wrists were fine" along with Dr. Goldfarb's "favorable causal opinion." *P-brief at 13.* The Arbitrator found Petitioner "creditable" that she "did not experience any significant hand/wrist pain prior to the work injuries and her hands/wrists have not been pain-free since the work injuries." *Dec. at 8.* The Arbitrator found Dr. Goldfarb to be more persuasive than Respondent's §12 physician, Dr. Rotman. Respondent argues that the Arbitrator did not

adequately consider and address Dr. Rotman's opinion and the "decision is completely devoid of any discussion regarding Dr. Rotman's testimony regarding his findings on examination." *R-brief at 13.*

Regarding causation, Dr. Goldfarb testified that "all I really have to go on is her report to me, and based on her report to me, I think that the injury was contributing or was the cause of her [left] wrist pain." *Px8 at 14.* He had the same opinion about the right wrist. *Id.*

Although Petitioner's August 29, 2018 left wrist CT arthrogram showed a central triangulofibrocartilage (TFC) tear, Dr. Goldfarb noted that, at his October 22, 2018 examination, Petitioner had no laxity between the bones, deviating her wrist did not recreate the pain, and Petitioner had no swelling. *Px8 at 8-9.* She did have decreased strength but his assessment was "it was difficult to localize her pain." *Id.* He was also uncertain whether the TFC was the source of Petitioner's pain because he was not able to correlate her pain with the imaging. *Id. at 9.* He stated, "Doesn't mean they didn't correlate, but my examination wasn't necessarily consistent with a TFC being the source of her pain." *Id.* The extent of Dr. Goldfarb's causation opinion was that a TFC tear "could have been" the source of her pain. *Id.*

Respondent's §12 physician, Dr. Rotman, testified that the TFC "tear" was just a "little perforation…a pinhole lesion," which is a "pretty normal finding." *Rx1 at 13.* He testified that he tested Petitioner for ulnar impaction, which is a sign to see if the TFC is tender, but Petitioner actually had pain on the opposite side of the wrist at the base of the thumb. *Id. at 16.* Petitioner had areas of local tenderness but nothing that could be pinpointed as an actual problem. *Id.* He opined that Petitioner has no injury of the left upper extremity and the pinhole lesion in the TFC is a normal finding at her age and not the source of Petitioner's pain because her pain was not in that same area. *Id. at 18.*

Dr. Goldfarb testified that a pinhole perforation is the same as a tear and it would be very hard to determine its size unless they are seen arthroscopically. *Px8 at 16.* However, he was "not suggesting etiology" and testified that it could be age-related or related to trauma, "so I can't comment on that." *Id.*

We do find it interesting that Petitioner testified she suffered a previous brachial plexus injury to her right arm and shoulder in 2010, which resulted in a Missouri workers' compensation claim that was settled "based on approximate disability of 60 percent of the right shoulder." *T.18-19.* Although this previous right arm injury would normally not seem relevant to Petitioner's current left-hand condition, Petitioner did not testify about how long she had been off work between her 2010 brachial plexus injury and when she began her job at Respondent. We do not know when Petitioner settled that 2010 claim. We also note that the October 26, 2018 Athletico physical therapy record indicates that Petitioner's past medical history "includes history of broken back with spinal fusion in January." This is confirmed by Dr. Rotman's report, dated October 29, 2018, that Petitioner reported to him that her past surgical history included "an L5 spinal fusion in 2018." *Rx1-DepRx2 at 3.* Therefore, Petitioner had recently undergone a spinal fusion in January 2018 and only began working for Respondent in June 2018. The evidence seems to indicate that Petitioner's job with Respondent was her first attempt to return to work in quite some time; possibly years. We find that Petitioner's subjective left-hand symptoms were more likely than not a result of deconditioning and a long absence from the workforce as opposed to any discrete, anatomic injury sustained on August 21, 2018.

20IWCC0438

The Commission finds that, although Petitioner may have experienced some left wrist pain, she failed to prove that her August 21, 2018 injury caused, aggravated or contributed to the TFC tear. Dr. Goldfarb's opinion was based strictly on what Petitioner reported to him. He was unable to explain how any alleged mechanism of injury caused or contributed to any specific pathology or was medically correlated with any of Petitioner's symptoms. Regarding Dr. Rotman's opinion that Petitioner's CT arthrogram findings were normal and age-related, Dr. Goldfarb testified, "I can't disagree with Dr. Rotman but I also can't agree with him." *Px8 at 16.* Based on all of the evidence, we find Dr. Rotman's opinion most persuasive that, at the time of his examination on October 29, 2018, Petitioner had no injury of the left upper extremity.

We therefore award the medical bills in evidence for Petitioner's left-hand treatment through the date of Dr. Rotman's §12 examination on October 29, 2018, subject to the fee schedule in §8.2 of the Act. We find that any prospective medical care for the left hand recommended by her physicians is not causally related to her August 21, 2018 accident. Finally, Petitioner was not taken off work until September 14, 2018, and this was done by Dr. Neighbors due to her subsequent right-hand accident. We find that Petitioner failed to prove that she is entitled to any temporary total disability benefits related to the instant case and, instead, address this issue in case number 18 WC 28966, which is Petitioner's right-hand claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the medical expenses in evidence related to treatment for her left hand through October 29, 2018, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,000.00. 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: AUG 5 - 2020

Maria E. Portela

Kathryn A. Doerries

Thomas J. Tyrrell

SE/
O: 6/9/20
49

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

MEYER, CASEY
Employee/Petitioner

Case# **18WC028592**

18WC028966

ARAMARK
Employer/Respondent

20IWCC0438

On 9/30/2019, 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:

0384 NELSON & NELSON AAL PC
NATHAN C LANTER
420 N HIGH ST
BELLEVILLE, IL 62220

2337 INMAN & FITZGIBBONS LTD
COLIN MILLS
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

20IWCC0438

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Casey Meyer
Employee/Petitioner

v.

Aramark
Employer/Respondent

Case # **18** WC **28592**

Consolidated cases: **18 WC28966**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **8/8/19**. 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 _____

20IWCC0438

FINDINGS

On the date of accident, **8/21/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,532.56**; the average weekly wage was $**471.78**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**1,919.70** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,919.70**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $19,983.12, as set forth in Petitioner's exhibit 7, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical care to Petitioner's left hand and wrist as recommended by Dr. Goldfarb and/or Dr. McCleary, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $319.00/week for 18 2/7 weeks, commencing 9/14/18 through 11/4/18 (7 3/7), and 11/12/18 through 1/26/16 (10 6/7), as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $1,919.70 for temporary total disability 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.

Michael K. Nowak, Arbitrator

9/24/19
Date

ICArbDec19(b)

BACKGROUND

Petitioner suffered two undisputed injuries while working for Respondent. Both claims were consolidated for trial. 18 WC 28592 involves injuries to Petitioner's left hand and wrist which were sustained on August 21, 2018. 18 WC 28966 involves injuries to the right hand and wrist which were sustained on September 5, 2018.

This matter proceeds to hearing on Petitioner's 19(b) Petitions for prospective medical care, specifically, for the care and treatment recommended by Dr. Goldfarb, past medical expenses, and temporary total disability benefits. Respondent stipulated Petitioner sustained work-related injuries, but disputed liability on the basis of causal relationship. Respondent denied liability for some of the medical expenses incurred by Petitioner, denied Petitioner's need for prospective medical care, and denied TTD benefits.

FINDINGS OF FACT

Petitioner worked for Respondent as a bulk fold and belt operator, sorting and folding soiled and clean items onto conveyor belts and industrial hampers, as well as carrying large bags of napkins, towels, and aprons.

Petitioner testified that prior to August 21, 2018 she had not suffered any injuries to her left hand or wrist. She had also not experienced any significant left hand or wrist pain. Prior to August 21, 2018 she was able to fully perform her job duties. She is right hand dominant.

On August 21, 2018 Petitioner, towards the end of her shift, pulled on an industrial size hamper, which was in a row with other hampers. The row was wedged between two support poles. Using both hands, Petitioner's initial tug on the hamper did not move it. Petitioner tugged really hard on the hamper a second time, leaning in and using her body weight. The grip of her right hand slipped off, the hamper broke free, and she felt a "pop" and felt immediate pain in her left wrist. She had never felt anything like this before. She finished her shift and the pain grew worse. She did not report the injury at that time because there were no supervisors on duty when she clocked out.

The next morning Petitioner's left wrist was red and swollen. Her fingers and left hand were also swollen and inflamed. She felt pain on the small finger side of her left wrist. She notified a supervisor about the injury shortly after beginning her shift.

Petitioner initially sought treatment at St. Joseph's Hospital on August 22, 2018. Petitioner advised she had sustained a work-related injury while pulling on a hamper that felt stuck and when she pulled harder, she had a popping sensation in her left wrist followed by pain which radiated towards her elbow. On examination, it was noted Petitioner had tenderness, worst at ulnar side of her left wrist. Left wrist x-rays showed soft tissue swelling which could be consistent with tendon or ligament injury. The impression was wrist pain. An Ace wrap was applied, and pain medication was prescribed. She was instructed to return to ER if the condition worsened and to otherwise follow-up with a hand specialist. (Petitioner's Exhibit 1)

On August 23, 2018 Petitioner was seen by Dr. David Neighbors at HSHS Southern Illinois Division. Dr. Neighbors noted a history of injury consistent with Petitioner's testimony. It was also noted Petitioner's left

wrist was in a brace, she had continued to work, and she was having significant pain. Dr. Neighbors' assessment was disorder of the ulna / radius / wrist joint(s) triangular fibrocartilage tear left wrist. He recommended Petitioner undergo a left wrist MRI, cease offending physical activity, keep the wrist immobilized, anti-inflammatory medication, and no work with her left upper extremity. (Petitioner Exhibit 3)

The Respondent accommodated Petitioner's restrictions. On August 29, 2018 Petitioner underwent a left wrist CT arthrogram, which showed evidence of a tear of the triangular fibrocartilage. (Petitioner's Exhibit 2)

On September 5, 2018 Petitioner returned to HSHS Southern Illinois Division and was seen by Dr. Marc McCleary. Petitioner reported a new work-related injury to her right wrist. Dr. McCleary told Petitioner to follow-up with Dr. Neighbors. (Petitioner's Exhibit 4)

On September 6, 2018 Dr. Neighbors examined Petitioner for both wrists. He prescribed physical therapy, told her to use a splint and a sling, and provided work restrictions of no lifting. He opined that due to her left triangular fibrocartilage injury, along with the injury to her right hand/wrist, she would only be able to do desk type work. He kept her off work for two weeks. (Petitioner's Exhibit 3)

On September 10, 2018 Petitioner began physical therapy at St. Joseph's Hospital primarily for her right wrist, but a history of the work-related left wrist injury was noted. Petitioner attended a total of six physical therapy sessions from September 10, 2018 through September 24, 2018. (Petitioner's Exhibit 1)

On September 14, 2018 Petitioner returned to Dr. Neighbors, who noted the Respondent was making Petitioner fold napkins and she was having increased right-hand symptoms. Dr. Neighbors had told the Respondent it was acceptable for Petitioner to do this as long as she could perform the folding while wearing braces on each wrist. Petitioner told Dr. Neighbors she was unable to do this while working with both wrist braces because she was not able to wear the right wrist brace and perform her job duties. Dr. Neighbors kept Petitioner off work until she was seen by a hand surgeon. (Petitioner's Exhibit 3)

Petitioner testified consistently with the history Dr. Neighbor took on September 14, 2018 about the difficulties she had while working under restrictions and folding napkins and how that work increased her symptoms.

On September 20, 2018 Dr. Donald Bassman examined Petitioner. Dr. Bassman's history of Petitioner's work-related left-hand injury was consistent with Petitioner's testimony at trial. On physical exam, he found left hand ulnar and radial deviation of ten degrees produced wrist pain, and he noted she was tender over the radioulnar joint and the triangular fibrocartilage. His diagnosis was a tear of the left wrist triangular fibrocartilage. He recommended she be examined by a hand surgeon. (Petitioner's Exhibit 6)

On September 26, 2018 Petitioner returned to Dr. Neighbors, who kept her off work until further evaluation and treatment from a hand surgeon. (Petitioner's Exhibit 3)

On October 22, 2018 Petitioner saw Dr. Goldfarb, who took a history consistent with Petitioner's testimony. He noted she had left hand pain ever since the injury and she had tried therapy, ice, elevation, bracing, and Motrin. He reviewed the CT arthrogram and believed it showed a likely central TFCC tear. Dr. Goldfarb's diagnosis was left wrist pain and a possible TFCC tear. He recommended a course of therapy with

immobilization before considering diagnostic/therapeutic injections. Dr. Goldfarb provided the following restrictions: may use injured hand assisting on light tasks; avoid lifting more than 5 lbs with her left hand; avoid pushing, grasping, pulling twisting, vibratory tools, repetitive movements, climbing, or unprotective heights. He recommended occupational therapy and to follow-up in four weeks. (Petitioner's Exhibit 5)

Petitioner attended nine physical therapy sessions from October 26, 2018 through November 16, 2018 at Atletico Physical Therapy. (Petitioner's Exhibit 9). At the initial evaluation, the therapist noted Petitioner reported she enjoyed her job and wanted to return to work. The therapy was for both hands / wrists. On October 31, Petitioner told the therapist she returned to work yesterday and she was told to sort soiled linens, towels, rags, napkins, tablecloths, and mops, which required grasping, pulling, pushing, pulling, and untying knots, and it was extremely painful. On November 2, 2018 Petitioner informed the therapist she was informed by her employer that coverage for therapy would be discontinued, so she provided her private insurance information to Athletico. On November 5, 2018 Petitioner told the therapist she went to work that morning and after 45 minutes her right wrist was painful, so she left work and went to the emergency room. Petitioner also told the therapist her left wrist was feeling better than before starting therapy and her right wrist pain was overshowing her left wrist pain. On November 12, 2018 and November 14, 2018, the therapist noted Petitioner was making some objective and subjective improvements in her left wrist. Petitioner testified the therapy did not provide lasting relief from her symptoms. On November 16, 2018 the therapist noted Petitioner demonstrated steady progress, with her overall active range of motion, grip and pinch strength, and reported functional use having all improved. The therapist also noted Petitioner had been compliant with HEP and visit attendance and had put forth good effort with all requested clinic activities. Petitioner was discharged from therapy on December 28, 2018 after she informed Athletico she was unable to pay her deductible to continue therapy with use of her private health insurance. Petitioner testified the therapy did not provide lasting relief from her symptoms.

On October 26, 2018 Petitioner saw Dr. Rotman at Respondent's request for a Section 12 exam. Dr. Rotman believed Petitioner could return to work without restrictions.

Petitioner testified she received TTD benefits from the Respondent until October 26, 2018. Petitioner remembered signing a Modified Work Order on October 29, 2018. (Respondent's Exhibit 7). The Respondent was not able to accommodate Dr. Goldfarb's restrictions until November 5, 2018. Petitioner attempted to return to work on November 5, 2018. Respondent changed Petitioner job from "bulk fold" and "incoming soil". The job required Petitioner to separate soiled clothing items and throw them into corresponding hampers. Petitioner testified she was not able to work as fast as she could before her left hand/wrist injury. Petitioner also testified, while performing this work, a co-worker threw a bag of wet towels on top of her hands while she was sorting soiled towels, which caused pain and her fingers to swell. The last day Petitioner worked for the Respondent was November 11, 2018.

On November 12, 2018 Petitioner returned to Dr. Marc McCleary, who took her off work due to right wrist pain being exacerbated by work. On December 3, 2018 Dr. McCleary instructed Petitioner not to work until being further evaluated by Dr. Goldfarb.

On December 12, 2018 Petitioner returned to Dr. McCleary, who noted Petitioner's complaints of bilateral wrist pain, right greater than left, and it was affecting her ability to accomplish activities of daily

living. Physical exam showed grip strength weakness, right hand greater than left hand. The impression was bilateral numbness and tingling of hands. Dr. McCleary referred her for a neurology exam and possible nerve conduction studies. He prescribed Mobic and Elavil.

Petitioner testified the Respondent terminated her employment on or around December 29, 2018. She has not returned to Dr. Goldfarb because the Respondent has not authorized payment for the appointment.

Petitioner testified on January 26, 2019 she began working for a different employer, Cato, which is a women's clothing store, as a part-time sales associate. On May 2, 2019 she was promoted to full time store manager. Her job for the Respondent involved more use of her hands than her work for Cato. She took the job with Cato because she had to provide for her family. The job requires her to occasionally fold clothes, sort through garments on hangers, put garments on hangers, and use a cash register. As store manager she is not constantly repetitively using her hands.

Regarding the current condition of her left hand, Petitioner testified the hand is sore, but it is tolerable, and she is able to function. At the end of the day after performing activities requiring the use of her hand, it gets stiff, swells, and there is a "goose egg" on the right side of her left wrist at the top. She applies ice, rubs it, and tries to keep it elevated. At her current job, if she has too much trouble performing her job duties due to increased pain, she trades jobs with a sales associate. At home, Petitioner testified she has difficulty with twisting motions, opening stuff, opening bottles of water, and opening her car door.

Petitioner testified her left hand/wrist has not been symptom free since August 21, 2018. She has not had any left wrist/hand injury since August 21, 2018.

Regarding the current condition of her right hand, Petitioner testified she has reduced grip strength and when she squeezes too hard, she experiences a sharp shooting sensation through her hand and her grip releases automatically. She testified she's had these symptoms since September 5, 2018.

Petitioner testified her right hand/wrist has not been symptom free since September 5, 2018. She has not had any right wrist/hand injury since September 5, 2018.

She testified her hand symptoms improved quite a bit with physical therapy, but since she was unable to complete the therapy, she tries to do exercises at home that she learned in physical therapy.

Dr. Goldfarb's deposition, taken on April 26, 2019, was submitted into evidence on behalf of Petitioner. He's a board-certified orthopedic surgeon with an added qualification in hand surgery. He's affiliated with Barnes-Jewish Hospital, Children's Hospital. He provides treatment, including surgeries, to the wrist and hand. (Petitioner's Exhibit 8)

Dr. Goldfarb generated two reports, one for Petitioner's left hand and the other for her right hand. Regarding her left hand, Petitioner provided a history of pulling a heavy industrial cart and felt a pop in her wrist on or around August 21, 2018 and had pain and discomfort since that time. Therapy, ice, elevation, bracing and Motrin did not provide relief. Prior to the initial appointment, he was aware she had undergone diagnostic testing of her left wrist. He was aware that in the days, weeks, and months, before August 2018 there was no history of her have any significant left hand or wrist pain or symptoms. Prior to August 2018 she had no difficulty performing her job duties. He reviewed the CT arthrogram film of her left wrist and believe it showed

a likely central TFCC tear, triangular fibrocartilage tear, on the small finger side of her wrist. On physical exam, he found her wrist to stable, there was no laxity between the bones. Deviation of her wrist did not recreate her pain. Her strength was decreased. There was no swelling. It was difficult to localize her pain. Her strength was less with her left hand than her right hand. He noted Petitioner was uncomfortable on physical exam, but he was unable to correlate the pain on exam with the imaging. His exam was not consistent with a TCF being the source of her pain. He testified the TFC could have been the source of her pain. He recommended occupational physical therapy for up to eight weeks, a follow-up appointment in four weeks, with a steroid injection being the next step for symptom relief and for diagnostic purposes. He placed her under restrictions to avoid lifting more than five pounds and to use the injured hand only for light tasks, avoid pushing, grasping, pulling, twisting, vibratory tools, repetitive movements and climbing. Petitioner had not yet followed-up with him.

Dr. Goldfarb believed the treatment he recommended, the occupational therapy and work restrictions, were reasonable and necessary. He did not believe she had reached MMI. He testified the August 2018 work injury was contributing or was the cause of her left wrist pain.

Regarding the right wrist, Petitioner provided a history that on September 5, 2018 she pulled a heavy bag overhead which caused her right wrist to extend sharply and she felt a snapping sensation. Petitioner had mentioned to him that, eight years prior, she had a brachial plexus injury, but he believed this had no bearing on her current injury. She told him she had right wrist pain, aching and sharp with movement since the work-injury. She had undergone therapy without resolution, and she was frustrated with the continued discomfort. He was aware that in the days, weeks, and months, before September 2018 there was no history of her have any significant right hand or wrist pain or symptoms. Prior to September 2018 she had no difficulty performing her job duties. On physical exam, he could not find an area that specifically reproduced her pain. Her strength was pretty good. His assessment was she had pain, but he was uncertain exactly what was the source of her pain. Her x-rays were normal. He recommended a course of therapy hoping this would calm down her symptoms and he would then re-evaluate. He placed her under restrictions to avoid lifting more than five pounds and to use the injured hand only for light tasks, avoid pushing, grasping, pulling, twisting, vibratory tools, repetitive movements and climbing. Petitioner had not yet followed-up with him.

Dr. Goldfarb believed the treatment he recommended, the occupational therapy and work restrictions, were reasonable and necessary. He did not believe she had reached MMI. He testified the September 2018 work injury was contributing or was the cause of her wrist pain.

Regarding prognosis, Dr. Goldfarb felt there was a chance her conditions would get better without surgery, but if her symptoms don't improve on their own, he believed it would take intervention to help her get better. He did not believe she was exaggerating her symptoms. He did not believe she was malingering. He did not believe her complaints of pain were unreliable.

Dr. Goldfarb was asked about Dr. Rotman's opinion that the left wrist CT arthrogram showed a little pinhole perforation rather than a tear. He testified a perforation or tear was one in the same and it is very hard to determine the size of a central TRC tear on a study like a CT arthrogram. Both are tears, both are perforations. He doesn't understand the size of them until he sees them arthroscopically. He was also asked about Dr. Rotman's opinion the CT arthrogram findings were normal and generally age-related. He testified

that if 100 patients who are 50 years or old her examined, it has been estimated that 50 percent of the patients will have a tear like this, with some being symptomatic and many will not be. Petitioner is younger than 50 years old, so the finding could be age-related, or it could be related to her work-injury. He also testified, that unlike Dr. Rotman, he did not find several non-physiologic responses on physical exam. He did not believe that a nerve conduction study or bone scan would be tests he would recommend for her left wrist.

Dr. Goldfarb reviewed August 22, 2018 ER record from St. Joseph's Hospital. (Petitioner's Exhibit 1) He said the history of injury in the record "basically says the same thing" as the history she provided to him. He believed it was consistent and did not change his opinion. He commented it was nice to see a patient who's at least consistent from visit to visit and it was a couple of months between these visits.

Dr. Rotman's deposition, taken on December 06, 2018, was submitted into evidence on behalf of Respondent. He is a board-certified orthopedic surgeon who specializes in hand surgery. He performed an independent medical exam on behalf of the Respondent on October 29, 2018.

Dr. Rotman did not believe Petitioner suffered an injury to her left upper extremity in August 2018. He believed the left wrist MRI showed a pinhole lesion in the radial side of the triangular fiber cartilage, which he considered to be a normal finding at her age. She did not have pain that could the attributed to that finding. He did not believe Petitioner suffered an injury to her right upper extremity on 09/05/18. He believed her right arm was completely normal. He did not believe she required any work restrictions. He did not believe she need braces, medication, or any more tests for either wrist. He believed she had reached MMI.

Dr. Rotman did not believe Petitioner suffered an injury to her right upper extremity on 09/05/18. He believed her right arm was completely normal. He did not believe she required any work restrictions. He did not believe she need braces, medication, or any more tests for right wrist. He believed she had reached MMI.

On cross-examination, Dr. Rotman testified he didn't review any records indicating Petitioner had significant bilateral wrist pain in the days, weeks, and months before August 2018. He admitted she gave sufficient effort with left hand grip strength testing. He did not review Dr. Goldfarb's records. He didn't review any records of the treatment Petitioner received after being injured while working at Conway Freight. He believed the treatment and testing done prior for her right and left hands had been reasonable.

CONCLUSIONS

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

The Arbitrator finds that the greater weight of the evidence indicates the Petitioner sustained her burden of proof that her current conditions of ill-being are causally related to the accidents she sustained on 8/21/18 and 9/5/18. The Arbitrator finds Petitioner to be creditable. She did not experience any significant hand/wrist pain prior to the work injuries and her hands/wrists have not been pain-free since the work injuries. The Arbitrator carefully considered the testimony of Dr. Goldfarb and Dr. Rotman and finds Dr. Goldfarb to be the more persuasive expert.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that Petitioner has met her burden of establishing that the condition of ill-being in her left hand/wrist is causally related to the accident

of 8/21/18. The Arbitrator further finds Petitioner has met her burden of establishing that the condition of ill-being in her right hand/wrist is causally related to the accident of 9/5/18.

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

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

The Arbitrator finds Petitioner is entitled to the medical expenses of $19,983.12 for the left and right hands/wrists contained in Petitioner's Exhibit 7. The Arbitrator finds that treatment has been reasonable and necessary pursuant to Act. Respondent shall pay for the medical expenses contained in Petitioner's Exhibit 7 pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any of the awarded expenses which were paid prior to the hearing date. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided by Section 8(j) of the Act.

Benefits for past medical bills are being awarded in case number 18 WC 28592 and will not be duplicated in case number 18 WC 28966.

The Arbitrator further finds, for the reasons stated above, Petitioner is entitled to the prospective medical care as recommended by Dr. Goldfarb and Dr. McCleary.

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

The Arbitrator finds, for the reasons stated above, Petitioner is entitled to TTD benefits from September 14, 2018 through November 4, 2018 and from November 12, 2018 through January 26, 2019 due to the left hand/wrist injury. This is a total of 18 2/7 weeks. Respondent will receive a credit for TTD benefits previously paid.

TTD benefits are being awarded in case number 18 WC 28592 and will not be duplicated in case number 18 WC 28966.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CASEY MEYER,

Petitioner,

vs. NO: 18 WC 28966

ARAMARK,

20IWCC0439

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causation, but attaches the Decision of the Arbitrator, which is made a part hereof, for the Findings of Fact with the modifications noted 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 finds that Petitioner failed to prove that her current right hand and wrist condition is casually related to her stipulated accident on September 5, 2018. Petitioner testified that she began working for Respondent in June 2018. *T.14.* Her first accident (left hand/wrist) occurred on August 21, 2018, and is addressed in our decision issued in case number 18 WC 28592. She continued to work with restrictions for the left hand and sustained the second accident (right hand/wrist) on September 5, 2018. Petitioner argues that causation is established by a chain-of-events analysis because "prior to dates of injury, Petitioner's hands and wrists were fine" along with Dr. Goldfarb's "favorable causal opinion." *P-brief at 13.* The Arbitrator found Petitioner "creditable" that she "did not experience any significant hand/wrist pain prior to the work injuries and her hands/wrists have not been pain-free since the work injuries." *Dec. at 8.* The Arbitrator found Dr. Goldfarb to be more persuasive than Respondent's §12 physician, Dr. Rotman. Respondent argues that the Arbitrator did not adequately consider and address Dr. Rotman's

opinion and the "decision is completely devoid of any discussion regarding Dr. Rotman's testimony regarding his findings on examination." *R-brief at 13.*

Regarding causation, Dr. Goldfarb testified that "all I really have to go on is her report to me, and based on her report to me, I think that the injury was contributing or was the cause of her [left] wrist pain." *Px8 at 14.* He had the same opinion about the right wrist. *Id.*

The Commission first addresses the problems we have with Petitioner's "chain-of-events" argument regarding her right hand. Petitioner testified that she suffered a previous brachial plexus injury to her right arm and shoulder in 2010, which resulted in a Missouri workers' compensation claim that was settled "based on approximate disability of 60 percent of the right shoulder." *T.18-19.* However, Petitioner never testified how that 60% disability of the right arm affected her in terms of symptoms or functional limitations.

We are mindful of the way Petitioner was questioned about whether she had sustained any injuries "in the days, weeks or months" (but was not asked about "ever") leading up to her injuries at Respondent and whether she had any prior difficulties performing her job duties or experience any significant pain. *T.17-18.* Petitioner answered that she had not. This would seem to be consistent with Dr. Goldfarb's October 22, 2018 right wrist evaluation, in which he noted that Petitioner had a history of brachial plexus injury and has an implanted Medtronic nerve stimulator which has helped dramatically. Dr. Goldfarb noted the injury was about eight years ago and Petitioner "has been doing well with her hand and wrist and was injured on 9/5/18 pulling a heavy bag..." *Px5.*

However, Petitioner's testimony and Dr. Goldfarb's record is inconsistent with the October 26, 2018 Athletico physical therapy record. It indicates that Petitioner already had limitation in her right-hand function prior to the September 5, 2018 injury due to being 65% disabled in her right hand from her brachial plexus injury 8 years ago. This record also indicates that Petitioner "reports that she used her vision during functional activity to compensate for her sensory loss in right hand." In other words, we find that Petitioner *did* have at least *some* right-hand deficits which is inconsistent with her testimony that she had no difficulty performing her job prior to her injury.

Also interesting is that this physical therapy record states that Petitioner's past medical history "includes history of broken back with spinal fusion in January." Therefore, it appears that Petitioner had undergone a spinal fusion in January 2018 and only began working for Respondent in June 2018. Petitioner did not testify about how long she had been off work between her 2010 brachial plexus injury and beginning her job at Respondent and we do not know when Petitioner settled that 2010 claim. It seems likely that this job at Respondent was her first attempt to return to work after that claim settled.

The September 9, 2018 physical therapy record also indicates that Petitioner is "65% disabled in right arm" and that she has fallen to her knees two to three times in the past twelve months "due to back surgery." We question whether Petitioner may have injured her hands during one of these falls instead of at work as she claims. We note that Petitioner did not seek to introduce any of her pre-accident medical records to support her testimony that she had not sustained any prior hand injuries or complaints.

20 IWCC0439

The August 22, 2018 emergency room record indicates that Petitioner had a past medical history of neurological problems (numbness) and chronic right upper extremity issues from a previous work injury. The September 5, 2018 emergency room record also indicates that Petitioner had preexisting decreased sensation in the right hand due to an old brachial plexus injury.

Respondent's §12 physician, Dr. Rotman, testified that Petitioner told him about her previous workers' compensation right shoulder injury eight years prior "and that she tore her ulnar nerve on her right arm in several places," which required a spinal cord stimulator and a lot of therapy and resulted in a 65% impairment to her right arm. *Rx1 at 10.* Dr. Rotman testified that Petitioner had numbness and tingling on the right, which Petitioner attributed to the old injury along with holding her hand in a "claw position at times." *Id.*

Based on the above, we find that Petitioner did have right arm/hand problems prior to her September 5, 2018 accident while working for Respondent.

We next address the medical opinions. Dr. Goldfarb's causation opinion regarding Petitioner's right hand is based on the history Petitioner provided to him. *Px8 at 11-12.* He testified that, on October 22, 2018, Petitioner had no dramatic findings on her right wrist exam: no area of point tenderness, no swelling, no specific localizable pain. *Id. at 12.* Her strength was "pretty good" with grip strength of 30 pounds on the right, less on the left side. *Id.* He was uncertain as to the source of her pain and she had normal radiographs so he recommended physical therapy. *Id.*

Respondent's §12 physician, Dr. Rotman, testified that at his examination on October 29, 2018, Petitioner's right arm looked completely normal despite the fact that she received a 65% impairment rating for it and all of her nerves looked like they were working normally. *Rx1 at 14.* Petitioner would hold her hand in a claw position at times but it wasn't a true claw because she did not have any atrophy and it was reversible; meaning that he could have her hold her hand straight if he coaxed her to do so. *Id. at 14; Rx1-DepRx2.* Dr. Rotman testified that this is "an odd finding that suggests that her whole history is not very credible." *Id. at 15.* Dr. Rotman opined that the September 5, 2018 mechanism of injury did not cause, aggravate or accelerate any injuries to the right upper extremity. *Id. at 19.* He testified that Petitioner had no injuries to her right upper extremity, she had reached maximum medical improvement and could work with no restrictions. *Id.*

The Commission notes that, at Dr. Goldfarb's examination on October 22nd, Petitioner had right-hand 2-point discrimination greater than 15 mm diffusely versus 5 on the left. He testified that Petitioner's grip strength was 30 pounds on the right. However, Dr. Rotman testified that, during his examination just one week later, Petitioner stated she could not feel anything ("zero") in any of her fingers on the right side. *Rx1 at 16-17.* Petitioner also did not give good effort on her grip strength testing which was a "flat line curve." *Id. at 17.* The Commission considers the markedly different examination results between Dr. Goldfarb and Dr. Rotman and finds that Petitioner's current right hand/wrist complaints are not credible. We also note that on December 12, 2018, Petitioner's physician, Dr. McCleary, wrote "there hasn't been definitive pathology noted," he was "unsure of [the] etiology" of Petitioner's bilateral hand numbness, and Petitioner's "symptoms are a bit out of proportion to exam."

20IWCC0439

The Commission finds that, to the extent Petitioner may have right hand/wrist complaints, it is more likely than not that they are residuals of her previous brachial plexus injury along with deconditioning after a long absence from the workforce. In any event, we find that Petitioner failed to prove that the September 5, 2018 accident caused or contributed to any aggravation, acceleration or exacerbation of any right hand/wrist condition of ill-being subsequent to the date of Dr. Rotman's examination.

We therefore award the medical bills in evidence for Petitioner's right-hand treatment through the date of Dr. Rotman's §12 examination on October 29, 2018, subject to the fee schedule in §8.2 of the Act. However, Petitioner is not entitled to double payment in the instant case for any overlapping expenses already awarded for the left hand in case number 18 WC 28592. We find that any prospective medical care for the right hand recommended by her physicians is not causally related to her September 5, 2018 accident. Finally, Petitioner was taken off work on September 14, 2018, by Dr. Neighbors due to her right-hand complaints. We find that Petitioner is only entitled to 6-4/7 weeks of temporary total disability (TTD) benefits for the period from September 14, 2018 through October 29, 2018, the date of Dr. Rotman's examination. Based on the parties' stipulation that Petitioner's average weekly wage was $471.78 and that she had three dependent children, Petitioner is entitled to the minimum TTD rate of $319.00 per week. The parties also stipulated that Respondent paid $1,919.70 in TTD benefits, which is hereby credited to Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $319.00 per week for a period of 6-4/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit of $1,919.70 for temporary total disability benefits already paid under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses in evidence related to treatment for her right hand through October 29, 2018, as outlined above, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

20IWCC0439

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 5 - 2020

Maria E. Portela

Kathryn A. Doerries

Thomas J. Tyrrell

SE/
O: 6/9/20
49

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

MEYER, CASEY
Employee/Petitioner

Case# **18WC028966**

18WC028592

ARAMARK
Employer/Respondent

20IWCC0439

On 9/30/2019, 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:

0384 NELSON & NELSON AAL PC
NATHAN C LANTER
420 N HIGH ST
BELLEVILLE, IL 62220

2337 INMAN & FITZGIBBONS LTD
COLIN MILLS
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Casey Meyer
Employee/Petitioner

v.

Aramark
Employer/Respondent

Case # **18** WC **28966**

Consolidated cases: **18 WC 28592**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **8/8/19**. 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 _____

FINDINGS

On the date of accident, **9/5/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,532.56**; the average weekly wage was $**471.78**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**1,919.70** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,919.70**.

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

ORDER

Benefits for past medical expenses and TTD are awarded in case number 18 WC 28592 and will not be duplicated herein.

Respondent shall authorize and pay for prospective medical care to Petitioner's right hand and wrist as recommended by Dr. Goldfarb and/or Dr. McCleary, 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.

Michael K. Nowak, Arbitrator

9/24/19
Date

ICArbDec19(b)

SEP 30 2019

BACKGROUND

Petitioner suffered two undisputed injuries while working for Respondent. Both claims were consolidated for trial. 18 WC 28592 involves injuries to Petitioner's left hand and wrist which were sustained on August 21, 2018. 18 WC 28966 involves injuries to the right hand and wrist which were sustained on September 5, 2018.

This matter proceeds to hearing on Petitioner's 19(b) Petitions for prospective medical care, specifically, for the care and treatment recommended by Dr. Goldfarb, past medical expenses, and temporary total disability benefits. Respondent stipulated Petitioner sustained work-related injuries, but disputed liability on the basis of causal relationship. Respondent denied liability for some of the medical expenses incurred by Petitioner, denied Petitioner's need for prospective medical care, and denied TTD benefits.

FINDINGS OF FACT

Petitioner worked for Respondent as a bulk fold and belt operator, sorting and folding soiled and clean items onto conveyor belts and industrial hampers, as well as carrying large bags of napkins, towels, and aprons.

Petitioner testified that prior to August 21, 2018 she had not suffered any injuries to her left hand or wrist. She had also not experienced any significant left hand or wrist pain. Prior to August 21, 2018 she was able to fully perform her job duties. She is right hand dominant.

On August 21, 2018 Petitioner, towards the end of her shift, pulled on an industrial size hamper, which was in a row with other hampers. The row was wedged between two support poles. Using both hands, Petitioner's initial tug on the hamper did not move it. Petitioner tugged really hard on the hamper a second time, leaning in and using her body weight. The grip of her right hand slipped off, the hamper broke free, and she felt a "pop" and felt immediate pain in her left wrist. She had never felt anything like this before. She finished her shift and the pain grew worse. She did not report the injury at that time because there were no supervisors on duty when she clocked out.

The next morning Petitioner's left wrist was red and swollen. Her fingers and left hand were also swollen and inflamed. She felt pain on the small finger side of her left wrist. She notified a supervisor about the injury shortly after beginning her shift.

Petitioner initially sought treatment at St. Joseph's Hospital on August 22, 2018. Petitioner advised she had sustained a work-related injury while pulling on a hamper that felt stuck and when she pulled harder, she had a popping sensation in her left wrist followed by pain which radiated towards her elbow. On examination, it was noted Petitioner had tenderness, worst at ulnar side of her left wrist. Left wrist x-rays showed soft tissue swelling which could be consistent with tendon or ligament injury. The impression was wrist pain. An Ace wrap was applied, and pain medication was prescribed. She was instructed to return to ER if the condition worsened and to otherwise follow-up with a hand specialist. (Petitioner's Exhibit 1)

On August 23, 2018 Petitioner was seen by Dr. David Neighbors at HSHS Southern Illinois Division. Dr. Neighbors noted a history of injury consistent with Petitioner's testimony. It was also noted Petitioner's left

wrist was in a brace, she had continued to work, and she was having significant pain. Dr. Neighbors' assessment was disorder of the ulna / radius / wrist joint(s) triangular fibrocartilage tear left wrist. He recommended Petitioner undergo a left wrist MRI, cease offending physical activity, keep the wrist immobilized, anti-inflammatory medication, and no work with her left upper extremity. (Petitioner Exhibit 3)

The Respondent accommodated Petitioner's restrictions. On August 29, 2018 Petitioner underwent a left wrist CT arthrogram, which showed evidence of a tear of the triangular fibrocartilage. (Petitioner's Exhibit 2)

On September 5, 2018 Petitioner returned to HSHS Southern Illinois Division and was seen by Dr. Marc McCleary. Petitioner reported a new work-related injury to her right wrist. Dr. McCleary told Petitioner to follow-up with Dr. Neighbors. (Petitioner's Exhibit 4)

On September 6, 2018 Dr. Neighbors examined Petitioner for both wrists. He prescribed physical therapy, told her to use a splint and a sling, and provided work restrictions of no lifting. He opined that due to her left triangular fibrocartilage injury, along with the injury to her right hand/wrist, she would only be able to do desk type work. He kept her off work for two weeks. (Petitioner's Exhibit 3)

On September 10, 2018 Petitioner began physical therapy at St. Joseph's Hospital primarily for her right wrist, but a history of the work-related left wrist injury was noted. Petitioner attended a total of six physical therapy sessions from September 10, 2018 through September 24, 2018. (Petitioner's Exhibit 1)

On September 14, 2018 Petitioner returned to Dr. Neighbors, who noted the Respondent was making Petitioner fold napkins and she was having increased right-hand symptoms. Dr. Neighbors had told the Respondent it was acceptable for Petitioner to do this as long as she could perform the folding while wearing braces on each wrist. Petitioner told Dr. Neighbors she was unable to do this while working with both wrist braces because she was not able to wear the right wrist brace and perform her job duties. Dr. Neighbors kept Petitioner off work until she was seen by a hand surgeon. (Petitioner's Exhibit 3)

Petitioner testified consistently with the history Dr. Neighbor took on September 14, 2018 about the difficulties she had while working under restrictions and folding napkins and how that work increased her symptoms.

On September 20, 2018 Dr. Donald Bassman examined Petitioner. Dr. Bassman's history of Petitioner's work-related left-hand injury was consistent with Petitioner's testimony at trial. On physical exam, he found left hand ulnar and radial deviation of ten degrees produced wrist pain, and he noted she was tender over the radioulnar joint and the triangular fibrocartilage. His diagnosis was a tear of the left wrist triangular fibrocartilage. He recommended she be examined by a hand surgeon. (Petitioner's Exhibit 6)

On September 26, 2018 Petitioner returned to Dr. Neighbors, who kept her off work until further evaluation and treatment from a hand surgeon. (Petitioner's Exhibit 3)

On October 22, 2018 Petitioner saw Dr. Goldfarb, who took a history consistent with Petitioner's testimony. He noted she had left hand pain ever since the injury and she had tried therapy, ice, elevation, bracing, and Motrin. He reviewed the CT arthrogram and believed it showed a likely central TFCC tear. Dr. Goldfarb's diagnosis was left wrist pain and a possible TFCC tear. He recommended a course of therapy with

immobilization before considering diagnostic/therapeutic injections. Dr. Goldfarb provided the following restrictions: may use injured hand assisting on light tasks; avoid lifting more than 5 lbs with her left hand; avoid pushing, grasping, pulling twisting, vibratory tools, repetitive movements, climbing, or unprotective heights. He recommended occupational therapy and to follow-up in four weeks. (Petitioner's Exhibit 5)

Petitioner attended nine physical therapy sessions from October 26, 2018 through November 16, 2018 at Atletico Physical Therapy. (Petitioner's Exhibit 9). At the initial evaluation, the therapist noted Petitioner reported she enjoyed her job and wanted to return to work. The therapy was for both hands / wrists. On October 31, Petitioner told the therapist she returned to work yesterday and she was told to sort soiled linens, towels, rags, napkins, tablecloths, and mops, which required grasping, pulling, pushing, pulling, and untying knots, and it was extremely painful. On November 2, 2018 Petitioner informed the therapist she was informed by her employer that coverage for therapy would be discontinued, so she provided her private insurance information to Athletico. On November 5, 2018 Petitioner told the therapist she went to work that morning and after 45 minutes her right wrist was painful, so she left work and went to the emergency room. Petitioner also told the therapist her left wrist was feeling better than before starting therapy and her right wrist pain was overshowing her left wrist pain. On November 12, 2018 and November 14, 2018, the therapist noted Petitioner was making some objective and subjective improvements in her left wrist. Petitioner testified the therapy did not provide lasting relief from her symptoms. On November 16, 2018 the therapist noted Petitioner demonstrated steady progress, with her overall active range of motion, grip and pinch strength, and reported functional use having all improved. The therapist also noted Petitioner had been compliant with HEP and visit attendance and had put forth good effort with all requested clinic activities. Petitioner was discharged from therapy on December 28, 2018 after she informed Athletico she was unable to pay her deductible to continue therapy with use of her private health insurance. Petitioner testified the therapy did not provide lasting relief from her symptoms.

On October 26, 2018 Petitioner saw Dr. Rotman at Respondent's request for a Section 12 exam. Dr. Rotman believed Petitioner could return to work without restrictions.

Petitioner testified she received TTD benefits from the Respondent until October 26, 2018. Petitioner remembered signing a Modified Work Order on October 29, 2018. (Respondent's Exhibit 7). The Respondent was not able to accommodate Dr. Goldfarb's restrictions until November 5, 2018. Petitioner attempted to return to work on November 5, 2018. Respondent changed Petitioner job from "bulk fold" and "incoming soil". The job required Petitioner to separate soiled clothing items and throw them into corresponding hampers. Petitioner testified she was not able to work as fast as she could before her left hand/wrist injury. Petitioner also testified, while performing this work, a co-worker threw a bag of wet towels on top of her hands while she was sorting soiled towels, which caused pain and her fingers to swell. The last day Petitioner worked for the Respondent was November 11, 2018.

On November 12, 2018 Petitioner returned to Dr. Marc McCleary, who took her off work due to right wrist pain being exacerbated by work. On December 3, 2018 Dr. McCleary instructed Petitioner not to work until being further evaluated by Dr. Goldfarb.

On December 12, 2018 Petitioner returned to Dr. McCleary, who noted Petitioner's complaints of bilateral wrist pain, right greater than left, and it was affecting her ability to accomplish activities of daily

living. Physical exam showed grip strength weakness, right hand greater than left hand. The impression was bilateral numbness and tingling of hands. Dr. McCleary referred her for a neurology exam and possible nerve conduction studies. He prescribed Mobic and Elavil.

Petitioner testified the Respondent terminated her employment on or around December 29, 2018. She has not returned to Dr. Goldfarb because the Respondent has not authorized payment for the appointment.

Petitioner testified on January 26, 2019 she began working for a different employer, Cato, which is a women's clothing store, as a part-time sales associate. On May 2, 2019 she was promoted to full time store manager. Her job for the Respondent involved more use of her hands than her work for Cato. She took the job with Cato because she had to provide for her family. The job requires her to occasionally fold clothes, sort through garments on hangers, put garments on hangers, and use a cash register. As store manager she is not constantly repetitively using her hands.

Regarding the current condition of her left hand, Petitioner testified the hand is sore, but it is tolerable, and she is able to function. At the end of the day after performing activities requiring the use of her hand, it gets stiff, swells, and there is a "goose egg" on the right side of her left wrist at the top. She applies ice, rubs it, and tries to keep it elevated. At her current job, if she has too much trouble performing her job duties due to increased pain, she trades jobs with a sales associate. At home, Petitioner testified she has difficulty with twisting motions, opening stuff, opening bottles of water, and opening her car door.

Petitioner testified her left hand/wrist has not been symptom free since August 21, 2018. She has not had any left wrist/hand injury since August 21, 2018.

Regarding the current condition of her right hand, Petitioner testified she has reduced grip strength and when she squeezes too hard, she experiences a sharp shooting sensation through her hand and her grip releases automatically. She testified she's had these symptoms since September 5, 2018.

Petitioner testified her right hand/wrist has not been symptom free since September 5, 2018. She has not had any right wrist/hand injury since September 5, 2018.

She testified her hand symptoms improved quite a bit with physical therapy, but since she was unable to complete the therapy, she tries to do exercises at home that she learned in physical therapy.

Dr. Goldfarb's deposition, taken on April 26, 2019, was submitted into evidence on behalf of Petitioner. He's a board-certified orthopedic surgeon with an added qualification in hand surgery. He's affiliated with Barnes-Jewish Hospital, Children's Hospital. He provides treatment, including surgeries, to the wrist and hand. (Petitioner's Exhibit 8)

Dr. Goldfarb generated two reports, one for Petitioner's left hand and the other for her right hand. Regarding her left hand, Petitioner provided a history of pulling a heavy industrial cart and felt a pop in her wrist on or around August 21, 2018 and had pain and discomfort since that time. Therapy, ice, elevation, bracing and Motrin did not provide relief. Prior to the initial appointment, he was aware she had undergone diagnostic testing of her left wrist. He was aware that in the days, weeks, and months, before August 2018 there was no history of her have any significant left hand or wrist pain or symptoms. Prior to August 2018 she had no difficulty performing her job duties. He reviewed the CT arthrogram film of her left wrist and believe it showed

a likely central TFCC tear, triangular fibrocartilage tear, on the small finger side of her wrist. On physical exam, he found her wrist to stable, there was no laxity between the bones. Deviation of her wrist did not recreate her pain. Her strength was decreased. There was no swelling. It was difficult to localize her pain. Her strength was less with her left hand than her right hand. He noted Petitioner was uncomfortable on physical exam, but he was unable to correlate the pain on exam with the imaging. His exam was not consistent with a TCF being the source of her pain. He testified the TFC could have been the source of her pain. He recommended occupational physical therapy for up to eight weeks, a follow-up appointment in four weeks, with a steroid injection being the next step for symptom relief and for diagnostic purposes. He placed her under restrictions to avoid lifting more than five pounds and to use the injured hand only for light tasks, avoid pushing, grasping, pulling, twisting, vibratory tools, repetitive movements and climbing. Petitioner had not yet followed-up with him.

Dr. Goldfarb believed the treatment he recommended, the occupational therapy and work restrictions, were reasonable and necessary. He did not believe she had reached MMI. He testified the August 2018 work injury was contributing or was the cause of her left wrist pain.

Regarding the right wrist, Petitioner provided a history that on September 5, 2018 she pulled a heavy bag overhead which caused her right wrist to extend sharply and she felt a snapping sensation. Petitioner had mentioned to him that, eight years prior, she had a brachial plexus injury, but he believed this had no bearing on her current injury. She told him she had right wrist pain, aching and sharp with movement since the work-injury. She had undergone therapy without resolution, and she was frustrated with the continued discomfort. He was aware that in the days, weeks, and months, before September 2018 there was no history of her have any significant right hand or wrist pain or symptoms. Prior to September 2018 she had no difficulty performing her job duties. On physical exam, he could not find an area that specifically reproduced her pain. Her strength was pretty good. His assessment was she had pain, but he was uncertain exactly what was the source of her pain. Her x-rays were normal. He recommended a course of therapy hoping this would calm down her symptoms and he would then re-evaluate. He placed her under restrictions to avoid lifting more than five pounds and to use the injured hand only for light tasks, avoid pushing, grasping, pulling, twisting, vibratory tools, repetitive movements and climbing. Petitioner had not yet followed-up with him.

Dr. Goldfarb believed the treatment he recommended, the occupational therapy and work restrictions, were reasonable and necessary. He did not believe she had reached MMI. He testified the September 2018 work injury was contributing or was the cause of her wrist pain.

Regarding prognosis, Dr. Goldfarb felt there was a chance her conditions would get better without surgery, but if her symptoms don't improve on their own, he believed it would take intervention to help her get better. He did not believe she was exaggerating her symptoms. He did not believe she was malingering. He did not believe her complaints of pain were unreliable.

Dr. Goldfarb was asked about Dr. Rotman's opinion that the left wrist CT arthrogram showed a little pinhole perforation rather than a tear. He testified a perforation or tear was one in the same and it is very hard to determine the size of a central TRC tear on a study like a CT arthrogram. Both are tears, both are perforations. He doesn't understand the size of them until he sees them arthroscopically. He was also asked about Dr. Rotman's opinion the CT arthrogram findings were normal and generally age-related. He testified

that if 100 patients who are 50 years or old her examined, it has been estimated that 50 percent of the patients will have a tear like this, with some being symptomatic and many will not be. Petitioner is younger than 50 years old, so the finding could be age-related, or it could be related to her work-injury. He also testified, that unlike Dr. Rotman, he did not find several non-physiologic responses on physical exam. He did not believe that a nerve conduction study or bone scan would be tests he would recommend for her left wrist.

Dr. Goldfarb reviewed August 22, 2018 ER record from St. Joseph's Hospital. (Petitioner's Exhibit 1) He said the history of injury in the record "basically says the same thing" as the history she provided to him. He believed it was consistent and did not change his opinion. He commented it was nice to see a patient who's at least consistent from visit to visit and it was a couple of months between these visits.

Dr. Rotman's deposition, taken on December 06, 2018, was submitted into evidence on behalf of Respondent. He is a board-certified orthopedic surgeon who specializes in hand surgery. He performed an independent medical exam on behalf of the Respondent on October 29, 2018.

Dr. Rotman did not believe Petitioner suffered an injury to her left upper extremity in August 2018. He believed the left wrist MRI showed a pinhole lesion in the radial side of the triangular fiber cartilage, which he considered to be a normal finding at her age. She did not have pain that could the attributed to that finding. He did not believe Petitioner suffered an injury to her right upper extremity on 09/05/18. He believed her right arm was completely normal. He did not believe she required any work restrictions. He did not believe she need braces, medication, or any more tests for either wrist. He believed she had reached MMI.

Dr. Rotman did not believe Petitioner suffered an injury to her right upper extremity on 09/05/18. He believed her right arm was completely normal. He did not believe she required any work restrictions. He did not believe she need braces, medication, or any more tests for right wrist. He believed she had reached MMI.

On cross-examination, Dr. Rotman testified he didn't review any records indicating Petitioner had significant bilateral wrist pain in the days, weeks, and months before August 2018. He admitted she gave sufficient effort with left hand grip strength testing. He did not review Dr. Goldfarb's records. He didn't review any records of the treatment Petitioner received after being injured while working at Conway Freight. He believed the treatment and testing done prior for her right and left hands had been reasonable.

CONCLUSIONS

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

The Arbitrator finds that the greater weight of the evidence indicates the Petitioner sustained her burden of proof that her current conditions of ill-being are causally related to the accidents she sustained on 8/21/18 and 9/5/18. The Arbitrator finds Petitioner to be creditable. She did not experience any significant hand/wrist pain prior to the work injuries and her hands/wrists have not been pain-free since the work injuries. The Arbitrator carefully considered the testimony of Dr. Goldfarb and Dr. Rotman and finds Dr. Goldfarb to be the more persuasive expert.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that Petitioner has met her burden of establishing that the condition of ill-being in her left hand/wrist is causally related to the accident

of 8/21/18. The Arbitrator further finds Petitioner has met her burden of establishing that the condition of ill-being in her right hand/wrist is causally related to the accident of 9/5/18.

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

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

The Arbitrator finds Petitioner is entitled to the medical expenses of $19,983.12 for the left and right hands/wrists contained in Petitioner's Exhibit 7. The Arbitrator finds that treatment has been reasonable and necessary pursuant to Act. Respondent shall pay for the medical expenses contained in Petitioner's Exhibit 7 pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any of the awarded expenses which were paid prior to the hearing date. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided by Section 8(j) of the Act.

Benefits for past medical bills are being awarded in case number 18 WC 28592 and will not be duplicated in case number 18 WC 28966.

The Arbitrator further finds, for the reasons stated above, Petitioner is entitled to the prospective medical care as recommended by Dr. Goldfarb and Dr. McCleary.

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

The Arbitrator finds, for the reasons stated above, Petitioner is entitled to TTD benefits from September 14, 2018 through November 4, 2018 and from November 12, 2018 through January 26, 2019 due to the left hand/wrist injury. This is a total of 18 2/7 weeks. Respondent will receive a credit for TTD benefits previously paid.

TTD benefits are being awarded in case number 18 WC 28592 and will not be duplicated in case number 18 WC 28966.

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

ROGER HOLMES,

Petitioner,

vs. NO: 17 WC 36747

FORTERRA, INC.,

Respondent.

20IWCC0440

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2019 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 $25,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 5 - 2020
o-6/30/20
KAD/jsf

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell
Thomas J. Tyrrell

DISSENT

I respectfully disagree with the majority's decision finding Petitioner proved his current condition of ill-being is causally related to his work accident.

It is undisputed that on May 3, 2017, Petitioner lost his balance and fell when his feet became tangled in cords and hoses at work causing him to strike his left elbow and left hip/back on the ground. However, the issue is whether Petitioner proved this accident caused his current condition of ill-being. A review of the contemporaneous medical records shows Petitioner has not sustained this burden.

After the accident, Petitioner did not seek any medical treatment for any injuries on that day. In fact, Petitioner did not seek any medical treatment for any injuries throughout the month of May. During this time period, Petitioner continued to work his regular job as a welder, which required occasional lifting of 50 pounds, and nearly always involved forward flexing, per his report to Respondent's IME physician, and required him to use a sledgehammer.

The initial treating records are compelling and cannot be ignored. Petitioner initiated medical treatment post-accident on June 1, 2017, when he saw Dr. Sekulic, his primary care physician. Petitioner presented with left heel and left hip pain, which he reported started a few weeks ago. The record notes Petitioner had a history of back/hip pain several years ago; he received an injection and felt better. Notably, there was no reported accident documented on June 1, 2017,

as the cause of his back or hip pain. Examination of Petitioner's lumbar spine revealed normal range of motion, no tenderness, no bony tenderness, no swelling, no deformity, and no spasm. His right and left hips were found to be normal. Dr. Sekulic's assessment was left heel pain consistent with plantar fasciitis and low back pain suggestive of facet joint irritation.

Petitioner returned for a follow-up appointment on June 30, 2017, reporting his back pain was improved, quantified as 2/10. Dr. Sekulic stated, "This is a recurrent problem. The current episode started more than 1 month ago. The problem occurs constantly. The pain has been gradually improving since onset." Examination of the lumbar spine revealed tenderness but normal range of motion, no swelling, no pain, and no spasm. The Assessment section notes low back pain suggestive of facet joint irritation, HTN not controlled, obesity, RLS not controlled and smoker. Again, there was no reported work accident documented as the cause of his back pain.

Petitioner returned on July 7, 2017, to discuss the x-ray results which showed an old fracture possibly unhealed at the spinous process at level L3. It was further noted Petitioner, "[d]enies any significant back injury in the past." Petitioner reported feeling much better and improved at least 60%. Petitioner reported his left heel was more painful, and Petitioner requested work restrictions. Dr. Sekulic noted there was no back tenderness and no bony tenderness on exam. The assessment again was low back pain suggestive of facet joint disease and left heel pain/plantar fasciitis. Petitioner received a work restriction of no sledgehammer use. Again, there was no reported work accident documented as the cause of his back pain.

Petitioner returned on July 22, 2017, complaining of back pain and, for the first time, pain in the left posterior leg. It was noted, "This is a new problem. The current episode started more than one month ago. The problem occurs intermittently. The problem is unchanged." Petitioner reported a pain level of 7/10. He was diagnosed with sciatica on the left side but once again did not report a work accident as the cause of his symptoms. *It must be noted that in the Decision of the Arbitrator, affirmed by the majority, this visit was dated as occurring June 22, 2017. The correct date is July 22, 2017. By taking the progress reports out of chronological order, it would appear Petitioner's pain level was elevated to 7/10, one month earlier than it actually was.*

These contemporaneous medical records simply do not support a causal connection between the work accident and Petitioner's condition of ill-being. Petitioner did not seek treatment for approximately one month and, when he did, he did not advise his treating physician of the accident or relate his complaints to his employment.

The first time Petitioner reports his work-related accident to a physician is on August 8, 2017, where he reports low back pain which reportedly began on May 3, 2017, when he tripped on cords at work. He provided a history of going to his Primary Care Physician and reported going to an emergency room on August 5, 2017. These records were not admitted into evidence. Petitioner reported increased pain and rated his pain level as 8/10. Examination at this time revealed diffuse tenderness of the lumbar paraspinal muscles on the right and the remainder of the

exam findings were normal. He was diagnosed with lumbar spine ligament sprain, referred for physical therapy evaluation and given work restrictions.

Petitioner underwent an MRI scan on October 17, 2017, which revealed edema L4-5 articular facet and edema both pedicles L4, bulging L4-5 arthropathy causing spinal stenosis and lateral stenosis, indention compressing the thecal sac centrally and to the left, may represent extruded disc fragment. Petitioner saw Dr. Fred Sweet on November 8, 2017, who diagnosed a large disc herniation at L4-5. He found Petitioner's condition related to the May work accident based on history, physical exam and other available data. He recommended an L4 laminectomy.

The majority's reliance on Dr. Sekulic's addendum, dated May 6, 2018, to prove Petitioner sustained his burden on causation is without merit. On March 16, 2018, Petitioner returned to Dr. Sekulic to discuss a Workers' Compensation injury from May 3, 2017. At this time, Workers' Compensation had denied the claim. Dr. Sekulic noted she and the Petitioner talked about his job injury and she explained the documentation and the impropriety of making an addendum some 9 months later to her earlier progress report. Dr. Sekulic, however, relented and authored an addendum, dated May 6, 2018, indicating, in part, that after discussion with Petitioner, and after reviewing an incident report about an accident that happened May 3, 2017, at work, it was her opinion at that time that the addendum needed to be included in his progress note. She wrote that based on available information Petitioner's back pain was likely related to his fall at work after tripping on hoses and in her professional opinion these things are connected. This addendum, although appropriately dated, was added to the June 1, 2017, treating record.

This addendum was completed at the behest of Petitioner, almost one year after the initial visit. The original entry, dated June 1, 2017, is devoid of any reference to the work accident, which is consistent with the treating records of June 30, 2017, July 7, 2017, and July 22, 2017. Petitioner's reason the work injury was omitted from the initial treating record, that Dr. Sekulic stepped out of the examining room mid conversation, doesn't explain why the history would be omitted in the subsequent treating records. Petitioner consistently did not report the accident as the cause of his low back pain in the June and July visits and even explicitly denied a specific back injury during one of these visits. The addendum was completed well after the fact, at Petitioner's request and is therefore unreliable and unpersuasive to prove causation.

I would place more weight on the initial, unaltered treating records as well as the opinion of Dr. Graf, Respondent's Section 12 examining physician. Petitioner reported a history of a trip/fall accident at work but stated his low back pain did not start for 4-6 weeks after the accident, further stating that the leg pain and numbness also started around 4-6 weeks after the accident. Dr. Graf noted, "Given the medical records provided, it is my opinion that this would in no way be related to the claimed work injury in question. Again, there was no work-related injury reported from May 3 incident until August 8, over three months thereafter." Thus, he opined the diagnosis and the care and treatment were attributable to Petitioner's pre-existing condition and not related to the work injury. Dr. Graf relied on the treating medical records that fail to reference the work-

20IWCC0440

related accident. I would place more weight on this opinion in conjunction with the treating medical records and find Petitioner failed to prove causation.

Although Petitioner tripped and fell at work on May 3, 2017, Petitioner failed to prove his low back condition is causally related to said accident. He did not seek medical treatment for approximately one month and, when he ultimately sought treatment, he did not report a work injury during the initial visit, or even the second, third or fourth visits. In fact, during the third visit, he denied a significant back injury. Also, he exhibited normal range of motion during these visits, there was no referral for an MRI scan, and he continued to perform his welding job after the accident.

Petitioner bears the burden of proof and, in this case, he has not met that burden. For this reason, I dissent.

Kathryn A. Doerries

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

HOLMES, ROGER
Employee/Petitioner

Case# **17WC036747**

FORTERRA INC
Employer/Respondent

20IWCC0440

On 2/4/2019, 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:

1131 GESMER LAW OFFICES PC
JAMES GESMER
526 E JEFFERSON ST
PEORIA, IL 61107

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)1 8)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ROGER HOLMES
Employee/Petitioner

v.

FORTERRA, INC.
Employer/Respondent

Case # **17 WC 36747**

Consolidated cases:

20 IWCC0440

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 October 15, 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. ☒ 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 _____

20 IWCC0440

FINDINGS

On the date of accident, ***May 3, 2017***, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned ***$40,476.80***; the average weekly wage was ***$778.40***.

On the date of accident, Petitioner was ***60*** years of age, **married** with 0 dependent children.

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

ORDER

- **Respondent shall pay $277.83 for medical services provided in Section 8(A) of the Act.**
- **Respondent shall authorize and pay for lumbar spine surgery, as recommended by Dr. Sweet and as further set forth herein.**

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. Mozenter

Signature of Arbitrator

2/1/19
Date

ICArbDec19(b)

FEB 4 - 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROGER HOLMES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 17 WC 36747
	)	
FORTERRA, INC.,	)	
	)	
Respondent.	)	

20 IWCC0440

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter proceeded to hearing on October 15, 2018 in Rockford, Illinois. (Arb. 1). Respondent has stipulated to a number of issues including accident and notice while causal connection, unpaid medical bills and proposed back surgery are in dispute. (Id.).

The Petitioner was employed by Respondent as a welder and had been so employed for approximately 10 years on the accident date.

Petitioner testified that on May 3, 2017, while working on a project for Respondent, he turned around, losing his balance because his feet had become entangled in some cords and hoses. Consequently, he fell onto the cement surface striking his left elbow before landing on his left hip/back. He reported the injury to Respondent and kept working the rest of the day despite pain in his back.

During the following weeks, Petitioner continued to work his regular job for Respondent despite persistent low back pain which worsened to the point that he couldn't walk or stand for long periods of time.

On June 1, 2017, Petitioner presented to his primary physician, Dr. Dusika Sekulic at Rockford Health Physicians. (PX 1) Dr. Sekulic noted a history of pain to Petitioner's left heel and left hip that started a few weeks ago. The doctor noted a diagnosis of left heel pain consistent with plantar fasciitis and low back pain suggestive of facet joint irritation. (Id.)

On June 22, 2017, Petitioner followed up with Dr. Sekulic who noted complaints of persistent back pain and increased left posterior leg pain at a 7 out of 10. The doctor prescribed a Medrol dose pack and Tramadol. (Id.)

Petitioner again presented to Dr. Sekulic on June 30, 2017 reporting improved back pain at a 2 out of 10. The Petitioner was provided with medications, and home exercises as he declined physical therapy. (Id.)

On July 7, 2017, Dr. Sekulic reviewed Petitioner's lumbar x-ray films noting an unhealed spinous process at L3. (Id.) Petitioner denied any significant prior back injury and reported a 60% improvement in his back although his left heel pain had increased. Pursuant to Petitioner's request, Dr. Sekulic instituted light duty work restrictions with no sledgehammer use until July 24, 2017. (Id.)

On August 8, 2017, Petitioner presented to Physicians Immediate Care with complaints of low back pain at an 8-9/10 since Wednesday, May 3, 2017. (PX 3) An injection was administered, and an MRI recommended. (Id.) The Petitioner continued following up at Physician's Immediate Care through August 2017 and on August 30, 2017 reported he was about 70% better. The Petitioner was undergoing some physical therapy at that time. (Id.)

On October 17, 2017, MRI testing noted edema and disk bulging at L4-L5 with facet arthropathy causing spinal and lateral stenosis. Some compression of the thecal sac was noted.

The following day, Petitioner followed up at Physicians Immediate Care where decreased sensation in both calves was noted. A diagnosis of bilateral lumbago with sciatica was issued by the treating physician. Petitioner was prescribed Norco, Nabumetone and referred to Rockford Spine Center. Work restrictions of "sit down only" were issued. (PX 3).

On November 8, 2017, Petitioner presented for initial consult at Rockford Spine Center where Dr. Fred A. Sweet noted a history of back and bilateral leg pain since May 2017 when Petitioner tripped over some cords and hoses. (PX 2) Dr. Sweet reviewed the recent MRI, noting a "fairly good-sized disc herniation at L4-L5 with caudal migration at L4-L5 that encroaches on and compresses the nerve roots bilaterally" while the central canal was "somewhat spared". In his chart note, Dr. Sweet stated, "I believe that this was related to his fall at work in May with medical and surgical confidence" (Id.).

The Petitioner was seen by Dr. Frederick Gahl at Rockford Pain Center where a lumbar epidural steroid injection was administered on December 13, 2017. (PX 2)

On January 15, 2018, Dr. Carl Graf examined Petitioner pursuant to Respondent's Section 12 request. (RX 1) Dr. Graf indicated that while the Petitioner may need treatment, his low back condition was not causally related to the accident, noting Petitioner did not treat for his low back for quite some time following the accident. According to page 2 of Dr. Graf's report, Petitioner reported that his low back pain did not start for 4-6 weeks following the incident. (Id.)

At Petitioner's January 29, 2018 appointment with Dr. Sweet, the doctor continued to recommend surgery. (PX 2)

On May 6, 2018, Dr. Sekulic issued an addendum to her chart note of June 1, 2017 noting the following:

> *[A]fter discussion with patient and after reviewing the incident report about accident that happened on May 3, 2017, at his work, it is my professional opinion that this addendum needed to be included into his progress note." Dr. Sekulic also stated that "based on available information, his back pain is highly likely related to his fall at work after tripping on hoses and it is my professional opinion that these things are connected.* (PX 1).

The Petitioner testified he is currently welding and is a sit-down welder. He takes medications for pain and wishes to proceed with the surgery proposed by Dr. Sweet.

CONCLUSIONS OF LAW

Causal Connection

Respondent does not dispute that Petitioner was involved in an accident on May 3, 2017 that arose out of and in the course of his employment with Respondent when he tripped over some hoses and/or cords and fell onto his left hip/back.

The Arbitrator recognizes that Petitioner's initial treating records from Dr. Sekulic are devoid of any work-related accident history, however, Dr. Sekulic, on May 6, 2018, made an addendum to her chart note of June 1, 2017 after reviewing an accident report documenting the May 3, 2017 incident noting, "it is my professional opinion that this addendum needed to be included into his progress note." Dr. Sekulic also stated that "based

on available information, his back pain is highly likely related to his fall at work after tripping on hoses and it is my professional opinion that these things are connected" (PX 1).

The medical records from Physicians Immediate Care and Rockford Spine contain accident histories corroborative of Petitioner's arbitration testimony.

Furthermore, MRI conducted on October 17, 2017 was significant for edema and disk bulging at L4-L5 with facet arthropathy causing spinal and lateral stenosis. Some compression of the thecal sac was noted. (PX 3). Dr. Sweet reviewed the imaging noting a "fairly good-sized disc herniation at L4-L5 with caudal migration at L4-L5 that encroaches on and compresses the nerve roots bilaterally". The doctor recommended laminectomy and diskectomy at L4-5. Dr. Sweet opined, "I believe that this was related to his fall at work in May with medical and surgical confidence" (PX 2).

The Arbitrator places less weight on the opinions of Respondent's Section 12 examiner noting his opinions are based on information that is inconsistent with evidence contained in the record: 1. Dr. Graf incorrectly noted the Petitioner failed to report the May 3, 2017 work-related injury until August 8, 2017 when Respondent stipulated to the issues of accident and notice and; 2. Petitioner's purported report to Dr. Graf that his back pain did not begin for 4-6 weeks after the work accident is inconsistent with the histories recorded by Dr. Sweet, Physicians Care and, most notably, Dr. Sekula who, 29 days after the accident, recorded Petitioner's report of left hip pain that "started a few weeks ago".

Based on a preponderance of evidence contained in the record, the Arbitrator finds Petitioner has sustained his burden with respect to causal connection.

Medical Services & Bills

Counsel for Respondent did not object to the reasonableness or necessity of the medical treatment that was rendered to Petitioner regarding his lumbar spine. Petitioner testified that during his course of treatment, he spent $277.83 at CVS Pharmacy to purchase medications prescribed by his treating physicians between June 1, 2017, and October 8, 2018 (PX 4).

Petitioner testified the medications that he paid for were Acetaminophen, Hydrocodone, Meloxicam, Tramadol and Nabumetone.

Having found in favor of Petitioner as to causal connection, the Arbitrator finds Respondent is liable to reimburse Petitioner in the amount of $277.83 for his purchases of prescription medications related to services rendered to Petitioner that were causally related to his work accident of May 3, 2017.

Prospective medical care

Based on the preponderance of evidence in the record including the testimony of Petitioner, the treating medical records and the opinions of Doctors Sweet and Graf, the Arbitrator finds Petitioner needs further medical treatment related to his work accident of May 3, 2017 including an L4-5 laminectomy and diskectomy as recommended by his treating surgeon Dr. Sweet.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JACQUELINE T. MACDONNELL-DAYHOFF,

Petitioner,

vs. NO: 14 WC 8089

VILLAGE OF WESTERN SPRINGS
POLICE DEPARTMENT,

20IWCC0441

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator for the reasons outlined below, and finds that Petitioner sustained accidental injuries that arose out of and in the course of Petitioner's employment by Respondent on February 6, 2014. The Commission further finds in favor of Petitioner on the issues of notice, causal connection, medical expenses, TTD benefits, and PPD benefits.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1) As of the date of arbitration, Petitioner was employed by the Village of Western Springs (hereinafter "the Village"), and had been its employee for nearly 18 years. (T.11-12). In

the mornings, Petitioner worked as a school crossing guard for Respondent; she also served as the Village's receptionist and general office clerk. (T.12-13).

2) Petitioner testified that on February 6, 2014, she exited her car and was going "[t]o get ready to go do the crossing." (T.18). Petitioner stated that she was not required to check in at Village Hall and was not required to do anything prior to commencing her crossing guard duties other than go to the intersection. (T.18).

3) Petitioner described her injury:

> I got to work, parked my car, opened my car door, stepped out of the car. There was snow, but – I had boots on, but I didn't realize there was black ice under the snow. After I got up, I went face-down. I was trying to protect my face so I wouldn't hit my face; put my hands out. This hand went out, and this hand took the beating. (T.14; T.17).

Petitioner injured her right arm in the fall. She testified that prior to this incident, she had never injured nor received treatment for her right arm. (T.23).

4) Petitioner stated that the intersection where she performed her crossing guard duties was outside Village Hall. (T.13). "Right outside the door at the corner." (T.13). Petitioner testified that she had parked in front of Village Hall. "It's angled parking facing the tracks." (T.14). Petitioner typically parked her vehicle in that area because it was close to the corner where she worked as a crossing guard and it was convenient for her; Petitioner performed her receptionist duties inside Village Hall. (T.13-14; T.46).

5) Petitioner's Exhibit 8 is a photograph of the location where Petitioner had parked. (PX8). "That's my car parked along the parking space with the four-hour parking sign." (T.16). Petitioner had taken the photo. (T.16). Petitioner testified that she did not know who controlled that parking area, but she knew that Public Works of Western Springs was in charge of clearing the snow. (T.21). On February 6, 2014, Petitioner noted a "dusting of snow." (T.22).

6) Petitioner further testified that the Village had an actual parking lot behind the building where she was allowed to park. However, when there was no space in the parking lot, she would park in front. (T.15). On cross-examination, Petitioner admitted that she usually did not check to see if the back parking lot was full. (T.45-46). Neither the Village nor Respondent directed Petitioner where to park; Petitioner could park where she wanted. (T.40; T.51-52; T.62-64).

7) Petitioner explained there was one restriction to parking in front: "Just make sure the police department has my license plate so they know it's my car." (T.15). By informing Respondent, Petitioner avoided getting a ticket. "They might think you're one of the commuters just taking the train downtown." (T.15; T.65-66). Petitioner had never received a ticket for parking in front of Village Hall. (T.16; T.69). The area in front

where Petitioner typically parked was only four-hour parking. (T.15-16). Petitioner stated that she had this parking privilege because she worked for the Village, and at least five other employees for the Village were allowed to park in front for more than the four-hour limit. (T.17).

8) Respondent's Exhibits 2, 3, and 4 are photographs; Petitioner identified Respondent's exhibits. (RX2; RX3; RX4). Exhibit 2 was a picture of the front of Village Hall and a picture across the street from Village Hall with the angled parking where Petitioner parked. (T.48-49). Exhibit 3 was a group of photographs that demonstrated one of the parking lots behind Village Hall. (T.45-46). Exhibit 4 showed the fire department parking lot which was also in the back but a little further. Petitioner believed she could park in that parking lot. (T.47). Petitioner testified that the two parking lots in back were not open to the general public; those were for Village Hall employees. (T.52). However, the parking in front and where Petitioner parked on February 6, 2014 was open to the general public. (T.52).

9) After Petitioner's fall, police officer Tony Jemison helped Petitioner up and had her sit in her car. (T.23). Officer Jemison was called as Respondent's witness at arbitration; he had not witnessed Petitioner fall. (T.87-104). However, Officer Jemison confirmed that Petitioner fell on Village property. (T.96; T.103). Respondent's Exhibit 1 was the police report and photographs from Officer Jemison; Petitioner identified and testified with respect to these exhibits. (T.54; RX1).

10) Petitioner testified that she also notified the Village Manager, Ingrid Velkme, after the falling incident. (T.35-36). Ms. Velkme was called as Respondent's witness at arbitration. (T.104-116). She confirmed that Petitioner could park wherever she wanted. (T.109). Ms. Velkme also confirmed that the parking lots depicted in Exhibits 3 and 4 were owned and maintained by the Village, and high priority was given to cleaning those lots. (T.111-112). She also confirmed that the Village also plowed and salted the streets in the entire Village. (T.112).

Medical Treatment

11) Petitioner was taken by ambulance to Adventist La Grange Memorial Hospital on February 6, 2014. (T.24; PX4). The emergency room record stated that Petitioner had right wrist pain after slipping and falling on ice; Petitioner's pain radiated to her forearm. X-rays of the right wrist revealed a comminuted and impacted fracture of the distal right radius with dorsal displacement and dorsal angulation of the major distal fracture fragments. There was associated radial shortening and a mildly displaced fracture of the ulnar styloid process. (T.25; PX4).

12) Petitioner next consulted with Dr. Kenneth Schiffman of Hinsdale Orthopaedics on February 7, 2014. (T.25-26; PX2). Dr. Schiffman noted that Petitioner tripped and fell on February 6, 2014, and she had used her right wrist to brace herself during the fall. Dr. Schiffman reviewed the x-rays previously taken and noted a comminuted fracture of the distal radius with considerable displacement of the radial direction and with dorsal

angulation of at least 30 degrees. He diagnosed Petitioner with comminuted and displaced right distal radius fracture, and recommended an open reduction and internal fixation procedure. Dr. Schiffman performed the open reduction and internal fixation of the right distal radius on February 10, 2014 at Salt Creek Surgery Center. (T.26; PX2).

13) Petitioner underwent outpatient occupational therapy at Adventist La Grange Memorial Hospital commencing February 26, 2014. (PX4).

14) By March 17, 2014, Dr. Schiffman allowed Petitioner to return to sedentary work for four to five hours per day. (PX2). Petitioner confirmed that she had been off work from February 10, 2014 through March 16, 2014; she went back to work on March 17, 2014. (T.26).

15) Petitioner testified that Dr. Schiffman subsequently gave up his practice, so her care transferred to Dr. Marc Fajardo of Hinsdale Orthopaedics. (T.27). She followed-up with Dr. Fajardo on May 9, 2014; although the pain had improved, Petitioner reported aching, swelling, numbness, joint pain, and tingling in the palm. X-rays taken at the appointment revealed a healed distal radius fracture with a volar plate construct. There was also intra-articular protrusion of the distal screws. Dr. Fajardo recommended surgery to correct the issue, but Petitioner wanted to defer for now. (PX2; PX3).

16) On July 3, 2014, Dr. Fajardo removed hardware from Petitioner's right wrist. Petitioner continued to follow-up with Dr. Fajardo. (PX2; PX3).

17) Petitioner testified that she returned to work as a receptionist with the Village a couple of days after surgery; since it was summer, she did not have crossing guard duties. (T.28). Petitioner noted that her right hand seemed okay for a while, but she started having pain again. (T.28-29).

18) On June 23, 2015, Petitioner underwent a revision open reduction internal fixation right distal radius fracture nonunion with Dr. Fajardo at Adventist Hinsdale Hospital. Petitioner's post-operative diagnosis was right distal radius fracture nonunion. (T.29; PX1; PX2; PX3). Petitioner was taken off work following surgery through September 16, 2015. (T.29-30). Petitioner thereafter returned to work as a crossing guard and receptionist in September 2015. (T.30-31).

19) Back on August 3, 2015, Petitioner had wire removed and underwent rehabilitation commencing August 5, 2015; she also received instructions for a home program. Petitioner completed this at Adventist Paulson Rehabilitation. (PX3). Petitioner continued to follow-up with Dr. Fajardo post-surgery: "I was doing okay for a while, and then things started to pinch; and when I went to see the doctor again, the bones started to slip." (T.31).

20) By February 15, 2016, Petitioner reported a pain level of one out of 10. However, she continued to experience aching, joint pain, and numbness and tingling in her fingers. Dr. Fajardo examined Petitioner and determined that she had evidence of right de quervains

tenosynovitis and right cubital tunnel syndrome. He recommended a right thumb spica splint, an injection that Petitioner wanted to defer, and an EMG/NCV in the future. (PX2; PX3).

21) Petitioner underwent the steroid injection over the first dorsal compartment on March 16, 2016. Dr. Fajardo indicated that there was now evidence of collapse of the lunate facet. Surgery was discussed, but Petitioner wanted to defer surgery for now.

22) On April 7, 2016, Petitioner completed the recommended EMG/NCV; the results were normal.

23) Dr. Fajardo administered another injection into the first dorsal compartment on October 26, 2016. Petitioner was allowed to work full duty. (PX3).

24) By December 28, 2016, Petitioner was complaining of an eight out of 10 pain level and that her pain had increased over the past week. Dr. Fajardo indicated that Petitioner had known loss of fixation of her right wrist fracture and that she had deferred right wrist revision surgery against his advice. Dr. Fajardo stated that Petitioner would likely require a wrist fusion versus partial fusion. Petitioner continued to follow-up with Dr. Fajardo who administered injections into her right wrist on January 25, 2017, April 28, 2017, and June 30, 2017; his recommendation for surgery remained the same. (PX3).

25) Petitioner returned to Dr. Fajardo on March 2, 2018 for another injection. The medical record indicated that Dr. Fajardo continued to recommend surgery to the right wrist – now he was considering wrist replacement as well. Petitioner continued to present with symptoms of right de quervains tenosynovitis, failure of fixation and collapse of the lunate facet, and subsequent radiocarpal traumatic arthritis. Petitioner received an additional injection on May 14, 2018. (PX3).

26) On September 11, 2018, Dr. Fajardo removed hardware from the right wrist/distal radius. He also performed a right wrist proximal row carpectomy and fusion. Petitioner's post-operative diagnosis was right wrist traumatic arthritis. Petitioner was taken off work for three weeks. (T.31; PX3).

27) By October 1, 2018, Petitioner was released to return to work; she resumed her duties as a crossing guard and receptionist for the Village. (T.31-32; PX3). The last medical record for Dr. Fajardo is dated December 28, 2018. On this date, Petitioner reported a zero out of 10 pain level and had no current complaints. Petitioner was working full duty. Examination revealed healed incisions, no swelling/echymosis/erythema, and negative Finkelstein, phalen, and tinel signs. (PX3).

28) As of the date of arbitration, Petitioner continued to treat with Dr. Fajardo. She also continued to wear a brace; she wore the brace at work, but not every day. (T.33; T.39). "I can do my job; just every so often, I have pain in my hand." (T.39). Petitioner further testified: "Sometimes it's just like a pinched nerve or sometimes it just stiffens up or my fingers will lock up; and then I use one of those stress balls to kind of get it back going."

(T.39). Petitioner has not had any subsequent injuries to her right hand. (T.34). Petitioner testified that she had an upcoming appointment with Dr. Fajardo. "My fingers were a little numb, and it was swelling up on me; and everything would stiffen." (T.39).

Respondent's Section 12 Examination – Dr. Craig Phillips

29) Respondent sent Petitioner for a Section 12 examination with Dr. Craig Phillips on February 2, 2018. Dr. Phillips' review of Petitioner's mechanism of injury, treatment, and work duties was consistent with the record. He found her complaints consistent with the objective findings, but that she had reached MMI. "She has had three surgeries on her wrist and has ultimately developed posttraumatic arthritis of her radiocarpal joint." Dr. Phillips did not recommend any further treatment as Petitioner was tolerating her pain with pain medication. Dr. Phillips also indicated that Petitioner did not have de Quervain's tenosynovitis because provocative tests were negative that day. The report further stated that there was no evidence that Petitioner had cubital tunnel syndrome. Petitioner did not have numbness or tingling, and provocative and nerve tests were normal. Dr. Phillips gave Petitioner an impairment rating of 10% of the upper extremity. (T.32; RX5).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n,* 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Arbitrator did not find accident and rendered the remaining issues moot. The Arbitrator considered the three types of risks under the issue of accident, and found that Petitioner was not exposed to a risk distinctly associated with her employment as a crossing guard nor was she exposed to a personal risk. The Arbitrator concluded that Petitioner encountered a neutral risk and that that risk was not greater than that which the general public was commonly exposed to. The Arbitrator noted that Petitioner had parked on a public street, she was not ordered to park in any specific spot or area, and she did not park in either of the two parking lots provided by the Village. The Arbitrator also found that "[d]angers created by ice and snow in public parking areas are dangers to which all members of the public are exposed on any winter day or [n]ight." (Arbitrator's Decision, pg. 3).

Petitioner argues that as a crossing guard, she was a traveling employee and falling on ice was a reasonable and foreseeable act. "A crossing guard is going to be exposed to the elements at all times while performing that job." (Petitioner's Brief, pgs. 6-7). Respondent disputes this theory and argues that at the time of Petitioner's injury, Petitioner was in the course of her regular commute to work. Petitioner had not yet begun her job duties; after parking, Petitioner intended to gather her items for work. "There was no testimony that Petitioner had undertaken any employment related task prior to exiting her car on the date of the alleged injury." (Respondent's Brief, pg. 8).

We first address whether Petitioner was a traveling employee at the time of her injury.

> The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable. (Citation omitted). This court has explained the purpose behind this rule, noting that 'the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest.' (Citation omitted). An exception applies, however, when the employee is a 'traveling employee.' '[C]ourts generally regard employees whose duties require them to travel away from their employer's premises (traveling employees) differently from other employees when considering whether an injury arose out of and in the course of employment.' *Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728 ¶¶ 16-17.

Additionally, "[a]n injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, *i.e.*, during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee's home to the employer's premises." *Pryor v. Ill. Workers' Comp. Comm'n*, 2015 IL App (2d) 130874WC ¶ 22.

Here, the facts do not support Petitioner's claim that she was a traveling employee. Petitioner cited various Commission Decisions in her Brief. However, all are distinguishable from the present claim. Petitioner's duties did not require her to travel away from her employer's premises from site to site, traveling was not an essential part of Petitioner's duties as a crossing guard, and the evidence demonstrated that Petitioner was assigned to one corner and was not required to travel to different intersections to perform her crossing guard duties.

Respondent relies on *Pryor v. Ill. Workers' Comp. Comm'n* for the proposition that Petitioner was not a traveling employee at the time of her injury on February 6, 2014, and that she was in the course of her regular commute to work. Respondent provided a synopsis of *Pryor* wherein the Appellate Court concluded that the claimant, a car hauler [delivered new automobiles to various car dealerships for Chrysler], was not a traveling employee at the time of his injury because he had not yet begun his work-related travel; the claimant's injury occurred during the course of his regular commute from his home to his employer's premises, and before he embarked on a work trip away from his employer's premises.

The Commission agrees that Petitioner was not a traveling employee at the time of her injury, as discussed above, but finds that unlike the claimant in *Pryor*, Petitioner here had reached her ultimate work destination; she had just completed her regular commute to work, was about to commence her crossing guard duties, and was on her employer's premises when the injury occurred.

> Generally, 'when an employee slips and falls at a point off the employer's premises while traveling to or from work, the resulting injuries do not arise out of and in the course of the employment and are not compensable under the Act.' (Citation omitted). This is known as the 'general premises rule.' However, our supreme court has carved out an exception to this rule when an employer 'provides' a parking lot to its employees. *Walker Bros. v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 181519WC, ¶ 21.

The "parking lot exception" provides:

> Whether or not the employer owned the parking lot is immaterial; for if the employer provides a parking lot which is customarily used by its employees, the employer is responsible for the maintenance and control of that parking lot. Therefore, the question presented to the circuit court was not one of disputed fact or whether the decision of the Industrial Commission was manifestly against the weight of the evidence, but whether, when an employer provides a parking [lot] for employees and an employee falls on the parking lot, this fact being uncontroverted on the record, the employee is entitled to recover as a matter of law. *Id.*

With that said,

> [I]it is clear that we must determine whether the employer 'provided' the parking lot in question to its employees. We make this determination by considering: (1) whether the parking lot was owned by the employer, (2) whether the employer exercised control or dominion over the parking lot, and (3) whether the parking lot was a route required by the employer. *Id.* at 23.

Here, Respondent's witnesses, police officer Tony Jemison and Village Manager Ingrid Velkme, both confirmed that the parking space where Petitioner parked was owned and maintained by her employer the Village. Although the Village had an actual parking lot or lots behind its building [Village Hall] where Petitioner was allowed to park, and notwithstanding that the parking area where Petitioner sustained her injury was open to the general public, Respondent allowed Petitioner to park in that area. Respondent not only allowed or acquiesced to this practice, but further waived the four-hour parking limit for Petitioner and other Village employees. Petitioner's unrebutted testimony with respect to this waiver was that this privilege was for Village employees. Taking the facts of this case, the preponderance of the evidence demonstrates that the Village owned the parking premises where the accident occurred, exercised control or dominion of the area, and although there is no evidence that Respondent required Petitioner to park there, they did confer different parking rules so that Village employees could use that parking space. Therefore, the Commission finds that Petitioner fell in a parking space provided by her employer.

20IWCC0441

Our Supreme Court has held that accidental injuries sustained on the employer's premises within a reasonable time before or after work arise "in the course of" employment. *Archer Daniels Midland Co. v. Indus. Comm'n*, 91 Ill. 2d 210, 215 (1990). Further, where the injury was due to the dangerous condition of the employer's premises, courts have consistently approved an award of compensation. *Id.* at 216. Thus, with respect to the "arising out of" element, a neutral risk analysis is unnecessary. In other words, the fact that this parking area was also used by the general public is immaterial to the issue of compensability because Petitioner's injury was caused by a hazardous condition on the employer's premises. This hazardous condition on the employer's premises renders the risk of injury incidental to employment without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. *Id.*

In light of the foregoing, the Commission finds that Petitioner herein was on her employer's premises at the time of her injury, and that her injury arose out of and in the course of her employment because the injury occurred as a result of a hazardous condition on the employer's premises, namely ice and snow.

The Commission additionally finds that no real dispute exists with respect to the issue of notice. By the Request for Hearing and the arbitration transcript, Respondent was only disputing notice of a compensable accident. Thus, the Commission not only finds that Petitioner sustained a compensable accident, but that timely notice of the accident was given to Respondent.

As to the next issue of causal connection, the chain of events in this claim supports a finding that Petitioner's right wrist conditions were causally related to the February 6, 2014 slip and fall. Petitioner testified to having no prior history related to the right wrist. Following the February 6, 2014 accident, Petitioner was taken by ambulance to the emergency room on that same date. Petitioner reported right wrist pain that radiated to her forearm. X-rays of the right wrist revealed a comminuted and impacted fracture of the distal right radius with considerable displacement and angulation.

As a result of her injuries, Petitioner underwent four surgeries: an open reduction and internal fixation of the right distal radius on February 10, 2014, hardware removal on July 3, 2014, a revision open reduction and internal fixation of the right distal radius fracture nonunion on June 23, 2015, and removal of hardware from the right wrist/distal radius on September 11, 2018. Petitioner's treating surgeon, Dr. Fajardo, also performed a right wrist proximal row carpectomy and fusion. Petitioner additionally underwent occupational therapy and injections, and was either off work or given work restrictions by her treating physicians.

With respect to causal connection, Respondent's Section 12 examiner, Dr. Phillips, simply stated in his Section 12 report:

> Ms. Macdonnell is a 65-year-old female who on February 6, 2014, fell on the ice, landing on her outstretched right wrist. She sustained a displaced intraarticular distal radius fracture. She had an open reduction and internal fixation of the fracture within a

> week of the injury. Due to intraarticular hardware, she had removal of hardware by Dr. Fajardo. Her lunate facet subsided. She underwent open reduction of the lunate facet with a plate, screws and K-wires; however her lunate facet has continued to subside and she now has posttraumatic arthritis of her right wrist. (RX5).

Based on the totality of the evidence, the consistent progression in treatment, and no real dispute by way of Respondent or its Section 12 examiner on this issue, the Commission finds that Petitioner's right wrist condition is causally related to the February 6, 2014 injury.

By its Brief, Respondent does not dispute the reasonableness and necessity of the medical treatment rendered to Petitioner, nor does Respondent dispute the claimed TTD period. Having found that Petitioner sustained a work-related accident and that her current condition of ill-being is causally related to that February 6, 2014 injury, the Commission awards the reasonable, necessary, and related medical bills as contained in Petitioner's Exhibits 5 through 7 totaling $79,290.21 and subject to Sections 8(a), 8.2, and 8(j) of the Act. The Commission further awards TTD benefits from February 10, 2014 through March 16, 2014; July 14, 2014 through July 18, 2014; June 23, 2015 through September 16, 2015; and, September 11, 2018 through October 1, 2018.

The Commission additionally finds that Petitioner is entitled to thirty-five percent (35%) loss of use of the right hand. With respect to the five factors under Section 8.1b of the Act, the Commission finds as follows:

(i) Impairment Rating: On February 2, 2018, Respondent's Section 12 examiner, Dr. Craig Phillips, determined that Petitioner had an impairment rating of 10% of the upper extremity. As indicated by Petitioner, the impairment rating was performed prior to maximum medical improvement as Petitioner subsequently underwent fusion surgery for the right wrist on September 11, 2018. The Commission gives this factor little weight.

(ii) Occupation of Injured Employee: Petitioner worked as a receptionist/general office clerk as well as a crossing guard for Respondent prior to her injury, and continued with her regular duties for Respondent/the Village as of the date of arbitration. The Commission gives this factor some weight.

(iii) Petitioner's Age: Petitioner was 61 years old on the accident date; the Commission gives this factor no weight as there is no evidence in the record that Petitioner's age had any effect on the level of permanent partial disability.

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

(v) Evidence of Disability: Evidence of Petitioner's disability is corroborated by the treating medical records. As a result of the February 6, 2014 work-related accident, Petitioner underwent four surgeries to her right wrist; the fourth one being a right

wrist fusion. The last medical record in evidence was Dr. Fajardo's medical record dated December 28, 2018. On this date, Petitioner reported a zero out of 10 pain level and had no current complaints. Petitioner was working full duty. Examination revealed healed incisions, no swelling/echymosis/erythema, and negative Finkelstein, phalen, and tinel signs.

At arbitration, Petitioner testified that she continued to wear a brace; she wore the brace at work, but not every day. Petitioner testified, "I can do my job; just every so often, I have pain in my hand." (T.39). Petitioner further testified: "Sometimes it's just like a pinched nerve or sometimes it just stiffens up or my fingers will lock up; and then I use one of those stress balls to kind of get it back going." (T.39). Petitioner continues to follow-up with Dr. Fajardo. "My fingers were a little numb, and it was swelling up on me; and everything would stiffen." (T.39).

In light of the foregoing, with no single enumerated factor being the sole determinant of disability, the Commission awards Petitioner thirty-five percent (35%) loss of use of the right hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on July 11, 2019, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable, necessary, and related medical bills as contained in Petitioner's Exhibits 5 through 7 totaling $79,290.21 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 of $79,290.18 under Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $426.67 per week for 21 weeks, commencing February 10, 2014 through March 16, 2014; July 14, 2014 through July 18, 2014; June 23, 2015 through September 16, 2015; and, September 11, 2018 through October 1, 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 shall pay Petitioner permanent partial disability benefits of $384.00 per week for 71.75 weeks because the injuries sustained caused thirty-five percent (35%) loss of use of the right hand, as provided in Section 8(e) of the Act.

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

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

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

DATED: AUG 5 - 2020

D. Douglas McCarthy

DDM/pm
O: 6/17/2020
052

Stephen J. Mathis

DISSENT

It is a well-established principle that "[t]he general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Commission*, 2013 IL 115728, ¶ 16 (quoting *Commonwealth Edison Co. v. Industrial Commission*, 86 Ill. 2d 534, 537 (1981)). I find Petitioner failed to prove that her injury occurred in the course of her employment. Therefore, I respectfully dissent.

I concur with the Majority's finding as it relates to Petitioner's failure to establish that she is a traveling employee. Despite Petitioner's failure to qualify as a traveling employee, the inquiry does not end. As the court noted in *Illinois Bell Tel. Co. v. Industrial Commission*, "when an employee slips and falls, or is otherwise injured, at a point off the employer's premises while traveling to or from work, his injuries are not compensable." 131 Ill. 2d 478, 483-484 (1989) (quoting *Reed v. Industrial Commission*, 63 Ill. 2d 247, 248-49 (1976)). Two exceptions to this general rule exist: 1) when an employee falls in a parking lot provided by the employer; or 2) when an employee is required to be at a place in fulfillment of her job duties, and the employee is exposed to a risk to a greater degree than the general public. *Illinois Bell Tel. Co* at 484. Neither exception applies.

The Majority's analysis regarding the parking-lot exception would be well and good if Petitioner had actually fallen in the employer-provided lot. As Ms. Velkme testified, Respondent does in fact provide a parking lot for its employees; furthermore, Respondent ensures that designated employee-only lot is cleared of ice and snow in order to protect its employees from this exact type of accident. Specifically, Ms. Velkme testified as follows: "It's a high priority because our first responders, our police department and also our fire department use that; the employees that park there. So it's – when there's snow and ice, it is immediately cleaned and salted." T. 111-12. Moreover, the lot was exclusive for Village employees. T. 52. Petitioner simply chose not to use the hazard-free lot. T. 62-3. Instead, Petitioner parked on the public street in front of Respondent's premises for her personal convenience. T. 42; 62-3. No one from Respondent directed Petitioner to utilize this parking spot. T. 51-52; 109. Petitioner was free to choose where to park. T. 40; 51-52; 62. The fact that the Village police department chose not to

20IWCC0441

enforce the posted time limits for parking has no bearing on Respondent's control over Petitioner's parking choices.

The Majority in its analysis routinely refers to Petitioner's accident site as the "parking area" or the "parking premises" presumably to avoid the undisputed fact- Petitioner fell on the public street. As Respondent is the Village of Western Springs, it maintains and plows all the streets in the Village. T. 112. Under the Majority's analysis, because Respondent performs its civic duties and responsibilities, all the public streets are considered its premises. Taking the Majority's analysis to its logical conclusion, an employee of any city/town/village/municipality who slips on a snowy/icy public street presumably now has a compensable claim. Petitioner did not fall in the employer-provided parking lot; in fact, Petitioner did not fall in <u>any</u> parking lot, but rather she fell in the public street. As such the parking lot exception is not applicable.

The second exception is no more applicable. Petitioner was not required to be at that parking spot to fulfil her job duties. As detailed above, Petitioner was free to park wherever she so desired. Additionally, there is no evidence Petitioner was exposed to a risk to a greater degree than the general public. Petitioner testified she and the general public alike could park in front of the Village Hall. T. 52. As the court noted in *Illinois Bell Tel. Co.*, "the mere fact that the duties take the employee to the place of injury and that, but for the employment, [s]he would not have been there, is not of itself, sufficient to give rise to the right to compensation." 131 Ill. 2d 478, 485-486 (1989) (quoting *Caterpillar*, 129 Ill. 2d at 63).

During her normal commute to work, Petitioner fell on an icy public street. Petitioner failed to prove her accident occurred in the course of her employment. For the above stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MacDONNELL-DAYHOFF, JACQUELINE T Case# **14WC008089**

Employee/Petitioner

VILLAGE OF WESTERN SPRINGS POLICE DEPT

Employer/Respondent

20IWCC0441

On 7/11/2019, 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 2.07% 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:

0147 CULLEN HASKINS NICHOLSON ET AL
MICHAEL A ROM
10 S LASALLE ST SUITE 1260
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

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

Jacqueline T. Macdonnell-Dayhoff
Employee/Petitioner

v.

Village of Western Springs Police Department
Employer/Respondent

Case # **14** WC **8089**

Consolidated cases: _____

20IWCC0441

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **April 26, 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 **February 6, 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 not*** sustain an accident that arose out of and in the course of employment.

In the year preceding the injury, Petitioner earned $**33,280.00**; the average weekly wage was $**640.00**.

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

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

Respondent is entitled to a credit of $**79,290.18** under Section 8(j) of the Act.

ORDER

Denial of benefits

BECAUSE PETITIONER DID NOT SUSTAIN ACCIDENTAL INJURIES THAT AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT, 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

July 11, 2019
Date

JUL 11 2019

Jacqueline T. Macdonnell-Dayhoff v. Village of Western Springs Police Department, No. 14 WC 8089

Preface

The parties proceeded to hearing April 26, 2019, on a Request for Hearing indicating the following disputed issues: whether Petitioner sustained accidental injuries that arose out of and in the course of employment; whether Respondent was given notice of the accident within the time limits stated in the Act; whether Petitioner's current condition of ill-being is causally connected to this injury; whether Respondent is liable for certain unpaid medical bills; whether Petitioner is entitled to periods of temporary total disability; and what is the nature and extent of the injury. Jacqueline T. Macdonnell-Dayhoff v. Village of Western Springs, No. 14 WC 8089 Transcript of Evidence on Arbitration at 4, 6-7; Arbitrator's Exhibit 1. Petitioner testified, as well as Officer Tony Jemison of the Western Springs Police Department, and Ingrid Velkme, the Village Manager of Western Springs.

Findings of Fact

The facts in this hearing are straightforward and essentially not disputed.

Jacqueline Macdonnell-Dayhoff (Petitioner), a 62 year old female, testified that on February 6, 2014, she was a crossing guard for the Western Springs Police Department (Respondent). She is to be at her location, Wolf and Hillgrove, at 7:40 a.m. and remain until 8:10 a.m. She testified she drives to work and parked in front of the Village Hall in angled parking. Petitioner testified she opened her car door, stepped out of the car, slipped on ice, lost her balance and fell down. She said she hurt her arm. Dayhoff at 12, 13, 21, 42, 14, 22-23.

Officer Tony Jemison testified he was on patrol in front of the Village Hall and was flagged down by Petitioner, who was in commuter parking spaces by the Village Hall. She told him she had fallen and he called for paramedics. Dayhoff at 90-91. He documented the incident at 7:35 a.m. Respondent's Exhibit 1.

Petitioner testified she was taken to LaGrange Hospital. She said she only injured her arm. The records of Adventist LaGrange Hospital indicated Petitioner arrived at 8:14 a.m. by ambulance. She complained of right wrist pain and had slipped on ice. An x-ray revealed Colles' fracture of the right wrist and no fracture of her elbow. Dayhoff at 24, 25; Petitioner's Exhibit 4 (unpaginated).

Subsequent to the fall and fracture, Petitioner had four surgical procedures to her right wrist: an open reduction and internal fixation of the right distal radius on February 10, 2014; removal of hardware in her right wrist on July 3, 2014; a revision open reduction internal fixation right distal radius fracture nonunion on June 23, 2015; and removal of hardware right wrist/distal radius, right wrist proximal row carpectomy right wrist fusion on September 11, 2018. Petitioner's Exhibit 2 (unpaginated); Petitioner's Exhibit 3 (unpaginated).

Petitioner testified as to the surgical procedures, and her time off work. She testified she has pain in her hand, and it is a little swollen. The records of one of her surgeons, Dr. Marc Fajardo, of December 28, 2018, indicate Petitioner denied being in pain, had no current complaints, and was working full duty. Dayhoff at 26, 28, 29, 31, 39, 40; Petitioner's Exhibit 3 (unpaginated).

Petitioner submitted to an independent medical examination March 2, 2018, by Dr. Craig Phillips. Phillips noted the diagnostics of Petitioner documented the fracture to her right wrist and noted Petitioner was coping quite well with her condition. She was working without restrictions. Phillips said Petitioner had developed post traumatic arthritis of the radiocarpel joint, but did not have de Quervain's tenosynovitis or cubital tunnel syndrome. Respondent's Exhibit 5 at 7, 9.

Conclusions of Law

The decision of this case begins and ends with disputed issue C, did an accident occur that arose out of and in the course of Petitioner's employment as a crossing guard for Respondent.

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that she has suffered a disabling injury which arose out of and in the course of her employment. Sisbro, Inc. v. Industrial Commission (Rodriguez), 207 Ill. 2d 193, 203 (2003). "In the course of employment" refers to the time, place and circumstances of the injury. If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of her duties and while she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 338 (1980). For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts she was instructed to perform by her employer, acts which she had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to her assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling her duties. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 58 (1989).

There are three categories of risk an employee may be exposed to: risks distinctly associated with the employment; risks personal to the employee; and neutral risks which have no particular employment or personal characteristics. Illinois Institute of Technology Research Institute v. Industrial Commission, 314 Ill. App. 3d 149, 162 (2000).

This is not a case where Petitioner was exposed to a risk distinctly associated with her employment as a crossing guard, nor a risk personal to her. This is a neutral risk that has no particular employment or personal characteristics, such as those to which the general public is commonly exposed and is compensable only where the employee was exposed to the risk to a

greater degree than the general public. Dukich v. Illinois Workers' Compensation Commission, 2017 Ill. App. (2d) 160351 WC.

Here, Petitioner parked on a public street in a space open to the general public. She was not told where to park, she could park wherever she wanted to park. She ignored the opportunity to park in either of two Village lots where snow and ice removal had a high priority, and never checked to see if spaces were available that day. Dayhoff at 112, 14, 109, 51, 64, 45, 111, 110. Petitioner fell on a public roadway well away from her crossing guard post, not on property designated for parking by Village employees. It has long been held when an employee slips and falls or is otherwise injured at a point off the employer's premises while, as Petitioner was doing here, traveling to work, those injuries are not compensable. Butler Mfg. Co. v. Industrial Commission, 85 Ill. 2d 213, 216 (1981). The testimony and photographs of the area support the conclusion Petitioner was not exposed to a risk greater than that of the general public. Dangers created by ice and snow in public parking areas are dangers to which all members of the public are exposed on any winter day or right. Petitioner was simply injured going to work, and that is not compensable. Burmeister v. Industrial Commission, 52 Ill. 2d 84, 86 (1972).

I find as a conclusion of law, Petitioner's injury did not arise out of and in the course of her employment as a crossing guard. Therefore, she is not entitled to compensation for medical treatment or temporary total disability benefits. All other issues are moot.

Arbitrator

7/11/19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANA PAVON,

Petitioner,

vs. NOS: 14 WC 32766

TAKEDA PHARMACEUTICAL,

Respondent.

20IWCC0442

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 31, 2018, is hereby affirmed and adopted.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party

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

DATED: AUG 5 - 2020
KAD/bsd
O063020
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OAVON, ANA
Employee/Petitioner

Case# **14WC032766**
14WC033690

TAKEDA PHARMACEUTICAL
Employer/Respondent

20IWCC0442

On 5/31/2018, 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 2.03% 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
205 W RANDOLPH ST SUITE 1750
CHICAGO, IL 60654

0766 HENNESSY & ROACH PC
AUKAE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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

Ana Pavon
Employee/Petitioner

v.

Takeda Pharmaceuticals
Employer/Respondent

Case # **14** WC **32766**

Consolidated cases: **14 WC 33690**

20IWCC0442

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**, on **April 24, 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 **10/21/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**48,899.24**; the average weekly wage was $**940.37**.

On the date of accident, Petitioner was **43** 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 $ for TTD, $ for TPD, $ for maintenance, and $**30,420.30** for other benefits, for a total credit of $**30,420.30**.

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

ORDER

The petitioner failed to prove that she sustained a repetitive trauma arising out of and in the course of her employment manifesting on 10/21/2013. All benefits are therefore denied. See attached Findings of Fact and Conclusions of Law.

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. DeCesty

Signature of Arbitrator

5/30/18
Date

ICArbDec p. 2

MAY 31 2018

FINDINGS OF FACT

Petitioner presented two consolidated matters for trial. 14 wc 32766 alleges a repetitive trauma type injury manifesting on 10/21/13, as amended at trial. The original manifestation date listed on the Application was 11/13/13. ARB EX 1. 14 wc 33690 alleges an accident date of 5/15/14 which was the last day Petitioner worked for Respondent. ARB EX 2. The following findings and conclusions apply to both cases.

Petitioner, a 43 year old woman, testified that she is currently living in Arizona and that she flew in for her trial. At trial, Petitioner testified that she began working for Respondent as a document specialist in 2002. As such, she was required to scan data. Petitioner testified that she sat in a rolling chair at her cubicle work station and placed documents into a scanner on her desk. Also on her desk were 2 computer monitors and a keyboard on a sliding tray. Petitioner testified that the scanner was on her right side so she moved to her right to insert papers into the scanner. The scanned information would appear on the computer monitor and Petitioner used the keyboard to enter data off the screen. Petitioner is right hand dominant.

Petitioner subsequently added filing to her duties when she began working in the records management department. Petitioner did not file as a document specialist. While in records management, Petitioner was also required to perform her scanning and date entry duties. Petitioner testified that she was required to scan documents, enter the data into the system and then file the document into a box for transfer to a storage facility. Petitioner testified that the boxes were either on her desk or on the floor. Petitioner was required to pick up the box and place it in a cart to be moved to storage. Petitioner testified that she would also file documents into folder contained in a file room and that the folders were above her head requiring her to reach up to file. Petitioner testified that she worked 8 to 9 hours per day with a 60 minute lunch. During this time she entered data 3 to 4 hours per day, scanned 3 to 4 hours per day and filed 2 hours per day.

On 10/3/13, Petitioner saw her primary care physician, Dr. Lalyre. The records indicate that Petitioner complained of right hand and right leg pain. Specifically, the hand written records state "x 1 week right hand right leg. Uses mouse at work. Wakes at 4 am. … feels at times overwhelmed by work…" PX 1. Petitioner also complained of pain in her low back. Dr. Lalyre ordered MRI of Petitioner's right arm, right wrist, and right leg. The right arm MRI indicated vague bone marrow edema within the proximal third shaft of the radius near the site of patient's symptoms. Differential diagnosis as above to include bone bruises, stress response, or other less common entities. Follow up is recommended as well as clinical correlation…" PX 1. The right wrist MRI indicated "no specific finding to account for pain along the anterolateral aspect of the wrist. Small subcortical cyst of the ulnar proximal aspect of the lunate." PX 1. The handwritten note of 10/3/13 also indicate "cts rt."

On 10/21/13, Petitioner continued to complain of right arm and forearm pain with difficulty holding items. The assessment was again "rt cts." Petitioner was referred to a neurologist and "pt." PX 1. On October 24, 2013, Dr. Lalyre noted Petitioner's report that she "could not got to work because of … pain rt wrist, forearm." Petitioner also reported "cramp in lt leg." The diagnosis on 10/24/13 and again on 10/26/13 was right arm and right wrist pain." Dr. Lalyre noted x rays of the right wrist, hand, elbow and forearm were normal and noted "to see chiropractor."

Petitioner testified that she gave notice of her work related wrist arm, hand and wrist complaints to either Jean Zyker or Marla Rimkus, her boss and her manager, specifically reporting her right hand swelling and pain. ARB EX 1.

On 10/28/13, Petitioner came under the care of Dr. Siddiqui, a chiropractor, for treatment of complaints to her neck, right shoulder, elbow, forearm, wrist, and low back pain with referral towards the right extremity. Ms. Pavon states that this pain is a direct result of an injury sustained at work. Patient states that she has worked over 11 years in the records department scanning documents and typing using her right arm/wrist. Ms. Pavon states that she has been experiencing sharp pain over the affected area since 8-13 due to the repetitive nature of her work. Mr. Pavon states her pain has been progressively getting worst over right upper extremity over the duration of the last few months. Patient states that her pain over her affected areas became unbearable about a week ago, and she presented to her MD Dr. Lalyre, who evaluated her, injected and prescribed pain medication, and referred Ms. Pavon to our office for treatment. In addition, patient states that she was sent for an MRI of the right arm/forearm/wrist, revealing a small subcortical cyst as well as a possible \bone bruising over the right forearm. Ms. Pavon states the medication has not been helping, and he pain over the affected area is severely interfering with her ability to perform routine activities of daily living. Ms. Pavon denies previous trauma or injury to her affected areas." PX 4.

Petitioner also reported a sharp pain over the lumbar spine and low back making it hard to sit for long periods of time. She reported neck pain referring over her right shoulder and into her right elbow, forearm and wrist. She reported weakness of the right arm and loss of grip strength with extreme tenderness over her right forearm and wrist with pain on flexion and extension of the right wrist. She reported that use of the right wrist causes sharp shooting pain towards her forearm and right wrist. PX 4. Petitioner began receiving chiropractic care for her neck, right shoulder, forearm, elbow, wrist and lumbar sprain.

Petitioner saw Dr. Nam, an orthopedic physician, who ordered a right wrist and forearm bone scan. The 11/5/13 report indicated bilateral symmetric bony abnormality in the wrists and shoulder AC joint arthritis. PX 3.

Petitioner saw Dr. Harsoor a pain management physician, on 11/19/13. PX 5. She was referred for evaluation of her right arm pain. Petitioner reported right arm and shoulder pain for the last 4 months. Petitioner reported that her symptoms were related to her job performing data entry, using a computer mouse and repetitive hand movements. Under a diagnosis of tendonitis, Dr. Harsoor performed tendon sheath injections. On 12/4/13, Petitioner reported moderate relief following the injection. Petitioner reported that she was still working but on short term disability. Petitioner reported that she was not on workers' compensation. PX 5. Petitioner reported mild right elbow tenderness and no tenderness and mild loss of thenar eminence in the right wrist. She did not receive a second injection due to mild improvement. Petitioner was to return to work on 12/10/13 per Dr. Harsoor. PX 5.

On 12/31/13, Petitioner returned to Dr. Harsoor and reported that she tried to return to work but that it worsened her pain. Petitioner requested a second injection and she received a second tendon sheath injection under a diagnosis of lateral epicondylitis of the elbow and myofacial pain. PX 5. Dr. Harsoor also noted Petitioner's report that physical therapy had not helped her symptoms. PX 5. Petitioner continued with Dr. Siddiqui's chiropractic care into 2014.

Petitioner testified that she filed for short term disability in October 2013 and as such did not request the matter be handled as a workers' comp claim. Petitioner testified that she worked for Respondent through 5/14/14 when she presented her restrictions from Dr. Siddiqui but was not provided accommodated duty. RX 9. Petitioner received continued short term disability thereafter until it ended in June 2014. Petitioner completed a first report of injury on July 8, 2014 alleged repetitive trauma manifesting on 10/21/13. RX 6. Petitioner filed

her workers' comp application in September 2014 and her claim was denied by Respondent. She requested an extension of her short term benefits in September 2014 which was denied.

On 4/16/14, the records indicate that Petitioner saw Dr. Iftikhar. Petitioner again reported right arm symptoms as well as left arm symptoms with greater symptoms on the right. An EMG of the right upper extremity was ordered. Dr. Iftikhar at Riverside Orthopedics stated that the Petitioner had very mild carpal tunnel syndrome, but the EMG/NCV did not correlate with the clinical symptoms. RX 9.

Petitioner continued to treat for her neck and right arm complaints with chiropractor Dr. Siddiqui and also began treating with Dr. Malek as of May 28, 2014 for her lower back and leg pain. Petitioner reported that her low back and leg complaints were related to her job via excessive sitting. On May 28, 2014, Dr. Malek noted Petitioner's complaints of pain in her neck, right upper extremity tingling and numbness, swelling in her elbow and low back pain radiating into the right leg for 8 months in duration. PX 2. Petitioner reported lifting at her job along with filing and stated that her job was repetitive. Petitioner reported some relief from Dr. Siddiqui's treatment and from the elbow injections performed by Dr. Harsoor. Dr. Malek noted the normal MRI of the right arm, forearm and wrist taken in October 2013 as well as the normal bone scan in November 2013 ordered by Dr. Nam and the cervical MRI done in March 2014 which show bulging cervical discs without disc herniation. Dr. Malek ordered a lumber MRI with a right lower extremity EMG/NCV with likely injection thereafter. PX 2. Dr. Malek took Petitioner off work. His impression was "a 44 year old lady with symptoms likely related to her repetitive work injury." PX 2.

Petitioner continued to treat with Dr. Saddiqui who prescribed chiropractic massage therapy for her right arm, leg and low back.

Dr. Malek noted the lumbar MRI indicated evidence of desiccation at L5-S1 and to a lesser degree at L4-5 and that the EMG was consistent with right L5 radiculopathy. He performed L4-5 and L5-S1 injections in June 2014 with limited response. He performed a lumbar discogram on 7/23/14 which he deemed valid noting L5-S1 is the pain generator level with some contribution from L4-5. The post disc CT showed evidence of tears at L4-S1 and on 7/28/14, Dr. Malek recommended a 2 level fusion which Petitioner declined. Dr. Malek placed Petitioner at MMI pending surgery. PX 2. She was released to regular duty "as tolerated" as of 7/28/14. PX 2. Petitioner continued to treat thereafter with Dr. Saddiqui.

Petitioner attended a Section 12 exam with Dr. Cherf at Respondent's request on October 13, 2014. The exam pertained to Petitioner's right wrist and cervical spine. He noted that Petitioner displayed "abnormal illness behavior" during the exam and "limitation of effort, nonanatomic tenderness, and nonphysiologic findings." He noted that the symptoms worsened despite Petitioner having been off work. He also reviewed her previous objective testing and requested to review the right upper extremity EMG report to determine a carpal tunnel diagnosis and cervical radiculopathy. In the interim, he opined that Petitioner did not present any objective findings of a condition in her right wrist or cervical area that could be related to her reported job duties from one year earlier in October 2013. RX 1. After review of the requested EMG, in January 26, 2015, Dr. Cherf opined that the minimal findings of right CTS on the EMG were not the cause of her right upper extremity symptoms and that the EMG from April 2014 did not identify an evidence of cervical radiculopathy. Given his lack of objective findings on exam or on objective testing, he opined that Petitioner's chiropractic treatment was excessive, that no further treatment was necessary and that Petitioner should be considered at MMI for any of her claimed conditions. PX 2. Petitioner continued her treatment with Dr. Saddiqui in early 2015.

Petitioner attended a Section 12 exam with Dr. Mirkovic for her low back and right leg complaints on 3/17/15, RX 4. Petitioner advised that her low back and leg complaints were caused by her 12 years of work for Respondent in the records department. Specifically, Petitioner reported that she repetitively filed, scanned and lifted boxes of about 10 to 20 pounds. Petitioner reported a gradual onset of low back pain and then gradual onset of right leg pain several weeks later. She reported that the low back pain was worse than the leg pain. Dr. Mirkovic noted that physical therapy since November 2013 has not improved the symptoms. He further noted that Petitioner received injection to her low back with little relief. Dr. Mirkovic also reviewed Petitioner's objective tests including her lumbar discogram, post discogram CT scan, cervical MRI, lumbar MRI, and right leg EMG. Dr. Mirkovic concluded that Petitioner suffered from chronic low back pain unrelated to her job duties with Respondent and attributed to the aging process. He noted that the job description provided indicated that her job was sedentary with occasional lifting of 40 pounds. He further noted that Petitioner's imaging studies did not support her reported pain levels on exam. Dr. Mirkovic opined that Petitioner was at MMI for her lumbar spine complaints. He determined that no further treatment was necessary and that she could return to work full duty. RX 4.

On 4/16/15, Dr. Saddiqui placed permanent restrictions on Petitioner. He stated that he had been treating Petitioner for right hand/arm pain due to carpal tunnel syndrome as well as 2 herniated discs of the cervical spine, and low back pain due to lumbar herniation. He wrote, "At this time, I am advising that she is to remain on light duty consisting of no heavy lifting past 5 pounds permanently." PX 4.

Petitioner testified that in June 2015, she found a job at Fisher Clinicals performing data entry similar to her job for Respondent but without the scanning requirement. She worked until September 2015 and then left the job due to hand swelling and "unbearable" pain.

In an addendum report dated January 6, 2016, Dr. Cherf noted that he disagreed with Dr. Saddiqui's permanent restrictions reiterating his prior opinion that Petitioner did not sustain a cervical injury, any evidence of carpal tunnel was very mild and that her cervical, right arm and right hand complaints were not supported by the EMG of April 2014. RX 3. On 4/19/16, Dr. Mirkovic also responded to Dr. Saddiqui's restrictions stating that his opinion regarding Petitioner's low back and leg had not changed and that her imaging studies did not support her clinical presentation or her complaints of pain. RX 5.

Petitioner continued treating with Dr. Saddiqui through 2016. Dr. Saddiqui sent her to Dr. Novoseletsky in May 2016 for her continued low back complaints. PX 8. Petitioner reported constant low back pain that radiates to her bilateral buttocks and legs. Petitioner attributed her back pain to sitting at work. Dr. Novoseletsky ordered a lumbar MRI and EMG. No treatment was rendered. PX 8. Petitioner's last visit to Dr. Saddiqui was in December 2016, 3 years after her alleged manifestation date. No treatment is currently scheduled for Petitioner.

Petitioner testified that she currently lives in Arizona. She does not work and asserts that she is unable to work. She has not treated since December 2016. Petitioner has not requested nor has she undergone any vocational training. She testified that she currently notices continued pain in her right arm elbow area and hand along with numbness, tingling and swelling in both hands. She testified that she does not currently have neck pain. Petitioner testified that she continues to have low back pain with occasional shooting pain down her right leg. She takes ibuprofen 600 and muscle relaxants prescribed by her new primary physician. She testified that she continues to use the previously prescribed TNS unit.

Respondent submitted utilization reviews a trial covering certain treatment. A utilization review dated August 29, 2014 indicated that the bone scan, MRI of the cervical spine on March 12, 2014, MRI of the lumbar spine on June 2, 2014 and the EMG on June 8, 2014 are non-certified. (RX 8) A utilization review dated August 29, 2014 indicates that the two tendon sheath injections on November 19, 2013 and December 31, 2013 were also non-certified. (RX 8) A utilization review dated September 4, 2014 indicated that the diagnostic cervical epidural steroid injection on May 28, 2014, and discogram on July 23, 2014 is non-certified. (RX 8) A utilization review dated August 29, 2014 indicates that the right L4-L5 and L5-S1 epidural steroid injection and epidural steroid injection on June 11, 2014 and June 22, 2014 are non-certified. (RX 8) Finally, a utilization review dated August 26, 2014 indicated that the EMG between August 21, 2014 and October 5, 2014 is also non-certified. (RX 8)

Respondent called Mr. Yoo to testify at trial in his capacity as the risk manager in charge of workers' comp claim investigation. He agreed that Petitioner's job duties required her to scan, file and enter data and to occasionally lift up to 40 pounds. Petitioner asked for help in lifting the boxes while employed by Respondent and did receive the help. He stated that if Petitioner had returned with restrictions of no lifting over 20 pounds she may have been accommodated. He further testified that Respondent handled this matter as a non work comp matter as short term disability was originally requested. His first notice of a comp matter was in July 2014 when Petitioner provided notice and a form 45 was completed. Petitioner filed her Application thereafter in September 2014 following a denial of the requested short term disability extension. Petitioner's job was officially terminated in December 2014.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law rendered in both consolidated matters of 14 wc 32766 and 14 wc 33690.

C. Did Petitioner sustain accidental injuries arising out of and in the course of her employment by Respondent? D. What was the date of accident? F. Is Petitioner's current condition of ill-being causally related to her injury?

Following a review of the record in its entirety, the Arbitrator finds that Petitioner did not sustain repetitive trauma type injuries to her neck, right arm, right hand, low back or right leg manifesting on either alleged dates of 10/21/13 or 5/14/14 which arose out of or in the course of her employment by Respondent and which were causally related to her employment for Respondent based on a preponderance of the credible evidence at trial. In so finding, the Arbitrator initially notes that Petitioner in fact complained of right hand pain to Dr. Lalyre in October 2013 and that she attributed that pain to her job duties of scanning and filing for Respondent. Petitioner repeated these right hand/wrist complaints and her relation of the complaints to her job duties to Dr. Siddiqui in October 2013. Petitioner was in fact initially diagnosed by Dr. Lalyre with "rt cts." Accordingly, the record seemingly supports Petitioner's alleged manifestation date of 10/21/13 for her "rt cts." However, the Arbitrator further finds that the record does not support this manifestation date for any of the other alleged conditions involving Petitioner's cervical spine, right arm, low back or right leg. Moreover, the Arbitrator further finds that the record does not support a finding of causal connection for any of Petitioner's alleged conditions, including her "rt cts" by a preponderance of the credible evidence.

In so finding with regard to Petitioner's cervical, right hand, wrist, arm, low back and right leg complaints, the Arbitrator notes a lack of medical opinion attributing Petitioner's conditions to her work activities. Regarding the right arm and hand and cervical complaints, while the medical records are replete with Petitioner's

statements that she believes her current problems are related to her work activities, there are no medical opinions stating that Petitioner's right arm, hand or cervical complaints are related to her work activities. Specifically, neither Drs. Lalyre, Harsoor, nor Chiropractor Siddiqui provided a causal relationship opinion linking Petitioner's ongoing condition to her work activities. The Arbitrator further specifically notes that the record is devoid of any medical opinion or testimony, lay or otherwise, regarding the details of Petitioner's job duties as sufficient to support a finding of repetitive trauma as alleged. In this matter, Petitioner's testimony alone regarding her work activities for Respondent does not provide a sufficient basis to support a finding of repetitive duties or repetitive trauma causally related to those duties.

The Arbitrator places greater weight on the opinion of Dr. Cherf who opined that Petitioner did not sustain any type of work-related injury to her neck or right wrist. Dr. Cherf had trouble diagnosing Petitioner with any problem at all based on the diffuse nature of her symptoms and complaints and the lack of objective medical or clinical support for the symptoms. He stated that she has "radicular symptoms of unknown etiology." (RX 1) Dr. Cherf stated that Petitioner's alleged symptoms even progressed while she was off work, which would point to the fact that work is not a causative factor regarding her neck and right arm problems. (RX 1)

Regarding Petitioner's alleged low back and right leg complaints, only Dr. Malek and Dr. Mirkovic provided causation opinions. Dr. Malek stated his impression was "a 44 year old lady with symptoms likely related to her repetitive work injury." Dr. Malek's opinion was seemingly based on Petitioner's reported history alone with any additional detail regarding Petitioner's specific job duties. According to Dr. Mirkvoic, an orthopedic surgeon, Petitioner's low back condition, namely subjective chronic low back pain, was not causally related to her work activities. (RX 4) He opined that Petitioner's reports regarding her work activities which were mainly sedentary, coupled with her imaging studies, do not support a causal relationship between her work activities and her low back pain.

The Arbitrator finds the opinions of Dr. Mirkovic in this matter to be more credible than those of Dr. Malek. Dr. Mirkovic reviewed Petitioner's job description and discussed with the petitioner her own description of her job. He also reviewed her diagnostic studies to determine if the results of those studies could be linked to a repetitive-trauma type of injury versus that of an ongoing degenerative condition. Finally, Dr. Mirkovic references current literature regarding causation of low back conditions and indicates that the types of mainly sedentary activities that the petitioner engages in do not cause low back problems. (RX 4) Dr. Malek based his causation opinion solely on the fact that the petitioner's work activities "seem repetitive." (PX 2)

Accordingly, because there is no sufficient evidence, testimony or causation opinion linking Petitioner's neck, or right hand/arm complaints to her work activities, and the Arbitrator finds Dr. Mirkovic's opinions to be more credible than Dr. Malek's regarding the petitioner's lumbar spine condition, the Arbitrator finds that the petitioner's current condition of ill-being regarding her neck, right hand/arm and low back/right leg are not causally related to her work activities. As such, all requested benefits are denied and all further issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANA PAVON,

Petitioner,

vs. NO: 14 WC 33690

TAKEDA PHARMACEUTICAL,

20IWCC0443

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 31, 2018 is hereby affirmed and adopted.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party

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

DATED: AUG 5 - 2020
KAD/bsd
O063020
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PAVON, ANA
Employee/Petitioner

Case# **14WC033690**
14WC032766

TAKEDA PHARMACEUTICAL
Employer/Respondent

20IWCC0443

On 5/31/2018, 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 2.03% 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
205 W RANDOLPH ST SUITE 1750
CHICAGO, IL 60654

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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

- [ ] 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

Ana Pavon
Employee/Petitioner

v.

Takeda Pharmaceuticals
Employer/Respondent

Case # **14** WC **33690**

Consolidated cases: **14 WC 32766**

20IWCC0443

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**, on **April 24, 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. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [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. [ ] Other _____

FINDINGS

On **5/15/2014**, 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 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 $**48,899.24**; the average weekly wage was $**940.37**.

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

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

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

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $**30,420.30** for other benefits, for a total credit of $**30,420.30**.

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

ORDER

The petitioner failed to prove that she sustained a repetitive trauma arising out of and in the course of her employment manifesting on 5/15/14. All benefits are therefore denied. See attached Findings of Fact and Conclusions of Law.

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

Signature of Arbitrator

5/30/18
Date

MAY 31 2018

FINDINGS OF FACT

Petitioner presented two consolidated matters for trial. 14 wc 32766 alleges a repetitive trauma type injury manifesting on 10/21/13, as amended at trial. The original manifestation date listed on the Application was 11/13/13. ARB EX 1. 14 wc 33690 alleges an accident date of 5/15/14 which was the last day Petitioner worked for Respondent. ARB EX 2. The following findings and conclusions apply to both cases.

Petitioner, a 43 year old woman, testified that she is currently living in Arizona and that she flew in for her trial. At trial, Petitioner testified that she began working for Respondent as a document specialist in 2002. As such, she was required to scan data. Petitioner testified that she sat in a rolling chair at her cubicle work station and placed documents into a scanner on her desk. Also on her desk were 2 computer monitors and a keyboard on a sliding tray. Petitioner testified that the scanner was on her right side so she moved to her right to insert papers into the scanner. The scanned information would appear on the computer monitor and Petitioner used the keyboard to enter data off the screen. Petitioner is right hand dominant.

Petitioner subsequently added filing to her duties when she began working in the records management department. Petitioner did not file as a document specialist. While in records management, Petitioner was also required to perform her scanning and date entry duties. Petitioner testified that she was required to scan documents, enter the data into the system and then file the document into a box for transfer to a storage facility. Petitioner testified that the boxes were either on her desk or on the floor. Petitioner was required to pick up the box and place it in a cart to be moved to storage. Petitioner testified that she would also file documents into folder contained in a file room and that the folders were above her head requiring her to reach up to file. Petitioner testified that she worked 8 to 9 hours per day with a 60 minute lunch. During this time she entered data 3 to 4 hours per day, scanned 3 to 4 hours per day and filed 2 hours per day.

On 10/3/13, Petitioner saw her primary care physician, Dr. Lalyre. The records indicate that Petitioner complained of right hand and right leg pain. Specifically, the hand written records state "x 1 week right hand right leg. Uses mouse at work. Wakes at 4 am. … feels at times overwhelmed by work…" PX 1. Petitioner also complained of pain in her low back. Dr. Lalyre ordered MRI of Petitioner's right arm, right wrist, and right leg. The right arm MRI indicated vague bone marrow edema within the proximal third shaft of the radius near the site of patient's symptoms. Differential diagnosis as above to include bone bruises, stress response, or other less common entities. Follow up is recommended as well as clinical correlation…" PX 1. The right wrist MRI indicated "no specific finding to account for pain along the anterolateral aspect of the wrist. Small subcortical cyst of the ulnar proximal aspect of the lunate." PX 1. The handwritten note of 10/3/13 also indicate "cts rt."

On 10/21/13, Petitioner continued to complain of right arm and forearm pain with difficulty holding items. The assessment was again "rt cts." Petitioner was referred to a neurologist and "pt." PX 1. On October 24, 2013, Dr. Lalyre noted Petitioner's report that she "could not got to work because of … pain rt wrist, forearm." Petitioner also reported "cramp in lt leg." The diagnosis on 10/24/13 and again on 10/26/13 was right arm and right wrist pain." Dr. Lalyre noted x rays of the right wrist, hand, elbow and forearm were normal and noted "to see chiropractor."

Petitioner testified that she gave notice of her work related wrist arm, hand and wrist complaints to either Jean Zyker or Marla Rimkus, her boss and her manager, specifically reporting her right hand swelling and pain. ARB EX 1.

On 10/28/13, Petitioner came under the care of Dr. Siddiqui, a chiropractor, for treatment of complaints to her neck, right shoulder, elbow, forearm, wrist, and low back pain with referral towards the right extremity. Ms. Pavon states that this pain is a direct result of an injury sustained at work. Patient states that she has worked over 11 years in the records department scanning documents and typing using her right arm/wrist. Ms. Pavon states that she has been experiencing sharp pain over the affected area since 8-13 due to the repetitive nature of her work. Mr. Pavon states her pain has been progressively getting worst over right upper extremity over the duration of the last few months. Patient states that her pain over her affected areas became unbearable about a week ago, and she presented to her MD Dr. Lalyre, who evaluated her, injected and prescribed pain medication, and referred Ms. Pavon to our office for treatment. In addition, patient states that she was sent for an MRI of the right arm/forearm/wrist, revealing a small subcortical cyst as well as a possible \bone bruising over the right forearm. Ms. Pavon states the medication has not been helping, and he pain over the affected area is severely interfering with her ability to perform routine activities of daily living. Ms. Pavon denies previous trauma or injury to her affected areas." PX 4.

Petitioner also reported a sharp pain over the lumbar spine and low back making it hard to sit for long periods of time. She reported neck pain referring over her right shoulder and into her right elbow, forearm and wrist. She reported weakness of the right arm and loss of grip strength with extreme tenderness over her right forearm and wrist with pain on flexion and extension of the right wrist. She reported that use of the right wrist causes sharp shooting pain towards her forearm and right wrist. PX 4. Petitioner began receiving chiropractic care for her neck, right shoulder, forearm, elbow, wrist and lumbar sprain.

Petitioner saw Dr. Nam, an orthopedic physician, who ordered a right wrist and forearm bone scan. The 11/5/13 report indicated bilateral symmetric bony abnormality in the wrists and shoulder AC joint arthritis. PX 3.

Petitioner saw Dr. Harsoor a pain management physician, on 11/19/13. PX 5. She was referred for evaluation of her right arm pain. Petitioner reported right arm and shoulder pain for the last 4 months. Petitioner reported that her symptoms were related to her job performing data entry, using a computer mouse and repetitive hand movements. Under a diagnosis of tendonitis, Dr. Harsoor performed tendon sheath injections. On 12/4/13, Petitioner reported moderate relief following the injection. Petitioner reported that she was still working but on short term disability. Petitioner reported that she was not on workers' compensation. PX 5. Petitioner reported mild right elbow tenderness and no tenderness and mild loss of thenar eminence in the right wrist. She did not receive a second injection due to mild improvement. Petitioner was to return to work on 12/10/13 per Dr. Harsoor. PX 5.

On 12/31/13, Petitioner returned to Dr. Harsoor and reported that she tried to return to work but that it worsened her pain. Petitioner requested a second injection and she received a second tendon sheath injection under a diagnosis of lateral epicondylitis of the elbow and myofacial pain. PX 5. Dr. Harsoor also noted Petitioner's report that physical therapy had not helped her symptoms. PX 5. Petitioner continued with Dr. Siddiqui's chiropractic care into 2014.

Petitioner testified that she filed for short term disability in October 2013 and as such did not request the matter be handled as a workers' comp claim. Petitioner testified that she worked for Respondent through 5/14/14

when she presented her restrictions from Dr. Siddiqui but was not provided accommodated duty. RX 9. Petitioner received continued short term disability thereafter until it ended in June 2014. Petitioner completed a first report of injury on July 8, 2014 alleged repetitive trauma manifesting on 10/21/13. RX 6. Petitioner filed her workers' comp application in September 2014 and her claim was denied by Respondent. She requested an extension of her short term benefits in September 2014 which was denied.

On 4/16/14, the records indicate that Petitioner saw Dr. Iftikhar. Petitioner again reported right arm symptoms as well as left arm symptoms with greater symptoms on the right. An EMG of the right upper extremity was ordered. Dr. Iftikhar at Riverside Orthopedics stated that the Petitioner had very mild carpal tunnel syndrome, but the EMG/NCV did not correlate with the clinical symptoms. RX 9.

Petitioner continued to treat for her neck and right arm complaints with chiropractor Dr. Siddiqui and also began treating with Dr. Malek as of May 28, 2014 for her lower back and leg pain. Petitioner reported that her low back and leg complaints were related to her job via excessive sitting. On May 28, 2014, Dr. Malek noted Petitioner's complaints of pain in her neck, right upper extremity tingling and numbness, swelling in her elbow and low back pain radiating into the right leg for 8 months in duration. PX 2. Petitioner reported lifting at her job along with filing and stated that her job was repetitive. Petitioner reported some relief from Dr. Siddiqui's treatment and from the elbow injections performed by Dr. Harsoor. Dr. Malek noted the normal MRI of the right arm, forearm and wrist taken in October 2013 as well as the normal bone scan in November 2013 ordered by Dr. Nam and the cervical MRI done in March 2014 which show bulging cervical discs without disc herniation. Dr. Malek ordered a lumber MRI with a right lower extremity EMG/NCV with likely injection thereafter. PX 2. Dr. Malek took Petitioner off work. His impression was "a 44 year old lady with symptoms likely related to her repetitive work injury." PX 2.

Petitioner continued to treat with Dr. Saddiqui who prescribed chiropractic massage therapy for her right arm, leg and low back.

Dr. Malek noted the lumbar MRI indicated evidence of desiccation at L5-S1 and to a lesser degree at L4-5 and that the EMG was consistent with right L5 radiculopathy. He performed L4-5 and L5-S1 injections in June 2014 with limited response. He performed a lumbar discogram on 7/23/14 which he deemed valid noting L5-S1 is the pain generator level with some contribution from L4-5. The post disc CT showed evidence of tears at L4-S1 and on 7/28/14, Dr. Malek recommended a 2 level fusion which Petitioner declined. Dr. Malek placed Petitioner at MMI pending surgery. PX 2. She was released to regular duty "as tolerated" as of 7/28/14. PX 2. Petitioner continued to treat thereafter with Dr. Saddiqui.

Petitioner attended a Section 12 exam with Dr. Cherf at Respondent's request on October 13, 2014. The exam pertained to Petitioner's right wrist and cervical spine. He noted that Petitioner displayed "abnormal illness behavior" during the exam and "limitation of effort, nonanatomic tenderness, and nonphysiologic findings." He noted that the symptoms worsened despite Petitioner having been off work. He also reviewed her previous objective testing and requested to review the right upper extremity EMG report to determine a carpal tunnel diagnosis and cervical radiculopathy. In the interim, he opined that Petitioner did not present any objective findings of a condition in her right wrist or cervical area that could be related to her reported job duties from one year earlier in October 2013. RX 1. After review of the requested EMG, in January 26, 2015, Dr. Cherf opined that the minimal findings of right CTS on the EMG were not the cause of her right upper extremity symptoms and that the EMG from April 2014 did not identify an evidence of cervical radiculopathy. Given his lack of objective findings on exam or on objective testing, he opined that Petitioner's chiropractic treatment was

excessive, that no further treatment was necessary and that Petitioner should be considered at MMI for any of her claimed conditions. PX 2. Petitioner continued her treatment with Dr. Saddiqui in early 2015.

Petitioner attended a Section 12 exam with Dr. Mirkovic for her low back and right leg complaints on 3/17/15, RX 4. Petitioner advised that her low back and leg complaints were caused by her 12 years of work for Respondent in the records department. Specifically, Petitioner reported that she repetitively filed, scanned and lifted boxes of about 10 to 20 pounds. Petitioner reported a gradual onset of low back pain and then gradual onset of right leg pain several weeks later. She reported that the low back pain was worse than the leg pain. Dr. Mirkovic noted that physical therapy since November 2013 has not improved the symptoms. He further noted that Petitioner received injection to her low back with little relief. Dr. Mirkovic also reviewed Petitioner's objective tests including her lumbar discogram, post discogram CT scan, cervical MRI, lumbar MRI, and right leg EMG. Dr. Mirkovic concluded that Petitioner suffered from chronic low back pain unrelated to her job duties with Respondent and attributed to the aging process. He noted that the job description provided indicated that her job was sedentary with occasional lifting of 40 pounds. He further noted that Petitioner's imaging studies did not support her reported pain levels on exam. Dr. Mirkovic opined that Petitioner was at MMI for her lumbar spine complaints. He determined that no further treatment was necessary and that she could return to work full duty. RX 4.

On 4/16/15, Dr. Saddiqui placed permanent restrictions on Petitioner. He stated that he had been treating Petitioner for right hand/arm pain due to carpal tunnel syndrome as well as 2 herniated discs of the cervical spine, and low back pain due to lumbar herniation. He wrote, "At this time, I am advising that she is to remain on light duty consisting of no heavy lifting past 5 pounds permanently." PX 4.

Petitioner testified that in June 2015, she found a job at Fisher Clinicals performing data entry similar to her job for Respondent but without the scanning requirement. She worked until September 2015 and then left the job due to hand swelling and "unbearable" pain.

In an addendum report dated January 6, 2016, Dr. Cherf noted that he disagreed with Dr. Saddiqui's permanent restrictions reiterating his prior opinion that Petitioner did not sustain a cervical injury, any evidence of carpal tunnel was very mild and that her cervical, right arm and right hand complaints were not supported by the EMG of April 2014. RX 3. On 4/19/16, Dr. Mirkovic also responded to Dr. Saddiqui's restrictions stating that his opinion regarding Petitioner's low back and leg had not changed and that her imaging studies did not support her clinical presentation or her complaints of pain. RX 5.

Petitioner continued treating with Dr. Saddiqui through 2016. Dr. Saddiqui sent her to Dr. Novoseletsky in May 2016 for her continued low back complaints. PX 8. Petitioner reported constant low back pain that radiates to her bilateral buttocks and legs. Petitioner attributed her back pain to sitting at work. Dr. Novoseletsky ordered a lumbar MRI and EMG. No treatment was rendered. PX 8. Petitioner's last visit to Dr. Saddiqui was in December 2016, 3 years after her alleged manifestation date. No treatment is currently scheduled for Petitioner.

Petitioner testified that she currently lives in Arizona. She does not work and asserts that she is unable to work. She has not treated since December 2016. Petitioner has not requested nor has she undergone any vocational training. She testified that she currently notices continued pain in her right arm elbow area and hand along with numbness, tingling and swelling in both hands. She testified that she does not currently have neck pain. Petitioner testified that she continues to have low back pain with occasional shooting pain down her right leg.

She takes ibuprofen 600 and muscle relaxants prescribed by her new primary physician. She testified that she continues to use the previously prescribed TNS unit.

Respondent submitted utilization reviews a trial covering certain treatment. A utilization review dated August 29, 2014 indicated that the bone scan, MRI of the cervical spine on March 12, 2014, MRI of the lumbar spine on June 2, 2014 and the EMG on June 8, 2014 are non-certified. (RX 8) A utilization review dated August 29, 2014 indicates that the two tendon sheath injections on November 19, 2013 and December 31, 2013 were also non-certified. (RX 8) A utilization review dated September 4, 2014 indicated that the diagnostic cervical epidural steroid injection on May 28, 2014, and discogram on July 23, 2014 is non-certified. (RX 8) A utilization review dated August 29, 2014 indicates that the right L4-L5 and L5-S1 epidural steroid injection and epidural steroid injection on June 11, 2014 and June 22, 2014 are non-certified. (RX 8) Finally, a utilization review dated August 26, 2014 indicated that the EMG between August 21, 2014 and October 5, 2014 is also non-certified. (RX 8)

Respondent called Mr. Yoo to testify at trial in his capacity as the risk manager in charge of workers' comp claim investigation. He agreed that Petitioner's job duties required her to scan, file and enter data and to occasionally lift up to 40 pounds. Petitioner asked for help in lifting the boxes while employed by Respondent and did receive the help. He stated that if Petitioner had returned with restrictions of no lifting over 20 pounds she may have been accommodated. He further testified that Respondent handled this matter as a non work comp matter as short term disability was originally requested. His first notice of a comp matter was in July 2014 when Petitioner provided notice and a form 45 was completed. Petitioner filed her Application thereafter in September 2014 following a denial of the requested short term disability extension. Petitioner's job was officially terminated in December 2014.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law rendered in both consolidated matters of 14 wc 32766 and 14 wc 33690.

C. Did Petitioner sustain accidental injuries arising out of and in the course of her employment by Respondent? D. What was the date of accident? F. Is Petitioner's current condition of ill-being causally related to her injury?

Following a review of the record in its entirety, the Arbitrator finds that Petitioner did not sustain repetitive trauma type injuries to her neck, right arm, right hand, low back or right leg manifesting on either alleged dates of 10/21/13 or 5/14/14 which arose out of or in the course of her employment by Respondent and which were causally related to her employment for Respondent based on a preponderance of the credible evidence at trial. In so finding, the Arbitrator initially notes that Petitioner in fact complained of right hand pain to Dr. Lalyre in October 2013 and that she attributed that pain to her job duties of scanning and filing for Respondent. Petitioner repeated these right hand/wrist complaints and her relation of the complaints to her job duties to Dr. Siddiqui in October 2013. Petitioner was in fact initially diagnosed by Dr. Lalyre with "rt cts." Accordingly, the record seemingly supports Petitioner's alleged manifestation date of 10/21/13 for her "rt cts." However, the Arbitrator further finds that the record does not support this manifestation date for any of the other alleged conditions involving Petitioner's cervical spine, right arm, low back or right leg. Moreover, the Arbitrator further finds that the record does not support a finding of causal connection for any of Petitioner's alleged conditions, including her "rt cts" by a preponderance of the credible evidence.

In so finding with regard to Petitioner's cervical, right hand, wrist, arm, low back and right leg complaints, the Arbitrator notes a lack of medical opinion attributing Petitioner's conditions to her work activities. Regarding the right arm and hand and cervical complaints, while the medical records are replete with Petitioner's statements that she believes her current problems are related to her work activities, there are no medical opinions stating that Petitioner's right arm, hand or cervical complaints are related to her work activities. Specifically, neither Drs. Lalyre, Harsoor, nor Chiropractor Siddiqui provided a causal relationship opinion linking Petitioner's ongoing condition to her work activities. The Arbitrator further specifically notes that the record is devoid of any medical opinion or testimony, lay or otherwise, regarding the details of Petitioner's job duties as sufficient to support a finding of repetitive trauma as alleged. In this matter, Petitioner's testimony alone regarding her work activities for Respondent does not provide a sufficient basis to support a finding of repetitive duties or repetitive trauma causally related to those duties.

The Arbitrator places greater weight on the opinion of Dr. Cherf who opined that Petitioner did not sustain any type of work-related injury to her neck or right wrist. Dr. Cherf had trouble diagnosing Petitioner with any problem at all based on the diffuse nature of her symptoms and complaints and the lack of objective medical or clinical support for the symptoms. He stated that she has "radicular symptoms of unknown etiology." (RX 1) Dr. Cherf stated that Petitioner's alleged symptoms even progressed while she was off work, which would point to the fact that work is not a causative factor regarding her neck and right arm problems. (RX 1)

Regarding Petitioner's alleged low back and right leg complaints, only Dr. Malek and Dr. Mirkovic provided causation opinions. Dr. Malek stated his impression was "a 44 year old lady with symptoms likely related to her repetitive work injury." Dr. Malek's opinion was seemingly based on Petitioner's reported history alone with any additional detail regarding Petitioner's specific job duties. According to Dr. Mirkvoic, an orthopedic surgeon, Petitioner's low back condition, namely subjective chronic low back pain, was not causally related to her work activities. (RX 4) He opined that Petitioner's reports regarding her work activities which were mainly sedentary, coupled with her imaging studies, do not support a causal relationship between her work activities and her low back pain.

The Arbitrator finds the opinions of Dr. Mirkovic in this matter to be more credible than those of Dr. Malek. Dr. Mirkovic reviewed Petitioner's job description and discussed with the petitioner her own description of her job. He also reviewed her diagnostic studies to determine if the results of those studies could be linked to a repetitive-trauma type of injury versus that of an ongoing degenerative condition. Finally, Dr. Mirkovic references current literature regarding causation of low back conditions and indicates that the types of mainly sedentary activities that the petitioner engages in do not cause low back problems. (RX 4) Dr. Malek based his causation opinion solely on the fact that the petitioner's work activities "seem repetitive." (PX 2)

Accordingly, because there is no sufficient evidence, testimony or causation opinion linking Petitioner's neck, or right hand/arm complaints to her work activities, and the Arbitrator finds Dr. Mirkovic's opinions to be more credible than Dr. Malek's regarding the petitioner's lumbar spine condition, the Arbitrator finds that the petitioner's current condition of ill-being regarding her neck, right hand/arm and low back/right leg are not causally related to her work activities. As such, all requested benefits are denied and all further issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TINA DREON,

Petitioner,

vs. NO: 12 WC 15514

PONTIAC CORRECTIONAL CENTER,

Respondent.

20IWCC0444

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

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission modifies the Arbitrator's Decision with respect to the PPD award. The Arbitrator considered and assigned weight to the five factors under Section 8.1b of the Act and determined that Petitioner sustained twenty-five percent (25%) loss of use of the left leg pursuant to Section 8(e) of the Act. The Commission finds instead that the evidence supports a reduced award of fifteen percent (15%) loss of use of the left leg and reweighs the five factors under Section 8.1b of the Act as follows:

(i) Impairment Rating: The Commission gives no weight to this factor as neither party submitted an impairment rating.

(ii) Occupation of Injured Employee: Petitioner was released with no restrictions on May 18, 2012. She returned to her regular duties with Respondent and retired on her own accord in 2016. The Commission finds that Petitioner's retirement is unrelated to the March 19, 2012 work accident. The Commission gives little weight to this factor in light of the evidence presented herein.

(iii) Petitioner's Age: Petitioner was 50 years old on the accident date; the Commission gives this factor no weight as no evidence was introduced as to how Petitioner's age had an impact on any disability as a result of the work accident.

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

(v) Evidence of Disability: Petitioner sustained a left knee medial meniscal tear as a result of the March 19, 2012 work accident. Petitioner underwent treatment by way of physical therapy and surgery on April 26, 2012. Specifically, Dr. Brian Sipe performed a left knee arthroscopy with posterior horn partial meniscectomy, excision medial patellofemoral plica, and minimal medial chondroplasty. Petitioner's post-operative diagnoses were left knee pain, left knee posterior horn medial meniscal tear, left knee mild degenerative joint disease, medial compartment, and left knee medial patellofemoral plica.

Petitioner was released with no restrictions on May 18, 2012 – approximately three weeks post-surgery. The evidence demonstrates that Petitioner sought no further treatment since her release in 2012. During arbitration, on August 27, 2019, Petitioner reported persistent swelling, tenderness, and tingling in the left knee. The Commission assigns great weight to this factor.

Based on the totality of the evidence, the Commission modifies and reduces the Arbitrator's PPD award for the left leg to fifteen-percent (15%) loss of use of the left leg as provided in Section 8(e) of the Act. The Commission finds that this award corresponds with the evidence in the record and the injuries sustained by Petitioner as a result of the March 19, 2012 work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed September 6, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $775.00 per week for 3 1/7 weeks, commencing April 26, 2012 through May 17, 2012, as provided in Section 8(b) of the Act.

20IWCC0444

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay any and all outstanding, related, reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent shall make payment of any outstanding, related medical expenses to Petitioner's attorney pursuant to Section 9080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $695.78 per week for 32.25 weeks, because the injuries sustained caused the fifteen-percent (15%) loss of use of the left leg, as provided in Section 8(e) of the Act.

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

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

DATED: AUG 5 - 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 7/21/2020
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DREON, TINA
Employee/Petitioner

Case# **12WC015514**

PONTIAC CORRECTIONAL CENTER
Employer/Respondent

20IWCC0444

On 9/6/2019, 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 1.82% 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:

0190 PETER F FERRACUTI LAW OFFICES
ALEXIS P FERRACUTI
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

6079 ASSISTANT ATTORNEY GENERAL
BRAD DEFREITAS
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP - 6 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **MC LEAN**)

- ☐ 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

TINA DREON
Employee/Petitioner

v.

PONTIAC CORRECTIONAL CENTER
Employer/Respondent

Case # **12** WC **15514**

Consolidated cases: **N/A**

20IWCC0444

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **8/27/19**. 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 ___

FINDINGS

On **3/19/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**60,450.00**; the average weekly wage was $**1,162.50**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay any and all outstanding, related, reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent shall make payment of any outstanding, related medical expenses to Petitioner's attorney pursuant to Section 9080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

Respondent shall pay Petitioner temporary total disability benefits of $775.00/week for 3-1/7 weeks, commencing 4/26/12 through 5/17/12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator Gerald Granada

9/4/19
Date

SEP 6 - 2019

20IWCC0444

FINDINGS OF FACT

This case involves Petitioner, Tina Dreon alleging injuries sustained while working for the Respondent, Pontiac Correctional Center on March 19, 2012. Respondent disputes Petitioner's claims, with the issues in dispute being: 1) accident; 2) medical expenses; 3) TTD; and 4) nature and extent.

On March 19, 2012 - the Petitioner's alleged date of accident - Petitioner was working for Respondent as a correctional officer – a job she has had since May 9, 1994. Petitioner testified that on the date of accident she was at Respondent's Administration Building. Although she was not scheduled to work that day, she was called in on her day off by the Warden to turn in paperwork for mileage and to possibly obtain a vehicle so that she could attend a meeting the following morning in Springfield, Illinois as a part of her regular job duties. The Petitioner testified that on the accident date, prior to her injury, she had not completed the appropriate mileage paperwork or obtained a vehicle from the prison as required by Respondent's protocol in order to drive to Springfield the next morning. Her failure to do either would have been a violation of the duties of her position at the correctional center. Petitioner testified that reporting to the Administration Building on March 19, 2012 to obtain the paperwork for the following day was a regular part of her job duties that she was expected to perform.

Petitioner testified that when she reported to the Administration Building, she was wearing jeans, a shirt and a pair of low platform sandals. She testified that there is a dress code to come into the building, which requires that you must be wearing long pants and closed toed shoes to enter the correctional facility regardless of whether or not you are on shift. Petitioner further testified that the Administration Building is not open to the general public. After Petitioner entered the Administration Building, she stepped off of the rug in the building and onto the floor. Upon stepping on the floor, her left foot went out from underneath her causing her to fall onto her left knee and the rest of her body. She further testified that the floors had recently been waxed and due to the humidity and temperature inside of the building, the floors were slick. She immediately felt pain in the left knee, which became swollen shortly after the fall.

Jamie Hughes also testified on behalf of the Petitioner. Ms. Hughes has been a correctional officer for Respondent for 27 years. She was present at the Administration Building when Petitioner fell on March 19, 2012. Ms. Hughes confirmed that the floors of the Administration Building are made of concrete and are regularly waxed and buffed. When there is humidity outside the building, the floors get very slick to the point that Hughes has to walk slowly on the floor while wearing her duty shoes. Ms. Hughes saw Petitioner step off the carpet onto the floor, slip, and fall to her knees. Hughes later completed an incident report.

On March 26, 2012, the Petitioner first sought treatment at OSFMG Orthopedics, where she complained of left knee pain with catching and locking sensations in the knee. X-rays were taken at her initial office visit, which showed mild degenerative changes, but no acute fractures. She was given a recommendation of an MRI of the left knee and was given a cortico-steroid injection to the left bursa with an instruction to follow up for reevaluation in four weeks. Petitioner subsequently underwent physical therapy from March 29, 2012 through April 18, 2012 at OSF St. James. Her March 28, 2012 MRI revealed an abnormal signal within the medial meniscal horn suggesting a meniscal tear. Petitioner eventually underwent surgery on April 26, 2012 at OSF St. James with Dr. Sipe who performed a left knee arthroscopy and menisectomy with incision plica in minimal medial chondroplasty. Dr. Sipe took Petitioner off work as of April 26, 2012. Following a release to return to work full duty, Petitioner returned to work for Respondent on May 18, 2012.

On December 13, 2018, the Petitioner underwent an IME at Ortho Illinois with Dr. Ludwig, who noted that Petitioner's current diagnosis was persistent left knee pain related to the fall and described work injury on March 19, 2012. Dr. Ludwig found that her treatment, including her post-injury evaluations, surgery and follow up were reasonable and related and that the patient would not need further surgery in the future related to her left knee condition.

Petitioner testified that she retired from her employment with Respondent in 2016. She testified that upon her return to work following her injury and prior to her retirement, she had a job that allowed her to sit for most of the day. Her continued complaints related to her left knee include: pain, swelling and tingling in the left knee with walking or standing for any increased period of time; inability to run or squat; difficulty with sleeping and using stairs; atrophy and discoloration.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's unrebutted testimony, the testimony of Ms. Hughes and the investigative evidence, which all show that Petitioner slipped and fell while walking in the Respondent's Administration Building on March 19, 2012. The question raised by Respondent is whether the Petitioner's fall arose out of and in the course of her employment. Respondent's argument is two-fold: Petitioner's accident occurred when she was not scheduled to work, thereby taking her out of the course of her employment; and Petitioner's slip and fall was not due to a increased risk related to her employment as a correctional officer and was instead due to a neutral risk to which the general public would have been exposed – and therefore not arising out of her employment. The Arbitrator believes the Petitioner has proven both elements of this issue.

Petitioner's accident was in the course of her employment, despite not having been scheduled to work on the day she was injured. The following facts support Petitioner on this finding: she was called in by the warden to report to the Administration Building on the day in question; she was fulfilling the requirements of her job duties at the time of the occurrence; she would be in violation of Respondent's protocol if she failed to report to the Administration Building and complete the necessary paperwork prior to her scheduled job-related to trip to Springfield. There was no evidence offered to rebut Petitioner on this question. Accordingly, the Arbitrator concludes the incident on March 19, 2012 occurred within the course of her employment.

Petitioner's accident also arose out of her employment with Respondent. In support of this finding, the Arbitrator points to the following facts: Petitioner's injury occurred in an area that is not open to the general public; Petitioner had to traverse a floor that was made slick by the waxing, buffing and weather conditions, and which the general public did not have to traverse; Petitioner was wearing clothing that was compliant with building dress code at the time; and there was no evidence presented to rebut Petitioner on this issue, such as a safer, alternative method of entering the Respondent's premises. These facts further show that the conditions of the floor as maintained by the Respondent presented an increased risk of injury as evidenced by the testimony of both Petitioner and Ms. Hughes. Given that the general public did not have access to this building, the increased risk of injury due to the slickness of that particular floor was not a risk to which the general public would have been exposed.

Based on the above, the Arbitrator concludes that the Petitioner sustained an accident arising out of and in the course of her employment with Respondent on March 19, 2012.

20IWCC0444

2. Consistent with the Arbitrator's conclusions on the issue of accident, the Arbitrator further finds that the Petitioner's medical treatment for her left knee was reasonable and necessary in addressing her injuries stemming from her March 19, 2012 work injury. As such, the Arbitrator awards the Petitioner any and all medical expenses related to her left knee following her work injury as set forth in Petitioner's Exhibit 1. Respondent shall receive credit for any medical expenses it has already paid pursuant to Section 8(j) of the Act and shall hold Petitioner harmless for any related medical expenses paid through Petitioner's group insurance. The Arbitrator further orders Respondent to make payment of any outstanding, related medical expenses to Petitioner's attorney pursuant to Section 9080.20 of the Rules Governing the Practice Before the Illinois Worker's Compensation Commission.

3. Based on the Arbitrator's conclusions above, the Arbitrator further finds that the Petitioner was temporarily totally disabled from April 26, 2012 through May 17, 2012. In support of this finding, the Arbitrator relies on both the Petitioner's unrebutted testimony and the medical evidence, which show that Petitioner's treating physician, Dr. Sipe, authorized Petitioner off work for the time period in question as of her surgery on April 26, 2012. Petitioner subsequently returned to work full duty on May 18, 2012. Accordingly, Respondent shall pay Petitioner TTD benefits from April 26, 2012 through May 17, 2012, a period of 3-1/7 weeks, pursuant to Section 8(b) of the Act.

4. Regarding the issue of the nature and extent of Petitioner's injuries, the Arbitrator applies the factors set forth in Section 8.1b of the Act and notes the following: (i) no AMA rating was introduced into evidence, so the Arbitrator gives this factor no weight; (ii), Petitioner was a correctional officer who returned to the same position following her work-injury with no medical restrictions, a factor to which the Arbitrator gives considerable weight; (iii) Petitioner was 50 years old at the time of injury, a factor to which the Arbitrator gives some weight; (iv) there was no evidence regarding future earnings and the Arbitrator gives no weight to this factor; (v), there was evidence of disability which show that the Petitioner sustained a left medial meniscus tear that required surgical intervention involving a left knee arthroscopy and menisectomy resulting in her current complaints of pain, swelling and tingling in the left knee with walking or standing for any increased period of time and difficulty with stairs, running, squatting and sleeping – the Arbitrator gives great weight to this factor. Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 25% loss of the left leg as provided in Section 8(e) of the Act.

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

ZBIGNIEW GOTFRYD,

Petitioner,

vs. NO: 12 WC 15733

LINCOLN PARK AUTO REPAIR,

Respondent.

20IWCC0445

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical, temporary total disability (TTD) benefits, and credit due Respondent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission modifies the Arbitrator's Decision with respect to the issue of credit due to Respondent. The Decision stated that Respondent was entitled to a credit of $32,053.60 for TTD previously paid and $22,484.74 for medical services previously paid. However, no right of credit exists under Section 8(j) of the Act for any benefits or payments made to the employee,

or Petitioner herein, other than for compensation payments provided by the Act. In other words, Section 8(j) of the Act allows a credit for benefits paid when compensation pursuant to the Act is awarded. By its Brief, Respondent confirmed that it paid an additional amount to Petitioner totaling $54,538.34. Respondent acknowledged that this amount for which it sought credit represented payments toward benefits that the Arbitrator did not award and that Petitioner was not entitled to under the Act.

Respondent is not entitled to a credit where no compensation or benefits were awarded under the Act. Therefore, the Commission modifies the Arbitrator's Decision with respect to this issue and vacates the credit to Respondent totaling $54,538.34; since no compensation has been awarded, the credit is inapplicable. The Commission finds such amounts were paid by the Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 18, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove that his current condition of ill-being is causally related to the May 19, 2011 work-related accident.

IT IS FURTHER ORDERED BY THE COMMISSION that any claimed condition of ill-being, lost time, or medical bills after June 23, 2011 are hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that any claims for prospective treatment are hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the credit of $32,053.60 for TTD previously paid and $22,484.74 for medical services previously paid is vacated.

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

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

D. Douglas McCarthy

DATED: AUG 5 - 2020

D. Douglas McCarthy

DDM/pm
O: 6/17/2020
052

Stephen J. Mathis

L. Elizabeth Coppoletti

20 IWCC0445

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

GOTFRYD, ZBIGNIEW
Employee/Petitioner

Case# **12WC015733**

LINCOLN PARK AUTO REPAIR
Employer/Respondent

20IWCC0445

On 3/18/2019, 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:

5858 MINKOW DOMIN
ANDREW P DOMIN
123 N WACKER DR SUITE 250
CHICAGO, IL 60606

0210 GANAN & SHAPIRO PC
ELAINE T 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
19(b)

Zbigniew Gotfryd
Employee/Petitioner

v.

Lincoln Park Auto Repair
Employer/Respondent

Case # **12 WC 15733**

Consolidated cases: **N/A**

20IWCC0445

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **11/20/18 and 1/15/19**. 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 _____

FINDINGS

On the date of accident, **5/19/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,000.00**; the average weekly wage was $**1,250.00**

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

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

Respondent shall be given a credit of $**32,053.60** for TTD, $**0.00** for TPD, and $**0.00** for maintenance, and, for a total indemnity credit of $**0.00**.

Respondent shall be given a credit of $**22,484.74** for medical bills paid.

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

ORDER

Having found Petitioner failed to prove that his current condition of ill-being is causally related to the accident of May 19, 2011, the Arbitrator denies any claimed condition of ill-being, lost time, or medical bills after June 23, 2011. All claims for prospective medical care are denied.

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

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

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

Signature of Arbitrator

3/17/2019
Date

ICArbDec19(b)

MAR 18 2019

Zbigniew Gotfryd v. Lincoln Park Auto Repair
Case Number 12 WC 15733

Findings of Fact:

Petitioner is employed with Respondent as a car mechanic, and performs all aspects of car repair, including lifting 150 lb. transmissions and 200 lb. engines. He works from 7 a.m. to 5 p.m. with a ½ hour lunch break. Three quarters of his day is spent standing, and the rest crouching and in "all sorts of bent positions." He acknowledged the work is heavy. He testified he would not be able to do the work with either a neck or a low back injury.

On May 19, 2011, Petitioner testified he was reinstalling a transmission in a car when the transmission became stuck. As he yanked on it, "it let loose and overpowered me and made me fall on my back with the transmission on the top of me." He described the transmission as landing on the left side of his body while he was down on the ground. The transmission weighed between 100 and 120 lbs. He was able to push the transmission off himself without damaging it. He testified this was a dramatic occurrence, "very untypical" of his usual workday.

Petitioner testified he experienced immediate pain in his low back and left leg, neck, left arm and elbow.

Petitioner testified that a colleague, Rafael Mendez, was present when this occurred. Petitioner took a short break and then resumed work. He testified that he and Rafael were able to get the transmission back into the car, and he was then able to finish the work needed on the car that took another 3-4 hours.

Petitioner testified that on May 19, 2011, he "mentioned" the occurrence to the general manager, Bob Loher, and told him: "I think my back is hurt." Petitioner did not ask Mr. Loher to file a claim on his behalf or to fill out paperwork but told Bob that "perhaps it would go away on its own." Petitioner further testified that on May 23, 2011, he spoke again to Bob Loher at work and Bob said that maybe this time it will go away and I said "yes" and that is how they "kind of let it go for that time."

Petitioner testified he continued working but was "careful to avoid things that could perhaps make things worse." He did not request or seek medical attention and had no restrictions from any doctor.

The payroll records (Rx. 1) show that in the weeks before May 19, 2011 Petitioner worked an average of 6.54 hours per day. Between May 20 and September 26, 2011, he worked 768.96 hours, about 8.31 per day. (Rx. 2) His duties included doing oil changes, front and rear brake service, replacing brake rotors, front assemblies, brake lines, clutch assemblies, exhaust pipes, removing and replacing transmissions, center pipes, mufflers, converters, head gaskets, oil pumps, water pumps, manifold gaskets, brakes shoes, rear bearings, radiators, alternators, shock absorbers, wheel cylinders, cooling systems, fuel injector systems, timing belts, and batteries. Larger projects included spending 2 hours replacing power steering pumps and right front hub bearings, 3 hours replacing rear water flanges, tuning a 6 or 8 cylinder car, and replacing fuel pumps, 3.25 hours replacing wheel cylinders and brake lines, 3.5 hours on starters, removing the gas tank to replace a fuel pump and filter, rear wheel cylinders and brake shoes, 4 hours replacing brake lines, brake pads and rotors, 4.5 hours on timing and serpentine belts or replacing an oil pump, 5.5 hours on replacing seals, water pumps and gaskets, 6 hours replacing complete clutch assemblies, 6.5 hours on intake manifolds, and a 15-hour job replacing head gaskets, valve springs, an exhaust valve, intake valve, oil pump and manifold gasket. (Rx. 1)

Petitioner first sought medical attention from his primary care physician, Dr. Gawrysz, on June 16, 2011, and testified he specifically told the doctor how he had been hurt at work on May 19, 2011. Petitioner testified at trial through the use of a Polish interpreter. He testified he and the doctor both speak and communicated in Polish. He told the doctor he was having pain in his lower back, hip and neck, with the low back the worst. He insisted he did report neck pain. Petitioner denied that this was actually a follow-up exam to go over blood pressure issues and cystoscopy results. He saw the doctor a second time, on June 23rd, and testified he told the doctor at that time his low back pain had improved but claimed he still had pain in his low back, left hip, the left side of his neck and in his left arm. (Rx. 1)

Petitioner continued submitting full-time hours after May 19, 2011, including 11 on June 15th and 7.99 on June 16th, which was the day before and the day of his first medical visit with Dr. Gawrysz. Following a break in hours September 27th – October 13th, a period which would comport with his reported trip to Poland, he performed another 133.1 hours over 5+ weeks before seeking further care with Dr. Gawrysz. (Rx. 1)

Petitioner testified he continued working and did not seek medical attention until returning to Dr. Gawrysz November 10, 2011. He did take a month off to go to Poland, although recalled it was from September 20 to October 18, 2011.

Petitioner denied any new injuries and could not explain why Dr. Gawrysz testified he understood Petitioner to have sustained another injury about a month before the

November 10, 2011 visit. He denied that the only complaints he had before November 10th were to the low back and left leg, but then testified that he first reported left arm and shoulder pain to the doctor only after he came back from Poland. Dr. Gawrysz testified Petitioner first reported left shoulder and elbow pain at the November 17, 2011 visit. The doctor took him off all work duties, referred him for an EMG, MRI's of the cervical and lumbar spine, and then referred him to Dr. Sokolowski.

Petitioner acknowledged giving Respondent a verbal statement of the injury in November 2011. He testified he specifically provided to Respondent exactly how he had been hurt on May 19, 2011, including that he fell with the transmission landing on him.

Petitioner first saw Dr. Sokolowski on December 28, 2011. Petitioner was likewise able to communicate with this physician in Polish. He described a "jerking" injury with left-sided neck, left arm, left leg and low back pain since May 19, 2011. Dr. Sokolowski diagnosed him with an annular tear at L5-S1 and impingement at C5-7. He recommended a lumbar decompression, a cervical fusion or epidural injections. Petitioner had waxing and waning low back pain, but no further mention was made of lumbar surgery after that December 28, 2011 visit. Dr. Sokolowski testified the low back was really not an issue for Petitioner after January 2013. Petitioner received cervical epidural steroid injections with only limited improvement. He has a standing prescription for a discectomy and fusion at C5-6 from Dr. Sokolowski.

On referral from Dr. Sokolowski, he saw Dr. Brackett August 30, 2012. Dr. Brackett prescribed a cubital tunnel release in the left elbow. Petitioner last saw him November 13, 2012.

Petitioner testified that he first noticed right-sided symptoms in April 2015, which Petitioner related to not using his left hand as much. Petitioner sees Dr. Sokolowski about every 6 months. On March 19, 2018, he was referred for pain management to Dr. Kurzydlowski and has been under his care since September 18, 2018.

Petitioner testified he has continued working for Respondent since January 2013, but testified he only takes lighter jobs. He testified to continued pain in his left arm, left elbow and neck pain.

Petitioner testified that between the date of accident, May 19, 2011, and the first time he saw Dr. Sokolowski, December 28, 2011, he required assistance at work from Rafael Mendez, and later, from two mechanics: Hector, as well as Tom Selez.

Antonio Milito testified he is the owner of Respondent's business, which repairs cars and light trucks. He testified that mechanics perform the physical work with a lot of standing, lifting, bending and stooping required. There are hoists and lifts but "at some point you do have to get physical." He described it as a "physically exerting job."
Mr. Milito testified that Respondent has employed Petitioner since 1990. Neither Mr. Milito, nor any of his other employees, speak Polish. He testified he and the other workers are able to communicate with Petitioner in English. He could not recall ever having any difficulty communicating with Petitioner in English. The service writers would communicate job needs in English. He could recall no issues with Petitioner understanding and being able to perform what was required of him. All instructions, manuals, information and directions are conveyed to Petitioner in English.

Between May 19, 2011 and November 8, 2011, Petitioner worked full duty. Mr. Milito recalled no issues with Petitioner performing all of his work. At no time before November 2011 did Petitioner reject a job or request lighter work. Mr. Milito identified as Respondent Exhibit No. 1 a payroll run and job summary for Petitioner from May 1 through November 30, 2011. Mr. Milito identified several of the heavier duties performed by Petitioner during that timeframe, including performing rear suspension work which requires a lot of reaching up and bending, reattaching a front bumper, and multiple brake jobs which Mr. Milito termed is "not light duty" as it involves removing and replacing tires. He described all of the work as requiring "using your physical abilities, your legs, arms, back."

Mr. Milito testified that before trial on November 20, 2018, he had never heard the report that a transmission had fallen on Petitioner on May 19, 2011. He recalled being notified on November 7 or 8, 2011 that Petitioner was claiming a work injury sustained on May 19, 2011. He met with Petitioner and Rafael. Petitioner described to him what had occurred, in English, and provided nothing about being knocked down or that a transmission landed on him. Mr. Milito reviewed the accident description with Rafael, who confirmed what the written statement said. Petitioner was given the statement to review, after it was typed, and signed it. Mr. Milito testified that Raphael Mendez works for Respondent as a porter.

Petitioner's statement of November 8, 2011 provides that he had a back injury on May 19, 2011 while removing a transmission. The transmission shifted to one side, and "to prevent the transmission from falling off the jack I twisted my back in such a way as to cause me pain." He acknowledged he continued to work and thought it would go away. He provided, however, that the pain persisted, he had been given pain killers, and his "new doctor" wanted a MRI so he was reporting a workers' compensation claim to get

the testing authorized. Petitioner signed it to acknowledge the statement. Mr. Mendez. also signed it. (Rx. 3)

After November 8, 2011, there were periods of time in which Petitioner was off work and periods when he requested and was provided light-duty work. Mr. Milito would have provided Petitioner such work irrespective of cause as "he is a valued employee." Mr. Milito testified that since Petitioner has been back to work consistently as of January 20, 2013, Petitioner has been doing "all of the work he has ever done," and all of the regular repair work the mechanics are required to do. He further testified that if Petitioner had doctors' notes restricting him from performing certain activities he would honor those. He recalled a 25-lb. lifting restriction imposed in May 2013 but testified that "to do the job it would be hard to see how he could be so productive without exceeding the weight limit," and that he has not seen "any change in his productivity.

Dr. Gawrysz's chart notes are basically illegible. (Px. 1) He was therefore deposed on January 20, 2017, and testified that he completed medical school in Poland, moved to and became licensed in Illinois, and practices in family medicine. He first saw Petitioner on February 10, 2011 for other medical issues. In a follow-up visit on February 21, 2011, Petitioner reported a "trauma about six months ago." However, the doctor did not know how or what was injured. He next saw Petitioner on June 16, 2011. At that time Petitioner complained of low back pain and discomfort in the left foot "from lifting at work." On cross-examination, Dr. Gawrysz testified that Petitioner provided a history of low back pain for 2 weeks, with a history of a "lifting injury" at work 2 weeks before the exam. The only part of the body Petitioner claimed to have injured was the low back. The only medical finding was some tightness in the paraspinal muscle, suggestive of irritation of the nerves, which per the doctor could be from lifting, sitting or sleeping wrong. Petitioner did not have any reported radiation down the left leg. Petitioner was also seen for review of cystoscopy results for bladder problems and urinary issues at that time.

Dr. Gawrysz understood Petitioner was not claiming an accident at work as "he didn't say he made a claim at the workplace." The only parts of the body Petitioner complained of on June 16, 2011 were "discomfort in the left foot and low back pain." Dr. Gawrysz gave him an anti-inflammatory medication. The remainder of care on that date was for other health issues.

He next saw Petitioner on June 23, 2011, at which time Petitioner reported "no more back pain" and "50% better." Dr. Gawrysz testified he understood there were no problems. The remainder of the exam was for blood pressure and other health issues. Dr. Gawrysz testified he had understood Petitioner to be working as of that date and had no opinion on his work capability.

Dr. Gawrysz testified he directed Petitioner to return in a week but did not see Petitioner again for 5 months. (Px. 9, p. 57) When asked if Petitioner's condition had resolved on June 23, 2016, Dr. Gawrysz testified that sometimes people don't complain of anything, and later on it shows up again.

Yet, Dr. Gawrysz testified that "the fact that he didn't see me for so many months suggests that he was fine and all of a sudden he started having problems."

Petitioner then returned on November 10, 2011, and then reported low back pain with radiation to the left leg and exhibited a positive straight leg raise. Petitioner reported another accident at work about a month earlier. Dr. Gawrysz thought Petitioner was referring to an injury at work that occurred 1 month before the November 10, 2011 visit and not back in May. He gave Petitioner anti-inflammatory medication. Petitioner returned 4 days later and asked to be taken off work. He now reported low back pain radiating to the left hip, and reported he was going to be seen by a Dr. Vogelsang. Dr. Gawrysz did not prescribe any treatment for Petitioner.

On cross-examination, Dr. Gawrysz testified he understood the low back pain to have resolved by June 23, 2011 and then to have come back, now radiating down the left leg, and reported by Petitioner to be related to an injury that had happened one month before the November 10, 2011 visit. Petitioner did not describe that injury to the doctor. Dr. Gawrysz now made findings of tension in the left side of the lower back, "much bigger … so it looks like he reinjured himself." Later, he testified: "maybe he did something to exacerbate his symptoms." (Px. 9, p. 59)

Dr. Gawrysz also testified that the difference in symptoms from June 23, 2011 to November 10, 2011 could be owing to the natural progression of the disease process.

Petitioner first reported left shoulder and neck pain on November 17, 2011. Petitioner did not advise the doctor what brought on those symptoms. Petitioner was sent for MRI's of the shoulder and low back. Petitioner asked to be taken off work. When seen on November 21, 2011, Petitioner first reported left elbow discomfort, along with pain in the right lower quadrant of his abdomen. Petitioner was now referred for physical therapy, left hip x-rays, and an EMG/NCV. He ordered a cervical MRI after Petitioner reported pain radiating into his left hand on December 8, 2011. Dr. Gawrysz reviewed the cervical MRI as showing severe left C5-6 stenosis and he referred Petitioner to Dr. Sokolowski.

Dr. Gawrysz continued seeing Petitioner periodically for chronic pain. Petitioner "came to me at his will." He first reported right-sided neck pain and right flank pain on August

12, 2012. He understood Petitioner to be undergoing cervical epidural steroid injections with Dr. Sokolowski. He last saw Petitioner on September 8, 2012.

Dr. Gawrysz testified he did not have any opinion as to whether any of Petitioner's conditions were related to a claimed accident at work on May 19, 2011. He was asked if, when Petitioner first saw him on June 16, 2011, Petitioner seemed concerned about an accident at work, the doctor replied: "From my notes, because I have very little about the accident, my impression is that he was not very concerned about it ...There was something else going on for him." (Px. 9, p. 61)

Dr. Sokolowski testified on April 3, 2017 that he first saw Petitioner December 28, 2011. Petitioner gave a history of injury at work in which a transmission started to fall, he caught it, and felt a jerking sensation on his left side of his neck with pain radiating down his left arm, as well as back pain radiating down his buttocks. He attempted to work but his symptoms remained severe. Physical therapy brought about improvement of his low back pain but not of his neck pain. He had a slight limp on the left, was slightly bent on the left, had a positive Spurling's sign on the left consistent with cervical radiculopathy, tenderness in the left shoulder, and decreased strength in the left C7-8 distribution. Dr. Sokolowski reviewed the MRI an indicated it showed a herniated disc at L5-S1 and impingement from C5-7, which was consistent with his exam findings.

Dr. Sokolowski recommended no work and therapy. He reviewed an EMG on January 27, 2012 that confirmed left C5-6 radiculopathy, left L5-S1 radiculopathy, early carpal tunnel syndrome and entrapment of the ulnar nerve at the left wrist. He offered cervical epidural steroid injections. He first cleared Petitioner to light-duty work on March 12, 2012. He felt Petitioner suffered a double crush syndrome with both carpal and cubital tunnel in the left wrist and elbow. He referred Petitioner to Dr. Brackett for elbow care. He has continued Petitioner on light duty since March 2013. He has continued seeing Petitioner for the same conditions every 3-6 months.

Dr. Sokolowski felt the transmission landing on Petitioner caused his medical conditions in the low back, neck and left elbow, and cited a "temporal correlation between the onset of symptoms and the inciting event ... (along with) the consistent clinical findings ..." When asked about Dr. Gawrysz not documenting any cervical or left arm complaints until November 2011, Dr. Sokolowski stated it did not change his opinion, as "he basically reports coexistent back pain, neck pain, left arm pain . . . (with) a temporal correlation between the falling transmission and the onset of his symptoms."

When asked about Petitioner's continued ability to work from May 19, 2011 until November 2011, Dr. Sokolowski testified that was "consistent with his history . . . that

he's attempted to return to work after *taking a period of time off* to manage his symptoms." (Emphasis added.)

Dr. Sokolowski testified that his formal diagnoses of Petitioner on October 24, 2016 were as follows:

"Cervical pain, cervical radiculopathy. He has carpal tunnel syndrome also identified on EMG. Ulnar neuropathy. Lumbar radiculopathy. Lumbar pain. Left elbow pain and we included that left hip pain diagnosis, but there's not intra-articular pathology for the left hip." (Px. 8, p. 40) Dr. Sokolowski also testified that Petitioner's complaints were consistent with his exam findings, which were all consistent with the mechanism of injury as Dr. Sokolowski understood it. (Px. 8, p. 43)

On cross-examination, Dr. Sokolowski testified that lifting and carrying a transmission is heavy-duty work, and that Petitioner's work as a mechanic would require working on his feet, standing or squatting, with lifting required.

He understood that the specific incident of May 19, 2011 occurred when a transmission came toward Petitioner, caused him to jerk, and required him to catch the transmission with his left hand. He had immediate, left-sided neck pain, left arm pain, and low back pain down both buttocks. He felt the pathology in both the cervical and lumbar spine were either caused or aggravated by the work accident. He understood Petitioner to have had immediate severe low back pain that had improved by the time he sought Dr. Sokolowski's care, and immediate neck and left arm pain that had stayed fairly severe.

Dr. Sokolowski further testified he had not reviewed Dr. Gawrysz's records or his January 2017 deposition. He understood Petitioner to have taken a month off work before seeking care with Dr. Gawrysz on June 16, 2011, to "try to deal with his symptoms on his own." He did not know that Petitioner did not report any neck, left arm or elbow problems when he was seen by Dr. Gawrysz in June 2011, or that Petitioner had indicated that his low back pain had resolved by the second visit June 23, 2011. He did not know Petitioner had not returned for care after that second visit, or at all, until November 10, 2011. He testified that the findings in both the cervical and lumbar spine could be degenerative in nature.

Dr. Philiips testified on July 25, 2017 on behalf of Respondent. He testified that about 90% of his practice consists of treating or consulting with patients. He performs about 300 cervical and lumbar surgeries per year. He also conducts Section 12 exams (IMEs). Dr. Phillips examined Petitioner on September 20, 2012, at which time Petitioner described an injury to his neck, left arm and low back after lifting an object overhead.

Petitioner reported immediate and persistent neck pain, but also testified he continued working regular duty for several months before seeking medical care. Dr. Phillips noted Petitioner's employment as a mechanic and deemed it involved bending, twisting and fairly heavy lifting. He noted "if someone had a severe injury with really severe pain, it would be less likely they would be able to function in a fairly heavy job for months after the injury." He would have related the cervical condition to the alleged injury "if he developed those complaints right after this lifting injury," but not, as here, where Petitioner did not seek medical attention for almost a month, then had only a few visits, for reported low back pain only, and continued working in what Dr. Phillips described as "full, heavy duty for months." (Rx. 5)

At the time of his exam, Dr. Phillips diagnosed cervical radiculopathy and cubital tunnel syndrome. He suggested conservative care including therapy and injections, along with possible surgery. Dr. Phillips did not find these conditions to be related to the reported work injury as Petitioner's 2011 imaging showed "primarily advanced multilevel degenerative changes", which clearly support significant degeneration, years of development in his cervical spine. Dr. Phillips stated Petitioner's cervical condition could have become symptomatic with or without any activity, in fact, "most times it becomes symptomatic absent a specific event or activity." (Rx. 5)

Dr. Phillips testified that his examination findings of Petitioner are in large part consistent with Dr. Sokolowski's examination findings on December 28, 2011. (Rx. 5, p. 21)

Dr. Phillips reviewed the testimony of Dr. Gawrysz and Dr. Sokolowski. After reviewing the testimony of Dr. Gawrysz, Dr. Phillips stated: "[it] did not change my opinions, in fact confirmed them." (Rx. 5, p. 15) In his report dated April 25, 2017, which was admitted into evidence as Deposition Exhibit #3 of Respondent's Exhibit #5, Dr. Phillips did not alter his opinions after he reviewed a deposition of Dr. Gawrysz and "Dr. Sokolowski's IME from April 3, 2017."

Conclusions of Law:

In support of his decision with regard to issues (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?" and (E) "Was timely notice of the accident given to Respondent?", the Arbitrator makes the following findings:

On direct examination, Petitioner testified to the following:

Q: After you began your work day, would you describe your accident or what, if anything, unusual happened to you on May 19, 2011?

A: On that day I replaced a clutch in the car, and I was reinstalling the transmission unit back into the engine, reattaching it. And the thing that happened was that the transmission would not get in because it got stuck. What you do if something like that happened is that you have to somehow remove it in order to reinstall it properly. In order to remove it when it get (sic) stuck, you have to yank on it and that's what I did. At one point it just let loose and overpowered me and made me fall on my back with the transmission on top of me.

Q: Where was the transmission in relation to your body?

A: The left side of my body got underneath the transmission, and my left arm and generally the left side of my body got pressed by that part after I fell.

*****

Q: What was the weight of this manual transmission?

A: As I already mentioned, between 100 and 120 pounds. (Tr. 13-14)

*****

Q: At the time the transmission fell on you, what did you notice about yourself?

A: I noticed that my back is hurting really badly, and also my leg was hurting and my neck.

Q: Which part of your body was most painful, if you remember?

A: My lower back was the worse. (Tr. 14)

Petitioner testified that on May 19, 2011, he "mentioned" the occurrence to the general manager, Bob Loher. He testified: "I told him pretty much I was installing the transmission and something went terribly wrong, I think my back is hurt." Petitioner did not ask Mr. Loher to file a claim on his behalf or to fill out paperwork but told Bob that "perhaps it would go away on its own." Petitioner further testified that on May 23, 2011, he spoke again to Bob Loher at work and Bob said that maybe this time it will go away and I said "yes" and that is how they "kind of let it go for that time." (Tr. 15-18)

On cross-examination, Petitioner testified that the transmission "went off that cart, that's how I ended up squished." He testified that when it fell, he had the reflex to grab it, to prevent it from falling, and as a result he lost his balance and it ended up on top of him. Petitioner testified that he ended up on the ground, laying down with the transmission on top of him. Petitioner characterized that event as a "very untypical" occurrence, an occurrence that in his 28 years of work there, never happened before or since.

After May 19, 2011, Petitioner did not seek any medical treatment until June 16, 2011, which was 4 weeks later. He sought treatment on that date from Dr. Gawrysz, his primary care physician. Petitioner communicated with Dr. Gawrysz in Polish, which is Petitioner's native language. Because Dr. Gawrysz's handwritten notes were so difficult to read, the parties took his testimony via deposition. Dr. Gawrysz read into the record his handwritten note for June 16, 2011 as it pertained to Petitioner:

"He said that about two weeks prior to the visit he complains - - started complaining of low back pain, and then discomfort in the left foot from lifting at work, and it was all about the accident at that time." (Px. 9, pp. 10-11) Yet, Dr. Gawrysz testified that there were other things - - he had had a cystoscopy for bladder problems, urinary problems. (Px. 9, p. 11) Dr. Gawrysz testified that from his notes of June 16, 2011, he had very little about the accident, so his impression is that Petitioner was not very concerned about it. (Px. 9, p. 61)

On cross-examination, Dr. Gawrysz testified that on June 16, 2011, Petitioner told him that 2 weeks prior to coming to the office, he said he had an accident at work when he was lifting something. Dr. Gawrysz also testified that Petitioner told him that the only injury he sustained was to his low back. It was Dr. Gawrysz's understanding that Petitioner was still working when he saw him. The only objective finding Dr. Gawrysz found at that time was tightness of the paraspinal muscle that would suggest irritation of the nerves that go from the spine to the muscles. Dr. Gawyrsz testified that this could be

from a lifting incident. Dr. Gawrysz further testified that at that time, Petitioner did not have any complaints of radiation down the left leg.

The Arbitrator recognizes that Petitioner told Dr. Gawrysz that the lifting incident occurred 2 weeks ago, not 4 weeks ago, and that Petitioner did not go into any detail about this "very untypical" occurrence. The Arbitrator also recognizes that Petitioner continued to work from May 19, 2011 to June 16, 2011. Petitioner testified that he had co-workers help him with some of his work duties between May 19, 2011 and early November 2011. Mr. Milito testified that Petitioner worked full duty without any reported problems or rejection of jobs during this period.

However, as Petitioner provided unrebutted testimony that he reported the incident to supervisor Bob Loher on May 19, 2011, and as Petitioner testified that he hurt his low back on that date, the Arbitrator finds that on May 19, 2011, Petitioner sustained an accident that arose out of and in the course of his employment by Respondent.

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator makes the following findings:

Dr. Gawrycz testified that in his February 21, 2011 chart notes, he wrote: "I have a note something (sic) the patient admits to having trauma about six months ago, but to what I don't know." Yet, Petitioner did not complain of anything. (Rx. 9, pp. 41-42, 53)

The Arbitrator notes the only condition Petitioner complained of initially was low back pain and some left foot discomfort, which, by his second visit to Dr. Gawrysz on June 23, 2011, was either 50% better or completely gone. Dr. Gawrysz specifically testified that Petitioner was not having any low back symptoms on that date.

Dr. Gawrysz testified that on June 23, 2011, he instructed Petitioner to return to him in 1 week. However, Petitioner did not return until 5 months later.

Petitioner continued working full duties and performed consistently from May 20, 2011 through early November 2011.

Dr. Gawrysz testified that when Petitioner next visited him in November 2011, he stated that his low back pain had returned and was now radiating down the left leg. Dr. Gawrysz testified the fact that he did not see me for so many months suggests that he was "fine" and all of the sudden he started having problems. (Px. 9, p. 63) Dr. Gawrysz thought maybe something exacerbated his symptoms. Petitioner testified that he took a

month off work to go to Poland and recalled it was from September 20 to October 18, 2011. He testified that he took it easy on vacation.

The Arbitrator also notes that it was not until November 2011 that Petitioner first reported or sought care for neck, left arm or left elbow pain. There is no mention of these conditions in the prior records, and no testimony from either Dr. Gawrysz or Dr. Phillips that these would in any way be related to any claimed injury sustained on May 19, 2011. The Arbitrator further notes that Dr. Sokolowski's causal connection opinions in which he attempts to relate the cervical and left arm/elbow conditions to a May 19, 2011 incident are so flawed as to be deemed unpersuasive. It is only for the neck and left arm/elbow that Petitioner has been receiving care since early 2012, and for which he seeks prospective medical care now.

The Arbitrator finds no causal connection between any claimed accidental injury on May 19, 2011 and any condition of ill-being that manifested itself on November 10, 2011. The Arbitrator finds that Petitioner's low back injury resolved itself after his June 23, 2011 visit to Dr. Gawrysz. Dr. Phillips did not find any ongoing lumbar condition at all. By the time of his July 17, 2017 exam, he found Petitioner's low back and left leg condition to be normal.

In support of his decision with regard 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 makes the following findings:

As the Arbitrator has found Petitioner sustained an accidental injury to his low back on May 19, 2011, he finds that Petitioner is entitled to medical care through June 23, 2011. The Arbitrator relies on the findings and opinions of Dr. Gawrysz, Petitioner's primary care physician, and denies all medical care received by Petitioner after June 23, 2011.

In support of his decision with regard to issue (K) "Is Petitioner entitled to any prospective medical care?", the Arbitrator makes the following findings:

Having found no causal connection, the Arbitrator denies Petitioner's claim for prospective medical care.

In support of his decision with regard to issue (L) "What temporary benefits are in dispute? TTD", the Arbitrator makes the following findings:

No temporary total disability benefits are due.

In support of his decision with regard to issue (N) "Is Respondent due any credit?", the Arbitrator makes the following findings:

Respondent paid $32,053.60 in temporary total disability benefits and $22,484.74 for medical services for which they are entitled to receive a credit.

Brian T. Cronin
Arbitrator

3-17-2019
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

JOHN R. MALLOY,

Petitioner,

vs. NO: 13 WC 13025

SYNERGY COMPANY d/b/a NUANCE SOLUTIONS,

Respondent.

20IWCC0446

DECISION ON REVIEW AND ORDER

This matter comes before the Commission on Respondent's timely Petition for Review as well as Petitioner's Petition for Penalties and Fees. Notice given to all parties, the Commission, after considering the 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. Further, as set forth below, the Commission denies Petitioner's Petition for Penalties and Fees.

CONCLUSIONS OF LAW

Penalties and Fees

On March 13, 2020, while Respondent's Petition for Review was pending, Petitioner filed a Petition for Penalties and Fees. Therein, Petitioner alleged Respondent had suspended payment of wage differential benefits as of February 14, 2020; arguing Respondent's conduct was unreasonable and vexatious, Petitioner requested the Commission impose penalties under Section 19(k) and attorney's fees under Section 16.

Petitioner's Petition was originally set for March 18, 2020; however, due to the shutdown caused by the COVID-19 pandemic, the matter was automatically continued. The parties ultimately appeared before Commissioner Coppoletti on June 25, 2020. After a discussion, Commissioner Coppoletti entered and continued Petitioner's Petition for Penalties and Fees to

20IWCC0446

July 8, 2020, that being the rescheduled oral argument date on Respondent's Review, at which time the parties would argue all issues before the full panel.

When the penalties issue was argued before the Commission, Respondent's Counsel conceded wage differential payments had been suspended but explained the termination was caused by an accounting error. Respondent's Counsel further advised the panel that this had since been rectified and in June 2020, Respondent brought Petitioner current and recommenced payment of benefits.

Section 19(k) of the Act provides, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k)* (West 2012). Section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory, and "is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998). Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. *820 ILCS 305/16* (West 2012).

The Commission finds Respondent's termination of benefits was the result of carelessness, and if §19(l) was applicable to permanency benefits, such would apply. Nonetheless, while Respondent was clearly negligent, we do not find Respondent's conduct was intentional or rises to the level of vexatious. As such, the Commission denies Petitioner's Petition for Penalties and Fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 12, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $600.00 per week commencing on July 23, 2018 and continuing until Petititioner reaches the age of 67 or five (5) years from the date the award becomes final, whichever is later, as provided in §8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is hereby denied.

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

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

20IWCC0446

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,100.00. 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: AUG 5 - 2020

L. Elizabeth Coppoletti

LEC/mck

O: 7/8/2020

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALLOY, JOHN R
Employee/Petitioner

Case# 13WC013025

SYNERGY COMPANY D/B/A NUANCE SOLUTIONS
Employer/Respondent

20IWCC0446

On 9/12/2019, 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 1.82% 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:

2208 CAPRON & AVOERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2965 KEEFE CAMPBELL BIERY & ASSOC
MATTHEW A WRIGLEY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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

John R. Malloy
Employee/Petitioner

v.

Synergy Company d/b/a Nuance Solutions
Employer/Respondent

Case # **13** WC **13025**

Consolidated cases: _____

20IWCC0446

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 **June 10, 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 **October 10, 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 $**37,065.60**; the average weekly wage was $**712.80**.

On the date of accident, Petitioner was **51** 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.

ORDER

For accidents on or after 9/1/11: Respondent shall pay Petitioner permanent partial disability benefits, commencing July 23, 2018, of $600.00/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Signature of Arbitrator

09-11-19
Date

SEP 12 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN R. MALLOY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 13 WC 13025**
	)	
SYNERGY COMPANY d/b/a NUANCE SOLUTIONS,	)	
	)	
Respondent.	)	**20IWCC0446**

ATTACHMENT TO ARBITRATOR'S DECISION

I. Findings of Fact.

Petitioner began working for Respondent in 2006 as a forklift operator. About three years later, he was promoted to Warehouse Foreman. In addition to his supervisory duties, Petitioner had to periodically operate a forklift and carry materials.

On October 10, 2012, Petitioner injured his right shoulder when he tripped over a pallet while working. He was seen at Concentra clinic where an MRI revealed a torn rotator cuff. He was referred to an orthopedic surgeon, Dr. Craig Westin. (PX 1)

When conservative treatment failed to relieve Petitioner's shoulder pain, he underwent surgery by Dr. Westin on March 6, 2013 consisting of a rotator cuff repair and biceps tenodesis. The post-operative course was sub-optimal and an MRI on June 10, 2013 revealed a full thickness re-tearing of the rotator cuff. Dr. Westin performed a revision surgery on Petitioner's right shoulder on October 9, 2013. (PX 1)

On April 29, 2014, Dr. Westin referred Petitioner to Dr. Guido Marra for consideration of additional shoulder surgery. (PX 1)

On October 15, 2014, Petitioner underwent a right rotator cuff repair and debridement, along with a subacromial decompression by Dr. Marra. (PX 2, p. 105)

While engaged in physical therapy, Petitioner experienced heart problems which required cardiac surgery for the insertion of multiple stents in July, 2015. (PX 2, p. 79) Petitioner was cleared to resume physical therapy on October 21, 2015. (PX 2, p. 72) On January 14, 2016, Dr. Marra recommended another right shoulder surgery. (PX 2, p. 63)

Petitioner was examined at Respondent's request by Dr. Vishal Mehta pursuant to Section 12 of the Act on June 15, 2016. Dr. Mehta concurred that Petitioner needed another shoulder surgery. (RX 4)

On August 31, 2016, Petitioner underwent a reverse shoulder arthroplasty by Dr. Marra. (PX 3) On November 9, 2017, Dr. Marra cleared Petitioner to return to restricted duty consisting of lifting 40 lbs occasionally (15 lbs overhead), and carrying 25 lbs for a distance of 50' (25 lbs with the right arm.) (RX 3)

Petitioner testified that before he has able to embark on a job search, he experienced additional cardiac problems which required surgery for the insertion of additional stents. After his recovery, Petitioner met with Eric Flanagan of Encore Unlimited, a vocational counselor retained by Respondent, on April 25, 2018. (PX 4) Petitioner undertook a job search under Mr. Flanagan's direction. The two of them met together regularly. In June, 2018, Petitioner found a job with Lozano Recovery. The job was part time, 20 hours per week, and paid $10.00 per hour.

Prior to accepting the job, Petitioner consulted with Mr. Flanagan who urged him to accept it.

Petitioner returned to work for Lozano Recovery on July 23, 2018. This job required him to accompany a tow truck driver on a search for cars and trucks subject to repossession. When such a vehicle would be located, Petitioner would enter the essential data into a laptop computer such as the license plate number, VIN number, address of the location, etc. He took no part in the physical towing of the vehicles, but essentially made sure that the documentation for the repossession was in order. Petitioner has been performing this job since July 23, 2018.

After returning to work for Lozano Recovery, Petitioner continued looking for a full time job. He did this on a regular basis for a period of about three months, but he has continued to intermittently apply for jobs since then, most recently in February, 2019. He has not found any other employment.

Robert Ernst, Respondent's operations manager, testified that Petitioner's former job as a Warehouse Foreman has had some additional duties blended with it and is now known as a Warehouse Supervisor. The job currently pays at the rate of $1,100.00 per week. Mr. Ernst felt that Petitioner would have been a viable candidate for the job of Warehouse Supervisor if he had been able to return to full duty work.

II. Conclusions of Law.

In support of the Arbitrator's decision relating to the nature and extent of the injury ("L"), the Arbitrator concludes as follows:

The parties agree that Petitioner qualifies for an award of wage differential benefits pursuant to Section 8(d)(1) of the Act. They disagree only on the precise amount of that weekly award. Since Petitioner's return to work for Lozano Recovery, Respondent has been paying Petitioner weekly compensation checks in the amount of 66 2/3% of the difference between his average weekly wage on the date of the accident ($712.80) and his current weekly earnings ($200.00.)

Wage differential awards are to be measured against what the injured worker would be earning at present in the full performance of his duties. *Old Ben Coal Co. v. Industrial Com'n*, 198 Ill.App.3d 485, 144 Ill.Dec. 682, 555 N.E.2d 1201 (5th Dist., 1990) Although Robert Ernst testified that Petitioner's former job no longer exists and that the duties of that job have been subsumed into another position, the Arbitrator takes note of the two written job descriptions supplied by Respondent.

The job descriptions for Warehouse Foreman (RX 5) and Warehouse Supervisor (RX 6) are word-for-word identical. It is clear, therefore, that the measuring stick for the full performance of Petitioner's duties at the present time is the job of Warehouse Supervisor, which pays at the rate of $1,100.00 per week.

Based on the foregoing the Arbitrator concludes that the proper measure of Petitioner's entitlement to wage differential benefits is to compare the current weekly rate of pay for Respondent's Warehouse Supervisor ($1,100.00) with Petitioner's current weekly earnings at Lozano Recovery ($200.00), a gross difference of $900.00 per week, 66 2/3% of which is $600.00 per week. That is the amount to which Petitioner is entitled on a weekly basis until the age of 67.

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

GUILLERMO HERNANDEZ,

Petitioner,

20IWCC0447

vs.

NO: 14WC 39262

SARABIA AUTO PARTS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 11, 2018, 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.

20IWCC0447

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 $48,000.00. 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: AUG 6 - 2020

O072320
MP/jrc
068

Marc Parker

Barbara Flores

Deborah Simpson

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

HERNANDEZ, GUILLERMO
Employee/Petitioner

Case# **14WC039262**

SARABIA AUTO PARTS INC
Employer/Respondent

20IWCC0447

On 10/11/2018, 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 2.38% 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:

0233 DePAOLO ZADEIKIS & GORE
DONNA ZADEIKIS
309 W WASHINGTON ST SUITE 550
CHICAGO, IL 60606

0766 HENNESSY & ROACH PC
SUSAN E WALSH
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0447

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
19B ARBITRATION DECISION

Guillermo Hernandez
Employee/Petitioner

v.

Sarabia Auto Parts, Inc.
Employer/Respondent

Case # **14** WC **39262**

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 **Gary Gale**, former Arbitrator of the Commission, in the city of Chicago, on December 13, 2016. Thereafter, Arbitrator **Gary Gale** left the Commission without issuing a decision. This matter was recently re-assigned to **Arbitrator Tiffany Kay** for purposes of judicial expediency. Both parties have agreed to allow **Arbitrator Kay** to author the decision based upon the evidence and transcripts provided. After reviewing all of the evidence presented, including the transcript of the proceedings, 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. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [ ] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0447

FINDINGS

On **November 20, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,800.00**; the average weekly wage was $**400.00**.

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

Respondent shall be given a credit of $**1250.00** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**1250.00**.

ORDER

Medical Benefits

Respondent shall pay reasonable and necessary medical services of **$49,566.18**, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner total disability benefits of **$266.40** / week for **185 weeks** commencing **November 30, 2013** through **December 13, 2016**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**1250.00** for TTD

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

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

Signature of Arbitrator

10/09/18
Date

OCT 11 2018

PROCEDURAL HISTORY

Guillermo Hernandez ("Petitioner") alleged injuries arising out of and in the course of his employment with Sarabia Auto Parts ("Respondent"). This matter was tried before former Arbitrator Gary Gayle, in the city of Chicago, on December 13, 2016. By agreement of the parties, the matter was reassigned to Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay"). A transcript of the proceedings was ordered and the evidence that was entered during the trial was provided to Arbitrator Kay. The parties agreed that Arbitrator Kay would review the transcript and all evidence and issue a decision.

The parties stipulated that the Respondent was operating under the Act on November 20, 2013 (date of accident), that there was an employer-employee relationship between Respondent and Petitioner, that Petitioner was 56 years old, single and with 0 dependent children at the time of the injury. (Arb.X1) At issue in this case was: accident, notice, causal connection, medical bills, temporary total disability benefits. The following is a recitation of the facts adduced at trial.

FINDINGS OF FACT

Petitioner testified that he was initially hired by Respondent, as a glass installer/maintenance worker on March 20, 2012. Respondent is a junk yard also referred to as a salvage yard. Petitioner testified that he was paid $400.00 per week in cash. (T.22-23) Petitioner's duties included installation of windshields and auto glass, removal of usable parts from junk cars and maintenance work around the grounds of the yard.

On November 20, 2013, Petitioner was assigned the task of using a broadcast spreader to spread gravel on Respondent's grounds to even out the holes that had developed in the surface. Petitioner testified that as he was pushing the broadcast spreader and the spreader began to tip. In order to keep the spreader from tipping over, Petitioner extended his right foot, and struck his third right toe on his right foot on a rock protruding from the ground. (T.32, 35-36) Petitioner testified that he experienced pain in his third 3rd right toe and a "little pain underneath the foot." (T.36) Petitioner testified that he reported the accident to his supervisor, Mario Sarabia (hereinafter "Sarabia"), who was operating a machine nearby. Sarabia instructed the Petitioner to rest. After approximately an hour, Petitioner returned to work. Petitioner's counsel submitted photos of the workplace; however, Petitioner admitted the area in which he was injured was not depicted in the pictures submitted into evidence. (T. 73; P.X 4)

ARBITRATORS SUMMARY OF TESTIMONY & MEDICAL EVIDENCE

Petitioner initially testified that he had no chronic medical problems; however, when further questioned by his attorney he admitted to diabetes, anemia, high blood pressure and cholesterol. (T. 26) In fact, he had been diagnosed with diabetes thirty-five (35) years prior. (T. 26) He admitted that he was not taking any type of medication for his diabetes in November of 2013. (T. 27) Prior to the incident in question, he admitted to problems with left foot and that "it would fall asleep." (T. 29)

On November 20, 2013, Petitioner originally complained of pain in his third toe on his right foot. However, as of November 28, 2013, Petitioner complained that the pain had spread to all of the toes in his right foot along with pain along the underside of the right foot. (T.38-39) Petitioner continued to work through November 29, 2013. (T.82) On November 29, 2013, Petitioner testified that his third right toe started to discolor. On November

30, 2013, Petitioner testified that he could no longer walk and had pain in all the toes on his right foot along with the right foot itself.

On November 30, 2013, Petitioner was seen at Cook County Hospital/ Stroger Hospital (hereinafter "Stroger") in the emergency room. (T.40-41) Petitioner gave a history of striking his right foot 10 days prior. Petitioner also admitted that he had not been compliant with his diabetes medication for two (2) years due to being in Mexico. On exam, he had right foot pain, swelling and 3rd toe necrosis for one (1) week. He admitted to experiencing two (2) weeks of right foot pain progressing to 3rd toe necrosis with clear fluid discharge from the toe. X-rays revealed soft tissue gas concerning for soft tissue infection with gas forming organic. Podiatry performed a 3rd toe amputation at bedside. (T. 46)

On December 2, 2013, Petitioner returned to Stroger and underwent an open right midfoot amputation. The diagnosis was right foot infection and gas gangrene. He was discharged from Stroger on December 5, 2013 with a walker. He was advised to follow-up on December 12, 2013. (P.X 8 &9) Petitioner admitted that he had no off -work slips. (T. 57) In addition, Petitioner testified that his medical bills were paid by Public Aid. (T. 61)

On December 6, 2013, Petitioner returned to Stroger. Petitioner complained of worsening right foot pain when ambulating with his walker and difficulty changing his dressings. He was re-admitted and diagnosed with right foot gangrene status-post amputation. Petitioner was given antibiotic therapy to treat his infection. On December 9, 2013, Petitioner underwent Chopart amputation of the right foot. On December 14, 2013, Petitioner was discharged and given a standard walker. (P.X 8&9)

On December 20, 2013, Petitioner returned to Stroger for a follow-up post his mid foot amputation of the right foot secondary to gas gangrene and Chopart amputation. Petitioner reported that he had been taking his prescribed medications but failed to perform his insulin injections because he had not received any instructions on how to do so. Petitioner reported that he felt better since his discharge, was changing his dressings and ambulating with his walker. His doctor recommended that he start taking his insulin, tight glucose control and monitoring for recovery from foot surgery. (P.X 8&9)

On January 28, 2014, Petitioner returned to Stroger for a follow-up. It was noted that he had failed to attend two prior follow-up appointments with podiatry due to transportation issues. It was noted that his right foot was healing well. (P.X8 & 9) On February 19, 2014, Petitioner was evaluated since his discharge. He finished his course of antibiotics.

On February 27, 2014, Petitioner testified that he had a meeting with the owner of Respondent, Sarabia. Petitioner asked Sarabia for help with his rent and bills. (T. 19; 50; 80) Sarabia gave Petitioner $1,250.00. (T. 53; P.X. 3)

On May 9, 2014, Petitioner was switched from a walker to crutches. It was noted that his foot was healed and he was referred for a prosthetic. (P.X 8 &9)

On July 7, 2014, Petitioner received a pneumococcal vaccination. The discharge diagnosis was anemia diabetic infection of right foot; dyslipidemia; history of right lower limb amputation; hypertension; morbid obesity; Type 2 diabetes with HbA1C goal below 8.0. (P.X 8 &9)

On August 8, 2014, Petitioner returned to Stroger. In May of 2014 he received a right tibial tubercle height partial prosthesis. He reported that he initially felt okay; however, he had progressive worsening of his right foot

pain. He stated that he was having difficulty walking. He presented with a straight cane and healed foot. The doctor noted that the prosthesis was not providing rear foot support and Petitioner required modification or a new brace to provide rear foot control while walking. (P.X 8 &9)

On October 6, 2014, Petitioner returned to Stroger for diabetic management. He admitted that he did not watch his diet as he should. He reported polydipsia, polyuria and blurry vision on occasion. He reported that he followed-up with podiatry regarding his amputation. He had no other complaints. (P.X 8 &9) On October 16, 2014, Petitioner attended a follow-up appointment at Stroger and reported no complaints.

On October 31, 2014, Petitioner returned to Stroger after receiving a new AFO style prosthesis with reinforced footplate with graphite base. He was able to walk with a cane. (P.X 8 &9)

On May 14, 2015, Petitioner had an IME performed, at the Respondent's request, by Dr. George Holmes (hereinafter "Dr. Holmes"). Dr. Holmes opined that there was not a causal connection between the alleged work accident and Petitioner's diagnosis. Assuming, arguendo, that Petitioner did sustain a work injury on November 20, 2013 to the 3rd right toe; Dr. Holmes opined that the injury itself would never have led to an amputation of the foot. Likewise, it would not have caused or aggravated any ischemia of the foot which would have resulted in an amputation. Therefore, the doctor opined that an injury to the toe would not have led to the subsequent amputations and it was far more plausible that this represented known complications in patients with diabetes. Dr. Holmes concluded that Petitioner's symptoms and treatment was related to his diabetes, subsequent noncompliance and other comorbidities including hypertension, elevated cholesterol and poorly, if not, out of control diabetes with an HbA1c of 11.90. (R.X1)

On March 23, 2016, Petitioner was evaluated by Dr. Adam Schiff (hereinafter "Dr. Schiff"), at his attorney's request. The diagnosis was right midfoot amputation following a diabetic ulcer and gangrene of Petitioner's right third toe, complicated by infection. The doctor opined that Petitioner's right foot condition and ultimate amputation was causally related to the work injury. Dr. Schiff noted Petitioner's history of uncontrolled diabetes and acknowledged that it is a large contributing risk factor to his condition; however, he reported that the development of ulcers or wounds is often a result of a traumatic event or abnormal pressure phenomenon as it was in Petitioner's case when his foot struck a rock. (P.X11)

On April 21, 2016, Dr. Holmes issued a supplemental report following his review of additional medical records and Dr. Schiff's causal connection opinion. The doctor opined that the alleged work injury did not cause or aggravate Petitioner's pre-existing ischemia. The doctor further opined that diabetic individuals frequently have ulcers and amputations as a result of non-traumatic events. The foot of a diabetic individual is at an intrinsic risk for amputation or other injuries. The doctor reported that that "simply putting on a shoe, walking or having an ill-fitting shoe are common causes of patients having ulcers and diabetic complications." Petitioner gave a history of merely bumping his foot. Thereafter, he worked for a week. Dr. Holmes opined that this would be contraindicated in a patient with uncontrolled diabetes, high blood pressure and possible sensory deficits. The doctor concluded that the mere wearing of non-diabetic shoes and his working for a week following the alleged accident were all contributing factors to his ultimate amputation of the toe.

CONCLUSIONS OF LAW

With respect to issue (C) whether an accident occurred that arose out of and in the course of employment with Respondent, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner proved by a preponderance of the evidence that his accident arose out of and in the course of his employment with Respondent. "A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment." 820 ILCS 305/2 (West 2002). Both elements must be present in order to justify compensation. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 137 Ill. Dec. 658, 546, N.E.2d 603 (1987).

An injury "arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, so as to create a causal connection between the employment and the accidental injury." Brais v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 120820WC, ¶18.

Here, the Petitioner's injury was distinctly associated with his employment with Respondent. Petitioner testified that on November 20, 2013 he was assigned the specific task of operating a broadcast spreader to spread gravel for the purpose of filling uneven areas in Respondent's yard. Petitioner testified that while pushing the spreader he encountered an uneven area on the ground and in order to keep the spreader from tipping over, Petitioner extended his right foot, and struck his third right toe on his right foot on a rock protruding from the ground. (T.32, 35-36) Petitioner testified that he experienced pain in his third 3rd right toe and a "little pain underneath the foot." (T.36)

Respondent presented no evidence or witnesses to the contrary. Accordingly, the Arbitrator finds that Petitioner proved by a preponderance of the evidence that his accident on November 20, 2013 arose out of and in the course of his employment with Respondent.

With respect to issue (E) whether the Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the Petitioner proved by a preponderance of the evidence that notice of the accident was given to the Respondent within the time limits stated in the Act. At the time of his accident, Petitioner testified that he was using a broadcast spreader to spread gravel around the Respondents yard. Petitioner testified that while he was spreading the gravel, his boss, Sarabia, was using a machine to bring more gravel to the job site for Petitioner to use in his spreader. Petitioner testified that after striking his foot on the rock, he notified Sarabia that he had just struck his foot. Sarabia responded by telling Petitioner to go to the office and rest. Respondent provided no testimony or evidence to the contrary. Accordingly, the Arbitrator finds that Respondent failed to sufficiently rebut that notice was given. Based on the above, and after reviewing the entire record, the Arbitrator finds that timely notice was given to Respondent.

With respect to issue (F) whether the Petitioner's current condition of ill-being is causally related to the Injury, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that Petitioner did prove by a preponderance of the evidence that his current condition of ill-being is causally connected to his work accident on November 20, 2013. Petitioner testified that on November 20, 2013 he was assigned the specific task of operating a broadcast spreader to spread gravel for the purpose of filling uneven areas in Respondent's yard. Petitioner testified that while pushing the spreader he encountered an uneven area on the ground and in order to keep the spreader from tipping over, Petitioner extended his right foot, and struck his third right toe on his right foot on a rock protruding from the ground. (T.32, 35-36) Petitioner testified that he reported the accident to the Respondent the same day, November 20, 2013. Petitioner testified that over the next couple of days the pain began to worsen, his toe began to change colors, it became foul smelling and he could no longer walk.

On November 30, 2013, Petitioner sought medical attention in the ER of Stroger. Petitioner gave a history of striking his foot on a rock at work. Petitioner's foot was examined and due to the condition of his third right toe, it was immediately amputated at his emergency room bedside. Subsequent to the amputation of the third right toe, Petitioner was started on an IV antibiotic and transferred to the inpatient department were thereafter, Petitioner was brought into surgery on December 2, 2013 for a mid-foot amputation due to gangrene on exam. The third tow was gangrenous with an ulcer and noted on the dorsal and lateral aspects of the third toe base along with discharge and mal odor along with macerated interdigital spaces. Soft tissue gas noted in the fore foot extending to the level of mid metatarsals dorsal. The diagnosis was right foot gas gangrene.

On March 23, 2016, Petitioner was examined by Dr. Adam Schiff (hereinafter "Dr. Schiff"), at his attorney's request. A deposition was also taken of Dr. Schiff (P.X11). In preparation for his evaluation of the Petitioner, Dr. Schiff, reviewed medical records from Stroger, clinical photographs of Petitioner, and the addendum written by Dr. George Holmes. Petitioner was diagnosed at Stroger with necrosis of his third toe, infection and diabetes. After an independent examination, Dr. Schiff diagnosed Petitioner with diabetes, peripheral neuropathy, and a midfoot amputation of the right lower extremity. (P.X11) He also opined that Petitioner had a right midfoot amputation following an ulcer and gangrene of the right third toe complicated by infection. All subsequent to the trauma of striking his foot at work. Dr. Schiff went on to testify that but for the fact that Petitioner struck his right foot on a rock at work, he would not have suffered the ulceration, necrosis or infection that ultimately resulted in the need for the mid foot amputation. (P.X11p42-43) Dr. Schiff went on to explain that patients with diabetes, even those with uncontrolled diabetes do not spontaneously have ulceration gangrene. Dr. Schiff testified that there has to be an inciting event. (P.X11p 29) Dr. Schiff testified that diabetic neuropathy or loss of sensation is a risk factor for ulceration and ultimately a risk factor for amputation, but it is a risk with patients who have an inciting traumatic event that causes a cascade of events such as laceration gangrene resulting in amputation. (P.X11p.35) Furthermore, Dr. Schiff explained that the initial injury to the third toe that resulted in infection and gangrene does not necessarily confine the condition to remain in that particular toe. Dr. Schiff explained that infections and gangrene can spread thru tissue planes and progress to the foot. In order to perform a successful amputation there needs to be skin and tissue to close over the bones and tissue inside and with an amputation performed at a certain level if there was not enough healthy tissue in that area, the amputation would need to be done at a higher level in order to have healthy tissue to close.

On May 14, 2015, Petitioner had an IME performed, at the Respondent's request, by Dr. Holmes. In addition, on April 21, 2016, Dr. Holmes issued a supplemental report following his review of additional medical records and including Dr. Schiff's causal connection opinion. Dr. Holmes provided his opinions in the form of a

deposition that was also provided. (P.X13) Initially Dr. Holmes denied that Petitioner's work accident was the cause of his mid foot amputation. Dr. Holmes opined that Petitioner's amputation was related to his alleged 25-year history of diabetes. (P.X13p.16) He opined that diabetic individuals get ulcers spontaneously absent any traumatic event. (P.X13p.18) Dr. Holmes later admitted that he did not do any ABI testing on Petitioner prior rendering his opinion on the case and further admitted that the medical records he reviewed also did not contain this information. Information that he would need to serve as the basis of his opinion. (P.X13p.33-34)

Although, the Respondent provided testimony from Dr. Holmes disputing causation, the Arbitrator finds the Petitioner's treating medical records from Stroger and the deposition testimony of Dr. Schiff more persuasive. Accordingly, the Arbitrator finds that Petitioner's current condition of ill being is causally related to his injury on November 20, 2013.

With respect to issue (G) what the Petitioner's earnings were at the time of the accident, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the Petitioner proved by a preponderance of the evidence that his average weekly wage calculated pursuant to Section 10 of the Act was $400.00. Petitioner testified that when he initially went to Respondent and applied for his position as a glass installer/maintenance worker, Sarabia advised him that the job would be Monday thru Saturday 8:00am to 7:00pm and that the pay would be $400.00 per week in cash. Petitioner testified that pay day was on Saturday's and Respondent paid Petitioner by directly handling him $400.00 in cash. (T.22-23) Respondent provided no evidence to the contrary of Petitioner's testimony. Accordingly, the Arbitrator finds that the Petitioner's average weekly wage calculated pursuant to Section 10 of the Act was $400.00.

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

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator finds that the medical services provided to the Petitioner were reasonably required to diagnose, treat, cure and relieve Petitioner from the effects of the injury on November 20, 2013. As causal connection has been resolved in favor of Petitioner, as explained in detail above, the Arbitrator awards the reasonable and necessary medical bills incurred by Petitioner and submitted as exhibits into evidence to be paid by Respondent as provided in Section 8(a) and pursuant to Section 8.2 of the Act. In addition, Dr. Holmes opined in his June 17, 2015 addendum report and again during his deposition, that the treatment Petitioner received at Stroger was reasonable and necessary. (P.X13) The Arbitrator notes that, pursuant to the Request for Hearing form submitted by the parties and the trial proceedings, Respondent's dispute with regard to the medical bills was premised upon liability. Respondent did not specifically dispute Petitioner's total medical expense amount calculation of $ $62,279.14 or submit its own calculation of the amount of medical bills in dispute.

Petitioner entered into evidence medical bills from Cook County Health System covering the John Stroger Hospital and Jorge Prieto Medical Center visits totaling $62,279.14. Petitioner also entered into evidence documentation from Public Aid claiming payments totaling $49,566.18. (P.X6) Therefore, the Arbitrator finds the Respondent shall pay the sum of $49,566.18 for reasonable and necessary medical services. (P.X6)

With respect to issue (K), what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Having considered all evidence and the record as a whole, the Arbitrator concludes that Petitioner is entitled to temporary total disability benefits. Both parties stipulated that Respondent gave Petitioner $1250.00 which Respondent shall receive credit for. (P.X3) At trial, Petitioner sought TTD from 11/30/13 through 12/13/16. (Arb.X1) Petitioner testified that he has been off work pursuant to the instructions of Jorge Prieto Health Center. Petitioner further testified that Respondent has not offered him any light duty work.

Additionally, Petitioner offered into evidence the IME report from Dr. Holmes dated May 14, 2015 and addendum report dated June 17, 2015. In the May 14, 2015 report Dr. Holmes opined that the Petitioner's work status should be "off work". (P.X5) Additionally, in the June 17, 2015 addendum, Dr. Holmes opined that Petitioner was capable of working with restrictions in a job that is sedentary or semi-sedentary or light duty. The Arbitrator notes that Petitioner testified that his job duties included installing windshields and auto glass, removing car parts, stacking parts and maintenance work including cleaning up the grounds of Respondent. There is no evidence to suggest Petitioner could perform his duties after the injury and Petitioner testified that he could not work after the incident.

Accordingly, the Arbitrator finds that Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 30, 2013 through December 13, 2016, and shall pay the remainder of the award, if any, in weekly payments. Respondent shall receive a credit for TTD paid in the sum of $1250.00.

With respect to issue (M), whether the Petitioner is entitled to penalties/attorney's fees under §19(k), §19(l) and §16, the Arbitrator finds as follows:

Given the facts presented in this case, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's injuries subsequent to November 20, 2013 (accident date) arose out of his employment as alleged. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

Signature of Arbitrator

10/09/18
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: §8(j) credit	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSE YURIK,

Petitioner,

20IWCC0448

vs.

NO: 16 WC 7214 & 17 WC 7215

ALEXIAN BROTHERS MEDICAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of casual connection, medical expenses, temporary total disability, permanent partial disability, and Respondent's §8(j) credit, and being advised of the facts and law, modifies the Decisions of the Arbitrator as stated below and otherwise affirms and adopts the Decisions of the Arbitrator, which are attached hereto and made a part thereof.

The Arbitrator issued two separate Decisions in Petitioner's consolidated cases, 16 WC 7214 and 16 WC 7215, both of which awarded Respondent a §8(j) credit of $65,017.91. Following a careful review of the entire record, the Commission finds that awarding Respondent the §8(j) credit in both cases was erroneously duplicative. The $65,017.91 in medical expenses relates to the treatment Petitioner received after her December 12, 2015 work accident; and therefore, the credit for this amount corresponds only with 16 WC 7215. Accordingly, the Commission modifies 16 WC 7214 to remove the duplicative §8(j) credit of $65,017.91 and finds that this credit was properly attributed only once to 16 WC 7215.

In all other respects, the Commission affirms and adopts the Decisions of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator dated March 25, 2019 are modified as stated herein. The Commission otherwise affirms and adopts the Decisions of the Arbitrator.

20IWCC0448

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not entitled to any §8(j) credit under 16 WC 7214. The Commission finds that Respondent remains entitled to the §8(j) credit of $65,017.91 under 16 WC 7215.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 6 - 2020

Barbara N. Flores

Marc Parker

DLS/met
O: 6/18/20
46

DISSENTING IN PART, CONCURRING IN PART

I concur with the Decision of the majority on all issues except for the nature and extent of Petitioner's low back injury. As to the award of permanent partial disability benefits, I respectfully dissent from the Decision of the majority and would have found that Petitioner sustained a 20% loss of use of the person as a whole as a result of her December 12, 2015 work accident.

Following her second work accident, Petitioner returned to full duty work on September 16, 2016. Although Petitioner testified that she has since changed the way that she performs her job duties, she continues to work in her same pre-accident position without any medical restrictions or formal accommodations. She does not require any orthopedic device or back brace, nor is she currently taking any prescription medication. Given that Petitioner was able to return to her regular physically demanding job with no formal restrictions and Dr. Yadla noted that Petitioner had made good progress post-surgery with resolved radicular symptoms, I would have found that Petitioner established permanent partial disability of 20% loss of use of the person as a whole. I would have modified the award accordingly for the December 12, 2015 accident.

DLS/met
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0448

YURIK, ROSE
Employee/Petitioner

Case# **16WC007214**

16WC007215

ALEXIAN BROTHERS MEDICAL CENTER
Employer/Respondent

On 3/25/2019, 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 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:

2208 CAPRON & AVGERINOS PC
NICK J AVGERIONS
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
JOHN P FASSOLA
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

20 IWCC0448

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROSE YURIK
Employee/Petitioner

v.

ALEXIAN BROTHERS MEDICAL CENTER
Employer/Respondent

Case # **16** WC **7214**

Consolidated cases: **16 WC 7215**

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 **MARIA BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **February 19, 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. [ ] Were 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 [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0448

FINDINGS

On **October 30, 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 **$31,692.40**; the average weekly wage was **$609.47**.

On the date of accident, Petitioner was **45** 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 **$3,038.01** for TTD, **$0** for TPD, **$0** for maintenance, and $0 for other benefits, for a total credit of **$3,038.01**. Respondent is entitled to a credit of **$65,017.91** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$406.31**/week for **6-5/7th weeks**, commencing **October 30, 2014** to **November 6, 2014**, **December 23, 2014** to **December 24, 2014**, **February 19, 2015** to **March 29, 2015**, and **April 30, 2015** to **May 4, 2015** as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$3,038.01** for the payment of temporary total disability benefits paid.

Respondent shall not pay Petitioner permanent partial disability benefits because the injuries sustained did not cause Petitioner any disability.

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

3-25-2019
Date

MAR 25 2019

20 IWCC0448

FINDINGS OF FACT

Petitioner was born on May 1, 1968. (T. 11). Following high school graduation, Petitioner attended college and earned her license in practical nursing. *Id.* Petitioner is CPR certified and CNA certified. *Id.* at 12. Petitioner's entire employment history has been in the health care field. *Id.*

Upon receiving her license, Petitioner worked at Lexington Nursing Home and The Arbor of Itasca. *Id.* After five years of employment, Petitioner began to work for Alexian Brothers in 1993 as a certified nursing assistant. As a certified nursing assistant, Petitioner was required to engage in physical work such as pulling and lifting *Id.* at 13. Prior to beginning employment with Alexian Brothers, Petitioner testified that she did not have any back issues. *Id.* at 15.

Before the October 30, 2014 work injury, Petitioner testified that she sustained back strains. *Id.* at 16. On March 1, 1995 Petitioner felt a pulling sensation in her back as she was assisting a worker turning a 250lb male patient. (RX 2). On August 27, 2000 Petitioner slipped and fell on her buttocks on an empty clear plastic EKG pad at work (RX 3). On December 31, 2006 Petitioner sustained an injury at work while lifting a patient. (RX 4). In regard to the above-referenced incidents, Petitioner received minimal treatment, all of which was brief and conservative. Following these incidents, Petitioner was able to continue performing her regular job duties. Petitioner testified that she never experienced any accidents or injuries outside of her workplace. *Id.* at 19. As it relates to the above-referenced incidents, Petitioner never filed a workers' compensation claim with the Illinois Workers' Compensation Commission. *Id.* These incidents were also reviewed by Respondent's Section 12 doctor. See, Rx1.

Prior to the October 30, 2014 work injury, Petitioner was not under the care of any health care professional for her low back. *Id.* Furthermore, Petitioner was not experiencing any pain or problems with her back and was not taking any medication or under any work restrictions. *Id.* at 20.

On October 30, 2014 Petitioner was performing her regular work duties when she pulled a 250lb patient. *Id.* at 20-21. As Petitioner was pulling the patient up, she felt low back pain around the midline. *Id.* at 21. When comparing this pain to her prior incidents, Petitioner stated "[i]t felt, like, pressure, like, somebody was weighing me down or sitting on my shoulders, like just weighing me down. It was a pressure pain." *Id.* at 22. Furthermore, Petitioner testified that she had not felt this type of pain in the past. *Id.* Petitioner notified her supervisor and received medical care. *Id.*

On November 20, 2014 Petitioner presented to Barrington Orthopedics and came under the care of Dr. Richard Rabinowitz. (PX 1, Pg. 1-5). Petitioner complained of low back pain that was deep and dull and radiated to her right lateral thigh. *Id.* at 1. An MRI of the lumbar spine showed Grade I spondylolisthesis at the L5-S1 level with diffuse bulging disc contributing to neuroforaminal stenosis. *Id.* at 3. After this initial evaluation, Dr. Rabinowitz recommended physical therapy and sedentary work/activity. *Id.* at 4-5. After six weeks of physical therapy, Petitioner did not experience any relief in pain. *Id.* at 18.

On February 19, 2015 Petitioner returned to Dr. Rabinowitz with ongoing low back pain. *Id.* at 22. Dr. Rabinowitz ordered additional physical therapy and took Petitioner off work. *Id.* at 25. On February 25, 2015 Petitioner received an epidural injection. *Id.* at 30. Following the March 26, 2015 appointment, Dr. Rabinowitz released Petitioner to return to work full duty on March 30, 2015. *Id.* at 34. On April 30, 2015 Petitioner

returned to Dr. Rabinowitz with increased back and leg pain. *Id.* at 36. After taking Petitioner off work from April 30, 2015 to May 4, 2015, Dr. Rabinowitz released Petitioner to return to full duty work on May 4, 2015. *Id.* at 38. Petitioner returned to full duty work on May 4, 2015, and testified that there was no change in her work duties or responsibilities. (T. 26-27).

For seven months, between May 4, 2015 and December 11, 2015 Petitioner was not receiving any medical attention for her back. *Id.* at 27. Also, Petitioner was not taking any medication. *Id.* Petitioner did not have any accidents or injuries either at work or outside of the workplace during this time period. *Id.*

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that her condition of ill-being is causally related to her work accident of 10/30/14. In so finding, the Arbitrator relies on Petitioner's credible testimony and on the treatment records of Dr. Rabinowitz.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she is entitled to TTD as a result of her injuries.

The parties stipulated that Respondent paid temporary total disability from October 30, 2014 to November 6, 2014, February 19, 2015 to March 29, 2015, and April 30, 2015 to May 4, 2015 totaling $3,038.01. However, as a result of the subject accident, Petitioner was also unable to work on December 23, 2014 and December 24, 2014. After obtaining an understanding of Petitioner's job duties and responsibilities, Dr. Rabinowitz stated that she was unable to work on December 23, 2014 and December 24, 2014 due to her back pain. *Id.* at 17.

Therefore, the Arbitrator finds that Respondent shall be given a credit of $3,038.01 for the payment of temporary total disability benefits in this amount. The Arbitrator further finds that Petitioner is entitled to receive temporary total disability benefits for October 30, 2014 to November 6, 2014, December 23, 2014, December 24, 2014, and from February 19, 2015 to March 29, 2015, and from April 30, 2015 to May 4, 2015. Respondent request for non-occupational credit is denied as this claim, as payments were paid following the date of the second accident. See 16 WC 7215 for that credit.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she reached MMI for this accident and any claim for permanency is ripe for adjudication.

On the date of the accident, Petitioner was a 45 years-old certified nursing assistant who had worked in the health care field her entire employment history. (T. 12). Following the October 30, 2014 accident, Petitioner

underwent an MRI of the lumbar spine which showed Grade I spondylolisthesis at the L5-S1 level with diffuse bulging disc contributing to neuroforaminal stenosis. (PX 1, P.g. 3). At this time, Dr. Rabinowitz recommended physical therapy and sedentary work/activity. *Id.* at 4-5. After not experiencing a relief in pain after six weeks of physical therapy, Dr. Rabinowitz ordered additional physical therapy and took Petitioner off of work. *Id.* at 22, 25. After a minor setback, Dr. Rabinowitz released Petitioner to return to full duty work on May 4, 2015. *Id.* at 38.

Petitioner returned to full duty work on May 4, 2015, and testified that there was no change in her work duties or responsibilities. (T. 26-27).

Petitioner testified that between May 4, 2015 and December 11, 2015 Petitioner did not receive any medical attention for her back. *Id.* at 27. Petitioner was not taking any medication for her back. *Id.* More importantly, Petitioner did not have any accidents or injuries either at work or outside of the workplace during this time period. *Id.*

Pursuant to Section 8.1b of the Act, the Arbitrator considers the following factors:

1. **The reported level of impairment under the AMA Guides:** The Parties did not offer into evidence any impairment ratings and there was no evidence indicating either party wished or desired to offer such evidence pursuant to subsection (a). The Arbitrator assigns no weight to this factor.

2. **The occupation of the injured employee:** Petitioner remains employed as a certified nursing assistant for the Respondent performing her regular duties. The Arbitrator assigns no weight to this factor.

3. **The age of the employee at the time of injury:** The Petitioner was 45 years of age on the date of the accident. There was no evidence presented regarding the affect her age may have with respect to disability. The Arbitrator assigns to weight to this factor.

4. **The employee's future earning capacity:** Between the months of May 4, 2015 through December 11, 2015, Petitioner was working full duty. There was no evidence indicating the Petitioner's level of earnings or earning capacity have been adversely affected by the October 30, 2014 accident. The Arbitrator assigns no weight to this factor.

5. **Evidence of disability:** There is no medical evidence of disability as it pertains to the October 30, 2014 injury. The Arbitrator assigns the greatest weight to this factor.

The Arbitrator finds no disability as it relates to the October 30, 2014 injury given that Petitioner sustained a subsequent injury to the same body part resulting in a second claim. Therefore, any permaenancy benefits will be awarded under that second claim. However, the Arbitrator incorporates by reference the findings of fact and conclusions of law set forth in the companion case 16 WC 7215 that was consolidated for hearing with the subject claim.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20 IWCC0448

YURIK, ROSE
Employee/Petitioner

Case# **16WC007215**

16WC007214

ALEXIAN BROTHERS MEDICAL CENTER
Employer/Respondent

On 3/25/2019, 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 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:

2208 CAPRON & AVGERINOS PC
NICK J AVGERINOS
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
JOHN P FASSOLA
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

20 IWCC0448

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

ROSE YURIK
Employee/Petitioner

v.

ALEXIAN BROTHERS MEDICAL CENTER
Employer/Respondent

Case # 16 WC 7215

Consolidated cases: **16 WC 7214**

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **Chicago** , on **February 19, 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 **December 12, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,692.40**; the average weekly wage was $**609.47**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,496.28** for other benefits, for a total credit of $**4,496.28**. Respondent is entitled to a credit of $**65,017.91** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**406.31**/week for **16** weeks, commencing **12/15/15** through **12/22/15** and **4/19/16** through **8/1/16,** as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**4,496.28** for non-occupational disability benefits it paid to Petitioner from **5/3/16** through **9/30/16.**

Respondent shall pay reasonable and necessary medical services of $**32,538.23**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $**65,017.91** 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 reimburse Petitioner for out-of-pocket expenses totaling $**1,070.01.**

Respondent shall pay Petitioner permanent partial disability benefits of $**365.68**/week for **150** weeks, because the injuries sustained caused **30%** loss of the person as a whole, as provided in **Section 8(d)2** of the Act.

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

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

Signature of Arbitrator

3-22-2019
Date

MAR 25 2019

FINDINGS OF FACT

The Arbitrator incorporates by reference and adopts the findings of facts and conclusions of law set forth in the arbitration decision rendered in the companion case, 16 WC 7214.

On December 12, 2015 Petitioner was still employed at Alexian Brothers as a CNA, also known as a patient care tech. Later that night, Petitioner needed to relocate a crash cart. *Id.* at 28. In order to make the crash cart lighter, Petitioner picked up a defibrillator and put it on the counter. *Id.* In transferring the defibrillator to the counter, Petitioner testified that she "felt a pop, like, a rubber band snapping." *Id.* Due to the immense pain, she was unable to relocate the crash cart. *Id.* at 29. Immediately following the injury, Petitioner notified the nurse and went to Alexian Brothers Emergency Department. *Id.* When asked at arbitration whether the symptoms Petitioner was experiencing were anything she had experienced before, she testified, "[n]o. It was so painful. I couldn't even walk. It was excruciating pain, a 10." *Id.*

On December 12, 2015 Alexian Brothers Emergency Department ordered Petitioner to not return to work. (PX 6, Pg. 5). On January 15, 2016 Petitioner presented to her primary care physician, Dr. Palosha Ahmed. Petitioner stated that she was carrying a defibrillator from the cart to the counter. (PX 3, Pg. 11). The wires got caught on the crash cart, and she was struggling to pull it to the counter. *Id.* As Petitioner twisted, she felt a snap like a rubber band. *Id.* Following this appointment, Dr. Ahmed referred Petitioner to Barrington Orthopedic.

On February 11, 2016 Petitioner presented to Barrington Orthopedic Specialists. After examining Petitioner, Dr. Anubhav Jagadish recommended further diagnostic testing. (PX 1, Pg. 47.) On February 19, 2016 Petitioner had an MRI of the lumbar spine. A comparison of Petitioner's February 19, 2016 MRI with her previous diagnostic tests showed a grade 2 spondylolisthesis at L4-L5 with worsened disc space narrowing. (PX 2, Pg. 47). Dr. Jagadish recommended surgical intervention. *Id.* at 41.

On March 7, 2016 Petitioner presented to Dr. Sanjay Yadla for a second opinion. (PX 2, Pg. 4). Dr. Yadla opined that Petitioner's back pain began after a work-related injury in October 2014 and was exacerbated by another injury sustained on December 12, 2015. (PX 4, Pg. 30). Following an examination, Dr. Yadla determined that Petitioner's signs and symptoms are consistent with mechanical back pain and a right lumbar radiculopathy due to facet disease and spondylolisthesis at L3-4 and L4-5 levels. (PX 2, Pg. 4). Furthermore, the February 19, 2016 MRI demonstrated a grade II spondylolisthesis at L4-5 and severe bilateral facet arthropathy at L3-4. (PX 4, Pg. 30). Dr. Yadla opined that her work and work-related injuries contributed to the degenerative disease at these levels. *Id.* Dr. Yadla opined that the pathology on imaging had progressed at the L3-4 level compared to an MRI performed on November 11, 2014. *Id.* Dr. Yadla recommended a lumbar fusion (TLIF) at L3 to L5 from a posterior approach. (PX 2, Pg. 4).

On April 19, 2016 Petitioner underwent a transforaminal lumbar interbody fusion at L3 to L4, L4 to L5. *Id.* at 9. Thereafter, Petitioner underwent physical therapy from May 16, 2016 through August 12, 2016, and a work hardening program from August 15, 2016 to September 9, 2016.

The surgical recommendation given by Dr. Jagadish and Dr. Yadla were the first surgical recommendations that Petitioner received in regard to her low back. (T. at 33). Petitioner was able to return to work in a light duty capacity on August 1, 2016. (PX 4, Pg. 23). Roughly a month and a half later, Petitioner resumed full-duty activity on September 16, 2016. (T. at 35).

On September 28, 2016 Dr. Babak Lami prepared a record review report for the Respondent. (RX 1). After a review of the records, Dr. Lami opined that it is possible that lifting a patient on October 30, 2014 increased her preexisting back condition. *Id.* However, Dr. Lami believed that this was only a temporary

aggravation of her preexisting chronic back condition. *Id.* In regard to the December 12, 2015 injury, Dr. Lami opined that the mechanism of lifting a defibrillator is trivial and did not constitute an injury which aggravated her chronic spondylolisthesis. *Id.* Dr. Lami concluded that the spinal decompression and fusion performed by Dr. Yadla were appropriate, but unrelated to any of the work-related injuries. *Id.*

CONCLUSIONS OF LAW

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

Prior to the October 30, 2014 work injury, Petitioner testified that she sustained back strains. (T. 16). As a result of these back strains, Petitioner received minimal treatment. All treatment Petitioner received was brief and conservative. Following each incident prior to October 30, 2014 Petitioner was able to continue performing her regular job duties, and was never given any permanent restrictions.

On October 30, 2014 Petitioner sustained an injury while pulling a 250lb patient. *Id.* at 20-21. Petitioner testified that she had not felt this type of pain in the past. *Id.* at 22. After notifying her supervisor, Petitioner received immediate medical care. *Id.*

Petitioner presented to Barrington Orthopedics and came under the care of Dr. Richard Rabinowitz. (PX 1, Pg. 1-5). Petitioner complained of low back pain that was deep and dull and radiated to her right lateral thigh. *Id.* at 3. Dr. Rabinowitz recommended physical therapy and recommended sedentary work/activity. *Id.* 4-5. Following six weeks of physical therapy, Petitioner remained in pain. *Id.* at 18. Dr. Rabinowitz recommended additional physical therapy and took Petitioner off work until the next appointment. *Id.* at 25. On March 26, 2015, Dr. Rabinowitz released Petitioner to return to work full duty on March 30, 2015. *Id.* at 34. After having a minor setback on April 30, 2015, Petitioner was again released to work full duty on May 4, 2015. *Id.* at 38. Petitioner returned to full duty work on May 4, 2015, and testified that there was no change in her work duties or responsibilities. (T. 26-27).

After the October 30, 3014 work injury, Petitioner did not receive any permanent restrictions and was able to return to full duty work. More importantly, between May 4, 2015 and December 11, 2015 Petitioner received no medical attention for her back. *Id.* at 27. Furthermore, Petitioner was not taking any medication, and did not have any accidents or injuries either at work or outside of the workplace during this time period. *Id.*

On December 12, 2015 Petitioner continued to work for Alexian Brothers as a CNA. After picking up a defibrillator and using a twisting motion to put it on the counter, Petitioner testified that she "felt a pop, like, a rubber band snapping." *Id.* at 28. Petitioner testified that she had not experienced this type of symptom in the past. *Id.* at 29. This testimony was unrebutted.

On December 12, 2015 Petitioner presented to Alexian Brothers Emergency Department where she was instructed to not return to work (PX 6. Pg. 5). Following a visit with Dr. Palosha Ahmed, Petitioner was referred to Dr. Anubhav Jagadish at Barrington Orthopedics.

Dr. Jagadish recommended an MRI of the lumbar spine. As compared to Petitioner's previous MRI, the February 19, 2016 MRI showed a grade 2 spondylolisthesis at L4-L5 with worsened disc space narrowing. (PX 2, Pg. 24). Dr. Jagadish recommended surgical intervention. This was the first surgical recommendation Petitioner received for her back.

The Arbitrator finds the causal connection opinion of Dr. Sanjay Yadla more compelling than that of Dr. Babak Lami and therefore assigns greater weight to the opinions of Dr. Yadla. Dr. Yadla opined that Petitioner's work injuries have contributed to her degenerative disc disease at those levels. Similar to Dr.

Jagadish, fusion surgery was recommended. Eventually, a lumbar fusion (TLIF) at L3 and L5 from a posterior approach was performed. Dr. Yadla opined that Petitioner's pain began after a work-related injury in October 2014 and was exacerbated by the injury on December 12, 2015. *Id.* at 30. Dr. Yadla maintains that Petitioner's work and work-related injuries contributed to the degenerative disease at these levels which ultimately required surgical intervention. *Id.* The February 19, 2016 MRI demonstrated a progression at the L3-4 level compared to the MRI performed on November 11, 2014. *Id.*

Unlike Dr. Yadla, Dr. Lami did not conduct a medical examination of Petitioner. Rx1. Dr. Lami concedes it is possible that the October 30, 2014 injury may have aggravated Petitioner's preexisting back condition. *Id.* His conclusion that the December 12, 2015 accident was too trivial to cause an injury is not supported by facts. Here, the symptoms she experienced following the December 12, 2015 accident did not abate which creates a reasonable inference that the effects of the December 12, 2015 accident were permanent, not temporary and not trivial. Thus, the chronology of events, mechanism of injury and history of treatment document a change in condition. A second MRI of February 19, 2016 demonstrated a change in the underlying condition which provides further support for Dr. Yadla's opinion that the accidents aggravated the underlying condition, resulting in the need for surgery. Surgery was first discussed following this accident. Dr. Yadla's explanation and conclusions are consistent with the change in Petitioner's symptoms and conditions that followed the work accidents and, in particular, the accident of December 12, 2015. Accordingly, the Arbitrator adopts the opinion of Dr. Yadla in support of causal connection.

Therefore, the Arbitrator finds causal connection between the condition of the Petitioner's low back/lumbar spine and the accident of December 12, 2015.

ISSUE (K) ***What temporary benefits are in dispute?***
ISSUE (N) ***Whether Respondent is due any credit?***

There is no dispute among the parties that if there exists a causal connection between the accident and Petitioner's condition of ill-being the period of incapacity from work extends from December 15, 2015 through December 22, 2015 and April 19, 2016 and August 1, 2016. The Petitioner's testimony and medical records confirm that the Petitioner was off work on account of the accident and under medical care during the above-mentioned time periods.

Having determined the existence of a causal connection, the Arbitrator finds the Petitioner is entitled to have and receive from Respondent the sum of $406.31 per week from December 15, 2015 to December 22, 2015 and April 19, 2016 to August 1, 2016, that being the period of temporary total disability from work.

The parties stipulated the Respondent paid non-occupational disability benefits to the Petitioner in a gross amount of $5,844.12, which after taxes totaled $4,496.28. (PX 13). The benefits covered the period from 5/3/16 to 9/30/16. The Respondent is entitled to a credit against the amount of TTD for the post-tax amount received by the petitioner. *Navistar Int'l Transp. Corp. v. Industrial Comm'n (Diaz),* 315 Ill. App. 3d 1197, 1206-08 (1st Dist. 2000).

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 Petitioner introduced evidence that indicates her group health provider paid medical bills associated with her work-accident in the amount of $65,017.91. Px7, Ax2.

The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary and, therefore, finds Respondent shall be given a credit under Section 8(j) of $65,017.91 for medical benefits that

have been paid as set forth in Petitioner's Exhibit #7, and shall be responsible for satisfying all medical expenses, and shall hold Petitioner harmless from any claims by any providers of the services which Respondent is receiving this credit, including: Equian, Automated Benefit Services and Respondent as provided in Section 8(j) of the Act.

The Petitioner also introduced evidence of medical bills which remain outstanding consisting of Exhibits 8-12:

Barrington Orthopedic Specialists, Ltd.	$7.62
ATI Physical Therapy	$30,152.78
Alexian Brothers Medical Center	$ 2,263.18
Elk Grove Radiology, S.C	$114.65
Total:	$32,538.23

The Petitioner also introduced evidence of the following out-of-pocket expenses totaling $1,070.01.

Having found the existence of a causal connection between the condition of Petitioner's low back and the accident of December 12, 2015, the Arbitrator further finds the Respondent is responsible for payment of the medical bills set forth in Exhibits 8-11 pursuant to Section 8(a) and 8.2 of the Act, and further that Respondent shall hold Petitioner harmless for said bills and expenses as set forth in Exhibits 8-11 totaling $32,538.23. In addition, Respondent is responsible for reimbursement to the Petitioner for out-of-pocket expenses totaling $1,070.01.

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

On the date of the second accident, Petitioner was 46 years-old. Petitioner's entire employment history has been in the health care field. *Id.* at 12. For the past 25 years, Petitioner has been employed as a certified nursing assistant, also known as a patient care tech, at Alexian Brothers. As a certified nursing assistant, Petitioner is required to engage physically demanding work that includes pulling and lifting *Id.* at 13.

The December 12, 2015 resulted in a lumbar fusion at L3 to L5 from a posterior approach. Following Petitioner's surgery on April 19, 2016, Petitioner underwent physical therapy from May 16, 2016 to August 12, 2016. Petitioner resumed her customary duties following her full duty release, but testifies she continues to experience pain and discomfort while performing her regular duties which she described as physically demanding. The Arbitrator concludes that Petitoner has reached maximum medical improvement for this injury and that any claim for permanency is ripe for adjudication.

Pursuant to Section 8.1b of the Act, the Arbitrator considers the following factors:

The reported level of impairment under the AMA Guides: The Parties did not offer into evidence any impairment ratings and there was no evidence indicating either party offered such evidence. The Arbitrator assigns no weight to this factor.

The occupation of the injured employee: Petitioner remains employed as a certified nursing assistant, also known as a patient care tech for the Respondent performing her regular duties. However, Petitioner is taking Aleve twice a week for the continued low back pain caused by her job. Petitioner testified that sitting and walking for long periods at work cause pain. Petitioner also notices a sharp pain in her lower back while lifting at work. The Arbitrator takes note and assigns some weight to this factor.

The age of the employee at the time of injury: Petitioner was 46 years of age on the date of accident. Her age suggests perhaps a somewhat long work life expectancy remaining. The Arbitrator assigns some weight to this factor.

The employee's future earning capacity: no evidence showed her earnings were impaired. The Arbitrator assigns no weight to this factor.

Evidence of disability: Petitioner's fusion surgery was on April 19, 2016. To date, Petitioner experiences low back pain. Petitioner's surgeon, Dr. Yadla, opined that her work and work-related injuries contributed to the degenerative disease at L4-5. When asked what Petitioner notices about herself performing work activities, she stated "[w]ell just if I walk for a long period of time, it starts aggravating my back. And if you want me to rate the pain from one to 10, I would save five. When I'm at work, it's higher, eight, nine." *Id.* at 40. Petitoiner's testimony is consistent with her medical records. See, Px4:1, 23, Px5:5. The evidence shows the Petitioner's accident aggravated and/or exacerbated her pre-existing DDD, that this resulted in a two level fusion from L4 to S1 after failed conservative care, that she was released full duty and returned to her regular employment and that she experiences difficulty with prolonged walking. The Arbitrator assigns the greatest weight to this factor.

For all the reasons stated, the Arbitrator concludes the Petitioner is entitled to have and receive from the Respondent the sum of $365.68 per week for a period of 150 weeks, as provided in Section 8(d)(2) of the Act, as the accident of December 12, 2015, resulted in a permanent loss of use of a person as a whole to the extent of 30%.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWANDA CLARK,

Petitioner,

vs. NO: 08 WC 06322

STATE OF ILLINOIS,
ELGIN MENTAL HEALTH CENTER,

20IWCC0449

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2020 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.

20IWCC0449

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: AUG 11 2020
o-7/14/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CLARK, LAWANDA
Employee/Petitioner

Case# **08WC006322**

ELGIN MENTAL HEALTH CENTER
Employer/Respondent

20IWCC0449

On 1/3/2020, 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:

2356 DONALD W FOHRMAN & ASSOC LTD
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60610

5604 ASSISTANT ATTORNEY GENERAL
DAVID CHRISTENSEN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

JAN 3 - 2020

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lawanda Clark
Employee/Petitioner

v.

Elgin Mental Health Center
Employer/Respondent

Case # **08** WC **6322**

Consolidated cases: _____

20IWCC0449

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **7/17/19 & 9/9/19**. 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 _____

FINDINGS

On 1/11/08, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* 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 $37,919.44; the average weekly wage was $729.22.

On the date of accident, Petitioner was 45 years of age, *single* with 0 dependent children.

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

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

Respondent shall be given a credit of $337,694.10 for TTD, $0 for TPD, $99,819.63 for maintenance, and $0 for other benefits, for a total credit of $437,513.73.

Respondent is entitled to a credit of $258,869.10 under Section 8(j) of the Act.

ORDER

MEDICAL BENEFITS

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $6,400.56 to Injured Workers' Pharmacy and $26,387.81 to Metro Health Solutions, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits/maintenance of $729.22/week for 600-5/7 weeks, commencing 1/12/08 through 7/17/19, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $437,513.73 for temporary total disability benefits and maintenance payments.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $729.22/week for life, commencing 7/18/19, 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 Respondent, 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.

Signature of Arbitrator

12/27/2019
Date

JAN 3 - 2020

FINDINGS OF FACT

Petitioner was employed by the Elgin Mental Health Center on January 11, 2008. She had worked for that facility for approximately twenty years prior to that date. (T.9) Her job title was that of a maintenance equipment operator which essentially required her to operate various vehicles for the Respondent which included transport vans and snowplows. (T.10)

On January 11, 2008, Petitioner testified that she was driving an early morning food truck. She drove the truck to the dietary dock for it to be loaded with dietary trays which were to be delivered from building to building by the dietary staff. (T.12) Petitioner testified that after the truck was loaded, Petitioner headed up the ramp and she heard a loud noise in the back of the truck. (T12-13) Petitioner exited the vehicle to investigate the noise and when she stepped onto the ground, she slipped on the icy driveway and fell to the ground. Petitioner stated that she put both hands out to break her fall. (Id.) Following the incident, Petitioner's primary complaint was her left wrist. (T.13)

Petitioner received emergency care at Sherman Benefit on January 11, 2008. She was diagnosed with a wrist fracture. (PX2) Petitioner subsequently sought treatment with Dr. David Schafer of Suburban Orthopedics. Dr. Schafer examined Petitioner and reviewed the x-rays. It was diagnosis that Petitioner had a left wrist sprain, possible TFCC tear and nondisplaced fractures of the ulnar styloid and scaphoid. (PX3, p. 6) Dr. Schafer recommended an MRI to determine if there was a TFCC tear. (Id.) Petitioner underwent an MRI at St. Alexius Medical Center on March 7, 2008. (PX1, p.199) She followed with Dr. Schafer on March 20, 2008 who reviewed the MRI and found that there was a widening of scapholunate space with a complete tear of the ligament, but no evidence of a TFCC tear. (PX3, p.8) Dr. Schafer recommended a referral to a hand specialist, Dr. Matthew Bernstein of Barrington Orthopedics. (Id.)

Petitioner was seen by Dr. Bernstein on April 4, 2008. Dr. Bernstein reviewed the diagnostic studies and examined Petitioner. It was his impression that Petitioner required surgery to repair the scapholunate ligament tear. (PX4, p.12,13) Surgery was performed on April 12, 2008 at St. Alexius Medical Center. The surgery consisted of a debridement of the arthritic dorsal aspect of the lunate and a repair of the triangular fibrocartilage complex. (PX1, p. 164, 165; PX4, p.19,20) Petitioner returned to Dr. Bernstein on May 13, 2008. Among Petitioner reported symptoms, Petitioner complained of burning type pain in the left wrist. (PX4, p.21) Petitioner testified that the burning type pain felt as if she had been burnt by hot grease. (T.18) Petitioner was advised to continue the use of the long arm splint that had been prescribed and to continue with occupational therapy. (PX4, p.21) Petitioner returned on May 27, 2008 and reported persistent swelling and pain. (Id. at 24) At Petitioner's follow-up on July 1, 2008, Petitioner reported similar complaints and noted hypersensitivity and pain with light touch. (Id. at 28) Dr. Bernstein assessed that Petitioner likely had complex regional pain syndrome (CRPS). (Id. at 29) Dr. Bernstein recommended removal of the retained sutures and referral to a physiatrist, Dr. Belcher.

(Id.) A second surgery was performed on July 31, 2008. The surgery consisted of a removal of a retained suture, lysis of adhesions, tenolysis of the extensor carpi ulnaris and extensor digiti minimi tendons. (PX1, p.116; PX4, p.36).

Petitioner returned to Dr. Bernstein on August 12, 2008. She continued to complain of burning pain to the wrist. (PX4, p.43) Petitioner was referred again to Dr. Belcher for a possible stellate ganglion block. (Id.) As of September 2, 2008 visit, Petitioner was doing worse and felt frustrated and depressed. (Id. at 47) She still had not been approved to Dr. Belcher. Dr. Bernstein referred her to Dr. Belcher or Dr. Lipov for pain management and recommended she continue with occupational therapy. (Id. at 48) She was also advised to discuss her depression symptoms with her internist and/or a psychiatrist. (Id.)

On September 25, 2008, Petitioner was seen by Eugene Lipov, M.D. of Advanced Pain Center. Petitioner reported symptoms of left wrist and hand pain that radiated up to her shoulder. (PX6, p.220) She explained to the doctor that it felt as if hot oil had splashed on her. She further stated that her left elbow and shoulder hurt with use. (Id.) Dr. Lipov diagnosed Petitioner with CRPS. (Id. at 224) Dr. Lipov prescribed Norco and Lyrica and recommended a stellate ganglion block. (Id.)

Petitioner subsequently received four stellate ganglion blocks between October 16, 2008 and January 19, 2009. Petitioner testified that the blocks provided minimal relief which is supported by the office visits within that time period. (PX6, pg. 181 - 223) On January 29, 2009, Dr. Lipov recommended that Petitioner undergo a Ketamine infusion. (Id. at 183) Petitioner underwent the Ketamine infusion on June 8, 2009. (Id. at 165) Petitioner followed with Dr. Lipov on July 9, 2009 and reported no pain relief. (Id. at 162)

Petitioner treated with Dr. Lipov on a monthly basis through December 27, 2012. Treatment consisted primarily of pain management through medications. (PX6, pg. 3-161) The list of medications that Dr. Lipov prescribed in his course of treatment of Petitioner included Norco, Lyrica, Flexiril, Cymbalta, Amrix, Baclofen, Opana ER, Dilaudid, and Savella (Id. at 9-16) Petitioner stated that the various medications prescribed reduced some of her pain, but never eliminated her constant pain. (T.24) The medications also caused side effects including severe nausea, headaches, muscles spasms and joint stiffness. (T.25) Petitioner stated the nausea is the worst of the side effects and continues to the present. (Id.)

Upon the referral of Dr. Lipov, Petitioner transferred her pain management care to Dr. Sajjad Murtaza of Skypoint Medical for medication management. Petitioner began treatment with Dr. Murtaza on January 2, 2013. Dr. Murtaza evaluated Petitioner and confirmed the diagnosis of CRPS and prescribed Nucynta, Lyrica, and a tens unit. (PX7, p. 33) Petitioner was seen on a monthly basis with Dr. Murtaza. On April 26, 2013, Petitioner reported neck pain that extended

down her left arm with associated numbness and tingling in the left hand. (Id. at 28) Dr. Murtaza recommended trigger point injections. (Id.) At her July 29, 2013 follow-up, Petitioner continued to complain of worsening pain in her neck with pain down both upper extremities (Id. at 22) On September 20, 2013, Dr. Murtaza performed a cervical epidural injection at C5-6. (Id. at 19) Petitioner testified that the injection did provide relief to her right upper extremity. (T.27)

Petitioner treated with Dr. Murtaza at Skypoint Medical through March 31, 2014. (PX7) She then followed Dr. Murtaza to another medical practice and began treating him with there, beginning May 12, 2014. Petitioner's complaints were of cervical spine pain, left greater than right upper extremity pain, and pain down her left arm. (PX8, p.12) Medications were recommended and consideration was made for additional physical therapy, compound cream and the use of an ice machine. (Id. at 13) Petitioner treated with Dr. Murtaza through February 23, 2019. In that five-year span, Petitioner was primarily treated with medication management though she did receive a second cervical epidural injection on August 4, 2014 (PX8, p.23)(PX8, PX9)

Dr. Murtaza then referred Petitioner to Dr. Todd Hagle of APAC for pain management care. Her visit with Dr. Hagle occurred on March 14, 2019. Petitioner provided a consistent history of her injury and reported symptoms of pain of her left arm that extended to the right shoulder. (PX10, p.4) She also reported neck pain. (Id.) Dr. Hagle indicated that Petitioner should consider a spinal cord stimulator, recommended an MRI of the cervical spine, added Pamelor to her medications and referred her to a pain psychologist. (Id.) Petitioner continued care with Dr. Hagle on a monthly basis. (T.32) Petitioner never received authorization to see a pain psychologist. (T.33) Petitioner expressed that she was afraid to proceed with a spinal cord stimulator given that the last time she had surgery, it resulted in her developing CRPS. (T.34) As of her last office visit with Dr. Hagle on August 23, 2019, Petitioner reported that her symptoms were increasing and that she had a nausea sensation every day. (PX16) She described that her worst pain is across the neck into the left shoulder blade that radiates into the arm with pins and needles into the bicep region with dull pain in the wrist. (PX16) Dr. Hagle continues to prescribe medications to manage her pain and again recommended an MRI of the cervical spine. (Id.)

Petitioner testified that she has nausea from the medications for over eleven years. (T.36) Some days are better than others, but when it is severe, all she can do is lay in bed and cover up in the dark. (T.36)

Petitioner underwent several independent medical exams at the request of the Respondent. On January 6, 2011, Petitioner was examined by John Fernandez, M.D. of Midwest Orthopaedics at Rush. After examining Petitioner, it was Dr. Fernandez's impression that there was a causal relationship between Petitioner's symptoms and the work injury and confirmed that she developed CRPS as a result of the surgery. (RX4) He further added that there should be no

expectation for useful work with the left arm (Id.) Dr. Fernandez authored an addendum report on March 6, 2015 after reviewing additional records. Dr. Fernandez confirmed his prior diagnosis of CRPS and stated that she has not responded to treatment. (RX5) He further stated that he did not believe that Petitioner cold work in a full duty capacity and that she likely required a permanent restriction of minimal use of the left upper extremity. (Id.)

On March 10, 2016, Petitioner was seen by Respondent's examiner, Howard Konowitz, M.D. Dr. Konowitz confirmed the diagnosis of CRPS with symptoms of constant burning, numbness and pain to her left upper extremity radiating to her neck. (RX6, p.13) He opined that Petitioner required permanent restriction of minimal to no use of the left upper extremity. (Id. at 14) Dr. Konowitz performed a second exam on October 3, 2018. Dr. Konowitz essentially reiterated her same opinions and stated that her restrictions would be of no use of the left arm, sedentary duty. (RX7, p.22)

Petitioner testified that from the onset of the injury she had been off work. (T.39) On or about April of 2017, Petitioner received a communication that she needed to start looking for a job. (Id.) Per the Respondent's direction, Petitioner began a self-directed job search with the assistance of her sister. Her sister went online on her behalf and printed job ads and helped her to respond on the computer to jobs she was interested in. (T.40) Petitioner recorded her job search on job logs between May of 2017 through February of 2019. The job logs were submitted into evidence. (PX15)

On August 7, 2017, Petitioner meet with Melanie Kamen, MA, CRC of Creative Case Management. Ms. Kamen performed a Transferable Skill Analysis. (RX8) Relying on the restrictions recommended by Dr. Konowitz, Ms. Kamen opined that based on available information and the local labor market, Petitioner had transferable skills and a capacity to learn, should education be necessary to expand her computer skills or develop job specific skills. (Id. at 3) Ms. Kamen identified positions as Customer Service, Volunteer Coordinator, Case Worker, Community Outreach Worker and Dispatcher. (Id.) Ms. Kamen noted that it may take substantial time to locate a position given the length of time she has been away from active employment. (Id.) She also noted that she may require a reasonable accommodation from a potential employer. (Id.) Ms. Kamen acknowledged her pain issues and nausea issues as impediments to further employment. (Id. at 4) She further noted that Petitioner relies on narcotics for pain management. (Id.)

Petitioner met with Ms. Kamen again on October 18, 2017 at Elgin Community College. The intent of the meeting was to introduce her to workshops to develop her computer skills. (RX9, p.1)

Petitioner did not meet with Creative Case Management again until January 16, 2019. Petitioner met with Anita Johnson, MS, CRC, LCPC to resume job placement services. (Id. at 3) She thereafter worked with Ms. Johnson and submitted applications and resumes to various jobs to leads provided by Ms. Johnson as well as leads that she produced. (T.48, PX9) During the course of time that Petitioner worked with Ms. Johnson, she never received one positive response. (T.50)

On February 15, 2019, Petitioner underwent a vocational assessment with Michael Mooney, CRC, LCPC. of Return to Work, Inc. Mr. Mooney is also a Diplomat with the American Board of Vocational Experts. (PX11) Mr. Mooney interviewed Petitioner and reviewed her medical records along and her current prescriptions. He further reviewed the assessments of Creative Case Management. Mr. Mooney also conducted vocational testing. It was Mr. Mooney's opinion that Petitioner was a poor candidate for employment primarily due her condition of CRPS and her left upper extremity limitations. (Id. at 11) Her employability problems resulting from the condition include: mobility impairments, pain, reduced concentration/attention, impaired sitting ability, emotionality, sleep disturbances, good and bad days, unreliability as a worker, etc. (Id.) He stated that there are relatively few jobs which can be done with a single upper extremity. Her ability type on a keyboard was limited to her "hunt and peck" typing at 7-8 words per minute. (Id. at 12) He felt that she was underqualified for each of the positions identified by Creative Case Management as those jobs require assumptions of clerical and finger dexterity aptitude levels which Petitioner did not possess. (Id. at 13) Her mental ability testing was below average which could be impacted by her pain levels. (Id. at 14) He further stated that prospective employers would likely deem Petitioner as an "at risk" job candidate based on her physical limitations, unreliability and medication usage. (Id.)

Petitioner testified that she was 55 years of age as of the date hearing. (T.51) She usually does not drive farther than a few miles from her home, otherwise she relies on one of her four sisters. (T.52) Petitioner emotionally testified that she does not sleep well, maybe 2-3 hours max. (T.54) She is often awakened by pain. (Id.) She always nauseated and tired from not sleeping. (T.54-55) She described that she feels pins and needled from her left shoulder and down her left arm. (T.55) She described the sensation as hot and sensitive to the touch. (Id.) She compared her pain to being burned by hot grease or like angry fire ants running up her vein. (T.56) Petitioner requires assistance to put on her own bra and comb her hair. (Id.) She cannot cook for herself unless it is something she can microwave. (Id.) She often takes catnaps once or twice during the day. (T.58-59) From a mental health perspective, she wishes she never had the initial surgery to her hand as it has created a whole work of hurt and pain. (T.59) She feels very frustrated from having to rely on her family members. (T.60) Due to the injury, she cannot interact with her four grandchildren and could not even be trusted by her own son to hold her grandchild on her lap. (T.61)

Petitioner was asked if she thought she could perform a full-time job. She responded that she did not think she could because she could not be reliable due to the flare-ups of nausea that she often experiences. (T.62) Additionally, she is plagued by muscle spasms, headaches and fatigue. (Id.)

On cross-examination, Petitioner was asked if she had any subsequent injuries. She initially responded no, but upon further questioning she acknowledged a motor vehicle collision in 2015. (T.69-72) She could not recall any other accidents. (T.73) Petitioner testified that the 2015 collision caused symptoms to her right arm and right neck area. (T.70) The medical records of her family physician, Devendra Shah, M.D. confirmed that her right arm and neck were affected. (RX20, p.130) Medical records from St. Alexius Medical Center also confirmed that Petitioner was involved in a motor vehicle accident on or about December 13, 2008 as well. (PX1, p. 90) Petitioner was diagnosed with a closed head injury and cervical and back sprains. (Id. at 95)

The Arbitrator found the testimony of Petitioner to be credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

In support of the Arbitrator's Decision relating to (F) Is Petitioner's current condition of ill-being causally related to the injury of January 11, 2008, the Arbitrator finds the following:

The parties have stipulated that Petitioner sustained an accidental injury that arose out of and in the course of employment. It is clear from the medical records that as a result of Petitioner's fall she sustained a significant injury to the left wrist that required surgical repair. Following the surgery, the medical records are replete with symptoms of burning pain of the left hand that extended into the left arm and eventually into the neck and shoulders. The consensus of all the doctors involved, including Respondent's examiners, Drs. Fernandez and Konowitz, is that Petitioner suffers from CRPS resulting from her work accident and related surgery.

There is evidence presented by Respondent that indicates that Petitioner was involved in motor vehicle accidents that occurred in 2008 and 2015. Petitioner could not recall the 2008 incident and besides an initial report of a motor vehicle accident within the records of St. Alexius Medical Center, there was no other evidence presented by either party that reflects further medical care received by Petitioner for a 2008 motor vehicle accident.

Petitioner was able to recall the 2015 accident which Petitioner testified affected her cervical spine, lower back and right arm. Petitioner treated with her personal physician Devendrah Shah, M.D. for those issues between May 26, 2015 to December 15, 2015. (RX20, pgs. 129-146) The

medical records for that time period show that Petitioner's CRPS symptoms did flare up initially, but as time passed her symptoms stemming from the auto accident were mainly focused on her neck, back and right arm. (Id.) As of December 15, 2016, Dr. Shah noted that Petitioner was improved and at baseline and was released from care concerning her injuries from the auto accident.

The Arbitrator and reviewed the medical records and finds that the motor vehicle accidents Petitioner was involved in 2008 and in 2015 did not constitute independent intervening accidents that broke the chain of causal connection between Petitioner's injury incurred on January 11, 2008 and her diagnosis of CRPS and associated symptoms. Based on the foregoing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the injury of January 11, 2008.

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 the following:

Petitioner introduced three medical bills into evidence that have outstanding medical balances. (PX12) The first bill is from Injured Workers Pharmacy (IWP) in the amount of $6,400.56. The itemized charges correspond to medications prescribed of Dr. Todd Hagle. (Id.) The Arbitrator has reviewed the corresponding records and finds that the prescriptions are reasonable and necessary to treat Petitioner's CRPS symptoms. Respondent's contends on the stipulation sheet that all reasonable and necessary bills have been paid, however, its payout sheet does not reflect that payment was made for the unpaid charges of IWP. (RX15,p.5) Accordingly, the Arbitrators awards the bill of IWP in the amount of $6,400.56, subject to Section 8.2 of the Act and directs Respondent to make payment directly to Petitioner.

The second medical bill is from Metro Health Solutions for medications prescribed by Dr. Murtaza when he was with Skypoint Medical Center. The bill is in the amount of $2,827.34. The Arbitrator has reviewed the corresponding records and finds that the prescription is reasonable and necessary to treat Petitioner's CRPS symptoms. Respondent's contends on the stipulation sheet that all reasonable and necessary bills have been paid, however, its payout sheet does not reflect that payment was made for the unpaid charges of Metro Health Solutions. (RX15, p.7) Accordingly, the Arbitrators awards the bill of IWP in the amount of $2,827.24, subject to Section 8.2 of the Act and directs Respondent to make payment directly to Petitioner.

The third medical bill is also from Metro Health Solutions for medications prescribed by Dr. Murtaza when he was with Metropolitan Institute of Pain. The bill is in the amount of $23,560.47 for medications received between May 15, 2014 and July 15, 2017. The Arbitrator

has reviewed the corresponding records and finds that the prescriptions were reasonable and necessary to treat Petitioner's CRPS symptoms. Respondent's contends on the stipulation sheet that all reasonable and necessary bills have been paid, however, its payout sheet does not reflect that payment was made for the unpaid charges of Metro Health Solutions. (RX15, pgs. 6-7) Accordingly, the Arbitrators awards the bill of IWP in the amount of $23,560.47, subject to Section 8.2 of the Act and directs Respondent to make payment directly to Petitioner.

In support of the Arbitrator's Decision relating to (K) What temporary total disability benefits are due, the Arbitrator finds the following:

Petitioner has been disabled from returning to work as a maintenance equipment operator since her date of injury. She received orthopedic care and then continued pain management care through the date of hearing. On March 10, 2016, Respondent's examiner, Howard Konowitz, M.D. examined Petitioner and opined that Petitioner was capable of returning to work with no use of the left arm. (RX6) In April of 2017, Petitioner testified that she was contacted by Respondent and directed to begin a self-directed job search. (T.39) Petitioner testified that she acted accordingly and sought jobs listed online with the help of her sister. (T.40) Petitioner introduced into evidence job logs supporting her job searching efforts. (PX15) Petitioner subsequently participated in a formal job search program with Respondent's hired vocational counselor in January of 2019.

The Arbitrator has considered the testimony, the medical exhibits and the job search evidence and finds that the Petitioner is entitled to TTD and maintenance benefits from the Respondent for the period January 12, 2008 through July 17, 2019 representing 600-5/7 weeks at the rate of $729.33 per week. Respondent is entitled to a total credit of $437,513.73 representing TTD and maintenance benefits paid.

In support of the Arbitrator's Decision relating to (L) What is the Nature and Extent of the injuries? The Arbitrator finds the following:

The claimant has the burden of proving the permanence of his injury by a preponderance of the evidence. *Esposito v. Industrial Comm'n* (1989), 186 Ill.App.3d 728, 737, 134 Ill.Dec. 497, 542 N.E.2d 843. It is well-settled that "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, Inc. v. Industrial Comm'n* (1979), 77 Ill.2d 482, 487, 34 Ill.Dec. 132, 397 N.E.2d 804. The employee must show that he is unemployable, *i.e.*, unable to perform services except those that are so limited in quantity, dependability or quality that there is no reasonably steady market for them. *Marathon Oil Co. v. Industrial Comm'n* (1990), 203 Ill.App.3d 809, 148 Ill.Dec.835, 561 N.E.2d 141.

The 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 gainful employment without seriously endangering his health or life, such employee is not totally and permanently disabled." *E.R. Moore Co. v. Industrial Comm'n* (1978), 71 Ill.2d 353, 361, 17 Ill.Dec.207, 376 N.E.2d 206.

A claimant ordinarily satisfies his burden of proving he is not capable of obtaining gainful employment by showing either: (1) that work was not available, *i.e.*, diligent but unsuccessful attempts to find work (*A.M.T.C.*, 77 Ill.2d at 490, 34 Ill.Dec. 132, 397 N.E.2d 804); or (2) that based upon his age, experience, training and education, he is unable to perform any but the most unproductive tasks for which no stable labor market exists. *E.R. Moore*, 71 Ill.2d at 362, 17 Ill.Dec.207, 376 N.E.2d 206.

If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment for any person in his circumstances. Once the claimant presents medical evidence of his total disability, the burden shifts to the employer to present evidence that some kind of work is regularly and continuously available to such persons. See *Ceco Corp. v. Industrial Comm'n* (1983), 95 Ill.2d 278, 69 Ill.Dec. 407, 447 N.E.2d 842; *Rowe Construction Co. v. Industrial Comm'n* (1984), 128 Ill.App.3d 365, 83 Ill.Dec. 776, 470 N.E.2d 1196.

In the instant case, the Arbitrator first finds that the Petitioner was very credible throughout her testimony. Her self-described symptoms regarding persistent and burning pain in her entire left arm extending into her neck, her tiredness and drowsiness, and constant state of nausea symptoms were consistent with the histories that she continuously repeated to her treating physicians throughout her course of care. Petitioner presented the report of Michael Mooney of Return to Work Inc. who thoroughly assessed Petitioner's capabilities and the effects of her condition and he opined that Petitioner was a poor candidate for employment. (PX11,p.11) Mr. Mooney spelled out clearly Petitioner's employability problems which include mobility impairments, reduced concentration/attention, impaired sitting ability, emotionality, sleep disturbance, and unreliability as a worker. (Id.) Petitioner has sought employment both on her own and with the assistance of Respondent's hired vocational counselor for a period of two years and has had no positive results.

Respondent's vocational counselor, Anita Johnson, contends that Petitioner has transferable skills that potentially allow her to be successful in returning to employment. (RX9) The vocational counselor has Petitioner seeking jobs as a receptionist, inside sales representative, reservationist, dispatcher, hotel front desk clerk, patient care coordinator, and other similar positions. (Id.) As noted by Michael Mooney, many of the jobs that she has Petitioner seeking

are jobs which Petitioner is underqualified such as a receptionist and dispatcher that require typing and keyboarding skills. Testing performed by Mr. Mooney established that Petitioner can only type at the rate of 7 works per minute. (PX11, pg 21) It appears that Ms. Johnson solely focused on Petitioner's non-use of her left arm in assessing her employability and she did not account for the other factors affecting Petitioners employability such as her persistent nausea, reduced concentration, sleep issues and limited driving range.

Considering the evidence submitted by both parties, the Arbitrator finds that Petitioner has met her burden of establishing the unavailability of employment for a person in her circumstances. The Arbitrator relies on the findings of Michael Mooney, CRC as well as Petitioner's unsuccessful job search in concluding that Petitioner is unable to perform any but the most unproductive tasks for which no stable labor market exists. The Respondent has failed to provide convincing evidence that there exists some kind of work that is regularly and continuously available to Petitioner. Given Petitioner's state of ill-being it is unlikely that Petitioner could be a reliable employee to any employer.

Based on the foregoing, the Arbitrator finds as a matter of law that Petitioner is permanently and totally disabled under the Act and applicable case law as a result of the January 11, 2008 injury. As such, the Respondent is ordered to pay Petitioner the weekly sum of $729.33 beginning as of July 18, 2019 and through the duration of the Petitioner's disability pursuant to Section 8(f) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICK LATOZ,

Petitioner,

vs. NO: 14 WC 07005

PITTMAN MINE SERVICE,

Respondent.

20IWCC0450

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 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.

20IWCC0450

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 11 2020
o- 6/9/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LATOZ, NICK
Employee/Petitioner

Case# **14WC007005**

PITTMAN MINE SERVICE
Employer/Respondent

20IWCC0450

On 11/13/2019, 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:

2333 WOODRUFF JOHNSON & EVANS
RUSSELL HAUGEN
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

NICK LATOZ
Employee/Petitioner

v.

PITTMAN MINE SERVICE
Employer/Respondent

Case # 14WC 007005

Consolidated cases: _____

20IWCC0450

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **July 11, 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 **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **August 24, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's earnings were **$89,960.00** and his average weekly wage was **$1,730.00**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

Petitioner's claim for medical is denied.

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

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

ORDER

No benefits are awarded.

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

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

Paul Lee — Signature of Arbitrator

11/11/19 — Date

FINDINGS OF FACT

The Arbitrator finds:

Petitioner resides in Georgetown, Illinois with his wife, Tammy. They have been married for twenty years. Petitioner testified that his last date of work with Respondent was August 24, 2013. On that date his position was electrician/maintenance. In that job he made repairs to cables. He did a weekly inspection on cables, performed splices on cables due to damage and ran new phone communication lines. On the maintenance side he greased equipment, performed general maintenance and fixed blown hoses and bad water sprays. Petitioner was employed with Respondent for three years. He testified that he worked 48 hours per week and sixty percent of his time was spent in the mines doing work. He testified that during the time that he was in the mines, he was exposed to coal dust.

Petitioner testified that prior to January 2014 he did not have any issues with his health and had never suffered from blood clots. He testified that prior to January 2014 he did not have any issues with his heart. He did not have any restrictions in terms of his ability to perform any type of work. Petitioner testified that he sought treatment with Dr. Todd Georges on January 8, 2014, for complaints of pain in his back and hip as well as left leg numbness and tingling. He testified that if Dr. Georges' records reflected that he denied any type of trauma or injury that would be correct. He sought treatment with Carle Clinic in Danville on January 17, 2014, for swelling in both of his legs. Petitioner testified that if the medical records reflected that he denied any type of injury or trauma that would be correct. He testified that if the medical records reflected that he denied any recent periods of immobility that would be correct. Petitioner was admitted to Carle Hospital on January 17, 2014. Petitioner testified that he did not have any explanation as to why there was a history in the medical records from Carle Hospital that he had a one week period of immobility. He testified that he never told anyone at Carle that he had a one week period of immobility. Prior to being admitted to the hospital on January 17, 2014, Petitioner did not have any periods where he was immobile or not able to move, walk or anything like that. During that hospitalization Petitioner was diagnosed with DVT and a pulmonary embolism. After that he began a long course of treatment with Dr. Egner through Carle.

Petitioner testified that in 2017 Dr. Egner referred him to a Dr. Beeman to see if he could undergo some type of vascular surgery. Petitioner testified that he was able to undergo that procedure. Petitioner testified that Dr. Egner referred him to Dr. Patel who recommended that he undergo palliative care for his ongoing condition of DVT. Petitioner testified that he is still undergoing palliative care. He is still on medications that have been prescribed by these doctors. He is also still wearing leg stockings on a consistent basis.

Petitioner testified that he did not return to work in any capacity following his admission to the hospital in January 2014. Petitioner applied for and was awarded Social Security Disability. Petitioner testified that he continues to have leg pains and small ulcers on his legs. He also has leg swelling. He cannot do much outside due to the leggings making him hot. Petitioner testified that he has issues with walking. About every two hours he has to elevate his legs to help get the swelling and pain down. He testified that he is not able to sit in one position longer than an hour. He testified that he is not able to do much around the house. He testified that he takes care of the

dogs and he tries to help his wife sweep the floors. He testified that they live in a small apartment without any stairs. He tries to go out and get the groceries to get out of the house and to move around a little. He testified that by the time he gets home he has to elevate his legs. He tries to help his wife make supper. Petitioner testified that he has gained approximately 100 pounds since 2014.

Petitioner did not return to any work in any coal mine after August 24, 2013. Petitioner testified that Jerry Malone with Respondent called him just after he had gotten out of the hospital in January 2014. Mr. Malone told him to call him when everything got better, but he never got better. Petitioner testified that he was not working anywhere as of January 17, 2014. He was just helping his wife take care of the horses, moving some hay around and looking for a job. Petitioner testified that he and other employees were laid off from Respondent as of September 5, 2013.

Petitioner testified that he smoked for 20 years at the rate of about a pack a day. He testified that on weekends he might smoke a pack and a half. He quit smoking when he was diagnosed with the DVT in January 2014. Petitioner testified that the only physician he treated with for his DVT outside of the Carle Clinic System was Dr. Georges. He testified that he was always honest with his physicians about his smoking history. Petitioner testified that when he saw Dr. Georges on January 8, 2014, he was complaining of back pain radiating down his right leg. He told Dr. Georges that it had been about a week since he really felt good. He treated with Dr. Georges on January 8 and January 9, 2014. He testified that he did not go back to Dr. Georges for any further treatment because he was not getting any better. Petitioner testified that the ER personnel wanted to know what he had been doing. He told them the only thing he had actually done was help his wife shovel snow. His other activities included feeding the horses.

Tammy Latoz testified that she has been married to Petitioner for 20 years. She testified that there was not any time in December 2013 through January 2014 where her husband was immobile or on bedrest for a week. She testified that at that time he was looking for work and was taking care of the livestock at their farm while he was laid off. She testified that they are very athletic. She testified that they were runners and played with the grandkids. She testified that with the horses there was a lot of physical work. She testified that Petitioner did not have any problems managing the farm prior to January 2014. She testified that Petitioner did not have any health issues or any concerns regarding blood clots or issues with his legs prior to January 2014. She testified that he had never been sick other than a cold. Mrs. Latoz testified that they had a blizzard in January 2014, but if her husband injured his back shoveling snow it was minute. She testified that she worked 12 hours a day which is why her husband took over the farm chores for her.

Dr. James Egner is a hematology oncology physician. (Petitioner's Exhibit No. 1, p. 4). Dr. Egner is board certified in internal medicine, medical oncology and hematology. He has practiced in Urbana, Illinois for nearly 35 years. (Petitioner's Exhibit No. 1, pp. 6-7). Dr. Egner received his medical degree from the University of Iowa College of Medicine. He received training in internal medicine at Michigan State University. He did a fellowship in oncology, hematology and blood banking at Michigan State University. (Petitioner's Exhibit No. 1, p. 5). His areas of expertise are in general hematology and general oncology. In the course of his practice he had the opportunity to examine and treat Petitioner. (Petitioner's Exhibit No. 1, p. 7).

Dr. Egner testified that Petitioner first came under his care and treatment on January 17, 2014, in the hospital. Petitioner reported to Dr. Egner that he had worked in a coal mine. Petitioner had injured his back and woke up Tuesday morning prior to admission with a swollen right lower extremity. Petitioner saw his chiropractor and had things adjusted. Petitioner presented to the emergency department from a walk in clinic. He was found to have a massive deep vein thrombose that was located as high as the renal vein. Petitioner had been around coal dust and tobacco products. He had not had any prior difficulties with clots. He did not have a family history of blood clots. (Petitioner's Exhibit No. 1, pp. 8-9) Dr. Egner described deep vein thrombosis as a blood clot in a big vein. He recommended that they proceed with tissue plasminogen activator and anticoagulation. He testified that tissue plasminogen activator is a chemical which is injected to break the clots and the anticoagulants are substances that prevent the formation of new clots. (Petitioner's Exhibit No. 1, pp. 9-10).

Dr. Egner testified that coal dust is a particulate matter. He testified that any particulate matter can cause difficulties with increased tendencies to form clots. Other causes or risk factors associated with blood clots are exposure to smoking, family tendencies which are genetic, and difficulties with prolonged positioning in one place. He testified that being in cramped, crimped positions block off the blood flow. Dr. Egner testified that one's age can be a factor as well. He testified that taking certain hormonal compounds can also be a risk factor. (Petitioner's Exhibit No. 1, pp. 10-11). Petitioner was also diagnosed with a pulmonary embolism. Dr. Egner testified that same is a clot that has migrated into the lungs and has occupied a space within the pulmonary vein and impairs circulation and reduces the uptake of oxygen. The treatment for the pulmonary embolus was the same as for the DVT. (Petitioner's Exhibit No. 1, p. 11).

Dr. Egner testified that as of January 17, 2014, Petitioner would have been unable to work as he was in the hospital. Immediately following his discharge, he would have to recover from the DVT and pulmonary embolism which could take considerable time. Dr. Egner testified that the clot had to dissolve. He testified that the circumstances of breathing needed to substantially improve before Petitioner could return to work. He testified that even under the best of circumstances it usually takes a couple of months, if not more, for the best of the bunch to resume some form of sedentary work. (Petitioner's Exhibit No. 1, p. 12).

Dr. Egner testified that when Petitioner returned on April 18, 2014, he was on anticoagulants and tolerating it reasonably well without bleeding or bruising. He had a caval filter in place. They were unable to identify genetic factors for the blood clots other than an antiphospholipid antibody. They talked to Petitioner about smoking, which he apparently was continuing to do although he had reduced his smoking. Petitioner reported that he was taking Xarelto which is an anticoagulant. (Petitioner's Exhibit No. 1, pp. 12-13). Dr. Egner testified that as of that visit Petitioner was not able to work. (Petitioner's Exhibit No. 1, pp. 12-13). Petitioner returned to see Dr. Egner on July 18, 2014. He was doing better. His vena cava filter had been removed on May 15, 2014, and he was tolerating the procedure well. Petitioner was wanting to go off anticoagulants, but the doctor advised against it. They were going to evaluate his lower extremities with venous duplexes as well as a blood test to determine his tendency to form clots. Dr. Egner testified that Petitioner was not able to work as of that time. (Petitioner's Exhibit No. 1, pp. 13-14).

On August 7, 2014, Petitioner was having problems with his lower extremities. He had some leg sores which had been present for two weeks and were not improving. They were tender to the touch. Dr. Egner testified that the leg sores were due to issues with circulation in the lower legs. He testified that it may also have something to do with the Xarelto he was taking. Dr. Egner declared it to be cellulitis associated with tendency to form clots and prescribed an antibiotic. Petitioner was also referred to the wound clinic. Dr. Egner testified that based on his presentation at that visit, Petitioner was unable to work. (Petitioner's Exhibit No. 1, pp. 14-15).

Dr. Egner saw Petitioner on July 13, 2015. On that date he was complaining about the compression hose that they told him to wear. The right leg was somewhat discolored. There were some superficial clots that were visible. Everything else seemed to be status quo. The treatment recommendation at that time was to continue anticoagulation and to refer him to neurology to see whether he had neuropathy. The question was whether or not peripheral neuropathy was present that might require some sort of intervention. (Petitioner's Exhibit No. 1, pp. 15-17). Dr. Egner testified that the peripheral neuropathy would only peripherally be associated with DVT or pulmonary embolism. He testified that usually it is not directly associated. (Petitioner's Exhibit No. 1, p. 17). Dr. Egner testified that based on Petitioner's presentation on July 13, 2015, he was not able to work. (Petitioner's Exhibit No. 1, p. 17).

Petitioner was admitted to the hospital from October 1 through October 4, 2015. At that time he complained of right flank pain and right lower quadrant abdominal pain present for a day prior to presentation. He was taking his Xarelto. He was admitted to the hospital because there was some question as to whether there were issues with further clotting, bleeding or something else going on. (Petitioner's Exhibit No. 1, pp. 18-19). As of that hospital admission he was unable to work. (Petitioner's Exhibit No. 1, p. 19). Dr. Egner saw Petitioner on October 15, 2015. During his recent hospitalization they had switched him to Coumadin. He was having trouble with walking and getting around was difficult. The issue of standing for prolonged time came up and Petitioner was questioning whether he could do some other work requiring standing. Dr. Egner testified that some of the issues of walking were related to Petitioner's initial diagnosis. (Petitioner's Exhibit No. 1, p. 20). Dr. Egner recommended that Petitioner persist with anticoagulation Based on his presentation at that time, Petitioner was unable to work. (Petitioner's Exhibit No. 1, pp. 20-21).

Petitioner was doing better when he was seen on January 15, 2016. Dr. Egner testified that he was adjusting the Coumadin to maintain a steady level. At that time his back was a problem; he had trouble bending. The question came up on his part whether he could do machine shop work which would require standing. The doctor told Petitioner that maybe he could do it if all that was required was standing. (Petitioner's Exhibit No. 1, p. 21). With regard to his work status, Dr. Egner testified that he could do sedentary work or standing work as long as he had the ability to move around some and take appropriate rest. (Petitioner's Exhibit No. 1, p. 22).

Petitioner returned to Dr. Egner on October 17, 2016. Dr. Egner testified that he was still anticoagulated and doing okay with that. He was also on a new medicine ordered by one of his other physicians for his paresthesias. Petitioner reported that he was still smoking cigars although it was less than at his maximum. He had numbness in his feet. He still had trouble with bending and some problems when getting up from a lying down position. Standing was a little bit better.

His lower extremities were limited due to stiffness when lying down. Dr. Egner recommended continued treatment with anticoagulants. Dr. Egner testified that as of that date he was able to do certain things but not others that required bending, stooping or lifting. (Petitioner's Exhibit No. 1, pp. 22-23).

Petitioner was seen by Dr. Egner on January 16, 2017. He was still taking the Gabapentin for his paresthesias. Petitioner thought that was helping some. He still complained of numbness in his feet, more on the right than the left. He was having some trouble bending. Dr. Egner testified that paresthesia is numbness, lack of proprioception or ability to know where one's appendages are, like fingers and toes. Petitioner was dealing with that in his lower extremities. Dr. Egner testified that if the paresthesias was related to his diagnosis of DVT, it was indirectly. Dr. Egner testified that sometimes circulation issues can cause numbness. (Petitioner's Exhibit No. 1, pp. 23-24). Dr. Egner testified that Petitioner's work status would have been the same as his October 2016 visit. (Petitioner's Exhibit No. 1, p. 25). Petitioner was seen on February 13, 2017, with some pain in his lower extremities and changes in his skin, particularly on the left side. His examination with respect to movement was not changed much from the previous description. Dr. Egner wanted to keep him anticoagulated and referred him to the vascular team to assess circulation. (Petitioner's Exhibit No. 1, pp. 25-26). Dr. Egner testified that if Petitioner were to have a clot in a major area or if there were circulation changes due to constriction of various blood vessels, it could explain his symptoms. He testified that there were a lot of potential opportunities for difficulties in Petitioner's legs so this correlation was strictly hypothetical and subjective. (Petitioner's Exhibit No. 1, p. 26). Petitioner was seen on April 25, 2017, by Dr. Egner. He was still complaining of pain in his lower extremities. He had some stasis dermatitis. The neurologist had provided a report and did not think Petitioner's problem was neuropathy. Petitioner was still on Coumadin. He was having some issues with vision. He was referred to the ophthalmology group at Carle. Dr. Egner speculated that he had lazy eye. He testified that same would not be related to a diagnosis of DVT or pulmonary embolism. (Petitioner's Exhibit No. 1, p. 27). Dr. Egner testified that since the neurologist had determined Petitioner did not have neuropathy, it would indicate that something else was causing numbness and tingling and other symptoms in his appendages. This could include lack of circulation among other things. Dr. Egner testified that based upon his presentation on April 25, 2017, Petitioner was not able to work. (Petitioner's Exhibit No. 1, p. 28).

Dr. Egner testified that anything that aggravates the lungs, including coal dust, can cause inflammation. Inflammation aggravates clot formation. He testified that inflammation would cause difficulties with the release of Factor VIII which is released within the blood vessels and when released in excess can trigger clots. (Petitioner's Exhibit No. 1, p. 31). Dr. Egner testified that particulate matter could be a contributing factor to Petitioner's condition, but he could not single out coal as a particulate matter contributing to Petitioner's condition. He testified that he did not have a test that determined that Petitioner was exposed to particulates and/or coal dust. (Petitioner's Exhibit No. 1, p. 33). Dr. Egner testified that he would have to defer to a pulmonologist to find out what specific particulate matter in Petitioner's system contributed to the DVT. (Petitioner's Exhibit No. 1, p. 34). Dr. Egner testified that when things are inflamed, it increases clots. Whenever Factor VIII is increased by any stimulus, it can increase clots. Dr. Egner testified that he was not in possession of any objective studies regarding Petitioner that showed such inflammation. Dr. Egner testified that he did not know that Petitioner had any

inflammation from coal dust exposure with respect to his pulmonary circumstances. (Petitioner's Exhibit No. 1, pp. 35-36). Dr. Egner testified that he did not have any direct evidence or measurements of coal dust in Petitioner's lungs. (Petitioner's Exhibit No. 1, p. 37).

Dr. Egner testified that immobility is one of the risk factors that can lead to the development of DVT. (Petitioner's Exhibit No. 1, pp. 37-38). Dr. Egner testified that he was aware that Petitioner had been bedridden for a while prior to January 17, 2014. Dr. Egner testified that seven days of bedrest would be a significant enough period to cause a clinical immobility that can lead to the development of DVT. (Petitioner's Exhibit No. 1, p. 39). Dr. Egner testified that elevated antiphospholipid antibody is a risk factor in the development of DVT. Dr. Egner testified that Petitioner had a weakly positive test for antiphospholipid antibody. (Petitioner's Exhibit No. 1, pp. 41-42). Dr. Egner testified that another risk factor for the development of DVT is smoking. Dr. Egner testified that according to Petitioner's history he had smoked one to two packs of cigarettes a day for twenty years. Another risk factor was being older than 40. (Petitioner's Exhibit No. 1, pp. 43-44). Dr. Egner testified that the cause of Petitioner's DVT was multifactorial. Any one of the factors taken alone or in combination could have caused it. Dr. Egner was unaware of any diagnosis of pneumoconiosis in Petitioner. He was not aware of any chest x-rays that diagnosed pneumoconiosis or COPD. (Petitioner's Exhibit No. 1, p. 46). Dr. Egner testified that at nearly all of his office visits Petitioner's respiratory function was checked and his lungs were clear most of the time. He did not have any wheezing but had cough on some occasions. (Petitioner's Exhibit No. 1, p. 47).

Dr. Cristopher Meyer reviewed a CT scan of the chest for Petitioner dated January 17, 2014. Dr. Meyer testified that the CT scan was of diagnostic quality. (Respondent's Exhibit No. 1, p. 15). Dr. Meyer testified that the characteristic findings of coal workers' pneumoconiosis are centrilobular or perilymphatic nodules. He testified that Petitioner's CT demonstrated neither of those findings. He testified that there were no areas of large opacities or conglomerate fibrosis. Dr. Meyer did note some linear parenchymal bands in the lower lobes which might be scarring from prior aspiration or maybe a little atelectasis. There was a densely calcified granuloma in the right middle lobe with calcified right hilar mediastinal lymph nodes. Dr. Meyer testified that there was no evidence on the CT of a diffuse lung inflammatory process. There was no evidence on the CT of sequela from a past inflammatory process. Dr. Meyer testified that there was no evidence on the CT of any sequela from some particulate matter that Petitioner may have encountered. (Respondent's Exhibit No. 1, pp. 16-17).

Dr. Meyer testified that chest CTs are more specific and are recognized by the thoracic imaging community as a much better tool in the evaluation of interstitial lung disease than the chest x-ray. He testified that interstitial lung disease is sort of the large umbrella under which occupational lung disease falls. Things that increase the density and affect the lung parenchyma are better characterized by CT scan. (Respondent's Exhibit No. 1, p. 15). Dr. Meyer testified that he reviewed the report of Dr. Khoie dated January 17, 2014. Dr. Meyer testified that their interpretations of the CT were the same. (Respondent's Exhibit No. 1, p. 19).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 1, p. 5). Dr. Meyer has been a B-reader since 1999. He is also on the American College of Radiology Pneumoconiosis Task Force. (Respondent's Exhibit No. 1, p. 13). Dr. Meyer obtained his medical

degree from Washington University School of Medicine in 1987. (Respondent's Exhibit No. 1, p. 4). Dr. Meyer did an internship at Tripler Army Medical Center in Honolulu. From July 1988 through June 1992 he did a residency in diagnostic radiology at Walter Reed Army Medical Center in Washington D.C. He had four years of military commitment to pay back his scholarship to medical school and was honorably discharged in 1996. (Respondent's Exhibit No. 1, pp. 4-5). Dr. Meyer was Chief of Thoracic Imaging at Madigan Army Medical Center in Tacoma, Washington. In that position he was in charge of the entire chest imaging service which were primarily chest radiographs and chest CT scans. He trained residents to get them ready for their boards. (Respondent's Exhibit No. 1, pp. 5-6). Dr. Meyer then became an assistant professor of radiology at the University of Maryland Medical System in Baltimore. He was one of the assistant professors training residents and thoracic imaging fellows in the interpretation of chest radiographs and chest CTs. (Respondent's Exhibit No. 1, p. 6).

Dr. Meyer is a manuscript reviewer for the American Journal of Roentgenology. He is also a manuscript reviewer for the Journal of Radiology, the Journal of Radiographics, and the Journal of Thoracic Imaging. (Respondent's Exhibit No. 1, pp. 6-7). Dr. Meyer testified that when a manuscript is submitted to a professional journal, it undergoes a peer review process to make sure that it has enough scientific interest and validity to be published. He testified that those manuscripts are generally sent to people that are recognized as relatively expert in their field and of an appropriate level to decide the scientific validity of other individual's work. (Respondent's Exhibit No. 1, p. 7). In 2010, Dr. Meyer became Vice Chair of Finance and Business Development and professor of diagnostic radiology at University Hospital and Clinics in Madison, Wisconsin. (Respondent's Exhibit No. 1, p. 9). Dr. Meyer testified that his time is divided fifty percent clinical and fifty percent administrative/academic. In his clinical practice, he reads between 200 and 300 chest x-rays a week in the two and a half days he is on the service. In addition, he reads 50 to 70 CTs per week. (Respondent's Exhibit No.1, p. 10).

Dr. Lisa Boggio is a physician specializing in thrombosis and hemostasis, which is clotting and bleeding. She testified that thrombus is making of a blood clot and hemostasis is the whole mechanism of clotting and bleeding. (Respondent's Exhibit No. 2, pp. 4-5). Dr. Boggio did a fellowship in hematology/oncology and residency in internal medicine. Dr. Boggio has been on the faculty at Rush University Medical Center since 2007. She treats adults and children with bleeding and clotting disorders. (Respondent's Exhibit No. 2, p. 7). When she first started she did all of the benign hematology consults in the hospital. She testified that benign hematology means non cancer patients. That work transitioned over to full time in the hemophilia and thrombophilia center, which is housed within the department of pediatrics. She also does blood bank therapeutic apheresis. (Respondent's Exhibit No. 2, pp. 7-8). Dr. Boggio has participated in the preparation of guidelines for the prevention of venous thromboembolism. She was asked to participate in the guidelines for the American Association of Orthopedic Surgeons to prevent clots during knee and hip surgeries. She has also been a reviewer for other guidelines with regard to the American College of Chest Physicians. Dr. Boggio testified that in connection with her clinical practice and research activities, she keeps up with the literature with regard to deep vein thrombosis and its causes. (Respondent's Exhibit No. 2, pp. 8-9).

At the request of Respondent's counsel, Dr. Boggio reviewed records regarding Petitioner from Carle Foundation Hospital and the Carle Physician Group. She also reviewed a report from

Dr. Meyer and a report and deposition from Dr. Egner. (Respondent's Exhibit No. 2, pp. 11-12). Dr. Boggio testified that she reviewed the guidelines regarding DVT and thrombosis prevention, diagnosis and treatment in effect at the time of Petitioner's diagnosis. (Respondent's Exhibit No. 2, p. 12). Dr. Boggio testified that based on the materials that she reviewed in this case, she formed an opinion regarding the cause or causes of deep vein thrombosis in Petitioner. (Respondent's Exhibit No. 2, p. 12). Dr. Boggio testified that based upon the materials that she reviewed, the key history for Petitioner regarding the development of deep vein thrombosis and related health problems was the period of immobility prior to the development of the thrombosis. Dr. Boggio testified that at the time of Petitioner's work up in January 2014, he had an elevated anticardiolipin antibody. She testified that this test was not repeated so she was not sure of the strength of that as a potential cause. She testified that Petitioner's reading of 27.3 would be in the intermediate category. She testified that clinically significant anticardiolipin antibodies are those that are 30 or above. (Respondent's Exhibit No. 2, pp. 13-14). Dr. Boggio testified that Petitioner had other risk factors including tobacco use and alcohol use. (Respondent's Exhibit No. 2, p. 15).

Dr. Boggio testified that in order to form a clot, there must be three phases that all come together. First, there must be immobility or poor blood flow or lack of blood flow. Second, there must be injury to a blood vessel which is where Petitioner's smoking history would come in or there is inflammation of a blood vessel. Third, there is an acquired or congenital tendency to make blood clots. Dr. Boggio testified that she has seen people have clots with three days of bed rest or individuals who have a major surgery and have a blood clot later that day or the next day. (Respondent's Exhibit No. 2, pp. 15-16).

Dr. Boggio testified that based upon the materials that she reviewed and her knowledge of the literature, she formed an opinion that exposure to coal mine dust did not cause or contribute to the deep vein thrombosis in Petitioner. She testified that there is no evidence in any literature, going back to the 1950's that shows coal mine dust to have any effect on the development of thrombosis. Dr. Boggio testified that the only association between thrombosis and coal mine dust were in those patients with pneumoconiosis and who had severe respiratory conditions. She testified that COPD is a risk factor for someone to have a blood clot. She testified that in records she reviewed there was not any evidence that Petitioner had pneumoconiosis. (Respondent's Exhibit No. 2, pp. 17-18).

Dr. Boggio testified that tobacco exposure or smoking causes vascular narrowing. She testified that the evidence shows that those who smoke have a higher incidence of thrombus. She testified that she agreed with Dr. Greisler that causality with regard to smoking and blood clots has not been established, but higher incidence has been established. (Respondent's Exhibit No. 2, pp. 20-21).

Dr. Howard Greisler is a vascular surgeon. (Respondent's Exhibit No. 3, p. 5). Dr. Greisler attended medical school at Penn State University – Hershey Medical Center. He joined the Department of Surgery at Columbia University in New York as an intern and then as a resident. After his residency he was a fellow in vascular surgery and transplantation. He was on staff for two years at Columbia-Presbyterian Medical Center and then moved to Loyola University in Chicago. (Respondent's Exhibit No. 3, pp. 8-9). Dr. Greisler testified that vascular surgery is the understanding of disorders of the blood vessels for the purpose of diagnosis and treatment of those

disorders. (Respondent's Exhibit No. 3, p. 9). Dr. Greisler testified that during his vascular surgery training there was a strong component of work related to deep vein thrombosis. He testified that vascular surgeons routinely take care of patients with deep vein thrombosis. (Respondent's Exhibit No. 3, p. 10). Dr. Greisler testified that he is familiar with the literature with respect to the recognized causes of deep vein thrombosis. He testified that he was constantly involved in prophylactic therapies to prevent the development of deep vein thrombosis. (Respondent's Exhibit No. 3, pp. 10-11).

Dr. Greisler reviewed medical records and other documents generated regarding the Petitioner at the request of Respondent's counsel. He reviewed records from Carle Physician Group, and Carle Foundation Hospital as well as a note written by Dr. Egner and Dr. Egner's deposition. (Respondent's Exhibit No. 3, pp. 14-15). Dr. Greisler also reviewed literature in preparation for his work in this case. (Respondent's Exhibit No. 3, p. 15).

Dr. Greisler testified that in January 2014 Petitioner was a 40 year old male who had suffered some sort of strain or injury to his back either lifting heavy things or shoveling snow. This injury caused him to basically put himself at bed rest for the better part of a week so that he was immobilized for that week. Toward the end of that period he developed swelling of the right lower extremity and the following day swelling of the left lower extremity. This led him to seek medical attention. (Respondent's Exhibit No. 3, pp. 16-17). Petitioner was diagnosed with a deep vein thrombosis. During the hospitalization, he had a CT scan indicating a pulmonary embolism. (Respondent's Exhibit No. 3, p. 18). Dr. Greisler testified that the deep vein thrombosis almost certainly was the reason for the pulmonary embolus. (Respondent's Exhibit No. 3, p. 19).

Dr. Greisler testified that based on the records that he reviewed, his experience and his knowledge of the literature, it was his opinion that the strongest risk factor for Petitioner's deep vein thrombosis was the period of immobilization. He testified that there were some softer risk factors which included his age of 40, working as an electrician in a coal mine, being a smoker, and a mildly elevated antiphospholipid antibody test. (Respondent's Exhibit No. 3, pp. 19-20). Dr. Greisler testified that Petitioner's exposure in the coal mine was not relevant to the development of the deep vein thrombosis. He testified that there was nothing, to his knowledge, in the literature documenting any causal relationship between exposure to coal mining conditions and the development of deep vein thrombosis. Dr. Greisler testified that there was no documentation regarding Petitioner of the amount of exposure or of the development of any pulmonary condition as a consequence of his coal dust exposure. He testified that the concept of coal dust, or any other environmental factor leading to deep vein thrombosis, is not supported in the literature. (Respondent's Exhibit No. 3, pp. 21-22).

Dr. Greisler testified that Petitioner had strong risk factor with immobilization. He testified that of the known risk factors, immobilization is the only one that Petitioner related to the treating physicians. He testified that if immobilization was not involved, then he would simply call this an idiopathic DVT without any recognized risk factors. He testified that the other risk factors he mentioned were very very weak at best. (Respondent's Exhibit No. 3, pp. 22-23). Dr. Greisler testified that there are some patients that simply end up with a diagnosis of idiopathic deep vein thrombosis and the treating physician does not know why it developed in that particular patient. (Respondent's Exhibit No. 3, p. 23).

Medical records of Dr. Todd J. Georges were admitted into evidence. Dr. Georges is a chiropractor with Ridge Farm Medical Health and Wellness. Petitioner was seen by Dr. Georges on January 8, 2014, complaining of back pain. Petitioner answered "?" in response to the question about when his condition/symptoms/pain first appeared. He reported that it had been one week since he really felt good. He reported numbness and tingling. His hip pain was noted to be four on a scale of ten and his leg pain was a six or seven on a scale of ten. Petitioner complained of low back pain radiating down the right leg to his foot. The plan was for Petitioner to receive IFS and CMT three times a week for two weeks. Petitioner received treatment on January 8, 2014, and January 9, 2014. (Petitioner's Exhibit No. 2).

Medical records of Carle Physician Group were admitted into evidence. Petitioner was seen on January 17, 2014, reporting that his right leg began to swell on Tuesday from the thigh down to the foot. He was having trouble walking due to pain/discomfort. The next day his left leg began to swell from the knee down. Petitioner denied any injury, recent surgery, trauma or recent periods of immobility. Differential diagnoses included DVT, venous or arterial insufficiency and congestive heart failure. He was referred to the emergency department at Carle Hospital. (Respondent's Exhibit No. 5, pp. 464-466). When Petitioner was seen on February 21, 2014, the doctor noted that he still had significant clot when last measured by the duplex technique. It was recommended that he continue Xarelto until such time as the clot situation was a lot better. (Respondent's Exhibit No. 5, pp. 438-439). Petitioner was seen again on April 1, 2014. The diagnosis was venous insufficiency. Petitioner was to continue using thigh high compression hose and also to ace wrap the base of the toes up to just below the knee. He was given Flexeril for leg cramps. (Respondent's Exhibit No. 5, pp. 431-432). Petitioner was seen by Interventional Radiology on April 23, 2014. The doctor noted that Petitioner had been laid off from his work in the coal mine and had diminished capacity however there was no reason or explanation for the lower extremity DVTs. He had no history of malignancy nor was he immobile. At this visit options for retrieving the IVC filter were discussed. The doctor discussed with Petitioner lifestyle changes including supine leg elevation, frequent positional changes throughout the day, a walking program, sodium reduction and wearing of compression stockings. Petitioner was aware that further DVTs might occur as the exact etiology of the thrombus was not identified. The doctor planned for removal of the IVC filter. Petitioner would likely need to remain on anticoagulation for the next three to six months. (Respondent's Exhibit No. 5, pp. 406-408).

Petitioner was seen at the Wound Center on August 22, 2014. Petitioner thought that the ulcer on his right leg was due to trauma. The extremities had slightly diminished dorsalis pedis pulses present. He had numerous varicose veins bilaterally. There was a wound of the right medial lower leg with a scant amount of yellow exudate. The wound was debrided. (Respondent's Exhibit No. 5, pp. 354-356). He was seen at the wound clinic for debridement multiple times between August 29, 2014, and November 14, 2014. He reported that one of the wounds was due to trauma, specifically his dog running into his legs. He had a total of five wounds, two on the right and three on the left. (Respondent's Exhibit No. 5, pp. 262-341).

The Petitioner was seen in Interventional Radiology on November 21, 2014. The doctor noted his deep venous system was still compromised. Definitive management of his venous insufficiency would involve closing off some of the major superficial vessels. It was

recommended that he continue the graded compression hose if tolerated to control swelling. He was advised to elevate the legs and to perform regular activity to keep circulation flowing. Due to the chronic clot in the deep system, he was having post thrombotic symptoms with reflux noted in his deep veins. He had chronic swelling of the legs. (Respondent's Exhibit No. 5, pp. 246-249, 254-255).

Petitioner continued to treat with the Wound Center for wound debridement on December 5, 2014, December 12, 2014, and December 19, 2014. (Respondent's Exhibit No. 5, pp. 221-236). Petitioner was seen in the Hematology Clinic on January 8, 2015. It was noted that his lower extremities had not yet cleared. The doctor noted that his overall future seemed reasonable with anticoagulation. It was believed that if his venous return system improved, he would be able to go back to work as before. (Respondent's Exhibit No. 5, pp. 215-217). Petitioner was seen on February 2, 2015, with complaint of burning sensation in his lower right leg. The assessment was paresthesias of the right leg. Gabapentin was prescribed. The doctor was unsure if this was a side effect of Xarelto. (Respondent's Exhibit No. 5, p. 203). Petitioner was seen on April 9, 2015, complaining that he was not getting around very well. It was noted he had paresthesias in the lower extremities. The Gabapentin was stopped and he was prescribed Amitriptyline. (Respondent's Exhibit No. 5, pp. 173-174). Petitioner was seen by the Department of Neurology on July 24, 2015, for evaluation of burning pain in the right shin. There was significant color change and secretion and there was some burning sensation and tingling around the area. The doctor felt the neuralgic pain was due to the focal irritation. Petitioner was not interested in trying new medications. (Respondent's Exhibit No. 5, pp. 148-149).

Petitioner was seen on February 13, 2017, for pain in his lower extremities and worsening changes in his skin. He reportedly had a lot of numbness and stinging in his toes. The stiffness was worse than at the last visit. He was to continue the treatment with anticoagulants. The doctor noted that with palpation he was unable to feel pulses or at least not very well in the posterior tibial areas due to the skin eruptions. (Respondent's Exhibit No. 5, pp. 15-25). Petitioner was seen on April 13, 2017, regarding burning sensation in the leg. He had discoloration of both legs. He reported that if he walked too long, his legs would swell with pain and get worse. It was noted that Petitioner was a former smoker having smoked two packs a day for twenty years, quitting on January 16, 2014. A bilateral lower venous duplex performed on that date showed chronic deep venous thrombosis of bilateral common femoral and popliteal veins with partial recanalization. The bilateral femoral veins had chronic DVT with total occlusion. The diagnosis was venous insufficiency of both lower extremities. (Respondent's Exhibit No. 4, pp. 365-370).

Petitioner was seen on August 1, 2017, in the Palliative Care Clinic for pain management. He reported that he had severe burning pain in his bilateral lower extremities for years and noted that it was worse with activity. He was prescribed Pregabalin. His Gabapentin was discontinued. (Respondent's Exhibit No. 4, pp. 277-285). Petitioner was seen in the Palliative Medicine Ambulatory Center on September 13, 2017. His dose of Pregabalin at 50 mg was adequate for his pain management. (Respondent's Exhibit No. 4, pp. 189-193). On September 15, 2017, Petitioner underwent a venogram bilateral femoral veins and cavogram. The post op diagnosis was chronic venous insufficiency with IVC occlusion. (Respondent's Exhibit No. 4, pp. 127-128). Petitioner was seen on October 30, 2017, through Hematology/Oncology. He was noted to overall be fairly stable. He denied any new ulcers in his legs and denied any worsening in his swelling, however,

it was persistent. He wore Jobst stockings which were somewhat helpful. Petitioner was seen through Pain Management on December 6, 2017. His pain was well controlled with Lyrica. His legs were dark brown/purple and discolored with thick, scaly dry skin patches over the lower legs and foot. Social history indicated a forty pack year history of smoking. (Respondent's Exhibit No. 4, pp. 40-45). Petitioner was seen on April 3, 2018, for follow up regarding his bilateral lower extremity DVTs. He reported good pain control with the Pregabalin. He reported that elevating his legs was the most helpful and he was wearing compression hose to decrease edema. (Respondent's Exhibit No. 6, pp. 102-107). Petitioner was seen by Hematology/Oncology on April 30, 2018, for follow up on his chronic anticoagulation and post thrombophlebitis syndrome. The lower extremity swelling was much better since he had been wearing compression stockings on a regular basis. His pain and neuropathy symptoms were essentially stable and he continued to use Lyrica for pain management. (Respondent's Exhibit No. 6, pp. 77-82). Petitioner was seen on December 24, 2018, for routine follow up. It was noted that his chronic medical conditions were at goal and he was going to continue with his present medical medicine. (Respondent's Exhibit No. 6, pp. 5-9).

Medical records from Hoopeston Clinic were admitted into evidence. Petitioner was seen at the Hoopeston Clinic on March 31, 2015, regarding paresthesias. The assessment was paresthesias and hypertension. He was started on Amitriptyline and Chlorthalidone. (Respondent's Exhibit No. 7, pp. 5-7). He returned on April 28, 2015, for routine checkup regarding hypertension and paresthesias. He reported that the paresthesias had improved by 40% and he was tolerating his medications. (Respondent's Exhibit No. 7, pp. 12-14).

Medical records of Carle Foundation Hospital were admitted into evidence. Petitioner was admitted to the hospital from January 17 to January 23, 2014. (Respondent's Exhibit No. 4, pp. 543-545). Petitioner presented to the emergency department complaining of his bilateral lower extremities swelling for three days. He had no history of falls, leg trauma, heart disease, blood clots, diabetes mellitus, or renal disease. He had no recent long car rides or plane trips. The impression was bilateral lower extremity with DVTs and superficial venous thrombi. (Respondent's Exhibit No. 4, pp. 587-591). Vascular, interventional radiology, and hematology consultations were obtained. The history noted a week long period of immobility due to back and hip injury shoveling snow. Petitioner had been bed bound. Petitioner was noted to be a smoker. Over the past two days he had increased swelling develop in the right leg that progressed to the left. He had extensive DVT in both legs. (Respondent's Exhibit No. 4, p. 568). Petitioner reported that when he woke up on Tuesday morning, he noticed his right leg was swollen from the hip down. He recently received chiropractic treatment where his back and right hip were adjusted. After that he noticed his left leg swelling. (Respondent's Exhibit No. 4, pp. 571-572). Dr. Egner noted in his report that Petitioner smoked and had been around coal dust all of which could be thrombogenic. Dr. Egner's impression was massive clots of both lower extremities. Petitioner needed complete tissue plasminogen activator process and anticoagulation. (Respondent's Exhibit No. 4, pp. 571-573). During the hospitalization, he had placement of venous infusion catheter from the popliteal vein to the inferior vena cava with filter placement. (Respondent's Exhibit No. 4, p. 573).

Petitioner was seen in the emergency department on October 1, 2015, with complaints of flank pain. He described the pain as located to the right flank radiating to the right lower quadrant.

A CT of the abdomen and pelvis revealed a focal, wedge-shaped infarction of the right kidney. (Respondent's Exhibit No. 4, pp. 390-393). He was administered Heparin drip during the admission. (Respondent's Exhibit No. 4, p. 404).

Petitioner was awarded Social Security Disability benefits in a decision dated June 10, 2017. Petitioner's severe impairment which served as basis for award is chronic venous insufficiency status post filter placement for DVTs, status post filter retrieval. (Petitioner's Exhibit No. 11).

CONCLUSIONS OF LAW

Issue (c): Did an occupational disease occur that arose out of and in the course of Petitioner's employment with Respondent?

Issue (f): Is Petitioner's current condition of ill-being causally related to his occupational exposure?

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment.

The Arbitrator finds the opinions of Respondent's experts, Drs. Meyer, Boggio and Greisler to be more persuasive and credible than the opinions of Petitioner's expert and treating physician, Dr. Egner. Petitioner first came under Dr. Egner's care and treatment on January 17, 2014, for DVTs and pulmonary embolism. Dr. Egner continued to treat Petitioner for these conditions following his discharge from the hospital. Dr. Egner testified that any particulate matter can cause an increased tendency to form blood clots. He testified that other causes or risk factors associated with blood clots are exposure to smoking, genetics and immobility. Dr. Egner testified that anything that aggravates the lungs, including coal dust, can cause inflammation which can contribute to clot formation. Dr. Egner testified that inflammation in the lungs would cause release of Factor VIII within the blood vessels which in excess can trigger clots. Dr. Egner testified that particulate matter could be a contributing factor to Petitioner's condition, but he could not single out coal as a particulate matter contributing to Petitioner's condition. Dr. Egner testified that he would defer to a pulmonologist regarding what particulate matter in Petitioner's system contributed to the DVT. Dr. Egner testified that he was not in possession of any objective studies regarding Petitioner that showed inflammation which would have caused an increase in Factor VIII. According to the history recorded in the Carle Hospital records, Petitioner was on bedrest for approximately one week before he presented to the walk in clinic with complaints of pain and swelling in his legs. Dr. Egner testified that seven days of bedrest would be a significant enough period to cause clinical immobility that can lead to the development of DVT. Petitioner also had other risk factors for the development of DVT including an elevated antiphospholipid antibody, smoking history and being over age 40.

Dr. Cristopher Meyer, B-reader and radiologist, reviewed CT scan of Petitioner dated January 17, 2014. Dr. Meyer testified that the characteristic findings of coal workers' pneumoconiosis are centrilobular or perilymphatic nodules. He testified that the CT he reviewed

demonstrated neither of those findings. He testified that there were no areas of large opacity or conglomerate fibrosis. Dr. Meyer testified that on the CT he reviewed there was no evidence of a diffuse lung inflammatory process or sequela from a past inflammatory process. Dr. Meyer testified that on the CT he reviewed there was not any sequela from some particulate matter that Petitioner might have encountered.

Dr. Lisa Boggio is a hematologist specializing in thrombosis and hemostasis. Dr. Boggio testified that with regard to Petitioner's development of deep vein thrombosis and related health problems, the most significant factor was the period of immobility prior to the development of the thrombosis. Dr. Boggio testified that Petitioner had other risk factors including tobacco use and alcohol use. In addition he had an elevated anticardiolipin antibody. Dr. Boggio testified that exposure to coal mine dust did not cause or contribute to cause the deep vein thrombosis in Petitioner. She testified that there has been no evidence in any literature, going back to the 1950's, that has shown coal mine dust to have any effect on the development of thrombus. She testified that the only association with thrombosis and coal mine dust was in patients with pneumoconiosis. In the records that she reviewed, including the chest CT performed in January of 2014, she did not see any evidence of pneumoconiosis.

Dr. Howard Greisler is a vascular surgeon. He testified that with regard to Petitioner, the strongest risk factor for the deep vein thrombosis was the period of immobilization. Other softer risk factors included his age, smoking history and mildly elevated antiphospholipid antibody test. Dr. Greisler testified that Petitioner's exposure to coal mine dust did not cause or contribute to cause the deep vein thrombosis and related medical problems in Petitioner. Dr. Greisler testified that to his knowledge there was nothing in the literature documenting any causal relationship between exposure to mining conditions and the development of deep vein thrombosis. Dr. Greisler testified that if Petitioner did not have a period of immobility prior to the development of the DVT, then he would simply call this idiopathic deep vein thrombosis meaning that he does not know why it developed in this patient.

Drs. Boggio and Greisler testified that they were not aware of any literature that has shown coal mine dust to have any effect on the development of thrombosis. Dr. Egner testified that he did not know whether Petitioner had any inflammation from coal dust exposure with respect to his pulmonary circumstances. Dr. Meyer's review of the CT scan of January 2014 ruled out any inflammatory process in Petitioner's lungs related to coal mine dust exposure. The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that his deep vein thrombosis and related medical problems were causally related to his exposures in the coal mine while employed by Respondent.

Based on the Arbitrator's findings on the issue of disease and causal relationship, the Arbitrator finds the remaining issues to be moot and makes no ruling on same.

Petitioner's 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: §8(j) credit; Penalties and Fees	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Estate of Edward P. Meyer,

Petitioner,

20IWCC0451

vs.

NO: 17 WC 1604

Jewel Food Stores,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission hereby incorporates by reference the findings of fact contained in the arbitration decision, which delineate the relevant facts and analyses. However, as it pertains to penalties, the Commission modifies the decision of the Arbitrator relating to Petitioner's entitlement to §19(l) penalties and Respondent's entitlement to the §8(j) credit of $159,783.20.

As an initial matter, the Commission modifies the Decision of the Arbitrator to find that Respondent failed to prove its entitlement to the credit pursuant to Section 8(j) of the Act totaling $159,783.20. Section 8(j) provides in part:

> "In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under

> this Act. In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments. This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act."

820 ILCS 305/8(j)1 (West 2016). As we interpret the statutory language quoted above, there are three requirements which must be established before credit can be awarded under §8(j). First, group insurance must have paid medical benefits; second, the employer paid into the group policy; and third, the group policy must preclude medical payments for injuries sustained in work-related accidents. The burden is on the Respondent to prove its entitlement to an 8(j) credit.

On the Request for Hearing Form, Respondent only claimed a credit for temporary total disability benefits and not for medical expenses. Respondent's front-end operations manager, Deborah Becci, testified that her employer provides her group health insurance through Blue Cross Blue Shield of Idaho and that the employer contributes to the plan. Additionally, RX2 shows payments made from Blue Cross of Idaho. However, no evidence was presented establishing that the group plan precluded medical payments for injuries sustained in work related accidents. Thus, the Commission modifies the Decision of the Arbitrator to deny Respondent's §8(j) credit.

Next, the Commission turns to the penalties awarded by the Arbitrator affirming the penalties pursuant to Sections 19(k) and 16 of the Act and reversing the penalties awarded pursuant to Section 19(l) of the Act. The standard for granting penalties pursuant to Section 19(l) differs from the standard for granting penalties and attorney fees under Sections 19(k) and 16. Section 19(l) provides in pertinent part, as follows:

> "*If the employee has made written demand for payment of benefits* under Section 8(a) [820 ILCS 305/8] or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d) [820 ILCS 305/8.2]. In case the employer or his or her insurance carrier shall *without good and just cause* fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission *shall* allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." (Emphases added.) 820 ILCS 305/19(l) (West 2012).

Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer

or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10 (1982).

The standard for awarding penalties under section 19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part, as follows:

> "In case where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation *** then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphases added.) 820 ILCS 305/19(k) (West 2012).

Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2012). "The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission." *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516 (2003). The calculation of a penalty award under section 19(k) is simply a mathematical computation of 50% of the amount payable at the time of the award. *Williams*, 366 Ill. App. 3d at 516.

The standard for awarding penalties and attorney fees under sections 19(k) and 16 of the Act is higher than the standard for awarding penalties under section 19(l) because sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan*, 183 Ill. 2d at 514-15. It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *Id.* at 515. Instead, section 19(k) penalties and section 16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.* In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and section 16 fees is discretionary. *Id.*

Moreover, the Commission's Rules provide that when an employee becomes or alleges that he is unable to work due to an accident, "the employer *** shall, within 14 calendar days after notification or knowledge *** : 1) begin payment of temporary total compensation, if any is then due; or 2) if the employer denies liability for payment of temporary total compensation for whatever reason, provide the employee with a *written explanation of the basis for the denial*; or 3) if the employer has insufficient information to determine its liability for payment of temporary total compensation, *advise the employee in writing of the information needed to make that determination and provide in a written explanation why the requested information is necessary*." (Emphasis added.) 50 Ill. Adm. Code 9110.70(a) (2016). Subsection (b) similarly requires where payments are initially made and later terminated "the employer *shall provide the employee with a written explanation of the basis for the termination or suspension of further payment* no later

than the date of the last payment of temporary total compensation." (Emphasis added.) 50 Ill. Adm. Code 9110.70(b) (2016).

Subsection (d) of Rule 9110.70 requires that "the employer shall promptly notify the employee with a written explanation of the basis for the denial of liability or further responsibility[]" where it "denies liability for payment of the cost of all or a part of an employee's medical care, or initially accepts liability but subsequently declines further responsibility for providing or paying for all or a part of such care (for any reason including but not limited to the necessity or propriety of the care, or continuing care, or the unreasonableness of the cost of care)[.]" 50 Ill. Adm. Code 9110.70(d) (2016). The Commission observes that "[f]ailure by either party to comply with the provisions of subsection (a), (b), (c) or (d) of this Section, without good and just cause, *shall be considered* by the Commission or an Arbitrator when adjudicating a petition for additional compensation pursuant to Section 19(l) of the Act, or a petition for assessment of attorneys' fees and costs pursuant to Section 16 of the Act." (Emphasis added.) 50 Ill. Adm. Code 9110.70(e) (2016).

In this case, there is no evidence that Petitioner tendered any copies of his medical bills to Respondent or demanded payment from Respondent in writing. Petitioner acknowledges the foregoing. It is not lost on the Commission that Mr. Meyer had shortly after his accident undergone emergency brain surgery to address a subdural hematoma, or that he was thereafter totally disabled to the extent that he was never again able to eat, bathe, toilet, dress, or perform any functions independently until his death. Notwithstanding, Section 19(l) of the Act contains a directive to make a written demand for payment of benefits and there is no evidence that the Petitioner did so. Accordingly, there is no evidentiary basis upon which the Commission could award penalties pursuant to Section 19(l).

There is, however, clear evidence that Respondent's conduct in denying all benefits was unreasonable and vexatious. Respondent had surveillance video showing Petitioner getting hit by a car at work, holding his head, and remaining stunned on the ground for several minutes. This accident was severe enough for two of Respondent's employees, Ms. Becci and Ms. Tisky, to express concern for Petitioner's wellbeing following up with him by phone and having emergency personnel go to his home after he did not show up to work where he was found slumped over in the bathroom. The wellness check indicated that Petitioner had been found by the toilet, and Respondent posits that whatever preceded that presentation may have caused Petitioner's condition. However, no evidence was ever uncovered to that effect and, had Respondent a reason to justify its delay (or wholesale denial) of benefits it never stated as much. An employer or insurer has every right to investigate claims and utilize all legal means to effectuate a defense, whether that ultimately prevails or not. But they may not deny benefits without reason, fail to offer any reasonable basis for the denial, and retrospectively escape penalties for frivolous, unreasonable or vexatious actions.

Petitioner filed an Application for Adjustment of Claim on January 18, 2017. Twenty-two days after Petitioner's injury at work, in its January 25, 2017 denial letter, Respondent provided no reason or justification whatsoever for its denial of benefits. The substance of the letter states, in total, as follows:

> "Be advised that we represent the insurance interests for an employer, Jewel Food Stores, in a Workers' Compensation claim being brought by Edward P. Meyer. This claim is based on an incident that occurred on 01/03/17. We are aware that you have provided or are seeking to provide medical care to Mr. Meyer. Based on current information, any benefits that may be due to Mr. Meyer as a result of this claimed incident are presently denied. [paragraph spacing removed] We cannot currently honor any requests for payment for medical care of Mr. Meyer. We understand that Mr. Meyer does have coverage through Medicare and arrangement should be made to address his medical expenses with them. [paragraph spacing removed] Should you have any inquiries whatsoever, please feel free to contact me."

The foregoing letter fails to comply with the Commission's mandatory rules relating to the denial of temporary total disability, medical care, or "any benefits" it acknowledges it was aware Petitioner sought. Respondent directed Petitioner to seek coverage through Medicare and inexplicably stated that it could not currently honor any requests for payment of medical benefits.

After denying Petitioner benefits without explanation, Respondent appeared before the Arbitrator on its Emergency Motion to Preserve Evidence and Allow Premises Inspection beginning on February 15, 2017, wholly aware that Mr. Meyer had not lived outside of a hospital or rehabilitation facility to that point. Respondent sought to go into Mr. Meyer's former home to search for evidence that could support its theory of the case. Respondent had already cut off Petitioner's benefits without a stated explanation and its motion was certainly to utilize the limited means of pre-hearing discovery allowed by the Act in search of a defense. At the time it filed the motion, Respondent indicated that it did not know if there would even be evidence in the property.

Nevertheless, after denying all benefits Respondent launched an investigation after Petitioner was struck by a car in its parking lot, eventually deposing several police officers and firefighters in May of 2017, none of whom provided testimony establishing a break in the causal chain. Instead, their testimony shows that the responding police officers and firefighters were unsure as to if and how Petitioner fell in his bathroom on January 4, 2017. One of the police officers, Officer Kalter, even directly attributed the January 4, 2017 incident to Petitioner's January 3, 2017 work accident.

Following this investigation, Respondent still offered Petitioner no explanation for the denial of benefits. Rather, Respondent expended its efforts and resources deposing police officers and firefighters about the condition in which these individuals found the Petitioner, but offered no medical expert's opinion controverting the medical evidence subsequent to the accident at work and throughout treatment.

Notably, the medical records do not reflect any medical opinion at any point that a non-occupational source was the sole cause of Petitioner's injury or his subsequent condition. The police and fire department records do not reflect even substantial head trauma indicating that any incident preceding the state in which Petitioner was found in his bathroom was somehow the

20 IWCC0451

cause of his cerebral condition. Indeed, no medical opinion between the date that Respondent denied Petitioner's benefits without justification and the hearing date was offered to rebut the medical evidence attributing Petitioner's condition at least in part to his accident at work much less the coroner's opinion that the sole cause of Petitioner's death was the accident at work. The medical examiner's report specifically states the opinion that "[t]he death of this 75-year-old while male, EDWARD P. MEYER, is due to complications of closed head injuries due to automobile striking pedestrian." PX2. The medical examiner specifically attributes the manner of death to "ACCIDENT[.]" *Id.* (Emphasis in original.) Respondent offered no medical opinion controverting this opinion establishing that the fall in Respondent's parking lot was the sole cause of his closed head injury and eventual death. The medical records all reflect that Petitioner's work-related injury was a cause of his condition after the incident at work and the sole cause of his subsequent death. "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003).

Respondent's current arguments are little more than clever subterfuge attempting to deflect its responsibilities and complete lack of defense to the only stated medical opinion in the record regarding the cause—not just *a* cause—of Mr. Meyer's death. Without having received any written demand for benefits from Petitioner, Respondent's counsel sent the foregoing denial letter to Petitioner's counsel. Respondent now argues that the only way it would know about Petitioner's claim for medical and temporary total disability benefits would be a specific demand letter. This is despite the clear, early, and documented knowledge in Respondent's own letter unjustifiably denying benefits that Mr. Meyer sought.

Petitioner met its burden of proof establishing through credible medical evidence that Mr. Meyer's death was directly related to the injury at work. Respondent provided no medical evidence to the contrary establishing that Mr. Meyer's death was caused by anything other than the injury at work, or that the injury at work was not a cause of his condition post-injury and subsequent death. Rather, Respondent denied Petitioner benefits without explanation and then engaged in a fruitless investigation in an attempt to justify its unexplained denial of benefits. This conduct is unreasonable and vexatious. The Commission unequivocally finds no merit in Respondent's arguments other than relating to the strictly stated written requirement for Section 19(l) penalties.

The Commission modifies the Decision of the Arbitrator to deny the §19(l) penalties and the §8(j) credit accordingly. In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 11, 2019 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that penalties under §19(l) are denied. The Commission notes that Petitioner remains entitled to penalties and fees under §19(k) penalties in the amount of 50% of all outstanding medical expenses and temporary total

20 IWCC0451

disability benefits, and Section 16 attorney fees in the amount of 20% of all outstanding medical expenses and temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not entitled to any §8(j) credit. The Commission further finds that no §8(j) credit amount should be deducted from Petitioner's award of penalties and fees.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 14 2020

Barbara N. Flores

Marc Parker

DLS
O: 6/18/20
46

DISSENTING IN PART, CONCURRING IN PART

I concur with the Decision of the majority on all issues except for its award of penalties and attorney fees under Sections 19(k) and 16 of the Act. Petitioner failed to show that he tendered any copies of his medical bills to Respondent prior to the hearing date, nor did Petitioner make any written demand to Respondent for payment of his medical bills. As Section 19(l) explicitly requires the employee to have made a written demand for payment of benefits under the Act, I concur with the majority's denial of Section 19(l) penalties. However, I would have found that Petitioner also failed to meet the higher standard required to prove entitlement to penalties and attorney fees under Sections 19(k) and 16. I respectfully dissent from the Decision of the majority accordingly.

The imposition of Section 19(k) penalties and Section 16 attorney fees requires a higher standard than an award of additional compensation under Section 19(l). *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514 (1998). Penalties under Section 19(l) are in the nature of a late fee. *Id.* at 515. The assessment of a Section 19(l) penalty is mandatory whenever the employer fails, neglects, or refuses to make payment or unreasonably delays payment without good and just cause.

20IWCC0451

Id. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Jacobo v. Comm'n*, 2011 IL App (3d) 100807WC.

In contrast, the imposition of penalties and attorney fees under Sections 19(k) and 16 requires more than an unreasonable delay in the payment of an award. *Id.* Sections 19(k) and 16 are intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. *McMahan*, 183 Ill. 2d at 515.

If the Commission has determined that Petitioner did not meet the lower standard for establishing entitlement to Section 19(l) penalties, it does not logically follow that he would have nevertheless met the higher standard required for the imposition of penalties and fees under Sections 19(k) and 16. Moreover, Respondent had a reasonable justification for its delay in payment of medical bills in this case, because Petitioner did not tender the bills to Respondent in advance of the arbitration hearing. Without viewing the medical bills or a written demand for payment from Petitioner, Respondent had no way of knowing what the specific amounts owed were on any of the medical bills. Respondent cannot pay specific medical expenses prior to an arbitration hearing if it does not know the details of those expenses until the hearing date. The abstract knowledge that Petitioner was undergoing treatment that presumably had associated costs is not the same as being tendered with actual copies of medical bills from specific providers to review. Respondent cannot be late in paying medical bills that it did not receive.

For these reasons, Petitioner's failure to tender his medical bills to Respondent in advance of the hearing or make a prior written demand for payment created a reasonable justification for Respondent's non-payment of those medical bills as of the time of the hearing. Petitioner's failure to meet the lower burden required to receive Section 19(l) penalties further establishes his failure to meet the even higher standard associated with penalties and fees under Sections 19(k) and 16. Therefore, I respectfully dissent from the Decision of the majority and would have denied all penalties and attorneys fees under Sections 19(l), 19(k), and 16 of the Act.

DLS/met
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20 IWCC0451

ESTATES OF MEYER, EDWARD P Case# **17WC001604**
Employee/Petitioner

JEWEL FOOD STORES
Employer/Respondent

On 2/11/2019, 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 2.44% 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:

0154 KROL BONGIORNO & GIVEN LTD
MIKE BRANDENBERG
20 S CLARK ST SUITE 1820
CHICAGO, IL 60603

5074 QUINTAIROS PRIETO WOOD & BOYER
JULIE M SCHUM
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Estate of Edward P. Meyer,
Employee/Petitioner

v.

Jewel Food Stores,
Employer/Respondent

Case # **17** WC **1604**

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 **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **October 5, 2018 and October 9, 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. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other **Death/Burial Expenses**

FINDINGS

On **January 3, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**15,327.52**; the average weekly wage was $**294.76**.

On the date of accident, Petitioner was **74** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**6,160.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,160.00**.

Respondent is entitled to a credit of $**159,783.20** under Section 8(j) of the Act.

ORDER

Respondent shall pay to Petitioner reasonable and necessary medical services of $712,639.51 under Sections 8(a) and 8.2 of the Act for the following unpaid bills: Village of Arlington Heights--$400.00; Northwest Community Hospital--$281,308.49; Northwest Community Healthcare--$757.00; CEPAmerica--$667.00; Arlington Ridge Pathology--$3987.00; Professional Cardiac Services--$41.00; Northwest Radiology Assoc—-$4,501.14; American Surgical Professionals—$10,864.00; Critical Care Physicians of Illinois—$18,130.63; Northwest Suburban Medical Assoc—$620.00; Advent Neurology—$420.00; Medical Services RIC—$19,494.00; Shirley Ryan Ability Lab/RIC—$245,962.12; Elite Medical Transportation—$1,528.00; Michigan Ave Podiatry—$440.00; Northwestern Medicine—$17,838.34; Illinois Medi-car Inc.— $111.00; Superior Ambulance Service—$2,236.00; Apria Healthcare— $2,354.44; ALC Staffing, The Grand—$13,586.00; The Grand—$12,139.35; Thompson Memory Center—$2,800.00; Premier Podiatry Services—$200.00; Arden Courts: $56,602.66; Options for Aging—$3,468.43; Richard Kruger, DDS—$115.00; Inpatient Consultants of IL—$267.00; Heartland Healthcare Services—$251.16; Marla Davishoff, LCSW—$6,315.00; Dr. William Rhodes—$238.00; Osco Drug: $882.45; Mark Drug Medical Supply: $200.83; Provider Preferred Home Health—$3,914.17.

Respondent shall reimburse Petitioner for out-of-pocket expenses in the amount of $81,080.40.

Respondent shall pay Petitioner permanent total disability benefits of $535.79/week for the period of 77-3/7 weeks, commencing January 4, 2017 through June 29, 2018.

Respondent shall pay to Petitioner attorneys' fees of **$68,926.23** as provided in Section 16 of the Act; penalties of **$334,631.19** as provided in Section 19(k) of the Act; and penalties of **$10,000.00** as provided in Section 19(l) of the Act.

Respondent shall pay Petitioner burial expenses in the amount of $8,000.00 pursuant to Section 7(f) 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.

Robert M. Harris

Signature of Arbitrator

February. 11, 2019
Date

ICArbDec p. 2

FEB 11 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS	)	
	)	**Case No. 17 WC 1604**
COUNTY OF COOK	)	
	)	
Estate of Edward P. Meyer	)	
Petitioner,	)	
v.	)	
	)	
Jewel Food Stores,	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

I. Procedural History

This matter was pursued by Edward Meyer (hereinafter "Petitioner") who sought relief from Jewel Food Stores (hereinafter "Respondent") under the provisions of the Illinois Workers' Compensation Act (hereinafter "Act"). Petitioner had filed an Application for Adjustment of Claim on January 18, 2017 alleging a work-related accident on January 3, 2017. After Petitioner's death on June 29, 2018 at age 75, the Application was later amended to the "Estate of Edward Meyer". This matter was heard on October 5, 2018 in Chicago, Illinois before Arbitrator Robert Harris (hereinafter "Arbitrator Harris") and proofs were closed on October 9, 2018. Proofs were reopened for a revised determination of the Arbitrator's evidentiary ruling regarding the report of postmortem examination (PX 23) on January 4, 2019, and proofs were subsequently closed again on January 18, 2019.

Per Arbitrator's exhibit 1, the parties stipulated that on January 3, 2017, Petitioner was employed by Jewel Food Stores with an AWW of $294.76. On that date, Petitioner was 74 years old, single, with no dependents under the age of eighteen. Accident, causal connection, medical bills, TTD, Respondent's credit, nature and extent, PTD benefits, death benefits, and penalties were all placed at issue at trial.

The Arbitrator has carefully examined the multiple and voluminous submitted exhibits and Transcripts and accordingly renders the following decision.

Findings of Facts

On January 3, 2017, the date of the alleged accident, Edward P. Meyer ("Petitioner") was a 74-year-old laborer employed by Jewel Food Stores ("Respondent"). On January 3, 2017, Petitioner was working for Respondent collecting grocery carts when he was struck in a crosswalk by a vehicle. PX2. As shown in the video submitted in Petitioner's Exhibit 20, Petitioner was walking through a crosswalk away from the store at about 3:26 PM when a car making a left turn made contact with him on his left side. Petitioner is shown falling to the ground and striking his head. Petitioner then lies in the crosswalk for approximately 6-7 minutes until he is assisted by the AHFD to the ambulance. PX20.

Testimony of Susan Kamper

Petitioner called as its trial witness Susan Kamper ("Kamper"). Kamper testified she was familiar with Petitioner because she was his sister. (10/5/18 Arb. Tr., p. 13-14). Prior to January 3, 2017, Kamper would talk with Petitioner monthly and visit him a couple times per year. Kamper was aware Petitioner was employed by Jewel and resided at 1965 Cold Springs Road in Arlington Heights. Petitioner had been living there for about 30 years. (10/5/18 Arb. Tr., p. 14-15). Petitioner had lived there by himself since 2003, at which time his partner Kayla passed away. Kamper was not aware of Petitioner having any health problems or specific medical care while living by himself prior to January 3, 2017. (10/5/18 Arb. Tr., p. 16-18, 36-39). Kamper last saw Petitioner in person before the accident in the fall of 2016, at which time, he was very talkative about current events and family. (10.5.18 Arb. Tr., p. 14,18). Kamper's general impression of Petitioner was that he was doing very well for someone of his age. Kamper did not have any concerns about Petitioner at that time because he was living well alone and taking care of himself. (10/5/18 Arb. Tr., p. 19-20).

On January 4, 2017, Kamper became aware of the accident when she was contacted by someone at Northwest Community Hospital who told her that her brother had an

accident and had been admitted to the emergency room there for surgery. (10/5/18 Arb. Tr., p. 21-23). Kamper gave consent to proceed with surgery and all of Petitioner's subsequent care up until his death on June 29, 2018, pursuant to an executed power of attorney. (10/5/18 Arb. Tr., p. 23-26).

Following the accident on January 3, 2017, Petitioner never returned to his residence. Kamper sold the residence because she needed the funds to pay for Petitioner's assisted living care. Kamper also had to use funds from his 401(K) and take out a personal loan in order to pay for Petitioner's medical care. (10/5/18 Arb. Tr., p. 29-30). Kamper testified that Petitioner's home was in good condition before she sold it. (10/5/18 Arb. Tr., p. 35-36).

From the time of the accident until the time of his death, Kamper saw Petitioner five to six times in person and spoke to him over the phone at least once a month. She noticed that Petitioner had short-term memory problems and difficulty understanding his injuries and why he needed help. Petitioner was very much changed and had a totally different personality than before the accident. (10/5/18 Arb. Tr., p. 31).

Testimony of Deborah Becci

Respondent called as a trial witness Deborah Becci ("Becci"). Becci testified she was employed by Jewel Food Store as a front-end operations manager. Becci was in that position in January of 2017. Becci was familiar with Petitioner. (10/9/18 Arb. Tr., p. 49).

Becci testified she had a phone conversation with Petitioner on January 3, 2017 to see if he had arrived home safely. (10/9/18 Arb. Tr., p. 49-50). Becci's impression was that Petitioner had arrived home safely and did not require further assistance. (10/9/18 Arb. Tr., p. 51). Becci testified she called Petitioner because he had been struck by a moving vehicle that day at Jewel, and she was concerned that he had been injured—seriously enough for her to call and check on him. Becci agreed she does not normally call employees who have gone home after the end of a work day. Becci agreed she was not able to make any medical diagnosis when talking with Petitioner that day. (10/9/18 Arb. Tr., p.53-55).

Becci further testified that to the best of her knowledge, her employer (Respondent Jewel) contributes to the employer's group health plan since January of 2017. (10/9/18 Arb. Tr., p.52). This testimony was not rebutted.

Medical Records and Reports

The Arlington Heights Fire Department (AHFD) were called to the Jewel parking lot and found Petitioner in the parking lot. These records indicate Petitioner told AHFD that he was brushed by a car, knocking him off balance, causing him to fall landing on his buttocks and hitting the rear of his head. A two-inch round red rash with minor swelling was found at the rear of his head. Petitioner was evaluated in the ambulance but refused further treatment. AHFD conferred with hospital and emphasized the risks to Petitioner of a head injury. PX1.

The Arlington Heights Police Department (AHPD) were also dispatched to the Jewel parking lot. An Illinois Traffic Crash Report was completed that indicated that Petitioner was walking in the crosswalk when the vehicle made a left turn and struck Petitioner on his left, which caused him to fall to the ground and land on his right side. PX2.

Video surveillance was submitted into evidence by Petitioner of the parking lot at Jewel Food Stores. (PX.20). That video shows Petitioner was walking in the crosswalk of the parking lot immediately in front of Respondent store. The view is partially obstructed. Petitioner is carrying nothing visible in his hands. While in the cross walk, a car making a left-hand turn strikes Petitioner. Petitioner does fall. He rubs his head briefly but is able to stand and is seen walking with no apparent difficulty by the end of the video. (PX.20).

Fire Fighter Peter Newman of the Arlington Heights Fire Department was deposed on May 18, 2017. (PX 15). Newman initially had no independent recollection of any incident involving Petitioner and his recollection was refreshed via his report. (PX 1). Newman testified they found Petitioner sitting on a curb, possibly in front of the Jewel store, awaiting assistance. Newman testified he spoke with Petitioner at the scene and he refused any treatment or to disclose any personal information. Newman noted nothing unusual about Petitioner's manner of speech and indicated that Petitioner reported being

"brushed" by a car causing him to fall, landing on his buttocks, then hitting the rear of his head. He had no noticeable bleeding and his mental status was strong and confident and at all times alert and oriented to person, place, time, and events. Petitioner was considered competent to sign a refusal. **Newman testified – without any objection – that Petitioner told him, "He said he was working pushing carts." (PX. 15, p. 9).** Newman noted a 2" round rash with minor swelling on the rear of his head. Petitioner walked and Newman testified he did not have any unsteady or problematic gait. Newman watched him walk towards the store and had no further contact. (PX. 15).

PX 2, admitted into evidence, are the records from the Arlington Heights Police Department, specifically an "Incident/Offense Report" dated January 5, 2017. This Report was completed by Timothy J. Kalter. (This Report is also admitted into evidence as Resp. No. 3, found in Kalter's evidence deposition, PX 19). This Report documented a 911 call he received on January 4, from Kathy Tisky, Jewel Grocery Store manager at 440 E. Rand Road, Arlington Heights. The Report further indicates Tisky advised Kalter Petitioner failed to arrive at work on January 4. **The Report notes, "Kathy told me yesterday, Tuesday, 01/03/2017, Edward was struck by a car in the Jewel parking lot while Edward was working; he was collecting grocery carts (17-00148). Kathy said Edward suffered a head injury from the crash** and he was treated and released, on scene, by AHFD paramedics." Tisky asked that the police conduct a wellness check on Petitioner. Tisky was "very worried" about Petitioner's well-being. The Report further documents the events when the Police and Fire Department personnel went to visit Petitioner and what they found. Petitioner did not answer the door. They entered Petitioner's home and noted it was apparently the home of a "hoarder." Petitioner was found "…sitting on his bathroom floor against the wall, wedged between the toilet and the vanity, wearing only his pants and socks." Petitioner told FD he didn't know how he got there. Edward seemed dazed and confused and he was too weak to pick himself up off the floor. FD determined Edward needed further medical attention and was transported to Northwest Community Hospital ("NCH", PX 1).

Officer Timothy Kalter of the Arlington Heights Police Department was deposed on May 18, 2017. (PX 19). Kalter wrote the "Incident/Offense Report" dated January 5,

2017, PX 2. Kalter testified that January 4, 2017, he participated in a wellness check at Petitioner's residence. Kalter and Officer Bland were the first on the scene. When they received no response at the door, per protocol, they called the fire department to proceed with a forced entry. Officer Kalter did not see Petitioner until after the Fire Department had arrived and began treating him. At that point, Kalter did see Petitioner sitting on the bathroom floor between the toilet and the vanity. Kalter testified he thought he recalled an injury to Petitioner's face. Kalter only saw Petitioner face to face and testified that he recalled an injury he thought was from striking his head. Kalter did not see any marks on the wall indicating that Petitioner had fallen into it. Kalter did not have any discussions with Petitioner. (PX19, p. 13-15). Kalter further testified that he described Petitioner as a hoarder in his report and that there were boxes of miscellaneous papers and books stacked on the premises which was "messy." (PX 19 P. 21). Kathy Tisky had told Kalter that Petitioner had incurred a head injury after being struck by a car in the parking lot and she was concerned. (PX19, p. 16-17). Kalter agreed that he was not there to provide any medical assessment and did not make a diagnosis. Kalter's report did not mention any injury to Petitioner's face, which is something that would normally end up in his report. (PX19, p. 28-29).

Officer Wesley Bland was also deposed on that date and his testimony was consistent with Officer Kalter's. (PX 17). Bland also added that Petitioner's speech "didn't seem very clear" whne he was interviewed in his house (PX 17, P. 9).

Respondent deposed David Ruszkowski ("Ruszkowski"), who was employed as an Arlington Heights fire fighter and paramedic. (PX16, p.4). Ruszkowski had no independent recollection of the incident on January 3, 2017. Ruszkowsk was the secondary care-giver so he did not fill out a report – he was there to drive. (PX16, p. 7). Ruszkowski's only memory of the incident was a vague injury at a Jewel. (PX16, p. 11-12). Ruskowski testified that as long as someone is decisional, they cannot take someone to the hospital against their will, even if they may need further medical treatment. (PX16, p. 12-13). Ruszkowski testified that he would inform patients of any risks. In the case of a head injury, those risks would include potentially a concussion and nausea which could require a CAT scan which they do not have the equipment for. (PX16, p. 14-15).

Respondent deposed Daniel Bell ("Bell"), who was employed as an Arlington Heights police officer. Bell had some recollection of an accident taking place on January 3, 2017 in the parking lot in front of a store involving a black car and a bald pedestrian with glasses. (PX14, p.4-6). Bell spoke to Petitioner and was informed that he was struck while coming across the parking lot. Bell felt that Petitioner sounded coherent at the time he talked with him. Bell spoke to the driver who said he was making a left hand turn and didn't see Petitioner and then the impact happened. (PX14, p. 7-8). Bell did not recall a specific injured body part other than that Petitioner had made impact with the ground so he was going to be hurting. (PX14, p. 14). Bell filled out the narrative and diagram portion of the report after leaving the scene. He normally does not put specific injuries in the report. (PX14, p. 15-17).

Respondent deposed Ben Pieper ("Pieper"), who was employed as an Arlington Heights fire fighter and paramedic. Pieper vaguely recalled going on a call on January 4, 2017 involving a guy who had been hit by a car the day before at Jewel. (PX13, p. 4-6). As the secondary care-giver, Pieper probably drove the ambulance that day but did not have a lot of involvement with Petitioner's care. Pieper did not recall ever making it into the bathroom at the premises and did not recall any discussion with Petitioner that day. (PX13, p. 6-8).

Respondent deposed Benjamin Eschner ("Eschner"), who was employed as an Arlington Heights fire fighter and paramedic. 4. Eschner had some recollection of the wellness check involving Petitioner on January 4, 2017. That day, Eschner entered Petitioner's residence through the front door and located him in the bathroom. (PX12, p.7-8). Eschner did not have any independent recollection of seeing Petitioner on the floor of the bathroom or of what petitioner was wearing. (PX12, p. 9-10). Eschner explained that a cerebral infarction or stroke was a concern due to Petitioner's low acuity level and that he would zone out during conversation and stop talking. (PX12, p.13-15). Eschner agreed that he did not make any actual medical diagnosis of stroke or cerebral infarction at the time of his interactions with Petitioner, and there was no cardiac arrest at that time. (PX12,

p. 29-30). Eschner had reported that Petitioner had a laceration on his head but could not recall where. Eschner did not recall seeing blood anywhere on Petitioner's body. (PX12, p. 16-17). Eschner agreed with his report that Petitioner told him he did not know how he had gotten to the ground in his bathroom. Eschner did not recall if the lights were on when he first entered the bathroom or if there were any items or running water on the sink. He did not recall anything on the floor. (PX12, p. 21-23). Eschner explained that his statement in his report that cause of injury was a fall off toilet was just a best guess, based on a drop-down slection and the fact that there was a toilet next to Petitioner and he was uncertain about how he got there. Eschner was not making any forensic determination as to how Petitioner got there. Eschner agreed his report does not mention any laceration to Petitioner's face and that is something that would normally have made it into the report if it was present at the time. Eschner could not recall exactly what was in the bathroom but agreed that his report made no mention of any hoarder conditions in that room. (PX12, p. 24- 28).

Respondent deposed Shawn Gyorke ("Gyorke"), who was employed as an Arlington Heights police commander. Gyorke recalled a wellness check that took place involving Petitioner on January 4, 2017. (PX18, p. 4-6). Gyorke was there on that date in a supervisory capacity to make sure the forced entry was resecured. Gyorke entered through the front door and was towards the rear of the group of personnel. He did not make it far into home, which he described as small. Gyorke never entered the bathroom or saw Petitioner there, and he never had any discussions with Petitioner. (PX18, p. 6-11). Gyorke recalled the home being connected with an open kitchen area and living room where he stood. He did not recall any running water in the kitchen. Gyorke never saw any medication bottles, blood or broken glass in the residence. (PX18, p. 11-13). Gyorke agreed that he did not make any determination as to how Petitioner ended up on the ground in his bathroom or make any medical assessment. (PX18, p. 16).

Respondent deposed Wesley Bland ("Bland"), who was employed as an Arlington Heights police officer. Bland had some recollection of performing a wellness check on January 4, 2017. (PX17, p. 6). Bland entered the home through the front door and walked

through the kitchen at the front of the townhome and then through stacked items to the bathroom where Petitioner was located. (PX17, p. 6-7). When Bland entered the bathroom, Petitioner was sitting on the floor up against the wall with his arm up on the toilet. Petitioner may have been somewhat reclined like he had slid down a bit and become wedged. Bland did not recall any running water in the sink or anything on the floor of the bathroom. He did not think there was any blood on the floor. He could not say for sure what Petitioner was wearing. (PX17, p. 8-10). Bland's responsibility on the premises was to see if Petitioner was okay and if anyone needed medical attention. He did not have any conversations with Petitioner other than initially asking if he was okay. (PX17, p. 9, 11). Bland did not recall any other statements from Petitioner or notice any scratches on him. His contact with Petitioner and time inside the home was brief. Bland did not see any blood on Petitioner's clothes or anywhere on the premises. (PX17, p. 12-16). The only items that Bland noticed stacked up in the home were furniture and boxes. It was navigable and he could walk through. The items were stacked with purpose and nothing looked like it had fallen over. The bedroom had items, but the bathroom was not crowded. Bland believed the path from the bedroom to the bathroom was clear, and it was a small distance of about 10 feet. (PX17, p. 13-15). Bland did not make specific determination as to how Petitioner got on the floor of the bathroom. Bland was not providing any medical assessment of Petitioner at that time and did not make a diagnosis. Bland did not recall seeing anything that would indicate how Petitioner got to the floor. (PX17, p. 20-21).

Medical History

On January 4, 2017, Petitioner was admitted to NCH and reported that he did not recall falling or how he ended up on his floor or how long he had been there. Petitioner reported being hit by a car the day before and hit his head on the ground. Petitioner recalled going to sleep the night before but nothing after that. Petitioner reported a headache, pain with movement in the left hip, bruising and abrasion on his left foot. Upon examination, Petitioner was lethargic and falling asleep mid-sentence. A CT scan of the brain revealed a 4-cmfront right intracerebral hematoma in addition to bilateral frontoparietal subdural hematomas and mass effect. PX3.

Petitioner was examined by Dr. David Mahon, who noted Petitioner was a poor historian gave a similar history of being struck by a vehicle. Petitioner was somnolent and required aggressive stimulus to follow commands and communicate. There was no CT evidence of an acute infraction in the brain, but there was evidence of a subdural hematoma with mass effect. The diagnoses were frontal intracerebral hematoma, frontoparietal subdural hematomas with mass effect; left likely pleural effusion on CXR; status post pedestrian struck by vehicle 1-2 days prior with no other acute or traumatic injuries or abnormalities appreciable on imaging or exam currently. Dr. Mahon recommended a craniotomy. PX3.

Petitioner was then examined by Dr. Sean O'Leary, who agreed that Petitioner required an emergency craniotomy. He performed a right craniotomy for acute subdural hematoma and placement of left intracranial pressure monitor. PX3.

On January 12, 2017, Petitioner was examined by Dr. Christian Speil, who diagnosed Petitioner with serratia pneumonia following a craniotomy procedure due to traumatic right intraparenchymal hemorrhage and subdural hematoma from a motor vehicle accident. PX3.

As of January 16, 2017, Petitioner was evaluated by Dr. Chris Papa, who diagnosed Petitioner with a subdural hematoma with mass effect and intracerebral hemorrhages after a motor vehicle accident. Petitioner exhibited marked cognitive deficits, increased somnolence and general weakness. Dr. Papa recommended acute rehabilitation, but noted that he would have difficulty participating at this point and would need placement in an acute rehab facility that specializes in traumatic brain injury. PX3.

On January 19, 2017, the workers' compensation nurse case manager, Janet, informed NCH that Respondent would pay for RIC rehabilitation if Petitioner continued to progress. PX3.

On January 20, 2017, Nataliya Omelchenko with Neuroscience Services at NCH opined that the nature of Petitioner's injury correlates with a coup-contre coup mechanism which occurs when deceleration causes the brain to move within the skull and to impact the inside of the skull. Coup refers to the initial impact of the brain against the posterior of

the skull; contre-coup refers to the rebound of the brain against the opposite, or contra-lateral, side of the skull-in this case the anterior portion of the brain. The injury was severe enough to result in contusion and subsequent hemorrhage of brain tissues, which tends to occur when the brain comes into contact with areas of the skull that have bony protrusions. PX3.

On January 26, 2017, the claims adjuster, Mark Ripsch told NCH that Petitioner's rehab would not be approved because they are still investigating. On January 30, 2017, he told NCH that the case could take a long time to be approved and treatment should be obtained through other insurance. PX3.

On February 1, 2017, Petitioner underwent an ultrasound of his left leg at NCH which revealed deep vein thrombosis at the left proximal femoral vein and left gastrocnemius vein. Petitioner underwent placement of an IVC filter. PX3.

On February 2, 2017, Petitioner was discharged from NCH to acute rehabilitation. PX3.

That same day, Petitioner was admitted to the Rehabilitation Institute of Chicago, which is now Shirley Ryan Ability Lab. Petitioner was examined by Dr. Ryan Doyel and reported being struck by an automobile in a parking lot. Upon examination, Petitioner's left foot exhibited ecchymosis. **Dr. Doyel diagnosed him with functional and cognitive deficits from traumatic encephalopathy due to a pedestrian-auto accident, with large right intracerebral hematoma and bilateral frontoparietal subdural hematoma resulting in a deficit of initiation and attention, left facial weakness, hemiparesis and hyperreflexia with no significant concomitant injuries**. Petitioner's treatment course was complicated by pneumonia and acute proximal DVT, status-post IVC filter placement. Dr. Doyel recommended a comprehensive rehab program with physical therapy, occupational therapy, speech therapy and psychological and psychiatric supervision. PX4.

From February 2, 2017 through March 27, 2017, Petitioner underwent therapy and supervised care at RIC. PX4.

On March 21, 2017, Petitioner was examined by Jacqueline Cudia at RIC who performed a psych evaluation. **Cudia had Petitioner perform several tests and opined that he had significant cognitive impairment, consistent with the location and severity of his traumatic brain injury.** Due to his age and slowed neurorecovery, it was difficult to ascertain the degree to which he may recover. **Cudia recommended constant supervision and assistance, with some chance of recovery but unclear due to the extent of Petitioner's cognitive decrements.** PX4.

On March 27, 2017, Petitioner was discharged from RIC and transported to Northwestern Memorial Hospital due to dropping hemoglobin. PX4.

That same day he was examined at Northwestern, exhibiting uppergastric bleeding at the prior G-tube site and decreased bilateral leg strength. The impression was melena due to prior G-tube site and anticoagulation. On March 31, 2017, Petitioner was discharged from Northwestern to return to RIC and resume his Xarelto. PX5.

On March 31, 2017, Petitioner was readmitted to RIC and examined by Dr. Nenad Brkic. **Brkic reviewed Petitioner's history and recommended 24-hour rehabilitation nursing and physician medical management with coordinated intensive rehab care.** PX4.

From April 1, 2017 through April 18, 2017, Petitioner underwent therapy and supervised care at RIC. PX4.

On April 12, 2017, Dr. Brkic opined that Petitioner would need continued home health treatment at an assisted living facility in order to improve functional status and due to cognitive defects. PX4.

On April 18, 2017, Petitioner was discharged from care at RIC to an assisted living facility. PX4.

On April 18, 2017, Petitioner began residing at The Grand in Palatine, Illinois.

On May 10, 2017, Petitioner was examined by Dr. Siddiqui at The Grand who noted that **Petitioner was a poor historian due to head trauma. Petitioner had suffered a traumatic brain injury when a car backed into him in the parking lot**. PX6.

On September 5, 2017 and September 8, 2017, Petitioner was evaluated by Dr. Christina Vocos, a clinical neuropsychologist with the Thompson Memory Center. Dr. Vocos opined that while Petitioner was making some cognitive gains, there was evidence for residual cognitive impairment secondary to a traumatic brain injury with notable reduction in comprehension of instruction, semantic fluency, rote memory, and executive functions. Dr. Vocos further opined that Petitioner lacked capacity to make complex medical, legal and financial decisions. Dr. Vocos recommended that he continue to live in an environment where he receives 24/7 monitoring and support, and that he would benefit from physical therapy and psychotherapeutic services. PX7.

On September 29, 2017, Petitioner was admitted to Arden Courts in Northbrook, Illinois. PX8.

On October 12, 2017, Petitioner was evaluated by Dr. William Rhoades at Arden Courts. Dr. Rhoades recommended that Petitioner have the IVC filter removed and that **Petitioner needed to continue residing in an assisted living facility for memory care, such as Arden Courts**. PX8.

On November 16, 2017, Petitioner was taken to NCH for a Doppler ultrasound on both legs, which revealed no evidence of DVT. PX3.

On December 12, 2017, Petitioner was taken to NCH again, at which time he underwent removal of the IVC filter. Petitioner was discharged to continue current management and follow up treatment with Dr. Rhoades. PX3.

On April 5, 2018, Petitioner was reexamined by Dr. Rhoades, who noted that Petitioner still required assistance with daily hygiene and had periods of incontinence. Petitioner needed use of a walker for balance, and supervision with medications, grooming, coming to meals. Petitioner had trouble communicating and periodic

confusion about his circumstances. Dr. Rhoades' diagnosis was dementia due to traumatic brain injury. Dr. Rhoades recommended that Petitioner continue with neuropsych care, medical assistance, and supervision of activities of daily living at Arden courts. PX8.

From September 29, 2017 through the time of his death on June 26, 2018, Petitioner underwent assisted living care and resided at Arden Courts.

CONCLUSIONS OF LAW

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT ON JANUARY 3, 2017?

There is no dispute that an "incident" occurred on January 3, 2017, involving a motor vehicle striking Petitioner in the crosswalk of the Jewel Parking lot where he worked for Respondent. The question at issue is whether this agreed "incident" was an "accident arising out of and in the course of Petitioner's employment with Respondent on January 3, 2017." Based on a careful review of all the evidence in this very large file with voluminous records, the Arbitrator finds and concludes Petitioner has met his burden and has proven by a preponderance of the credible evidence that he did sustain an accident arising out of and in the course of Petitioner's employment with Respondent on January 3, 2017.

The Arbitrator has reviewed video footage of the incident which was obtained through Respondent pursuant to subpoena. The footage shows Petitioner walking through a crosswalk in **a yellow vest** away from the store when a car making a left turn strikes him and he falls to the ground, hitting his head. (PX20). The Arbitrator draws the reasonable inference that the yellow vest Petitioner is seen wearing in the video was a work vest – not a personal vest - worn during his work hours. The Arbitrator further concludes that Petitioner was on his way back to the store after moving carts in furtherance of his job duties (this inference is more than corroborated by Petitioner's own statement and that of his manager, Tisky; see below). These factors lead the Arbitrator to conclude – based on admittedly limited available evidence – that Petitioner sustained injuries arising out of and in the course of his employment on January 3, 2017.

Additional evidence in the record further persuasively leads the Arbitrator to find and conclude that a compensable accident occurred. The evidence shows Petitioner was engaged in the activity of retrieving carts from Respondent's parking lot when he was struck by the car, which was directly incidental to his employment. The evidence shows that on January 3, 2017, **Petitioner told AHFD that he was injured while getting carts.** (PX15, p.9): **Arlington Heights Firefighter Newman testified – without any objection – that Petitioner told him, "He said he was working pushing carts." (PX. 15, p. 9).** This very credible, persuasive, **unchallenged and unrebutted** evidence, even considered alone, is sufficient to find accident. **Even further, this testimony was corroborated - by an agent of Respondent, no less, with direct, personal knowledge of the relevant facts.**

On the following day, **Respondent's own employee, Jewel store manager Kathy Tisky, told AHPD that Petitioner was struck by the vehicle while working for Respondent collecting carts.** PX 2, admitted into evidence, are the records from the Arlington Heights Police Department, specifically an "Incident/Offense Report" dated January 5, 2017. This Report documented a 911 call the AHPD received on January 4, from Kathy Tisky, Jewel Grocery Store manager at 440 E. Rand Road, Arlington Heights, the location where Petitioner worked and was injured. The Report indicates Tisky advised Kalter that Petitioner failed to arrive at work on January 4. **Significantly, the Report notes, "Kathy told me yesterday, Tuesday, 01/03/2017, Edward was struck by a car in the Jewel parking lot while Edward was working; he was collecting grocery carts (17-00148). Kathy said Edward suffered a head injury from the crash** and he was treated and released, on scene, by AHFD paramedics." Tisky asked that the police conduct a wellness check on Petitioner. Tisky was "very worried" about Petitioner's well-being. **This evidence is an admission** - a powerful and conclusive one - by a party opponent, an agent of Respondent, Petitioner's own store manager, who actually admits and acknowledges Petitioner was working (doing his job) when he was injured. **This very credible, highly persuasive statement is an admission that went both unchallenged and unrebutted (Tisky was not called to testify as a trial witness). This evidence is convincing and clear evidence Petitioner was injured arising out of and in the course of his employment. Certainly, "collecting grocery carts" in the employer's parking lot (that is "working") placed Petitioner in danger, in harm's way, and by virtue of this**

task, increased his risk of injury, to an extent greater than that to which the general public is exposed. The Arbitrator draws the reasonable inference Respondent was aware this was a dangerous job – that is why Petitioner wore a yellow vest, so he could be seen by vehicles in the parking lot – to avoid injury. No further evidence is therefore necessary to prove this disputed issue.

Further, on February 15, 2017, Respondent's attorney stated on the record that Petitioner was involved in an accident while in the course of his employment with Respondent. (2/15/17, Arb. Tr., p. 21).

Lastly, the Arbitrator addresses several arguments/points/assertions Respondent raises to dispute accident, all of which must fail and which are found to be inaccurate and disingenuous:

1. Respondent argues there was no evidence submitted to show that Petitioner had any job duties in the parking lot. This assertion is incorrect. The evidence shows that Respondent's store manager Tisky told Kalter "**Edward was struck by a car in the Jewel parking lot while Edward was working; he was collecting grocery carts (17-00148). Kathy said Edward suffered a head injury from the crash". (PX 19, p. 16-17).** Further, the evidence shows that Fire Fighter Peter **Newman testified – without any objection – that Petitioner told him, "He said he was working pushing carts." (PX. 15, p. 9).** This evidence defeats Respondent's argument that "there was no evidence submitted that Petitioner had any job duties in the parking lot." This evidence was never rebutted.
2. Respondent argues Petitioner failed to establish that his presence in the parking lot and the subsequent automobile incident had any risk connected with or incidental to his employment and **there was no evidence presented to establish why Petitioner was in the parking lot at that time. Again, this assertion is incorrect. See also statement from Tisky.** Further, the evidence shows that Fire Fighter Peter **Newman testified – without any objection – that Petitioner told him, "He said he was working pushing carts." (PX. 15,**

p. 9). This evidence explains why Petitioner was in the parking lot at the time of the accident. This evidence was never rebutted.

3. Respondent argues that no evidence or testimony was presented to indicate Petitioner had any job duties in the parking lot itself and there was no evidence Petitioner was in fact even "on the clock" at the time of the incident and the only testimony regarding his work schedule was that his sister was under the impression that he worked at Jewel on a part time basis. All of the above assertions are inaccurate. Store manager Tisky said **Edward was struck by a car in the Jewel parking lot <u>while Edward was working</u>; he was collecting grocery carts. This proves Petitioner indeed had job duties in the parking lot and was "on the clock" when he was injured.** This evidence was never rebutted.
4. Respondent similarly argues no evidence was presented to show that Petitioner was in the parking lot for an employment related reason or that he was working at the time of the incident in the parking lot and no evidence was presented to show that Petitioner was at any increased risk due to his employment or that the motor vehicle accident was in any way related to Petitioner's employment. All of the above assertions are inaccurate, as noted above.

Therefore, Respondent's assertions on which it bases its arguments to dispute accident are all demonstrably false.

In sum, there is no evidence in the record even suggesting – let alone concluding – that Petitioner did not sustain accidental injuries arising out of and in the course of his employment with Respondent on January 3, 2017.

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

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence that his death is casually related to the accidental injuries sustained on January 3, 2017.

In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, some causal relation between the employment the claimed injury and current condition of ill being. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63, 541 N.E.2d 665, 669, 133 Ill. Dec. 454 (1989).

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). "[C]laimant has the burden of showing by a preponderance of credible evidence that his injury arose out of and in the course of employment, which requires a showing of causal connection.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. Berry v. Industrial Comm'n, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); Hosteny v. Illinois Workers' Compensation Comm'n, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); Fickas v. Industrial Comm'n, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

It is the Commission's function to choose between conflicting medical opinions. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill. 2d 1, 4, 31 Ill. Dec. 789, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232, 590 N.E. 2d 78, 82 (1992).

As indicated *supra*, Petitioner bears the burden of proving each element of his case by a preponderance of credible evidence. *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470 (4th Dist. 1987). In order to meet this burden, a Petitioner must "produce competent evidence of objective conditions and symptoms to support [a] claim." *Nunn* at 477. Where a claimant has a pre-existing condition, whether it is aggravated or accelerated is a question

of fact for the Commission. *Caterpillar Tractor Co. v. Indus. Comm'n,* 92 Ill. 2d 30, 36-37 (1982). Furthermore, in questions involving causation, the parties need not necessarily submit a medical opinion in order to prove causation. **However, "where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that the claimant's work activities caused the condition complained of."** *Nunn* at 507, citing to *Interlake Steel Co. v. Indus. Comm'n*, 136 Ill. App. 3d 740 (1985). In this case, the Arbitrator finds and concludes that the question of causation is "the question is one within the knowledge of experts only and not within the common knowledge of laypersons." Based upon the evidence submitted by the parties, the Arbitrator finds and concludes the evidence submitted by Petitioner is more than sufficient to prove by a preponderance of the evidence that his current condition of ill-being is related to the January 3, 2017 accident. Respondent, however, offered no medical evidence to challenge Petitioner's evidence which established causation. Respondent offered no medical opinion to dispute causation.

To fall under the Act, the employee must prove that some act or phase of the employment was a causative factor in the ensuing injury. It need not prove it was the sole causative factor nor even that it was the principal causative factor—only that it was a causative factor in the resulting injury. *Republic Steel Corp. v. Industrial Com.*, 26 Ill. 2d 32, 45, 185 N.E.2d 877, 884, 1962.

While Respondent raises several arguments disputing causation, these arguments are based not on facts, but rather on speculation, theories with a lack medical counter-opinions required to rebut medical causation opinions supporting Petitioner.

Respondent raises several arguments calling causation into question, all of which have ***potential*** merit; however, while Petitioner has met his initial required burden of proof, Respondent has only raised and presented speculation and theories, but no actual foundational evidence and opinions to support its assertions and arguments against causation. Most impactful is the absence of any expert medical opinion to support its arguments and assertions. Inexplicably, no Section 12 examination ever took place, nor was any Section 12 medical records review obtained. Further, no treating physician was

deposed. Therefore, no expert medical opinions were ever produced to support Respondent's arguments and assertions against causation. Again, when difficult medical causation issues are presented, that falls outside the realm of a layman to decide, and therefore expert medial opinions are required.

Respondent argues the following against causation: that Petitioner's purported fall in the bathroom in his home is itself sufficient to constitute an intervening accident. There is a clear change in Petitioner's condition after Petitioner's fall in the bathroom. Prior to the bathroom incident, Petitioner was walking without difficulty as evidenced both by the testimony of the fire fighters and the video itself. He was able to hold a coherent competent conversation. Petitioner refused medical care from the ambulance, told the attending police officer that his side hurt but that he wasn't injured, and did not seek out any medical care that evening. Petitioner was also able to hold a conversation with Becci. It is only after the fall in the bathroom that there are reports of Petitioner having difficulty with neurocognitive tasks. It is only after the fall in the bathroom that Petitioner requires any care and is, in fact, unable at that point to seek it out himself. There is no history in the records that Petitioner had been feeling poorly since the incident before – the only notation in the records regarding the fall is Petitioner telling the initial responding officers that he didn't know why he fell. This is Respondent's argument.

However, Respondent's argument above lacks any required supporting foundational expert medical opinion to reach the argued conclusion; without such, Respondent only offers an alternative theory, speculation, and therefore fails to rebut Petitioner's prima facie proof of the cause of death as found in the opinion of the assistant medical examiner. Again, Respondent never requested a medical expert to review the above and render an expert opinion on causation.

It could very well be the case that Petitioner had some manner of fall in his bathroom due to a cause unrelated to the accident at Jewel; **however, no one knows how or why he fell (even Petitioner did not know so he could not and did not offer any useful, let alone incriminating, statements)** and therefore merely asserting such without supporting evidence and opinion is not a rebuttal. It could also very well be the case that

Petitioner had some manner of fall in his bathroom as a direct consequence one way or another of the accident sustained at work the day before, that is, he could have fallen due to being dizzy, feeling nauseaus, etc. as a result of the work accident. Absent any facts or opinion in rebuttal, that is exactly the inference the Arbitrator draws from the evidence.

In other words, if Respondent wanted to argue that that the fall at home was not related to the accident at work, if had the burden to move forward and offer evidence to support this defense theory, which here would require expert medical evidence. **Merely raising a theory is insufficient to rebut a showing of *prima facie proof.*** However, Respondent offered no necessary expert opinion evidence offering the opinion that the fall at home was not related to the accident at work.

The bottom line is that if Respondent wanted to persuasively argue that the bathroom incident was an intervening accident that severed the chain of causation, at least an expert medical opinion stating that would be necessary.

The "Report of Postmortem Examination" - *prima facie proof of causation*

The most significant, persuasive and determinative evidence relating to the disputed issue of causation in this case is PX 23, the "Report of Postmortem Examination" dated September 27, 2018 regarding the July 1, 2018 examination. This Report contains an opinion of the cause of Petitioner's June 29, 2018 death. This opinion is as follows: "**The death of this 75-year-old white male, EDWARD P. MEYER, is due to complications of closed head injuries due to automobile striking pedestrian.**" Further, there is an opinion in the "Pathologic Diagnoses" section, number I.: **"Traumatic closed head injuries sustained when an automobile struck pedestrian during work on 1/3/2017."** Respondent adamantly and repeatedly objected to the admission into evidence of this opinion (not the full Report, only the Opinion portion thereof) and the Arbitrator overruled Respondent's objections and allowed the entire "Report of Postmortem Examination" into evidence.

Respondent erroneously argues **the death certificate which was admitted into evidence does not reflect a cause of death and the Report is lacking as an opinion relative to cause of death. A simple and direct reading the Report quickly dismisses any such notion.**

This record as a whole was entered into evidence pursuant to a specific Illinois statute relating solely to this very same kind of Report: 725 ILCS 5/115-5.1, **Records of the coroner's medical or laboratory examiner as evidence.** This statutory provision is as follows:

"Records of the coroner's medical or laboratory examiner as evidence. In any civil or criminal action the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section. These reports, specifically including but not limited to the pathologist's protocol, autopsy reports and toxicological reports, **shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions sated therein.**

A duly certified coroner's protocol or autopsy report, or both, complying with the requirements of this Section may **be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates.** The records referred to in this Section shall be limited to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.

Persons who prepare reports or records offered in evidence hereunder **may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause.** However, if such person is dead, the county coroner or a duly authorized official of the coroner's office may testify to the fact that the examining pathologist, toxicologist or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical

report or record was prepared in the ordinary and usual course of the deceased person's duty or employment in conformity with the provisions of this Section." **(emphasis added).**

It is therefore crystal clear this Statute allows PX 23, the "Report of Postmortem Examination" into evidence – in its entirety, including its opinions as to the cause of death. There is no argument to the contrary available, especially as Respondent did not raise any objections to the admission into evidence of this Report on the basis that this Report does not comply with the requirements of this Section for admission.

Further, on July 1, 2018, Petitioner's body was examined by Dr. Marta Helenowski with the Office of the Cook County Medical Examiner. The entirety of Dr. Helenowski's Report of Postmortem Examination was admitted into evidence as Petitioner's Exhibit 23. Upon removal of Petitioner's skull cap, the doctor noted numerous adhesions of the right hemisphere to the dura and yellowish remote evidence of prior injury. Serial sections of the brain revealed a tan to brown discoloration from a remote injury measuring 3 x 2 x 1.5 cm. The basilar artery displayed severe atherosclerosis

The pathologic diagnoses were: 1) traumatic closed head injuries sustained when automobile struck pedestrian during work on 1/3/17; 2) frontal hematoma, 4.0 cm and bilateral fronto-parietal hematomas, per hospital records; 3) status/post emergent right fronto-parietal craniotomy on 1/4/17; 4) remote areas of softening and discoloration in the right frontal area; 5) severe basilar cerebral artherosclerotic changes; 6) hypertension, per medical records; and 7) dementia, per medical records. Dr. Helenowski concluded that Petitioner died due to complications from his head injury when he was struck by an automobile. PX23. As noted above, per 725 ILCS 5/115, Dr. Helenowski's opinions are prima facie evidence that Petitioner's death was caused by the accident on January 3, 2017.

The force and meaning of the opinion in this Report cannot be exaggerated. As the Statute indicates, it is **prima facie proof of the cause of death (the necessary medical opinion on causation) of the person to whom it relates, here, Petitioner. A *prima facie* showing is one which is sufficient to authorize a finding on the matter in issue unless contradicted or explained. A *prima facie* showing establishes the proposition (here, causation) by that quantum of evidence the law requires (here, the**

preponderance of the evidence) and then that burden going forward shifts to the other party. If there is no evidence to contradict a *prima facie* case, it becomes conclusive. The only method by which the opinion of the cause of death in the Report could be contradicted would be a challenge presented by a conflicting expert medical opinion – but no such opinion was ever offered. This has such obvious impact that the Statute specifically provides that the preparer of such report **may be subpoenaed as a witness.**

The Arbitrator acknowledged this at trial and offered on the record the parties the opportunity to depose the preparer of the Report, namely, the assistant medical examiner; however, the parties declined this offered opportunity. Therefore, by not deposing the witness, the opinions (regarding cause of death) contained within the Report remain unchallenged and undisputed; the opinions remain unrebutted *prima facie* proof of the cause of death, that is, linking causation specifically to the car accident.

After the accident on January 3, 2017, multiple employees of Respondent, including Respondent's witness at the time of hearing, were concerned that Petitioner had sustained a significant head injury. The paramedics with AHFD who arrived on the scene urged him to come to the hospital for further care because they were concerned he had a head injury. PX1. Fire Fighter Newman explained to Petitioner that one of the risks of a head injury at his age could be bleeding in the brain amongst other complications. (PX15, p. 22).

Further, all of the medical records support a history of Petitioner suffering a traumatic brain injury and subdural hematoma on January 3, 2017 when he was struck by the car in Respondent's parking lot. Petitioner was examined by numerous doctors at NCH, who each confirmed a diagnosis of a subdural hematoma after being struck by a vehicle, with no other acute or traumatic injuries or abnormalities appreciable, including acute infarction or stroke or cardiac arrest. PX3. The nature of Petitioner's injury was found to correlate with a coup-contre coup mechanism which occurs when deceleration causes the brain to move within the skull and to impact the inside of the skull, severe enough to result in contusion and subsequent hemorrhage of brain tissues, which tends to occur when the brain comes into contact with areas of the skull that have bony protrusions. PX3.

Petitioner's sister, Kamper, testified that, prior to the accident on January 3, 2017, she interacted with Petitioner monthly, with the most recent time being in person during the Fall of 2016. She testified that he was doing alright living by himself and was able to hold conversations with her about family and current events. Since striking his head on January 3, 2017 and having to undergo an emergency craniotomy, Kamper noticed that Petitioner's personality was completely different and he had memory loss and confusion.

Respondent offered no medical opinion refuting Petitioner's treating records or indicating that Petitioner's reported mechanism of injury to these providers (the car accident only) is not consistent with his symptoms or not related to his work accident. Instead, Respondent claims that an intervening accident may have occurred in the time between the January 3, 2017 accident and when Petitioner was found in his bathroom residence on January 4, 2017, less than 24-hours later. But while a ***speculative*** argument could be raised that the likely fall at home (no one knows what really happened) was an intervening accident, **the fact remains there was no medical opinion evidence offered opining that the fall at home was an intervening accident**. Therefore, Respondent presents a mere theory with no evidentiary support. Such a theory has no value. Such a theory, in order to carry any weight and credibility, would need to be supported by expert opinions and such opinions would also need to dispute Petitioner's expert opinions which support causation - none of which has occurred here.

Furthermore, even if there was evidence of another accident occurring at Petitioner's home, Respondent would still have to show that said accident was significant enough to sever the chain of causation. In the *International Harvester* case, the Illinois Supreme court found that the causal connection between an employee's head injury and his condition was not interrupted by a second accident that occurred *four* years later. *International Harvester Co. v. Industrial Com.*, 46 Ill. 2d 238, 246, 263 N.E.2d 49, 54, 1970. Here, Petitioner was found less than 24 hours after his head injury at Jewel. Significantly, Respondent has offered no medical opinion to indicate that any subsequent fall, assuming one occurred in Petitioner's home, would be significant enough to - or actually did - constitute an independent intervening accident to sever the chain of causation.

Based on the nature of head trauma, the totality of the medical records, and especially the opinions in the "Report of Postmortem Examination" Petitioner's likely fall in his home bathroom was a direct result or consequence of the head trauma he experienced the prior day. Petitioner did not know what had happened or why he fell, which would be consistent with an elderly man who had sustained a head trauma the day prior. With no evidence to the contrary, this is the reasonable inference the Arbitrator draws.

The Arbitrator has had the opportunity to review the video of the accident, the medical evidence, and the testimony of the witnesses. The Arbitrator finds a causal connection between Petitioner's condition of ill-being and the work accident of January 3, 2017.

K. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL EXPENSES?

All of Petitioner's care was recommended by his treating physicians, including his need for assisted living and associated care. Under Section 8 of the Act: if, as a result of the injury the employee is unable to be self-sufficient, the employer shall further pay for such maintenance or institutional care as shall be required. 820 ILCS 305/8. Very significantly, **Respondent offered no expert medical opinion** to dispute that the medcial care and treatment or assisted living and related care Petitioner received was not medically necessary or reasonable or casually connected to the accident.

The Arbitrator therefore finds all of the treatment and care rendered to be reasonable and necessary.

Petitioner presented medical bills and receipts as part of Exhibits 9 and 24. $712,639.51 total charges. Based on the Arbitrator's findings in Section "F", the following bills are awarded to Petitioner pursuant to Sections 8(a) and 8.2, Commission medical fee schedule.

1. Village of Arlington Heights—DOS 1/4/17: $400.00
2. Northwest Community Hospital: DOS 1/4/17-12/12/17: $281,308.49
3. Northwest Community Healthcare: DOS 1/7/17- 1/16/17: $757.00

4. CEPAmerica—DOS 1/4/17: $667.00
5. Arlington Ridge pathology—DOS 1/4/17-2/2/17: $3,987.00
6. Professional cardiac services—DOS 1/4/17: $41.00
7. Northwest Radiology Assoc—-DOS 1/4/17-2/2/17: $4,501.14
8. American Surgical Professionals—DOS 1/4/17: $10,864.00
9. Critical Care Physicians of Illinois—DOS 1/4/17-1/15/17: $18,130.63
10. Northwest Suburban Medical Assoc—DOS 1/12/17-1/16/17: $620.00
11. Advent Neurology—DOS 1/15/17: $420.00
12. Medical Services RIC—DOS 2/2/17-4/18/17: $19,494.00
13. Shirley Ryan Ability Lab/RIC—DOS 2/2/17-4/18/17: $245,962.12
14. Elite Medical Transportation—DOS 2/2/17: $1,528.00
15. Michigan Ave Podiatry—DOS 2/8/17-3/15/17: $440.00
16. Northwestern Medicine—DOS 3/15/17-3/31/17: $17,838.34
17. Illinois Medi-car Inc.—DOS 4/18/17: $111.00
18. Superior Ambulance Service—DOS 3/27/17-3/31/17: $2,236.00
19. Apria Healthcare—4/17/17-7/30/18: $2,354.44
20. ALC Staffing, The Grand—DOS 4/18/17-9/29/17: $13,586.00
21. The Grand—DOS 4/18/17-9/29/17: $12,139.35
22. Thompson Memory Center—DOS 9/5/17-9/8/17: $2,800.00
23. Premier Podiatry Services—DOS 10/17/17: $200.00
24. Arden Courts: DOS 9/29/17-6/31/18: $56,602.66
25. Options for Aging—DOS 11/16/17-7/30/18: $3,468.43
26. Richard Kruger, DDS—DOS 11/1/17: $115.00
27. Inpatient Consultants of IL—DOS 12/12/17: $267.00
28. Heartland Healthcare Services—DOS 10/2/17-6/23/18: $251.16
29. Marla Davishoff, LCSW—DOS 10/1/17-3/29/18: $6,315.00
30. Dr. William Rhodes—DOS 1/11/18-3/8/18: $238.00
31. Osco Drug: DOS 4/17/17-9/26/17: $882.45
32. Mark Drug Medical Supply: $200.83
33. Provider Preferred Home Health—DOS 10/3/17-11/15/17: $3,914.17

The Arbitrator notes that Petitioner paid $81,080.40 out-of-pocket for his medical treatment related to the accident, for which Petitioner is entitled to reimbursement.

Further, as noted below, Respondent has met its burden of proof that it is entitled to **credit under Section 8(j) for the $159,783.20** in medical expenses paid by its group health plan as well as credit for the contractual adjustments made under the same, as noted in RX2.

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

The Arbitrator finds and concludes Petitioner is entitled to permanency benefits rather than temporary total disability benefits. The totality of the record evidence shows Petitioner was unable to participate in any stable labor market position as of January 4, 2017, the date of his first hospitalization, regardless of the absence of any specific opinion that he had reached maximum medical improvement. No opinion is found simply because none was solicited and none was required. **Petitioner's disabling medical condition was obvious such that he was never going to be able to obtain stable labor market employment.**

From the time Petitioner was found in his residence on January 4, 2017 until the time of his death at age 75 on June 29, 2018, Petitioner continuously required either hospitalization or assisted living and was never released to go back to his home (especially to live alone as he did prior to the accident). Significantly, Petitioner was found to be not competent with regards to complex legal, medical and financial decision making. Petitioner suffered from confusion and incontinence and required day to day care. Petitioner's treating physicians at NCH, RIC, Thompson Memory Center, and Arden Courts **all opined that he would require supervised daily care**. PX1-8 co.

On April 5, 2018, Petitioner was reexamined by Dr. Rhoades, who noted that Petitioner still required assistance with daily hygiene and had periods of incontinence. Petitioner needed use of a walker for balance, and supervision with medications, grooming, coming to meals. Petitioner had trouble communicating and periodic confusion about his circumstances. Dr. Rhoades' diagnosis was dementia due to traumatic brain injury. Dr. Rhoades recommended that Petitioner continue with neuropsych care, medical assistance, and supervision of activities of daily living at Arden courts. PX8. **From September 29, 2017 through the time of his death on June 26, 2018, Petitioner underwent assisted living care and resided at Arden Courts.**

The above indicates Petitioner's condition of ill-being was so severe the possibility of employment was clearly untenable. Further, the Arbitrator draws the inference that Petitioner's condition from January 4, 2017 onwards was permanent and there is no medical opinion that Petitioner would ever improve eithe4r mentally or physically (he had many co-morbidities) to such an extent that he would realistically be independent and be

employable. An assertion that Petitioner, effectively, was not at MMI is unsupported by the evidence and speculation; in fact, there is no evidence Petitioner would ever be independent and not require continuous assisted living care.

Petitioner's condition never improved to point that he would not require such care. Therefore, it is clear Petitioner had no access to any form of employment (let alone stable labor market employment) and was permanently and totally disabled during that time, which represents a period of 77-3/7 weeks.

Respondent did not present any expert medical evidence of any kind to refute Petitioner's treating doctors' findings that Petitioner was not competent and that he needed to be in an assisted living facility during that time. Respondent did not present any expert medical evidence of any kind to offer an opinion regarding the nature and extent of Petitioner's condition of ill-being.

The Arbitrator has reviewed the evidence and finds Petitioner is entitled to PTD benefits under Section 8(f) at his PTD rate of $535.79/week for a period of 77-3/7 weeks, representing the period between January 4, 2017 and June 29, 2018. This is the sum of $41,485.14.

Respondent is entitled to a credit for the disputed benefits it has paid in the amount of $6,160.00. **Therefore, total PTD benefits due and owing is the sum of $35,325.14.**

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?

After reviewing the testimony and the evidence submitted by the parties, the Arbitrator finds and concludes Respondent's disputes are unreasonable, vexatious and without merit. Respondent's own store manager admitted Petitioner was injured while working pushing carts and Petitioner's own statement was admitted, where he stated he was working as well. There was not one shred of evidence to challenge or dispute, let alone, rebut, this conclusive evidence.

Respondent only offered speculative theories to dispute and deny this claim, offering nothing substantive. It engaged in multiple depositions, none of which resulted in obtaining any useful evidence to dispute - let alone rebut - accident or causation. In fact,

these depositions yielded results to the contrary; Kalter's testimony (bolstering and confirming his "Incident/Offense Report") proves that Respondent's own agent Tisky admitted/acknowledged the next day after the accident that Petitioner was working when he was injured and she was aware of the accident. Respondent never called Tisky to testify. The Arbitrator notes Kalter was Respondent's own witness.

Further, Respondent disputes causation (that Petitioner's death is causally related to the car incident) a medical issue of proof (and in this case, a difficult medical issue and one therefore requiring expert medical opinions), yet inexplicably Respondent failed to obtain a single medical opinion to challenge causation – even when offered the opportunity, on the record, to depose the assistant medical examiner (who opined causation). Respondent never obtained an expert medical opinion to dispute any issue. As noted above, several treating physicians made entries in their treating records indicating Petitioner's condition of ill-being was linked to the car accident; however, again, these physicians were never deposed, and Respondent allowed these treating records with these opinions into evidence. Those opinions are credible, corroborate each other and the opinions of the assistant medical examiner, and went unchallenged.

Further, although required by the Act, Respondent also failed to obtain a Utilization Review report pursuant to Section 8.7 and 8.7(i)(3) or any other medical opinion (such as a Section 12 Report) to challenge the reasonableness and necessity of disputed medical treatment.

The Arbitrator emphasizes he does not reach these conclusions lightly, and appreciates its gravity, but does so only after careful and deliberate consideration of the total facts, circumstances and context this case presents.

Accordingly, the Arbitrator finds and concludes Petitioner is entitled to attorney's fees under Section 16 in the amount of $67,726.18, penalties under Section 19(k) in the amount of $338,630.92 and penalties under Section 9(l) in the amount of $10,000.00.

For the forgoing reasons, the Arbitrator finds Respondent liable for the following penalties and attorney's fees:

Section 19(l):

Section 19(l) provides in pertinent part, as follows:

"In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." (Emphasis added.) 820 ILCS 305/19(l) (West 2006).

Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Indus. Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763, 800 N.E.2d at 829. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Bd. of Educ. of the City of Chi. v. Indus. Comm'n*, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865 (1982).

Respondent has presented no viable or reasonable defense for denying Petitioner's benefits. It agrees that Petitioner was struck by a moving vehicle and hit his head while working for Respondent on January 3, 2017. The video of the accident, identified and provided by Respondent, shows Petitioner being hit in the crosswalk and striking his head on the ground. Multiple employees of Respondent had concerns that Petitioner was significantly injured by that accident that they made calls to check in on him. Less than 24-hours later, Petitioner was found in his home and had to be taken to NCH for an emergency craniotomy procedure due to a subdural hematoma bleeding in his head. All of the treating medical records support a history of traumatic brain injury resulting from the accident on

January 3, 2017. Respondent had this information because it initially hired a nurse case manager to attend Petitioner's care at NCH who indicated that treatment would be accepted under workers' compensation. PX3.

On January 26, 2017, Respondent's adjuster told NCH that the claim was being investigated. PX3. However, on January 25, 2018, Respondent's attorneys had already issued a letter with a blanket statement that the claim was being denied based on their current information. PX21. As of this date, Respondent was indicating that it had a defense for denying benefits under the Act but did not give any **explanation** for its denial. It did not present any medical opinion indicating that Petitioner's injuries were not caused by the accident that took place on January 3, 2017 at that time or at any other point prior to this hearing. Without paying any further benefits, Respondent later asserted that it still needed further investigation. **Because Respondent did not provide any "written explanation of the basis for the denial", Respondent violated Commission Rule Section 9110.70 as well as Section 19(l).**

Respondent's only current posited "defense" is actually a theory that an intervening accident took place at Petitioner's home which would sever causal connection with the accident that took place on January 3, 2017. However, it provided no evidence to support its theory of the existence of an intervening accident. Rather, it offered speculation. Even with roughly a year and a half to "investigate", and despite numerous requests for benefits and indications that penalties would be pursued, Respondent never paid benefits on this case beyond $6,016.00 in disputed advances. After reviewing the video of the accident, Respondent did not pay benefits. After obtaining medical records from the treating physicians, Respondent did not pay benefits. After taking the depositions of 8 Arlington Heights personnel including fire fighter paramedics and police officers, none of whom provided any indication that an intervening accident took place, Respondent still did not pay any benefits. After receiving the "Report of Postmortem Examination", Respondent still did not pay benefits. Respondent inexplicably never obtained any medical report or opinion. Respondent has no legitimate dispute and its requests for further investigation do not constitute a valid reason for denying benefits. Thus, maximum penalties under Section 19(l) are appropriate.

The Arbitrator awards $30.00 a day for each day that TTD and medical benefits were unpaid. The period from January 3, 2017 through October 9, 2018 is 645 days. The maximum allowable limit on 19(l) penalties is reached in this case, and the Arbitrator awards $10,000.00.

Section 19(k):

The standard for awarding penalties under section 19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part, as follows:

"In cases where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation...then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award."

An award of penalties pursuant to section 19(k) is "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *McMahan v. Indus. Comm'n*, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 463 (1997), aff'd, 183 Ill. 2d 499, 702 N.E.2d 545 (1998). The standard for awarding penalties and attorney fees under section 19(k) of the Act is higher than the standard for awarding penalties under section 19(l) because section 19(k) requires more than an "unreasonable delay" in payment of an award. *McMahan*, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552 (1998). It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Instead, section 19(k) penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

The evidence shows that Respondent withheld TTD and medical treatment payments for other than legitimate motives. The delay was deliberate and is the result of bad faith and improper purpose. It becomes clear when looking at the totality of the evidence that Respondent intended to accept the claim, but then decided to deny the case without any defense once it assessed how much the medical costs could be. There was no

other reason for Respondent's attorney to bring up the cost of medical treatment on February 15, 2017. (2/15/17 Arb. Tr., p. 24.) Respondent admitted that it cut off benefits while it was searching for evidence and did not have any actual defense at that time. (2/15/17 Arb. Tr., p. 28.; 3.16.17 Arb. Tr., p. 11) However, as stated by Arbitrator Black, this is conjecture on the part of Respondent as there is no actual evidence indicating that another accident occurred. (2/15/17 Arb. Tr., p. 30). This is an intentional and vexatious delay even if Respondent had found a defense to present, which it ultimately did not anyway. Because of Respondent's indefensible refusal to pay benefits, Petitioner's family had to make payments out of pocket, apply for Medicaid, sell his residence, and take out personal loans. Respondent essentially gambled with Petitioner's life in an attempt to limit its costs, which is precisely the situation the Act is meant to prohibit with the imposition of penalties. Respondent's actions warrant the award of penalties under Section 19(k).

PTD benefits are due for 77-3/7 weeks, representing the period between January 4, 2017 and June 29, 2018.

The total amount of PTD benefits due is $35,325.68 (77.429 X $535.79 = $41,485.68 minus a credit for $6,160.00 paid in disputed advances).

The total amount of outstanding medical bills is $712,639.51. That amount minus $159,783.20 credit under Section 8(j) is $552,856.31. That amount plus Petitioner's out-of-pocket expenses is **$633,936.71 total medical owed**.

Penalties under Section 19(k) are **50% of the unpaid total or $334,631.19** (50% of ($35,325.68 + $633,936.71= $669,262.39)).

Section 16:

Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2006).

Having found the Respondent's actions towards Petitioner to be unreasonable and vexatious, and having found the delay was deliberate and the result of bad faith and improper purpose, the Arbitrator awards attorney's fees under Section 16. The Arbitrator

awards **20% of the total penalties, or $68,926.23** (20% of ($10,000.00 + $334,631.19 = $344,631.19)).

N. IS RESPONDENT DUE ANY CREDIT

Respondent paid $6,160.00 in disputed advances of TTD benefits, for which it is entitled to a credit. (RX1)

Respondent submitted as its Exhibit 2 a ledger indicating payments made by Blue Cross Blue Shield of Idaho for medical treatment in the amount of $159,783.20. The Arbitrator notes the Parties did not stipulate to any amount of credit allowable under Section 8(j) of the Act. However, Respondent submitted an inventory of payments made by the employer's group health insurance – Blue Cross Blue Shield of Idaho. Section 8(j) of the Act provides that:

> "In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act."

Further, Becci's testimony reflects that the employer provided this group health plan to its employees and contributed to the same such as to qualify under section 8(j). The Arbitrator emphasizes Becci's testimony was never challenged, let alone rebutted. Therefore, the Arbitrator concludes Respondent has met its burden of proof that it is entitled to **credit under Section 8(j) for the $159,783.20** paid by its group health plan as well as credit for the contractual adjustments made under the same.

O. OTHER ISSUES – SECTION 7(f) BURIAL EXPENSES

The Arbitrator has already determined accident and causation, and the cause of death is related to same. The Arbitrator accordingly awards $8,000.00 for burial expenses pursuant to Section 7(f).

Robert M. Harris

Arbitrator Robert M. Harris

Dated: February 11, 2019

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

John Barickello

Petitioner,

20 IWCC0452

vs.

NO: 16 WC 32879

Engler, Meier & Justus, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, permanent disability and ripeness and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

I. FINDINGS OF FACT

A. Procedural History

The parties proceeded to a hearing pursuant to Section 19(b) of the Illinois Workers' Compensation Act (Act) on January 8, 2019. The disputed issues included whether Petitioner's undisputed accident was causally connected to his current condition of ill-being and whether Respondent was liable for certain medical bills, prospective medical treatment, and temporary total disability (TTD). Additionally, the parties noted stipulated credits due to Respondent. The Arbitrator's decision was issued on September 10, 2019. The Arbitrator found "[t]he disputed issues above **ARE NOT** ripe for resolution currently due to the pending Section 8(a) Petition concerning 09 WC 40196, presently before the Commission of the IWCC." (Emphasis in

original). Arb. Dec. at 2. In his conclusions of law, the Arbitrator found that all of the issues presented at the hearing, including causal connection, medical bills, prospective medical treatment, temporary total disability, and any credit due to Respondent were not ripe for resolution. In so concluding, he stated as follows:

> The Petitioner admitted to possessing 'open' Section 8(a) medical rights under the settlement contract governing this [sic] prior claim, 09 WC 40196. [] Furthermore, he acknowledged his attorney in the current case also represents his interests concerning 09 WC 40196, including presently pursuing a Petition for Section 8(a) medical rights before the IWCC. [] As noted above, the Petitioner has expressed an interest in securing the permanent implantation of the recommended spinal cord stimulator both to his physician and his attorney, who is advocating for his Section 8(a) Petition at the Commission level of the IWCC. []
>
> Simply put, it is evident to the Arbitrator the Petitioner is seeking the same medical remedy from two distinct sources at the same time and this medical remedy is NOT "ripe for resolution" in the current case (16 WC 32879). Separate awards from both the Arbitrator and Commission levels of the IWCC for medical under Section 8(a) only would result in confusion and further litigation. Instead, the Petitioner must exhaust his remedy option under 09 WC 40196 before turning to 16 WC 32879 for his desired spinal cord stimulator. If the Commission should decide the terms of settlement for 09 WC 40196 obligate the Respondent in that older claim to pay for the Petitioner's current spinal cord stimulator request, any such Section 8(a) request brought under 16 WC 32879 would be moot. Alternatively, if the Commission denies the pending Section 8(a) Petition, the issues of 16 WC 32879, including causal connection and prospective medical care, will have ripened sufficiently for resolution at the arbitration level of the IWCC.

Arb. Dec. at 6-7.

Petitioner filed his Petition for Review[1] on September 19, 2019 raising causal connection, medical bills, prospective medical treatment, and whether the "[i]ssues are ripe for Settlement[]" as issues on appeal. Both parties filed briefs with a central focus on the pendency of a section 8(a) petition filed by Petitioner against a different Respondent before another Commissioner concerning his settled claim against the prior employer in Case No. 09 WC 40196.

B. Background and Pre-Accident Medical Treatment

[1] Petitioner also raises whether the accident arose in the course of employment, but the Commission notes that the parties stipulated to a compensable accident at arbitration. Section 9030.40 of the Commission Rules provides that the request for hearing "shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case." 50 Ill. Adm. Code §9030.40. Representations made on the request for hearing are binding on the parties. *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1088 (2004).

Petitioner was employed by Respondent as a Laborer and had been so employed for three years prior to his undisputed accident on October 21, 2016. In his position, Petitioner carried drywall, did "stand-ups" in elevators, and loaded and pushed carts weighing up to 2000 pounds. Prior to his accident, Petitioner felt normal, which for him included minimal back problems due to a 2009 injury while working elsewhere.

In 2009, Petitioner suffered a low back injury while working for a different employer. He treated with Dr. Martin Herman of the Center of Brain and Spine Surgery and eventually required a lumbar fusion surgery on September 7, 2011. Subsequently, Petitioner underwent continuous low back as well as pain management treatment with Dr. Zaki Anwar of Pain Management Institute.

Petitioner testified that he had right leg complaints including numbness and tingling in his lower extremities in 2012. In 2013, Petitioner complained to Dr. Anwar of pain and a burning sensation in his right foot. Petitioner testified that, on February 25, 2013, Dr. Anwar recommended a lumbar spinal cord stimulator. As of February 2014, Petitioner complained of burning sensation in both legs, mostly on the right. On October 22, 2014, a trial dorsal column spinal cord stimulator was implanted.

By January 12, 2015, Dr. Anwar recommended permanent implantation of the spinal cord stimulator. Petitioner's lower extremity complaints continued, and in October 2015, Petitioner underwent a sciatic nerve block to the right side after complained of radiating pain into both hips. On November 25, 2015, Petitioner underwent bilateral lumbar facet joint injections from L3-S1, and again on January 18, 2016. In February 2016, Dr. Anwar diagnosed Petitioner with neuropathic pain in his legs.

The medical records reflect that Petitioner was evaluated by Dr. Anwar on August 17, 2016. At that time, Petitioner was periodically following up after two diagnostic and prognostic lumbar medial branch blocks at the facet joints at L3, L4, and L5 bilaterally performed on November 25, 2015. He reported decreased pain and reduction in symptoms of stiffness in the lower back as well as decreased numbness and tingling in both feet. Dr. Anwar noted "[Petitioner] continues to work as a drywall labor [sic] in construction and he has been performing activities in outdoor weather in extreme conditions." He assessed the 44-year old Petitioner with postlaminectomy back surgery syndrome and noted that he "had spinal cord stimulator trial which was done successfully with 90% reduction in same mostly in the bilateral feet. The patient would like to proceed with the spinal cord stimulator implant at some point as currently he is working and he is not willing to go through any time off from work."

Dr. Anwar also stated that Petitioner was responding very well to the diagnostic, prognostic, and therapeutic facet joint injection under fluoroscopy noting that radiofrequency neurolysis treatment would be suggested if he continued to get benefit from the treatment over the next four to eight weeks. He further noted "[h]owever, it is difficult to give the patient

significant benefit with his neuropathic pain, which is mostly described as a tingling and burning sensation in the lower extremities mostly in the feet, which is a constant issue with this patient's activity level and the patient would like to consider himself for a spinal cord stimulator in the future if that gets worse." Dr. Anwar renewed Petitioner's pain medications and imposed work restrictions of 20-pound lifting/carrying and pushing/pulling with no overtime. However, the accompanying progress note indicates that Petitioner was still carrying out his duties as a drywall laborer, even working outside in extreme conditions.

Petitioner returned to Dr. Anwar on October 3, 2016 reporting decreased pain and stiffness in the lower back. Petitioner also reported "decreased numbness and tingling in both feet. He continues to work as a drywall labor [sic] in construction and he has been performing activities in outdoor weather in extreme conditions." Dr. Anwar recited certain verbatim assessments in his plan for Petitioner's ongoing care with the addition of a medication and a recommendation for phenol neurolytic blocks. Petitioner was released from any physical restrictions, but Dr. Anwar maintained that Petitioner should not work overtime. He again noted that Petitioner continued to work as a drywall laborer for Respondent, including outside in extreme conditions.

C. Accident and Post-Accident Medical Treatment

Petitioner was then injured on October 21, 2016 while employed by Respondent. Petitioner was driving on Interstate 294 heading to a jobsite and, while driving his pickup truck, rolled over a semi-truck tire that had been left on the road. He then pulled over to the shoulder and was rear-ended while attempting to exit his vehicle. Petitioner felt pain through his back up to his neck along with stiffness.

Petitioner was taken by ambulance to North Shore University Hospital. He underwent X-rays that revealed no acute lumbar abnormality and minimal degenerative changes in thoracic spine.

Petitioner then returned to see Dr. Herman on October 27, 2016 reporting neck, thoracic and lumbar pain following a motor vehicle accident on October 21, 2016 when "driving north on 294 near willow road, and a truck tire was in road and hit his car and he was forced to pull over his pickup truck to shoulder and stopped, and when he was getting out of truck, he as rear ended by a car at 50 mph." Petitioner reported that he developed low back pain, mid-back pain, and neck pain that radiated to the back of the head and shoulders bilaterally. He also reported low back pain and left leg achiness, some right thigh numbness which was worse, and also left leg pain. Dr. Herman also noted that Petitioner had surgery approximately five years ago and he had been back to work for the past three years without difficulty delivering drywall. Dr. Herman diagnosed Petitioner with cervical disc disorder with radiculopathy and intervertebral disc degeneration in thoracolumbar region. He also ordered a cervical MRI, thoracic MRI, and lumbar CT scan.

On November 14, 2016, Petitioner returned to Dr. Anwar, his pain management doctor, for cervical and thoracic pain, as well as an aggravation of his lumbar pain. Petitioner reported pain in the neck area with associated tingling, mostly in the hand area, with pain radiating to the upper extremities. He also reported pain in the chest area, tightness in the middle part of the back, as well as pain in the lower part of his back that was aggravated and he experienced more pain going down to his right leg. Petitioner equated the pain level similarly to what he had in the past when he had the surgery, and that it was also aggravating his right leg. Dr. Anwar noted the mechanism of injury when Petitioner "was involved in a motor vehicle accident while he was on the job. [Petitioner] stated that it was a multi-car accident. His car was #2 in the row and he is not sure how many cars hit him from the back, but he was driving a Ford truck, which was totaled." Petitioner told Dr. Anwar about his emergency room treatment and "stated that based on his worsening headaches, back pain as well as worsening leg pain, he consulted his previous surgeon [Dr. Herman]…."

Dr. Anwar diagnosed Petitioner with cervicogenic headaches, occipital neuralgia, whiplash associated disorder with symptomatic cervical occipital cervicogenic headaches as well as cervical radiculitis with signs of tingling in both upper extremities, thoracic strain with paravertebral spasm. With regard to the low back, Dr. Anwar diagnosed an "[a]ggravation of pain which is intractable in nature in the lower part of the lumbar back, which is axial in nature with radiating pain to the buttocks mostly on the right side as well as radiating pain to the right side of the leg with noticeable tingling and burning sensation as well as weakness of the right side of the leg. The patient stated [th]at this pain is similar to what he had after the surgery. He thinks that his pain is aggravated in the right leg, which was present after the surgery and it was controlled over the years with different conservative treatments." He further diagnosed "symptomatic right lumbar radiculitis, which is a new onset after the auto accident and is aggravated by the injury." Dr. Anwar noted that Petitioner was off work waiting for diagnostic workup per Dr. Herman. He prescribed Norco, cyclobenzaprine, meloxicam, and a TENS unit until his next follow up visit at which time he wished to review Dr. Herman's report and the diagnostic films.

On November 16, 2016, Dr. Anwar performed bilateral cervical trigger point injections and neurolytic blocks. The following day, Petitioner underwent the diagnostic testing ordered by Dr. Herman. On November 17, 2016, a cervical MRI revealed mild retrolisthesis of C5 over C6 with degenerative changes, disc height loss and desiccation from C4-6. A lumbar CT revealed post-surgical changes from L4-S1 as well as right pedicle screw appears to extend laterally and beyond the superior endplate of L5. A thoracic MRI revealed mild degenerative changes.

On November 22, 2016, Petitioner presented to Dr. Herman for continued neck and mid-back pain, shoulder pain, and some numbness radiating to his thumbs/hands, worse with cervical extension. Dr. Herman reviewed the diagnostics and found a C5-6 herniated nucleus pulposus.

He prescribed physical therapy, stated injections were a possibility and discussed the option of surgery at C5-6. He placed Petitioner off work[2] until January 24, 2017.

On November 28, 2016, Petitioner saw Dr. Anwar with continued complaints of neck and thoracic pain with associated tingling in upper extremities, chest pain, middle and lower back pain, and lower extremity pain and symptoms. Petitioner was concerned about his lower back and was waiting to see Dr. Herman's recommendations. He was also asking for evaluation and further recommendations for his symptoms which were aggravated. Dr. Anwar agreed with Dr. Herman's physical therapy recommendation as well as cervical epidural treatment and a TENS unit for his cervical and thoracic areas. He also noted that Petitioner's aggravated lumbar pain radiating mostly to the right leg. Dr. Anwar again noted that Petitioner had aggravated pain in the right leg indicating that it had been controlled over the years with different conservative treatments. He then diagnosed Petitioner with symptomatic lumbar radiculitis, which he opined was a new onset after the auto accident and was aggravated by the injury. Dr. Anwar also placed Petitioner off work.

Petitioner continued to see Dr. Anwar for conservative treatments. On December 14, 2016, Petitioner's neck pain and upper extremity tingling continued and Dr. Anwar diagnosed cervical disc displacement, cervical radiculopathy, cervical strain and headaches and performed a cervical epidural injection at two levels. On January 9, 2017, Petitioner reported relief of cervical pain, numbness and tingling after the cervical injection, but reported increased pain down right leg. Dr. Anwar's treatment recommendation then included epidural injections from L4-S1.

D. Respondent's First Section 12 Examination and Report – Dr. Gleason

On January 10, 2017, Petitioner underwent a Section 12 examination at Respondent's request with Dr. Thomas Gleason. Dr. Gleason took a history from Petitioner noting "that on October 21, 2016, while at work, he hit a truck tire on the highway. As he pulled over to the side, he was rear ended by another vehicle." He noted that Petitioner had not returned to work since the accident and "does relate a prior lower back injury, while at work in 2009, having undergone a lumbar fusion in 2011 with relief. He returned to work in 2013 with no pain, other than some morning stiffness. He states he has not had any complaints or injuries to his neck or mid back prior to October 21, 2016. He has not had any subsequent injuries to his spine after October 21, 2016." Petitioner reported neck pain with numbness in both arms without improvement since the accident, mid back pain that improved and plateaued at that time, and low back pain without improvement since the accident.

Dr. Gleason reviewed various medical records following the October 21, 2016 accident including diagnostic studies from November 17, 2016 and January 10, 2017. Dr. Gleason examined Petitioner and found no objective physical findings opining that his subjective

[2] This note was not submitted into evidence as PX 1 page 17. However, both parties cite this off work note and fact in their briefs.

20IWCC0452

complaints outweighed objective findings and could not be confirmed. Dr. Gleason stated "[h]aving completed the examination process, in conjunction with review of records, the written reported [sic] dated January 10, 2017 is forwarded. The petitioner's description of the accident could be consistent with initial complaints, which could be consistent with a soft tissue type strain and or a temporary exacerbation of his pre-existing condition. It is further my opinion that the description of the accident and review of records, in conjunction with the examination process, is not consistent with his current complaints, being unrelated."

Dr. Gleason diagnosed Petitioner with findings as reflected in his review of the diagnostic studies of November 17, 2016 and with post-operative decompressive laminectomy at L4-S1 with posterior lateral fusion with internal fixation at those levels performed by Dr. Herman. Dr. Gleason opined Petitioner suffered a soft tissue strain or temporary aggravation of a preexisting condition, and that current condition was unrelated to the accident. He also opined that medical care was only reasonable through November 22, 2016 stating that "the treatment provided to petitioner related to his low back through approximately November 22, 2016, in other words, for a period of 4-6 weeks was reasonable and causally related to the reported accident of October 21, 2016. Any further additional or other treatment subsequent to this period of time would be unrelated and without causal relationship to the accident of October 21, 2016." Dr. Gleason believed that Petitioner had reached maximum medical improvement and was capable of returning to work full duty. He recommended home exercise, weight reduction and over-the-counter medication.

E. Continued Medical Treatment

In February and March of 2017, Petitioner continued to treat with Dr. Anwar for his cervical and lumbar spine conditions, including lumbar pain radiating down his right leg and burning and tingling in his feet. Cervical diagnostic and therapeutic treatment was recommended, along with L4-S1 injections if Petitioner's lumbar and leg pain did not improve. The medical records reflect that Petitioner continued to undergo treatment for his cervical and lumbar conditions with Dr. Anwar from April through August of 2017, during which time he remained off work.

In the interim, on June 1, 2017, Petitioner complained to Dr. Anwar of significant headaches and aggravation of lumbar pain with radiation into his left leg. On June 29, 2017, Petitioner complained of difficulty walking due to numbness in his feet. His back was hurting him "quite a bit at this point" and his pain was mostly in his buttocks and low back. He also has noticed some throbbing and stabbing pain in the right extremity, which is similar to what he had experienced after his prior surgery five years earlier. He indicated he was willing to implant the spinal cord stimulator now due to his worsening symptoms, which cannot be handled by his current medication. Dr. Anwar considered Petitioner a candidate for the stimulator based on the aggravation of his existing lower extremity pain.

On September 21, 2017, Petitioner complained of neck pain with associated headaches and shoulder pain bilaterally. Petitioner continued to show rigidity and spasticity in the trapezius and the splenius capitis muscles, limited cervical ROM with limited extension. He also had axial lumbar pain radiating mostly to the right buttocks, along with tingling and burning in the anterior right thigh. Dr. Anwar continued to diagnose symptomatic right lumbar radiculitis, which is a new onset after the auto accident and aggravated by the injury. The pain was gradually improving at this point. Dr. Anwar reiterated his agreement with Dr. Herman's physical therapy recommendation, along with prescribing therapeutic treatment from C4-6. If back and right leg pain worsened, Dr. Anwar would recommend a lumbar epidural injection from L4-S1.

In January of 2018, Petitioner still had cervical and thoracic pain. On January 9, 2018, Petitioner complained of low back pain with numbness in both lower extremities. Dr. Anwar continued to recommend a permanent spinal cord stimulator based on the aggravation of existing lower extremity pain from the accident.

On May 17, 2018, Petitioner had continued complaints of headaches, neck and low back pain with numbness in both hands and both lower extremities. Petitioner's lower extremity pain was similar to the pain he had after his prior lumbar fusion. Dr. Anwar again recommended the spinal cord stimulator and noted that the delay in approving therapy was worsening Petitioner's upper extremity symptoms. He continued to recommend diagnostic and therapeutic cervical epidural treatment.

F. Respondent's Second Section 12 Examination and Report – Dr. Gleason

On July 10, 2018, Petitioner underwent a second Section 12 exam with Dr. Gleason at Respondent's request. Petitioner reported neck and low back pain that was not any better since the injury. Dr. Gleason took additional history from Petitioner and noted that he had been supplied with additional records including July 10, 2018 diagnostics and records from Dr. Herman beginning on October 27, 2016 and from Dr. Anwar beginning on November 22, 2016. Dr. Gleason was asked to ask Petitioner a variety of questions relating to the spinal cord stimulator recommendation and his current work restrictions. Dr. Gleason opined that the recommendation for a spinal cord stimulator, which had been recommended prior to Petitioner's accident and which he had previously declined, was not indicated or warranted. He otherwise maintained his opinions from his initial report stating that Petitioner required no formal treatment related to the cervical thoracic or lumbar spine related to any injury of October 21, 2016.

G. Additional Information

Petitioner testified that, if awarded, he would have the stimulator implanted and would undergo injections and physical therapy for his cervical and thoracic spines. Petitioner testified that he received an advance payment from Respondent equal to 6% of a man totaling $20,430.30 for permanent disability. He also received an advance of $13,620.24 for temporary disability.

As part of a third-party settlement related to this claim, Petitioner agreed to a future credit of $6,666.67 which can be applied towards benefits awarded in the instant case.

II. CONCLUSIONS OF LAW

A. Ripeness Doctrine

As an initial matter, the Commission addresses the ripeness doctrine, which the Arbitrator reasoned formed a sufficient basis to decline to make a decision on the issues presented in this case. The Arbitrator noted that Petitioner admitted to possessing "open" section 8(a) medical rights under the settlement contract governing his prior claim in Case No. 09 WC 40196. He found it evident that Petitioner sought the same medical remedy from two distinct sources at the same time and reasoned that the prospective medical treatment sought in the case before him was not ripe for resolution. The Commission disagrees.

According to the ripeness doctrine, "Illinois courts may rule upon actual controversies only and are prohibited from entering judgments or orders which do not terminate the controversy, or some part thereof, giving rise to the proceeding." *Crawford v. City of Chi.*, 304 Ill. App. 3d 818, 822 (1999). When determining whether a case is ripe, the primary factors are the "fitness of the issues for judicial decision and the hardship to the parties if court consideration is withheld." *Id.* "A controversy is ripe when it has reached the point where the facts permit an intelligent and useful decision to be made." *People v. P.H.*, 145 Ill. 2d 209, 219 (1991).

In this case, the facts permit and require a decision to be made. Even where one of the involved body parts at issue might be the same, "the test is not whether [Petitioner] sustained a new or independent type of injury ***, but whether he suffered a second accident which caused further disability of a type which the law would recognize as compensable." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 99 Ill. 2d 487, 498 (1984). Similarly, "[r]ecovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. *Spector Freight System, Inc. v. Indus. Comm'n*, 93 Ill. 2d 507 (1983); *Darling v. Indus. Comm'n*, 176 Ill. App. 3d 186, 193 (1988) ("A causal connection between work duties and a condition may be established by a chain of events including petitioner's ability to perform duties before the date of the accident and inability to perform the same duties following that date.").

The issues presented, including the issue of whether a spinal cord stimulator is necessary and reasonable to treat Petitioner's current condition of ill-being as a result of this accident, are

20IWCC0452

all amenable to determination. That Petitioner has filed a separate Section 8(a) petition in which he may be able to recover medical benefits from a different, prior employer stemming from a settled matter based on a different accident does not render the questions before us premature, or prevent a determination whether Petitioner's accident on October 21, 2016 was a causative factor in the development of different, increased, or new medical conditions. The Commission has heard and disposed of cases in its over 100-year existence involving workers injured more than once to the same or overlapping body parts and involving questions of causal connection and liability among and between employers and insurers. There is no basis evident in this record on which the Commission should delay a determination on the issues presented involving these parties.

B. Causal Connection

Next, the Commission turns to the threshold issue in this case: whether Petitioner's undisputed accident while employed by this Respondent is causally connected to his current condition of ill-being. The Commission answers in the affirmative and reverses the decision of the Arbitrator.

To prevail, Petitioner must establish that some act or phase of his employment was a causative factor in his ensuing injuries. See *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro*, 207 Ill. 2d at 204-05. He must also establish that the claimed injury "was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Petitioner may do so by showing proof of prior good health and change immediately following and continuing after his injury. *Spector Freight System*, 93 Ill. 2d at 513; *Darling*, 176 Ill. App. 3d at 193.

The uncontroverted evidence in the record reflects that prior to his accident on October 21, 2016, Petitioner suffered from no cervical or thoracic condition of ill-being. Respondent stipulates as much. Petitioner had, however, suffered a low back injury in 2009 that required a two-level fusion performed on September 7, 2011. Petitioner underwent subsequent low back treatment and pain management as a result of that injury. While undergoing such treatment, Petitioner was hired by Respondent as a Laborer requiring him to carry drywall and load and push carts weighing up to 2000 pounds. Part of Petitioner's lumbar treatment prior to his accident included a successful trial implant of a dorsal column spinal cord stimulator on October 22, 2014. By January 12, 2015, Petitioner's pain management physician, Dr. Anwar, recommended permanent implantation.

Petitioner continued to work for Respondent and undergo regular pain management treatment with Dr. Anwar. Two months before his accident, on August 17, 2016, Petitioner saw Dr. Anwar after two lumbar medial branch blocks at the facet joints at L3, L4, and L5 had been

performed approximately nine months earlier. Dr. Anwar noted that Petitioner's trial spinal cord stimulator had, at that time, relieved 90% of Petitioner's symptoms. He apparently discussed that modality with Petitioner again, who declined permanent implantation because, while he wanted to proceed with it at some point, he was working and not willing to go through any time off from work. On October 3, 2016, three weeks before his accident, Petitioner reported that he continued to work as a drywall laborer. Dr. Anwar recited certain verbatim assessments in his plan for Petitioner's ongoing care with the addition of a medication and a recommendation for phenol neurolytic blocks. Petitioner remained working for Respondent restricted only from overtime, not activity, until his accident.

On October 21, 2016, Petitioner ran over a truck tire on a highway causing him to pull over on the shoulder and, while stopped and attempting to exit his vehicle, he was rear ended by another car at a high rate of speed. Petitioner was taken by ambulance to a local emergency room for care. The accident and need for emergency care are undisputed.

Petitioner then returned to see his orthopedic surgeon, Dr. Herman, for evaluation on October 27, 2016. He reported the mechanism of injury and increased or new low back pain, radicular symptoms into the legs, mid-back pain, and neck pain that radiated to the back of the head and shoulders bilaterally. Dr. Herman noted Petitioner's fusion surgery approximately five years before, and his ability to work without difficulty. Similarly, after the October 21, 2016 accident, Petitioner sought evaluation by his pain management physician, Dr. Anwar. He placed Petitioner off work after evaluating his post-accident condition opining that Petitioner's lumbar radiculitis condition was "new onset" and his condition was aggravated by the injury.

Respondent relies on the opinions of Dr. Gleason to refute causal connection between Petitioner's current conditions of ill-being and the accident subsequent to his first Section 12 examination on January 10, 2017. However, Dr. Gleason did not have any of Petitioner's medical records pre-dating the October 21, 2016 accident for his evaluation. Thus, specifically with regard to the lumbar spine, he was unable to assess whether objective medical evidence delineating Petitioner's pathology since the 2009 injury and thereafter had advanced as a result of the 2016 accident. In the absence of this critical information, Dr. Gleason cannot be said to have possessed all the information necessary to render informed opinions regarding Petitioner's lumbar spine. Notwithstanding, Dr. Gleason concluded that Petitioner suffered no more than soft tissue strains or the temporary aggravation of a preexisting condition despite acknowledging that Petitioner was able to work for Respondent full time for several years beforehand. The Commission is not persuaded by Dr. Gleason's opinions given the totality of this record.

Regarding Petitioner's cervical and thoracic conditions, the evidence establishes that Petitioner was asymptomatic in, and he did not undergo treatment for, these body parts prior to the accident. Respondent stipulates that there was no prior cervical or thoracic treatment for Petitioner. Subsequent to the high-speed motor vehicle accident, Dr. Anwar placed Petitioner off work completely and he consistently recommended cervical and thoracic treatment. Petitioner's complaints also remained consistent, with new or increased pain and symptoms, post-accident.

20IWCC0452

Regarding Petitioner's lumbar condition, there is no question that he had a pre-existing condition at the time that he was involved in the accident at work. However, the evidence establishes that his increased symptoms in the low back and radiating into his lower extremities were not merely temporarily aggravated as suggested by Dr. Gleason. Nor can Petitioner's increased symptoms be said to be the result of the natural progression of his pre-existing disease. The accident in 2016 caused increased symptomatology and pain that Petitioner could no longer tolerate prompting his physician to place him off work and Petitioner to no longer be able to avoid more invasive treatment. Indeed, Petitioner reported intractable pain which he equated to the levels that he felt over five years earlier after his two-level fusion surgery and which had since then been controlled with different conservative treatments to the exclusion of a permanent spinal cord stimulator.

Petitioner was the unwilling participant in a high-speed, rear end motor vehicle accident causing him to be transported by ambulance for emergency treatment. His low back and radicular symptoms during his employment with this Respondent did not prevent him from working. Petitioner also had no other conditions in any other body part that required treatment prior to the accident or that prevented him from performing his work. With regard to the lumbar spine, Petitioner's ongoing treatment for a post-2009 lumbar injury that had plateaued requiring ongoing pain management allowed him to work for Respondent until the date of his accident on October 21, 2016. Prior to the accident, Petitioner refused the permanent spinal cord stimulator implant because he did not want to miss work and he was physically able to work for Respondent while undergoing treatment with Dr. Anwar. There is no compelling evidence that, but for this accident, Petitioner could not have continued to work for Respondent or live without the need for the spinal cord stimulator for an indefinite period, or that he would require treatment to the cervical and thoracic spine. The clear and precipitating event causing or aggravating Petitioner's cervical, thoracic or lumbar conditions of ill-being was the accident on October 21, 2016. Thus, the Commission finds that Petitioner has established "prior good health and change immediately following and continuing after" his accident such that it was "*a* causative factor in the resulting condition of ill-being." See *Spector Freight System*, 93 Ill. 2d at 507; *Darling*, 176 Ill. App. 3d at 193; see also *Sisbro*, 207 Ill. 2d at 205.

Accordingly, the Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, reverses the decision, and hereby finds that Petitioner's current cervical, thoracic and lumbar conditions of ill-being are causally related to the accident on October 21, 2016.

C. Medical Bills

Having found that Petitioner's conditions of ill-being are causally related to the accident at work, the Commission awards Petitioner all reasonably necessary and related expenses regarding his cervical, thoracic, and lumbar spine treatment to be paid pursuant to §§8(a) and 8.2 of the Act. Additionally, the Commission finds that Respondent shall receive credit for expenses

20 IWCC0452

paid in the amount of $20,509.94 and may apply its Section 5(b) lien credit of $6,666.67 to the remaining outstanding amount. Respondent argues that the bill from Northmaine F.P.D. should be excluded, however there is documentation in the record of an ambulance charge in the amount of $702.50 that corresponds to the date of accident and corroborates Petitioner's testimony of being taken by ambulance to the hospital. This expense is included in Petitioner's award.

D. Prospective Medical Care

Having found Petitioner's conditions of ill-being are causally related to the accident at work, the Commission awards the prospective medical treatment recommended by Dr. Anwar and Dr. Herman including cervical physical therapy, a TENS unit for the cervical and thoracic areas, diagnostic and therapeutic cervical epidural treatment, and the permanent implantation of a spinal cord stimulator.

E. Temporary Total Disability

Lastly, the Commission addresses Petitioner's claim that he is entitled to temporary total disability benefits from October 26, 2016 through January 8, 2019. Petitioner argues that he is entitled to temporary disability benefits during this period. Respondent stipulates to Petitioner's entitlement to TTD only through January 24, 2017. Respondent argues that there are no work status reports taking Petitioner off work thereafter asserting that he is not entitled to temporary disability benefits subsequent to January 24, 2017.

The dispositive test for awarding TTD benefits is "whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). The time period of TTD is a question of fact for the Commission, and its decision should not be disturbed unless it is against the manifest weight of the evidence. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill.2d 107, 118-19 (1990).

The parties agree that Dr. Herman took Petitioner off work from November 22, 2016 through January 24, 2017, and Petitioner testified that he has not worked since the accident. The record also reflects that Petitioner was taken off work by Dr. Anwar on November 28, 2016 in relation to his cervical and thoracic symptomatology. Dr. Anwar's treatment notes reflect no diversion from this opinion since and reflect frequent and consistent reference to Petitioner being off work. Thus, the medical records establish that Petitioner's conditions of ill-being had not yet stabilized after his accident and rendered him unable to perform any of job duties to date.

Accordingly, the Commission hereby grants Petitioner's request and finds that Petitioner is entitled to temporary total disability benefits from October 26, 2016 through the arbitration date of January 8, 2019. The Commission further finds that Respondent has paid $44,212,75 combined for temporary disability benefits and permanent disability advance, for which it is owed credit.

20IWCC0452

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's cervical, thoracic and lumbar conditions are causally related to the instant accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to all reasonable and necessary medical expenses related to his cervical, lumbar and thoracic treatment, including any out-of-pocket expenses. Respondent shall receive credit for expenses paid in the amount of $20,509.94, and may apply its section 5(b) lien credit of $6,666.67 to the remaining outstanding amount.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective medical treatments recommended by Drs. Herman and Anwar, including cervical physical therapy, a TENS unit for the cervical and thoracic areas, diagnostic and therapeutic cervical epidural treatment, and the permanent implantation of a spinal cord stimulator.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to 115 weeks of temporary total disability benefits, with Respondent receiving credit in the amount of $44,212.75 for temporary disability and permanent disability advance paid.

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

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

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

Bond for 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: AUG 14 2020
O: 6/18/20
BNF/wde
045

Barbara N. Flores

Marc Parker

20IWCC0452

Dissent in Part & Concur in Part

I respectfully dissent in part from, and concur in part with, the Decision of the Majority. The Majority reversed the Decision of the Arbitrator who found that the issues presented in this claim were not ripe for adjudication because of a pending petition under §8(a) in a previous claim. The Majority held that a stipulated work-related motor vehicle accident on October 21, 2016 caused a condition of ill-being of his cervical spine and awarded him 115 weeks of TTD benefits, awarded all medical expenses incurred to date, and awarded prospective medical treatment recommended by Drs. Herman and Anwar, including implantation of a TENS unit. The majority also awarded Respondent credit for TTD and medical paid as well as an advanced payment of PPD representing loss of 6% of the MAW. I concur with the Decision of the Majority on the issues of causation to a current condition of ill-being of his cervical spine and credit for benefits paid. However, I dissent from the Decision of the Majority in its decision to adjudicate the other issues presented at arbitration.

Petitioner sustained a prior work-related injury to his lumbar spine in 2009. That resulted in settlement of a claim in the amount of $350,000.00 against another employer in 09 WC 40196 approved by the Commission on December 20, 2012. In addition, medical rights under §8(a) were left open. Petitioner is being represented by the same law firm in both claims.

Petitioner testified that a trial spinal cord stimulator was implanted on October 22, 2014 and that an implantation of a permanent stimulator was recommended prior to the instant accident. Petitioner also acknowledged that he had expressed his desire to have the stimulator permanently implanted prior to the instant accident, but he did not want to take the time off work at that time. Petitioner filed a petition under §8(a) in 09 WC 40196 in which he sought prospective medical treatment including implantation of the spinal cord stimulator.

The Arbitrator concluded that it was evident to him that "the Petitioner is seeking the same medical remedy from two distinct sources at the same time" and that remedy was not ripe in the instant claim. "Separate awards from both the Arbitrator and Commission levels of the IWCC for medical under Section 8(a) only would result in confusion and further litigation. Instead the Petitioner must exhaust his remedy option under 09 WC 40196 before turning to 16 WC 32879 for his desired spinal cord stimulator." I agree with the Arbitrator on this issue.

Petitioner argues that he must present this request under this claim because the employer in 09 WC 40196 has denied additional medical based on the intervening injury which is the subject of this claim. That is the very reason why Petitioner should pursue his prior §8(a) petition before receiving the §8(a) remedy in this claim. It would be under that auspice that the Commission should determine whether the need for the medical treatment sought was causally related to the prior accident or the instant accident. If the Commission finds that it was related to the prior accident the issue would be moot here. If the Commission determines that the need for the stimulator is not causally related to the 2009 accident, Petitioner would clearly be able to pursue the remedy in this claim. From the record before us, I do not believe the Commission has a sufficient basis to conclude that the need for the stimulator is casually related to the 2009 accident or the 2016 accident. Therefore, I would have affirmed the Decision of the Arbitrator that the issues of medical treatment, both current and prospective are not yet ripe for adjudication.

20 IWCC0452

For the reasons stated above, I concur with the Decision of the Majority on the issues of causation to a current condition of ill-being of his cervical spine and credit for benefits paid. However, I respectfully dissent from the Decision of the Majority in its decision to adjudicate the other issues presented at arbitration.

O-6/18/20
DLS/dw
46

Deborah L. Simpson

Deborah L. Simpson

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

20IWCC0452

BARICKELLO, JOHN Case# **16WC032879**

Employee/Petitioner

ENGLER MEIER & JUSTUS INC

Employer/Respondent

On 9/10/2019, 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 1.82% 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 & MACIARIELLO
DOMENIC C MACIARIELLO
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1454 THOMAS & ASSOCIATES
ERIC A BURGESON
300 S WACKER DR SUITE 2200
CHICAGO, IL 60606

20IWCC0452

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOHN BARICKELLO
Employee/Petitioner

v.

ENGLER, MEIER & JUSTUS, INC.
Employer/Respondent

Case # **16** WC **32879**

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 8, 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. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **OCTOBER 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.

In the year preceding the injury, Petitioner earned $**59,021.04**; the average weekly wage was $**1,135.02**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

ORDER

The disputed issues above **ARE NOT** ripe for resolution currently due to the pending Section 8(a) Petition concerning 09 WC 40196, presently before the Commission of the IWCC.

Also, in no instance shall this Arbitration Decision be a bar to subsequent hearing and determination of any of the issues discussed herein, an amount of medical benefits, or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

SEPTEMBER 9, 2019
Date

SEP 10 2019

JOHN BARICKELLO v. ENGLER, MEIER & JUSTUS, INC.

16 WC 32879

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on January 8, 2019. The issues in dispute were causal connection, medical bills, TTD benefits, Respondent's credit, and prospective medical. (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. (Transcript at 6 *and* Arbitrator's Exhibit (*hereinafter*, AX) 1).

FINDINGS OF FACT

Petitioner testified that he worked as a laborer for Respondent. (Transcript (*hereinafter*, T.) 12). Petitioner testified that he worked for Respondent for about three years prior to this accident. (T. 12). Petitioner testified that he previously injured his back in 2009 while working on a pipeline. (T. 13-14). Petitioner testified that he was treating for his low back 2013 which consisted of pain medication and injections. (T. 14). Petitioner was also prescribed a spinal cord stimulator prior to this accident. (T. 14). Petitioner had not scheduled the spinal cord stimulator implant prior to his October 21, 2016 accident. (T. 14).

Petitioner testified that on October 21, 2016, Petitioner was driving on Interstate 294 on his way to a jobsite. (T. 13). Two cars in front of him were swerving to avoid a semi tire. (T. 15). Petitioner hit the semi tire with his vehicle and pulled over to the shoulder. (T. 15-16). As Petitioner tried to exit his vehicle, another vehicle struck Petitioner's vehicle from behind. (T. 16). Petitioner admitted under cross examination that he was driving a pickup truck at the time of his motor vehicle accident. (T. 32).

Petitioner testified that immediately after the accident, he noticed pain throughout his whole back up into his neck. (T. 17). Petitioner was transported by ambulance to NorthShore Glenbrook Hospital. (T. 17). He testified that on October 27, 2016, he treated with Dr. Herman who ordered an MRI. (T. 18 *and* Petitioner's Exhibit 1). Petitioner testified that Dr. Herman was his prior surgeon who had performed a lumbar fusion on Petitioner in 2011. The records reflect

that, on March 28, 2011, Petitioner underwent a L4-S1 fusion performed by Dr. Herman. (Respondent's Exhibit 7 at 3-4).

Petitioner testified that he also followed up with Dr. Anwar who had been his prior pain management doctor. (T. 18-19). The records reflect that Petitioner treated with Dr. Anwar after his fusion in 2011 and continued treating with Dr. Anwar up to October 3, 2016, just weeks prior to his motor vehicle accident. (Respondent's Exhibit (*hereinafter,* RX) 7). The records reflect that on August 17, 2016, Petitioner followed up with Dr. Anwar who continued to recommend a spinal cord stimulator. (RX 7 at 127-128). On August 17, 2016, Dr. Anwar issued work restrictions of twenty pounds lifting, eight hours per day, forty hours per week and five days per week. (RX 7 at 129). On October 3, 2016, Dr. Anwar noted that Petitioner wanted to proceed with the lumbar spinal cord stimulator at some point, but he was currently working and not willing to take time off work. (RX 7 at 131). On October 3, 2016, Dr. Anwar issued work restrictions of eight hours per day, forty hours per week and five days per week. (RX 7 at 133).

Petitioner testified that he has been treating with Dr. Anwar monthly for his low back since his 2009 accident. (T. 19-20 *and* RX 7). Prior to the motor vehicle accident, Petitioner testified that he would have seen Dr. Anwar for his low back within a month prior to this accident. (T. 19 *and* RX 7). The records reflect that Petitioner saw Dr. Anwar on October 3, 2016, who again recommended a spinal cord stimulator just eighteen (18) days prior to this accident. (RX 7 at 131). Following this motor vehicle accident, Petitioner continued treating for the low back, but also started treating for cervical and thoracic complaints. (T. 20).

Petitioner testified that on November 16, 2016, he underwent trigger point injections for his cervical spine. (T. 20). However, the records reflect that Petitioner received lumbar injections on that date. (Petitioner's Exhibit (*hereinafter*, PX) 2 at 1). Petitioner testified that a cervical MRI revealed a herniated disk, a lumbar MRI remained unchanged from his prior accident, and a thoracic MRI did not show anything significant. (T. 21-22). The records reflect a November 16, 2016 cervical MRI that revealed moderate foraminal narrowing at C3-5 and moderate to severe bilateral neural foraminal narrowing at C5-6. (PX 1 at 9). The records reflect a November 16, 2016 thoracic MRI which revealed mild degenerative changes. (PX 1 at 10). The records reflect a November 16, 2016 lumbar MRI which revealed postsurgical changes with posterior instrumented fusion at L4-S1. (PX 1 at 11).

Petitioner testified that he was taken off work by one of his doctors in November and December of 2016 and he was receiving workers' compensation benefits. (T. 22). The records reflect that on November 22, 2016, Dr. Herman prescribed injections, physical therapy and took Petitioner off work until January 24, 2017. (PX 1 at 17). Dr. Herman also discussed the possibility of a cervical fusion but recommended attempting conservative treatment first. (PX 1 at 18). The records reflect that on November 14, 2016, Dr. Anwar completed a Work Status

form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 7). The records reflect that on November 28, 2016, Dr. Anwar completed a Work Status form that ***did*** take Petitioner off work. (PX 3 at 15). The records then reflect that on December 12, 2016, Dr. Anwar completed a Work Status form but again ***did not*** indicate whether Petitioner was off work. (PX 3 at 22).

Petitioner testified that in December of 2016, he received a cervical epidural steroid injection. (T. 22-23). The records reflect cervical injections on December 14, 2016. (PX 2 at 3). The records reflect that on January 9, 2017, Dr. Anwar again completed a Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 28).

Petitioner acknowledged he was examined on January 10, 2017 by Dr. Gleason for a Section 12 examination requested by Respondent. (T. 23 *and* RX 3). Dr. Gleason reviewed a November 17, 2016 MRI which he indicated revealed C4-6 spondylosis. (RX 3). Dr. Gleason reviewed a November 17, 2016 MRI which he indicated revealed moderate degenerative disc disease. (RX 3). Dr. Gleason reviewed a November 17, 2016 lumbar CT which he indicated revealed a L4-S1 fusion and internal fixation. (RX 3). Dr. Gleason did not find any objective findings on physical examination. (RX 3). Dr. Gleason found that Petitioner's subjective complaints outweighed the objective findings and could not be confirmed. (RX 3). Dr. Gleason found Petitioner capable working full duty with no restrictions. (RX 3). Dr. Gleason did not find Petitioner's current complaints to be causally related to the accident. He found treatment for four to six weeks after the accident to be reasonable and related. (RX 3). Dr. Gleason found Petitioner to be at MMI and not in need of further treatment. (RX 3).

Respondent paid TTD through January 24, 2017. (RX 1). On January 24, 2017, Respondent notified Petitioner that benefits were terminated based upon the IME. (RX 6). Respondent subsequently paid Petitioner a PPD advance of 6% PAW for $20,430.30 and a TTD advance of $13,620.24. (RX 1). Petitioner also settled his personal injury case and agreed that Respondent would have a Section 5(b) future credit of $6,666.67 to apply toward any benefits that might be awarded in this case (T. 37 *and* RX 5). Petitioner stipulated that Respondent is entitled to all of these credits (T. 6 and 37 *and* AX 1). Respondent also paid several medical bills. (RX 2). Petitioner has agreed that Respondent will receive credit for any bills previously paid. (T. 43).

Petitioner testified that he kept treating for his lumbar and cervical spine in February and March of 2017. (T. 23-24). Petitioner testified that he received a lumbar injection on February 22, 2017. (T. 24 *and* PX 2 at 6). Petitioner testified that from February to April of 2017, Petitioner was treating and kept off work by his doctors. However, the records reflect that on February 27, 2017, Dr. Anwar completed a Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 38). The records do not reflect any further work status reports or treating records for Dr. Herman after November 22, 2016. (RX 1). Petitioner

testified that his TTD ended on January 24, 2017. (T. 25 *and* RX 1). Petitioner testified that he started getting headaches and increased numbness in his arms. (T. 25). The records reflect that on March 27, 2017, Dr. Anwar completed a new Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 45).

Petitioner testified that in April of 2017, Dr. Anwar again recommended a lumbar spinal cord stimulator as he had done so prior to this accident. (T. 25-26). The records reflect that on April 10, 2017, Dr. Anwar completed one more Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 50). The records reflect that on April 27, 2017, Dr. Anwar completed another Work Status form but ***did not*** indicate whether Petitioner was off work (PX 3 at 57).

Petitioner testified that from June to August of 2017, Dr. Anwar continued to recommend the spinal cord stimulator. (T. 26). The records reflect that on July 27, 2017, Dr. Anwar completed yet another Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 67). Petitioner testified that he underwent a spinal cord stimulator trial in August of 2017. (T. 26-27). However, on cross examination, he admitted that the spinal cord stimulator trial was performed on October 22, 2014, two years prior to his motor vehicle accident. (T. 33 *and* RX 7 at 74-75). Petitioner testified that he was taken off work for his current accident. (T. 27). The records reflect that on August 24, 2017, Dr. Anwar completed an additional Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 75).

Petitioner testified that during the period from September through December of 2017, he was not receiving workers' compensation benefits and his medical bills were not being paid. (T. 27). Petitioner testified that from January to February of 2018, Dr. Anwar continued to recommend the spinal cord stimulator. (T. 28). Petitioner testified that during this period, he was not receiving physical therapy. (T. 28). He testified that from the period of March through April of 2018, he was following up with Dr. Anwar and he was prescribed Norco. (T. 28-29). Under cross examination, he admitted that he started taking Norco following his 2009 accident. (T. 33 and RX 7 at 113). The records reflect that on March 19, 2018, Dr. Anwar completed a Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 94). The records reflect that on April 19, 2018, Dr. Anwar again completed a Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 98). Furthermore, the records reflect that on May 17, 2018, Dr. Anwar completed yet another Work Status form but ***did not*** indicate whether Petitioner was off work. (PX 3 at 102).

On July 10, 2018, Petitioner underwent a second Section 12 examination with Dr. Gleason. (RX 4). Dr. Gleason noted that a spinal cord stimulator was currently in discussion which had been brought up previously prior to this accident related to Petitioner's 2009 injury, and Petition had declined the spinal cord stimulator. (RX 4). Petitioner gave a history that he

injured his low back at work in 2009 and treated with surgery with a little residual low back pain. (RX 4). Dr. Gleason found that Petitioner was capable of full duty work without restrictions. (RX 4). He did not recommend further treatment, opined the spinal cord stimulator was not warranted, and noted it was in fact related to Petitioner's prior 2009 accident. (RX 4).

Petitioner testified that his most recent medical appointment was on December 20, 2018 with Dr. Anwar. (T. 29). However, medical records and a work status report from this visit were not admitted into evidence. (*See generally* PX 3). Nonetheless, Petitioner testified that Dr. Anwar kept him off work, continued to recommend a spinal cord stimulator, and he now desired to move forward with the lumbar spinal cord stimulator, physical therapy, and cervical and thoracic injections (T. 29-30). Petitioner testified that he is aware of outstanding medical bills and had paid for some prescriptions out-of-pocket. (T. 31-32). However, Petitioner did not admit into evidence any written proof that he had paid for prescriptions. (*See generally* PX 4).

Under cross examination, Petitioner admitted that he injured his low back in 2009 which resulted in a prior workers' compensation settlement. (T. 34 *and* RX 8). Petitioner further admitted that he settled this case with open medical rights. (RX 8). The records reflect on September 25, 2012, a settlement was approved for claim 09 WC 40196 for $350,000.00, representing a wage differential settlement with open Section 8(a) medical rights for a September 17, 2009, back injury. (RX 8). Petitioner then admitted his attorney represented him on both in this case and that prior case. (T. 34 *and* RX8). Petitioner admitted that his attorney currently is seeking an award before the Illinois Workers' Compensation Commission (IWCC) for lumbar treatment including the spinal cord stimulator in that prior case.[1] (T. 34 *and* RX 8). Additionally, the records indicate that medical bills were being directed to Zurich for payment. (PX 4 at 34).

During cross examination, Petitioner admitted that on February 25, 2013, Dr. Anwar recommended a course of medical care that included a lumbar spinal cord stimulator (T. 34 *and* RX 7 at 50). Thereafter, Petitioner admitted that on October 22, 2014, Dr. Anwar implanted Petitioner with a trial dorsal column stimulator. (T. 34-35 *and* RX7 at 74). Petitioner admitted that subsequently, on January 12, 2015, Dr. Anwar recommended permanent implantation of a spinal cord stimulator. (T. 35 *and* RX 7 at 84). Petitioner also admitted that, most recently, on October 3, 2016, just a few weeks prior to his accident, he told Dr. Anwar that he wanted to proceed with the lumbar spinal cord stimulator, but he was currently working and did not want to miss time from that work. (T. 35 *and* RX 7 at 131).

[1] According to the IWCC's public records, the prior claim (09 WC 40196) is pending before Commissioner Maria Portella on a Section 8(a) Petition that next is to be heard on October 16, 2019 in New Lenox, Illinois.

Petitioner admitted that he had complaints of right leg pain prior to his motor vehicle accident. but testified that the pain increased following the motor vehicle accident. (T. 35, 38). Petitioner admitted under cross examination that on February 9, 2012, he complained to Dr. Anwar of increased exacerbation and numbness and tingling in the lower extremities, mostly in the left leg and worsening pain on the right side. (T. 35 *and* RX 7 at 27). Petitioner admitted that he then complained to Dr. Anwar on February 25, 2013 about pain and burning sensation in his right foot. (T. 35-36 *and* RX 7 at 49). Petitioner admitted that subsequently, on February 10, 2014, he complained to Dr. Anwar of a burning sensation in both legs mostly on the right leg. (T. 36 *and* RX 7 at 58). Petitioner admitted that on March 9, 2015, he made the same complaints to Dr. Anwar again. (T. 36 *and* RX 7 at 89). Petitioner admitted that on October 26, 2015, he underwent a sciatic nerve block on the right side. (T. 36 *and* RX 7 at 108). He admitted to complaining of radiating pain into both hips at that time. (T. 36 *and* RX 7 at 110). Petitioner admitted that on February 15, 2016, Dr. Anwar diagnosed Petitioner with neuropathic pain in his legs. (T. 36 *and* RX 7 at 117). Petitioner also admitted that he has not worked anywhere since his current accident and has no sources of income. (T. 36-37).

CONCLUSIONS OF LAW

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

The Petitioner admitted to possessing "open" Section 8(a) medical rights under the settlement contract governing this prior claim, 09 WC 40196. (T. at 34). Furthermore, he acknowledged his attorney in the current case also represents his interests concerning 09 WC 40196, including presently pursuing a Petition for Section 8(a) medical rights before the IWCC. (T. at 34). As noted above, the Petitioner has expressed an interest in securing the permanent implantation of the recommended spinal cord stimulator both to his physician and his attorney, who is advocating for his Section 8(a) Petition at the Commission level of the IWCC. (T. at 35).

Simply put, it is evident to the Arbitrator the Petitioner is seeking the same medical remedy from two distinct sources at the same time and this medical remedy is NOT "ripe for resolution" in the current case (16 WC 32879). Separate awards from both the Arbitrator and Commission levels of the IWCC for medical under Section 8(a) only would result in confusion and further litigation. Instead, the Petitioner must exhaust his remedy option under 09 WC 40196 before turning to 16 WC 32879 for his desired spinal cord stimulator. If the Commission should decide the terms of settlement for 09 WC 40196 obligate the Respondent in that older claim to pay for the Petitioner's current spinal cord stimulator request, any such Section 8(a)

request brought under 16 WC 32879 would be moot. Alternatively, if the Commission denies the pending Section 8(a) Petition, the issues of 16 WC 32879, including causal connection and prospective medical care, will have ripened sufficiently for resolution at the arbitration level of the IWCC.

Issue F: *Causal connection*

Based upon the foregoing, the issue of causal connection for 16 WC 32879 is not ripe for resolution at this time.

Issue J: *Medical bills*

Based upon the foregoing, the issue of medical bills for 16 WC 32879 is not ripe for resolution at this time.

Issue K: *Prospective medical care*

Based upon the foregoing, the issue of prospective medical care for 16 WC 32879 is not ripe for resolution at this time.

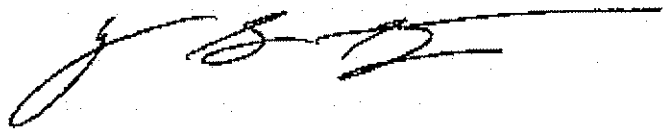
Issue L: *TTD*

Based upon the foregoing, including a finding that causal connection is not ripe for resolution at this time, the issue of TTD for 16 WC 32879 is not ripe for resolution at this time.

Issue N: *Respondent's credit*

Based upon the foregoing, the issue of Respondent's credit for 16 WC 32879 is not ripe for resolution at this time.

Also, in no instance shall this Arbitration Decision be a bar to subsequent hearing and determination of any of the issues discussed above, an amount of medical benefits, or compensation for a temporary or permanent disability, if any.



Signature of Arbitrator

September 9, 2019
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

Jerry Hanysz,

Petitioner,

vs. No. 16 WC 25396

C.R. Laurence Co., Inc.,

20IWCC0453

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary disability, permanent disability and deposition evidentiary rulings, and being advised of the facts and law, supplements the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 52-year-old laborer, testified that while unloading a truck on June 21, 2016, a steel beam he was holding slipped and struck him on the right side of his neck and right shoulder. Although he continued working, his neck pain worsened. On September 15, 2016, he underwent a C5-6 anterior cervical discectomy and fusion with Dr. Espinosa.

The Commission, after considering the entire record, affirms and adopts the Arbitrator's findings regarding causal connection, medical expenses, temporary disability and permanent disability.

In addition to those issues, however, Respondent raised an additional issue in its Petition for Review: the evidentiary rulings or lack thereof on objections made during the evidence deposition testimony of Dr. Thomas Stanley. However, Respondent, failed to present any argument on this issue in its brief. The Commission finds that Respondent has waived that issue.

Furthermore, it is presumed that the Industrial Commission considers only competent and proper evidence in reaching its decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 19, 2018, is hereby affirmed.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: AUG 17 2020
o-07/23/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AMENDED

HANYSZ, JERRY
Employee/Petitioner

Case# **16WC025396**

C R LAURENCE CO INC
Employer/Respondent

20IWCC0453

On 6/19/2018, 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 2.07% 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
EDWARD ADAM CZAPLA
1821 WALDEN OFFICE SQ #400
SCHAUMBURG, IL 60173

1596 MEACHUM BOYLE & TRAFMAN
DEBORAH A BENZING
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

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
AMENDED ARBITRATION DECISION

JERRY HANYSZ
Employee/Petitioner

v.

C.R. LAURENCE, CO. INC.
Employer/Respondent

Case # **16** WC **025396**

Consolidated cases: - - - -

20IWCC0453

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **3/6/18**. 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 **6/21/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,507.79**; the average weekly wage was **$605.92**.

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

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

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

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

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

ORDER

THE ARBITRATOR FINDS THAT PETITIONER **DID** SUSTAIN AN ACCIDENT ON JUNE 21, 2016 THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT WITH RESPONDENT.

THE ARBITRATOR FINDS THAT PETITIONER'S CERVICAL INJURIES **ARE** CAUSALLY RELATED TO THE JUNE 21, 2016 ACCIDENT AT WORK.

RESPONDENT **SHALL PAY** PETITIONER **TEMPORARY TOTAL DISABILITY BENEFITS** OF **$403.95**/WEEK FOR THE PERIOD OF **16 3/7** WEEKS, COMMENCING ON AUGUST 19, 2016 THROUGH DECEMBER 11, 2016, AS PROVIDED IN SECTION 8(A) OF THE ACT.

RESPONDENT **SHALL PAY** TO PETITIONER THE **OUTSTANDING MEDICAL EXPENSES FROM MACNEAL HOSPITAL**, AS IDENTIFIED IN PX. 5, PURSUANT TO SECTIONS 8(A) AND 8.2 OF THE ACT, D 8.2 OF THE ACT AND SUBJECT TO THE FEE SCHEDULE. RESPONDENT IS ENTITLED TO A CREDIT, PURSUANT TO SECTION 8(J) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER THE SUM OF **$363.55**/WEEK FOR A FURTHER PERIOD OF **125** WEEKS AS PROVIDED IN SECTION 8 (D) (2) OF THE ACT, BECAUSE THE INJURIES SUSTAINED CAUSED A **25%** LOSS OF A MAN AS A WHOLE.

RESPONDENT SHALL PAY PETITIONER COMPENSATION THAT HAS ACCRUED FROM JUNE 21, 2016 THROUGH MARCH 6, 2018, AND SHALL PAY THE REMAINDER OF THE AWARD, IF ANY, IN WEEKLY PAYMENTS. SEE THE RIDER ATTACHED HERETO AND MADE A PART HEREOF.

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

6/15/18
Date

JUN 19 2018

PROCEDURAL HISTORY

This matter was tried before Arbitrator Frank J. Soto on March 6, 2018. The disputed issues involve whether Petitioner sustained accidental injuries that arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for medical bills from MacNeal Hospital, whether Petitioner is entitled to TTD benefits from August 19, 2016 through December 11, 2016 and the nature and extent of Petitioner's injury. The Parties stipulate that Petitioner's average weekly wage, pursuant to section 10 of the Act, was $605.82 and that Respondent would be entitled to a credit, pursuant to Section 8(j), for the MacNeal Hospital medical bills, if Respondent is found to be liable for those bills. (Arb. Ex. #1).

FINDINGS OF FACT

Jerry Hanysz (hereinafter referred to as "Petitioner") testified that he worked for C.R. Laurence Company, Inc. (hereafter referred to as "Respondent") for fourteen years as a laborer. Petitioner worked full-time performing a variety of activities including work in shipping, receiving, loading and unloading trucks, repair work, janitorial work, making skids and work in the machine shop. Petitioner described his work as very physical and he was required to lift things weighing between 50 and 126 pounds. (Tr. pg. 15-19).

On June 21, 2016, Petitioner was 54 years old. Petitioner testified that on June 21, 2016, he injured his right shoulder and neck when a steel beam slipped out of his hand striking him on the right side of his neck and shoulder. (Tr. pg. 20). Petitioner testified that he grabbed the beam with his right and as he lifted the lifted the beam his hand slipped off the beam causing the beam to strike him on the right shoulder and neck area. (Tr. pg. 33). Petitioner reported feeling immediate and intense pain which felt as if someone stuck a butcher knife into his neck and right shoulder. (Tr. pg. 29).

Petitioner testified he immediately reported the injury to his supervisor, Dawn Meyer, was working nearby and asked her if he could go to the emergency room or to the clinic. (Tr. pg. 35). Petitioner testified that his supervisor ignored his request so he sought out Richard Carroll to report the injury. Petitioner was unable to locate Richard Carroll and he was subsequently directed to resume working by Dawn Meyer. (Tr. pg. 35-36).

Petitioner testified that after two days he did not hear anything so he advised Mike Kalisiak, the vice president of engineering, about his injury and whether Dawn Meyer had reported his injury. Petitioner was told that Dawn Meyer had not reported the injury. At that time, Petitioner asked Mike Kalisiak to complete an accident report and allow Petitioner to seek medical attention. (Tr. pg. 63). Petitioner testified that Mike Kalisiak did not respond and walked away. (Tr. pg. 37).

Petitioner testified, the same day or the next day, he attempted to report the accident to Richard Carroll who responded by mocking him by repletely saying "Do you want to go? Do you want to go?" (Tr. pg. 37). Petitioner told Richard Carroll that he wished to seek medical attention and Richard Carroll's response was to walk away. (Tr. pg. 38).

Petitioner testified that he subsequently called the office of his primary care physician, Dr. Matthew Hsieh, to schedule an appointment but was told his doctor was out of the office on vacation. (Tr. pg. 39). Petitioner decided to tell Dr. Espinosa about his injury on July 5, 2016, the date of a previously appointment on an unrelated matter. Petitioner testified that, on July 5, 2016, he reported to the injury to Dr. Espinosa who ordered an MRI.

Testimony of Dawn Meyer

Dawn Meyer testified that, on June 21, 2016, Petitioner reported being struck in the right shoulder by a steel bar. Dawn Meyer was nearby but did not witness the accident. Dawn Meyer testified that she turned around and saw the Petitioner was just standing, quiet and not working when she said to Petitioner "*Hey, come on. Let's go. Are you okay*?" (Tr. pg. 128). Dawn Meyer testified that the situation was weird. (Tr. pg. 128). Dawn Meyer acknowledged being told, by Petitioner, that a bar slipped out of Petitioner's hands and struck him on the right shoulder. (Tr. pg. 129). Ms. Meyer testified the accident occurred around ten (10) in the morning. (Tr. pgs. 135-136).

Dawn Meyer testified that, on the day of the injury, she reported the accident to Mike Kalisiak. Ms. Meyer testified that she told Mike Kalisiak how that accident had occurred and that the Petitioner did not want to go to urgent care. Dawn Meyer testified that when she reported the accident to Mike Kalisiak, he just walked away. (Tr. pg. 153). On cross examination, Dawn Meyer was asked "*so you have this one-way conversation where you told*

him one of the guys reports an injury at work and doesn't want to get medical treatment and Mike has nothing to say in response?" Dawn Meyer responded "*Well, he just nodded in agreement. I mean, he didn't really say anything, it's kind of how Mike is, thought*". (Tr. pg. 153). Dawn Meyer testified that Mike retired and no longer works for Respondent. (Tr. pg.153).

Dawn Meyer testified that she did not complete an accident report and that it was her responsibility to complete them. (Tr. pgs. 141-143). Dawn Meyer further testified that she had never completed an accident report prior to June of 2016. (Tr. pg. 143).

Testimony of Petitioner on Rebuttal

Petitioner was called as a rebuttal witness. Petitioner testified that if Dawn Meyer had completed an accident report he would have gone to MacNeal Hosptial for treatment. Petitioner testified that he "begged" Dawn Meyer five (5) or six (6) times to complete the accident report. Petitioner testified that he was not allowed to go for medical treatment and he was never provided the paperwork. (Tr. pgs. 161-163).

Medical Treatment

Petitioner testified that he continued working and he saw Dr. Espinosa on July 5, 2016. Dr. Espinosa's records state that "*...about 2 weeks ago injured his right neck and right shoulder lifting a pipe which broke and hit his shoulder. He may have also hit his neck.*" Dr. Espinosa noted Petitioner's medical history which included a L4-5 discectomy, hemorrhoidectomy, right knee arthroscopy in March of 2013, right knee surgery in 2004, and cystoscopy in 2016. (PX 1).

Dr. Espinosa noted the physical examination of the cervical spine revealed limitation to cervical range of motion with 50° forward flexion, 60° hypertension, 40° lateral flexion and 70° lateral rotation. Reflexes were absent throughout the upper and lower extremities. Dr. Espinosa further noted right shoulder pain without weakness and subjective decreased sensation in the entire right upper extremity in a nondermatomal distribution. (PX 1).

In his report, dated July 5, 2016, Dr. Espinosa wrote "*The concerning point of the examination was that he had what appeared to be Lhermitte sign when flexing the neck or pressing the head down. Therefore, he needs to have an MRI scan of the cervical spine to rule out cervical spinal stenosis and spinal cord compression although there is no acute*

manifestation of any spinal cord compression on today's examination." Dr. Espinosa proscribed Cymbalta and Robaxin for pain and muscle spasms. (PX 1).

On August 18, 2016, Petitioner was examined by his primary care physician, Dr. Matthew Hsieh. The history of present illness states *"R arm pain and numbness since around june 21 worsen after picked up post (ROW1) off cart with left hand and post slopped and hit R shoulder immediate pain."* After the examination, Dr. Hsieh took Petitioner off work. (PX 2).

On August 26, 2016, Petitioner returned to Dr. Espinosa to review the results of the MRI. Dr. Espinosa reviewed the MRI scan which showed spinal stenosis at 2 levels, C5-6 and, most severely, at C6-7. Dr. Espinosa found that Petitioner continued to have diminished sensation in the C4 through C8 dermatome together with allodynia or neuropathic pain. Dr. Espinosa also noted sever neck pain and reduced range of motion. (PX 2).

In his report dated August 26, 2016, Dr. Espinosa stated the MRI showed herniated discs at C5-6 and C6-7 which, he noted, explains the Lhermitte sign and severe neck pain and right arm symptoms. At that time Dr. Espinosa recommended surgery consisting of an anterior cervical discectomy at C5-6 and C6-7 with partial corpectomy at the C6-7 level and fusion with instrumentation using a bone graft, bone dowell at C6-7 and PEEK cage with bone grafting material at C5-6 and plate and screws. Surgery was scheduled on September 15, 2016 at MacNeal Hospital. (PX 2).

Petitioner underwent an anterior cervical microdiscectomy at C5-C6 and partial corpectomy at C6-C7 at MacNeal Hospital on September 15, 2016. The surgical report showed that the spinal cord was severely compressed and the herniated disc at C5-C6 was removed. A Bengal cage with uniplate and 3 screws was inserted and a partial corpectomy was done at C6-C7 with fusion and a bone dowel. Petitioner was discharged from the hospital the following day. (PX 4).

On September 21, 2016, Petitioner returned to Dr. Espinosa who noted that Petitioner's neck pain improved and the arm symptoms resolved. (PX.1). Petitioner returned to Dr. Espinosa, on November 1, 2016, reporting posterior neck pain that could be controlled with medication. Dr. Espinosa proscribed physical therapy and Norco. (PX 1). Petitioner attended physical therapy at Rehab Solutions Physical Therapy. (PX.3)

Petitioner testified he returned to work, full duty, without any restrictions, on December 12, 2016. Petitioner testified that he was still experiencing pain but he needed to work because he was out of money, had not worked since August 19, 2016 and had not received any benefits. Petitioner testified he requested that his primary care physician, Dr. Hsieh, released him to work without restrictions on December 9, 2016. Petitioner testified that he did not receive any benefits from August 19, 2016 through December 11, 2016. (Tr. pg. 60)

On February 3, 2017, Petitioner returned to Dr. Espinosa who noted that Petitioner continued to experience neck pain and he ordered a cervical CT scan to determine whether there was a non-union of the fusion or pseudoarthrosis. Petitioner returned to Dr. Espinosa on March 29, 2017 to review the CT scans. At that time, Petitioner reported returning to work performing manual labor and experiencing left sided neck pain. Dr. Espinosa reviewed the March 21, 2017 CT scan and noted the C6-7 fusion was not mature and there was also lucency around the screws in C6 and Ct, which was indictive of psuedoarthrosis. The CT scan also showed severe facet arthropathy at C3-4 and C4-5. Dr. Espinosa diagnosed cervical disc disorder at C6-7 level with myelopathy. (PX 1).

Petitioner returned to Dr. Espinosa on October 24, 2017 after having a new CT scan of the cervical spine. Dr. Espinosa found the CT scan showed the fusion had matured. Dr. Espinosa also found severe facet arthropathy at C2-3, C3-4, and C4-5 on the left side with spontaneous fusion of the facet joints at those levels, which Dr. Espinosa indicated, explains Petitioner's persistent severe neck pain. Dr. Espinosa did not recommend any additional treatment other than independent physical therapy exercises which Petitioner could do at home and anti-inflammatory medicine. (PX 1).

Prior medical treatment from Dr. Ho of Orthopaedic Associates of Riverside.

On April 9, 2012, Petitioner was seen by Dr. Ho of Orthopaedic Associates of Riverside. At that time, Petitioner reported chronic history of right shoulder and hand pain. Petitioner reported diffuse pain about his upper arm and wrist. Dr. Ho noted localized shoulder pain radiating down toward the wrists and motion of the shoulder and wrist causes discomfort. Dr. Ho assessed right upper extremity numbness and right shoulder pain and proscribed an EMG and MRI of the right shoulder. The MRI showed acromioclavicalar joint moderate arthropathy,

supraspinatus tendinopathy, subscapularis tendinopathy and possible undersurface fraying and infraspinatus tendinopathy. (RX 6).

Petitioner followed up with Dr. Ho on May 23, 2012. At that time, Dr. Ho indicated that he did not find anything focal and Petitioner's issues appear to be persistent discomfort resulting in chronic narcotic use. On October 8, 2014, Petitioner returned to Dr. Ho for his right knee and on November 20, 2015 for intermittent numbness radiating into his fingers. (RX 6).

On February 9, 2016, Petitioner underwent an EMG at the request of Drs. Hsieh and Amin. The EMG showed evidence of a mild ulnar neuropathy at the elbow of the purely neuropraxic tight on the right side. The EMG also noted a finding of a previous and resolved denervation and reinnervation (greater than 1 year old and resolved) in the C5-7 root distributions in the right upper extremity, previously felt to be related to a resolved brachial plexopathy on that side and there does not appear to be evidence of any significant recent or ongoing axonal degeneration. The EMG further notes that the findings would strongly suggest that the majority of the right upper extremity complaints are related to musculoskeletal dysfunction. (RX 6)

On February 10, 2016, returned to Dr. Ho who noted that Petitioner's wrist pain and finger pain hand improved after injections. Dr. Ho reviewed the EMG and his records indicate that Petitioner may have a potential root issue in the cervical spine causing his numbness and Dr. Ho recommended seeing a spine surgeon. (RX 6). Petitioner testified that he did not follow up with a spine surgeon and he continued to work full duty.

Section 12 Examination by Dr. Tom Stanley

Dr. Stanley prepared a report as the result of his independent medical examination performed on September 28, 2017. (The report was admitted into evidence in Dr. Espinosa's records, RX. 9, Pgs. 22-36).

Dr. Stanley testified that Petitioner reported to have been injured when a steel beam slipped out of Petitioner's hand striking his right shoulder. Dr. Stanley also testified that Petitioner had residual numbness in his hands and that Petitioner did not report having any prior neck problems.

Dr. Stanley opined that Petitioner had evidence of non-organic pain of either malingering or some sort of chronic myofascial pain syndrome not from a structural abnormality. Dr. Stanley testified there was evidence of symptom exaggeration but there was also objective evidence of an ongoing structural problem. (RX 7, pgs. 28-29). Regarding the structural abnormality, Dr. Stanley testified when there is a failure of the fusion and the individual takes opioids chronically, it is challenging to assess the pain levels and to test for pain.

Dr. Stanley further testified that Petitioner's positive Waddell's signs reinforces that there was some component of non-organic pain leading to Petitioner's neck pain. Dr. Stanley opined that based upon history of a blunt trauma to the Petitioner's right shoulder and complaints of shoulder pain, Petitioner sustained a right shoulder contusion which was causally related to his June 21, 2016 work injury. Dr. Waddell opined that Petitioner did not suffer an injury to his neck. (RX 7, pgs. 30, 31)

Dr. Stanley was also retained to perform an impairment rating calculation uing the AMA guides, 6th Addition. Dr. Stanley opined that Petitioner's diagnosis of a resolved shoulder contusion was a Class 0 injury with a default rating of 0% whole person impairment, without the allowance for modifications, with a final calculation of whole person impairment was 0% (RX pgs. 9-7).

On cross-examination, Dr. Stanley acknowledged that Petitioner was not complaining of neck pain on April 16, 2016, when he saw Dr. Hsieh, and the Petitioner did not seek medical treatment, for neck pain, from February of 2016 until after Petitioner's work injury of June 21, 2016. (RX 7, pg. 59). Dr. Stanley acknowledged immediately after the June 21, 2016 work injury, Petitioner complained of right-sided neck pain and that there was a temporal relationship between the onset of the right-sided neck pain and the Petitioner's work injury of June 21, 2016. (RX 7, Pgs. 66,77).

At trial, the Petitioner testified that he last saw Dr. Espinosa was on October 24, 2017. Petitioner testified he currently experiences neck pain if he keeps his neck steady, in one place, for too long. (Tr. pg. 58). Petitioner also testified that his neck has a reduced range of motion causing him to turn his whole body to look side-to-side while driving. (Tr. p. 59). Petitioner further testified that he continues to experience neck pain every day which affects him at work

and at home. (Tr. p. 62-65). Petitioner also testified that his shoulder bothers him when he sleeps. (Tr. p. 67).

The Arbitrator notes that Petitioner was confused regarding whether his medical treatment, prior to June 21, 2016, involved his neck or his shoulder, elbow or wrists. Other than the Petitioner's confusion regarding the scope of his past medical treatment, the Arbitrator finds the testimony of the Petitioner to be credible.

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, a claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002). 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 to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. vs. Industrial Commission*, 129 Ill. 2d, 52, 133 Ill. Dec. 454, 541 N. E. 2d. 665 (1989). Accidental injury need not be the sole causative factor, not even the primary causative factor, as long as it was a causative factor in resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Commission*, 37, Ill. 2d. 123, 227 N.E. 2d. 65 (1967

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

Where an accident occurs both within the course of and arises out of Petitioner's employment, said injury is compensable under the Act. *Horath v. Industrial Comm'n, 96 Ill.2d 349 (1983); Technical Tape Co. v. Industrial Comm'n*, 58 Ill.2d 226 (1974). "In the course of" speaks generally to whether the accident occurred at Petitioner's location of employment during Petitioner's work hours. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57-58 (1989). "Arising out of" addresses whether the accident originated due to "some risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury." *Material Service Corp. v. Industrial Comm'n*, 53 Ill.2d 429, 433 (1973).

The Arbitrator finds that Petitioner presented sufficient, credible evidence that Petitioner sustained an accidental injury that arose out of and in the course of his employment by Respondent on June 21, 2016 as set forth more fully below.

Petitioner testified he was injured at work on the morning of June 21, 2016 after a steel beam slipped out of his hands and struck him on the right shoulder and neck (Tr. pg. 20). Dawn Meyer, Petitioner's supervisor, testified that the accident occurred around ten (10) in the morning and she turned around and saw the Petitioner was just standing, quiet and not working. At that time, Dawn Meyer said to the Petitioner "*Hey, come on. Let's go. Are you okay?*" (Tr. pg. 128). Dawn Meyer acknowledged being told, by Petitioner, that a bar slipped out of Petitioner's hands and struck him on the right shoulder. And that she reported the accident to Mike Kalisiak. The Arbitrator finds the testimony of Dawn Meyer supports the Petitioner's testimony and is consistent with the medical histories Petitioner provided.

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

In preexisting conditions cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been casually-connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill2d 30, 36-37. When a workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n*, 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec 70, 797 N.E.2d 665 (2003). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d, 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). When a chain of

events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *Shafer v. Illinois Worker's Compensation Comm'n,* 2011 IL App. (4th) 100505WC. The chain-of-events principles have been applied where an accident is claimed to have aggravated a preexisting condition. *See Schroeder v. Illinois Worker's compensation Comm'n.*, 2017 IL App. (4th) 160192WC.

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner's cervical condition is causally related to his work accident of June 21, 2016, as set forth more fully below.

Prior to his work accident of June 21, 2016, Petitioner was working full time/full duty performing a physically demanding job as a laborer for Respondent. Petitioner was not under any type of active medical care any cervical condition. After the work accident, Dr. Espinoza noted that Petitioner had restricted range of motion in the cervical spine with a positive Lhermitte sign and, after reviewing the MRI, Dr. Espinoza diagnosed herniated discs at C5-C6 and C6-7 which, Dr. Espinoza, noted explained the positive Lhermitte sign and the severe neck pain and right arm symptoms. (PX 1). The surgical report showed that Petitioner's spinal cord was severely compressed at the C5-C6 level. (PX 4).

Petitioner testified that he was in extreme pain immediately after the injury and he wanted to seek medical attention. Petitioner attempted to secure approval from Respondent but he was unable to secure approval. Dawn Meyer's testified that Petitioner reported the injury but she did not complete an accident report. Dawn Meyer's acknowledged completing accident reports is part of her job duties. Petitioner testified that he also tried to obtain approval to obtain medical treatment from Mike Kalisiak and Richard Carroll. Petitioner testified that Mike Kalisiak ignored Petitioner and walked away after requesting approval to seek medical care. The Arbitrator finds that Petitioner's testimony regarding his conversation to be similar to Dawn Meyer's conversation with Mike Kalisiak, when he walked away from Dawn Meyer after being advised of the accident. Dawn Meyer testified "*he didn't really say anything. It's kind of how Mike is*" (TR. pg. 152, 153). Respondent did not complete the accident report until after Petitioner sought treatment on his own and presenting the work restrictions.

Petitioner treated with Dr. Hsieh and Dr. Espinoza who both examined Petitioner before and after the June 21, 2016 accident. On August 18, 2016, Petitioner was examined by his primary care physician, Dr. Matthew Hsieh. The history of present illness states *"R arm pain and numbness since around june 21 worsen after picked up post (ROW1) off cart with left hand and post slopped and hit R shoulder immediate pain." (PX 2).* On July 5, 2016, Dr. Espinosa wrote "*The concerning point of the examination was that he had what appeared to be Lhermitte sign when flexing the neck or pressing the head down. Therefore, he needs to have an MRI scan of the cervical spine to rule out cervical spinal stenosis and spinal cord compression although there is no acute manifestation of any spinal cord compression on today's examination.*" (PX 2).

Prior to his work accident of June 21, 2016, Petitioner was experiencing problems with his right shoulder and wrists. On April 9, 2012, Dr. Ho noted localized pain in the shoulder radiating into the wrists. Dr. Ho assessed right upper extremity numbness and right shoulder pain and proscribed an EMG and MRI of the right shoulder. The MRI showed acromioclavicalar joint moderate arthropathy, supraspinatus tendinopathy, subscapularis tendinopathy with possible undersurface fraying and infraspinatus tendinopathy. The EMG, taken on February 9, 2016, showed evidence of a mild ulnar neuropathy at the elbow of the purely neuropraxic tight on the right side. The EMG also noted a a previous and resolved denervation and reinnervation (greater than 1 year old and resolved) in the C5-7 root distributions in the right upper extremity, previously felt to be related to a resolved brachial plexopathy on that side. The EMG report states that there no evidence of significant recent or ongoing axonal degeneration. The EMG suggested right upper extremity complaints that could be related to musculoskeletal dysfunction. (RX 6)

The Arbitrator further finds that Petitioner was able to work and was in relative good health prior to his work accident of June 21, 2016 which resulted in a disability sufficient to prove a causal nexus between the accident and Petitioner's disability. *See Schroeder v. Ill. Worker's Compensation Comm'n,* 2017 IL App. (4th) 160192 WC. In *Schroeder*, the Court reasoned that when there is some preexisting condition with a separate cause, it is not relevant as long as the accident at issue was a cause of the claimant's current condition of ill being. *Id. at 17.* The claimant in *Schroeder* had a preexisting condition and was experiencing similar pain

complaints before and after a work accident but after the accident. *Id.* After the accident, the claimant's condition deteriorated such that the claimant was unable to continue working as a truck driver and the Court found that it was reasonable infer the work accident aggravated or accelerated the condition. *Id. at 19.*

The Arbitrator finds that the delay being taken off work, after the June 21, 2016 accident, was due to Respondent's failure to complete an accident report and approve Petitioner's request for medical treatment. After Petitioner secured medical treatment, on his own, Petitioner was taken off work and surgery was scheduled within a month.

The Arbitrator did not find the testimony of Dr. Stanley persuasive. Dr. Stanley, who has been board certified as an orthopedic surgeon since 2012, opined that Petitioner sustained only a right shoulder contusion as a result of the June 21, 2016 injury at work because the beam struck only stuck Petitioner on the right shoulder. Petitioner testified that the beam struck him on the right shoulder and neck. In his July 5, 2016, report, Dr. Espinosa, stated "*...injured his right neck and right shoulder lifting pipe which broke and hit his shoulder. He may have also hit his neck*". (PX2). Dr. Stanley did not rule out that a beam striking the right shoulder and neck area could have cause, aggravated or accelerated Petitioner's current condition. However, on cross examination, Dr. Stanley testified as follows:

> Q. My question was, Dr. Espinosa reflects on the first visit on July 5, 2016 that the steel pipe struck him in his neck.
>
> A. It said it broke and hit his shoulder. It may have also hit his neck.
>
> Q. Now isn't a steel beam striking a gentlemen's neck a competent cause of a neck injury?
>
> A. A steel pipe hitting someone's neck could cause an injury.
>
> Q. Mr. Hanysz said a steel beam struck me on the right side of my neck and I'm asking you, isn't that a competent cause of the mechanism of injury to the cervical spine?
>
> A. Blunt trauma to the cervical spine can cause a cervical spine injury regardless of whether or not it is a steel beam or a steel pipe.
>
> (RX.7 P.47)
>
> Q. And if the steel beam struck him on the right side of the neck, that would be a competent cause of a neck injury, correct?
>
> A. It could.
>
> (RX.7, pg. 48)

Q. Now there is a temporal relationship between the onset of his cervical spine symptoms and the June 21, 2016 trauma at work?

A. Correct.

(RX.7 P.61)

Q. Immediately following the June 21, 2016 injury at work, Mr. Hanysz does complain of right-sided neck pain, correct?

A. Yes.

(RX 7. P. 65)

Q. There is a temporal relationship between the onset of the right-sided neck pain and the work injury of June 21, 2016, correct?

A. Yes.

(RX.7 P.66)

Q. Now, with regard to the trauma that he sustained on June 21, 2016, that would be a proximate cause of his complaints of neck pain following that incident, correct?

A. Yes.

(RX.7 P.74-54)

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

Respondent disputed liability for the medical expenses based upon causation. As stated above, the Arbitrator finds that Petitioner's cervical injury is causally connected to his work injury of June 21, 2016. Respondent did not proffer any evidence disputing the reasonableness or necessity of the medical treatment and bills. Therefore, the Arbitrator finds that the medical services provided by MacNeal Hospital including the cervical fusion surgery were reasonable and necessary medical treatment. Therefore, the Arbitrator finds that Respondent shall pay to Petitioner the medical services provided by MacNeal Hospital identified in PX 5, pursuant to Section 8.2 of the Act and the Illinois Medical Fee Schedule. The Parties stipulated that Respondent is entitled to a credit, pursuant to Section 8(j) if any medical expenses are awarded. (Arb. Ex. #1).

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

Petitioner seeks temporary total disability benefits (TTD) from August 19, 2016 through December 11, 2016. (Arb. Ex. #1). 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 Comm'n, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 271, 337 Ill. Dec. 707 (2010).* Once an injured employee's physical condition stabilizes, he is no longer eligible for TTD benefits. *Archer Daniels, 138 Ill.2d at 118, 561N.E.2d at 627.* The duration of TTD is controlled by the claimant's ability to work and his continuation in the healing process. *City of Granite City v. Industrial Comm'n, 279 Ill. App. 3d 087,1090, 666 N.E.2d 827, 828, 217 Ill.Dec. 158 (1996).*

Petitioner was taken off work by Dr. Hsieh, on August 19, 2016 after Dr. Espinosa recommended surgery. Petitioner underwent surgery on September 15, 2016 and returned to work on December 12, 2016. The Arbitrator finds that Petitioner's condition stablished at the time Dr. Hsieh released Petitioner back to work on December 11, 2016. Therefore, the Arbitrator further finds that Petitioner is entitled to Temporary Total Disability benefits of $403.95/week for 16 3/7 weeks, commencing on August 19, 2016 through December 11, 2016.

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

When making the determination of permanent partial disability as related to Petitioner's injuries, the Arbitrator is to address five factors, pursuant to Section 8.1b(b) of the Workers' Compensation Act: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records."

With respect to Subsection (i) of §8.1b(b), the Arbitrator notes that Respondent obtained an AMA impairment rating from Dr. Stanley who diagnosed Petitioner with a shoulder contusion and a 0% impairment rating. (RX.7, pg. 33). In light of the Arbitrator's finding of a causal connection between Petitioner's cervical injuries and the June 21, 2016 accident at work, the Arbitrator gives this factor little weight.

With regard to Subsection (ii) of §8.1b(b), the employee's occupation is physically demanding. Petitioner was able to return to work without restrictions. Petitioner did not receive an FCE. Petitioner testified that he returned to work at his request because he needed money. Petitioner has continued working but experiences daily neck pain while trying to perform his work duties. The Arbitrator gives this factor some weight.

With regard to Subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 52 years old at the time of the accident. It is unlikely Petitioner's condition will improve, due to his age, the fusion at C5-6 and C6-7 levels, severe facet arthropathy at C2-3, C3-4, and C4-5 on the left side with spontaneous fusion of the facet joints at three levels. Given the remaining years of work expectancy, the Arbitrator gives this factor significant weight.

With regard to Subsection (iv) of §8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that Petitioner requested a full duty release to return to work at the request of Petitioner. Although Petitioner continues to work full duty as a laborer, he experiences neck pain on a daily basis and given his age and significant medical history, it could be difficult for Petitioner to secure subsequent employment. Consequently, the Arbitrator gives this factor some weight.

With regard to Subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Dr. Espinoza recommended surgery immediately upon reviewing the cervical MRI study which revealed herniated discs at C5-C6 and C6-C7 with spinal cord compression. Dr. Espinoza performed an anterior cervical microdiscectomy at C5-C6 with plate and 3 screws. There was a significant disc herniation and the spinal cord was severely compressed. (PX.4). Dr. Espinoza noted, the last time Petitioner was examined, the CT scan of the cervical spine revealed sever facet arthopathy at C2-3, C3-4 and C4-5 on the left side with spontaneous fusion of the facet joints at all three levels. Dr. Espinoza said explains Petitioner's persistent severe neck pain. (PX 1).

Petitioner testified without contradiction that he experiences neck pain and stiffness daily. (Tr. pg. 64). Petitioner also testified that he has limited range of motion in the neck that makes it harder for him to drive. (Tr. pgs. 58,59). Petitioner testified that he experiences pain performing when he puts dishes into overhead cabinets or cleans his aquarium. (Tr. pgs. 64, 65). The

20IWCC0453

Arbitrator gives this factor significant weight in determining the award for permanent partial disability.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the person as whole pursuant to §8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM MESQUITA,

Petitioner,

vs. NO: 15WC 7877

MCMASTER-CARR,

20 IWCC0454

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2020, 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.

20IWCC0454

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,800.00. 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: AUG 17 2020

Marc Parker

Barbara Flores

Deborah Simpson

d080620
MP/jrc
068

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MESQUITA, WILLIAM
Employee/Petitioner

Case# **15WC007877**

16WC029541

McMASTER CARR
Employer/Respondent

20IWCC0454

On 1/13/2020, 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.

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

0975 BARBER LAW OFFICES LLC
SCOTT BARBER
1834 WALDEN OFFICE SQ STE 500
SCHAUMBURG, IL 60173

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

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
NATURE AND EXTENT ONLY

William Mesquita
Employee/Petitioner

v.

McMaster Carr
Employer/Respondent

Case # **15** WC **7877**

Consolidated cases: **16 WC 29541**

20IWCC0454

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 22,2019**. By stipulation, the parties agree:

On the date of accident, **September 23, 2014**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**46,046.00**, and the average weekly wage was $**855.50**.

At the time of injury, Petitioner was **39** years of age, ***single*** with **one** dependent children.

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

Respondent shall be given a credit of $**10,288.81** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,288.81**.

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

ORDER

Respondent shall pay Petitioner the sum of **$531.30**/week for a further period of **61.50** weeks, as provided in Section **8 (e) 9** of the Act, because the injuries sustained caused **30% loss of use of the left hand**.

Respondent shall pay Petitioner compensation that has accrued from **April 9, 2016** through **present** and shall pay the remainder of the award, if any, in weekly payments.

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

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

Christine M Day

Signature of Arbitrator

January 10, 2020

Date

JAN 13 2020

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM MESQUITA,

Petitioner,

vs. NO: 16WC 29541

MCMASTER-CARR,

Respondent.

20IWCC0455

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and 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 January 13, 2020, 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.

20IWCC0455

Bond for 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: AUG 17 2020

d080620
MP/jrc
068

Marc Parker

Barbara Flores

Deborah Simpson

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

William Mesquita
Employee/Petitioner

v.

McMaster Carr
Employer/Respondent

Case # **16** WC **29541**

Consolidated cases: **15 WC 7877**

20IWCC0455

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 **August 22, 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** 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 **May 26, 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 **$51,625.00**; the average weekly wage was **$992.79**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **1** dependent children.

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

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

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

Respondent shall be given a credit of **$0** for TTD/maintenance, and $**8,509.63** for other benefits, for a total credit of $**8,509.63.**

Respondent is entitled to a credit of **$10,569.76** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Temporary total disability benefits from September 1, 2016 through Mach 21, 2017, or 28-6/7 weeks at the rate of $661.86 per week, with credit to be given for the salary continuation of $8,509.63 and $10,569.76 payments made pursuant to §8 j.

Medical Benefits

Respondent shall pay medical bills totaling $88,692.11, pursuant to the fee schedule; §8 and §8.2 of the Act, with credit to be given for any payments directly by respondent or through the group insurance pursuant to §8 j.

Permanent Disability

Respondent shall pay Petitioner the sum of $**595.67**/week for a period of **75** weeks, as provided in Section **8 (d) 2** of the Act, because the injuries sustained caused **15% loss of use of person as a whole.**

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

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

Christine M Ory

Signature of Arbitrator

January 10, 2020

Date

ICArbDec p. 2

JAN 13 2020

20IWCC0455

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Mesquita	)	
Petitioner,	)	
vs.	)	**No. 15 WC 7877 & 16 WC 29541**
McMaster Carr	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Wheaton on August 22, 2019. The parties agreed that on September 23, 2014 and May 26, 2016 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and 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 and petitioner gave notice to respondent of the accident within the time limits stated in the Act. The parties agree petitioner earned $46,046.00 in the year predating the September 23, 2014 accident and his average weekly wage, calculated pursuant to §10 of the Act, was $885.50; and that he earned $51,625.08 in the year predating the May 26, 2016 accident and his average weekly wage, calculated pursuant to §10 of the Act, is $992.79.

At issue in in this hearing was as follows:

In case 15 WC 7877 for to the September 23, 2014 accident:

1. The nature and extent of petitioner's injury only.

In case 16 WC 29541 for the May 26, 2016 accident:

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 due temporary total disability benefits.
4. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

Petitioner testified he has been employed by respondent for over seven years. On September 23, 2014 petitioner was working on a rotational basis scanning on a scanning table. Petitioner scanned tubes that contained orders which had been filled by others and placed on the scanning table. After scanning, petitioner put them off to the side so that he could place them in pallets going to different locations. He lifted hundreds of tubes made of card board that weighed from a couple of pounds up to eighty pounds. The tubes were three foot to eight foot in length.

On September 23, 2014, as petitioner was picking up the tubes he felt a pop in his wrist. He made a comment to the effect of "ouch" and kept working as it was a very busy time of day. He eventually came under the care of Dr. Metz of Core Orthopaedics. He had an arthrogram on December 22, 2014; surgery was performed on January 22, 2015 to his left wrist. He underwent physical and occupational therapy. He was examined by doctors at Midwest Orthopaedics at Rush

He received pre-surgical clearance by Dr. Rittman. He returned to work for respondent.

He had slight pain every now and then. He was advised to avoid repetitive movement of his left-dominant hand. He notices pain with weather change and can't perform push-ups.

On May 26, 2016, petitioner was leaning down at ground level to put a box in a location and felt a strong pinch in his lower back. He could not get up so he radioed a supervisor for help. This occurred when he was working as a stock keeper, which required him to remove items from the moving conveyor belt to the static conveyor belt. He had to manipulate the items into various locations. The standard he had to meet was 70 put-aways in an hour. The box he was pushing inside the shelf when he hurt his back weighed 25 pounds.

He reported the injury and then went to Midwest Orthopedics at Rush Occupational Clinic. He also received treatment from a chiropractor and then went to Core Orthopedics and underwent a micro-discectomy on October 12, 2016. He received physical therapy at ATI prescribed by Dr. Drake. He obtained a pre-surgical clearance by Dr. Rittmann for this surgery also.

He continues to have good days and bad days. He returned to work after surgery and physical therapy. He has not, however, consistently made the 70 picks since he returned to work after the surgery.

On cross-examination, petitioner confirmed he had been employed by respondent since June, 2012. Prior to that, he served in the Brazilian Army. He was in the U S Army Reserves from 2009 to 2017; he was required to meet monthly over weekends and participate in physical activities. However, at the time of his back injury he was in the IRR, which is the reserve of the Army Reserves; placing him on hiatus status.

He confirmed he was working in the scanning department when he hurt his wrist and was working as a bin stock keeper when he hurt his back.

Petitioner reported he hurt his back on April 14, 2016; he completed a form, but received no treatment. On May 26, 2016, he confirmed he injured his back and went for treatment at Rush Orthopedic Occupational Clinic. He was seen again on May 31, June 3, and June 10, 2016. He was released to return to work at his regular position.

Petitioner confirmed he was seen by a chiropractor after the April, 2016 incident. He also confirmed he saw the chiropractor on May 27, 2016. He confirmed he saw Dr. Drake at Core Orthopedics on July 26, 2016.

He confirmed he saw Dr. Carroll at respondent's request for his wrist injury on June 20, 2016. He testified that between June 10, 2016 and July 26, 2016, he iced his back and took three Tylenol or Ibuprofen per day to help his back pain. He reportedly did not outside activities at all during this period.

Petitioner testified that although he was in the army reserves in 2016, he was listed as reserve of the reserves so he did not participate in any drills.

Petitioner confirmed on January 7, 2019 he went off work for other reasons.

Core Orthopedics Records (PX.1)

Petitioner was first seen by Dr. Robert Metz on December 5, 2014 for a sprain/strain of his left-dominant hand. Petitioner returned on December 29, 2014; arthroscopic surgery to inspect scapholunate ligament and TCC of the left hand was proposed.

Petitioner underwent surgery on January 22, 2015 for left wrist Geissler grade III scapholunate ligament tear which included arthroscopic capsular debridement, scapholunate ligament thermal ligamentorrhaphy and percutaneous scapholunate ligament pin fixation.

Petitioner followed up on March 4, 2015. He was seen on April 6, 2015, May 15, 2015, June 15, 2015, July 28, 2015, September 10, 2015, and January 4, 2016. He received physical

therapy from April 13, 2015 to October 13, 2015 and underwent a functional capacity evaluation on December 28, 2015. On January 4, 2016 he was released to return to work with restrictions to avoid repetitive activities.

Midwest Orthopaedics at Rush Records (PX.2 & PX.3)

Petitioner was seen on by Dr. Richard Rodarte for a left wrist sprain on October 1, 2014, October 8, 2014 and October 17, 2014, when he was referred to hand specialist, Dr. Cohen.

Petitioner was evaluated by Dr. Mark Cohen on October 29, 2014 for left wrist pain.

Amita Health Medical Group Records (PX.4)

Petitioner obtained his pre-surgical exam by Dr. Rittman on January 19, 2015.

Midwest Orthopaedics at Rush Records (PX.5)

Petitioner was seen on May 26, 2016 for lower back pain. He reported he had pain in his back that began three or four weeks earlier when stocking lower shelves. He reported it to his employer. He indicated that over the past two to three weeks his back pain had been manageable. As of May 23, 2016, he reported an increase back pain. On May 26, 2016, he as stocking lower shelves, knelt down and was unable to stand due to back pain. The diagnosis was back strain; physical therapy was prescribed; and petitioner was placed on light duty.

Petitioner returned on May 31, 2016. He reported the pain level was at a 3. His physical therapy was put on hold. Petitioner reported he had seen a chiropractor one or two times this week and will continue as needed.

He was seen again on June 3, 2016 and reported his pain level at 2; physical therapy was ordered.

On June 10, 2016, he reported his pain level was at 1 and was released from care. Petitioner had remained on light duty until June 10, 2016 when he was released to full-duty work.

Reinforce Health & Wellness Records (PX.6)

On May 27, 2016 petitioner was seen by Dr. David Kim D.C. Petitioner's history was that the pain started a month ago when he was bending and reaching out for a box. He stretched out and iced his back and the pain subsided. On Monday his back flared up due to the nature of his work; the day prior he bent over to pick up a five-pound box and could not get back up.

He was seen again on May 31, 2016 and June 4, 2016. Total charges for services rendered totaled $540.00

Core Orthopedics Records (PX.7)

Petitioner returned to Core Orthopedics on July 26, 2016 with a new injury involving his lower back. He reported injuring his back on May 26, 2016. He reported his symptoms have been worsening despite treatment at Rush and by a chiropractor.

The MRI performed on August 10, 2016 showed a large left near lateral disc herniation at the L5-S1 level. Petitioner returned to Dr. Drake on September 6, 2016 and surgery was proposed. He was seen again on September 27, 2016 and surgery was again discussed.

Dr. Drake performed a microdiscectomy on L5-S1 level on October 12, 2016.

Petitioner received physical therapy and followed up with Dr. Drake until March 21, 2017, when he was released from care and released to return to full-duty work.

The total bill for services rendered was $21,114.00, which was paid by United Health Care.

Amita Health Medical Group Records (PX.8)

Petitioner was seen by Dr. Rittmann for pre-surgical clearance on October 6, 2016. The charge for this service totaled $175.00, which was paid by United Health Care.

St. Alexius Medical Center Records (PX.9)

The records contain the operative report of the surgery on October 12, 2016 that consisted of a microdiscectomy at the L5-S1 level on the left for a herniated disc at that level.

The charges for services rendered was $30,159.00. The anesthesiologist, the Compass Healthcare Consolidated LLC, charges are $2,800.00. The radiologist, Radiological Consultants of Woodstock, charges were $52.00.

ATI Physical Therapy Records (PX.10)

Petitioner received physical therapy to his back from December 8, 2016 to February 10, 2017 and then work hardening from February 14, 2017 to March 6, 2017.

The charges for services rendered totaled $33,852.11.

Dr. Gregory Drake January 22, 2019 Deposition (PX.11)

Dr. Drake, orthopedic surgeon, testified in behalf of petitioner. He testified consistent with his records (PX.7). Dr. Drake opined that petitioner sustained a herniated disc at L5-S1 as a result of the work accident of May 26, 2016, which required a microdiscectomy Dr. Drake performed on October 12, 2016.

Dr. Charles Carroll May 18, 2015 Report (RX.1)

At respondent's request, Dr. Charles Carroll examined petitioner on May 18, 2015, who had previously undergone surgery for a scapholunate joint injury; which included a torn ligament of the left hand. Dr. Carrol found the condition was related to the work accident of September 24, 2014. He agreed physical therapy should continue and that petitioner would reach maximum medical improvement within six months' time.

Dr. Charles Carroll October 22, 2015 Report (RX.2)

On October 21, 2015, Dr. Carroll re-evaluated petitioner's left wrist injury. He agreed petitioner had some residual conditions and should remain on 20-pound weight-lifting and avoid repetitive activities. Dr. Carroll also recommended petitioner obtained a functional capacity evaluation.

Dr. Charles Carroll February 25, 2015 Report (RX.3)

Dr. Carroll reviewed medical records, including functional capacity evaluation, and agreed petitioner was restricted to lifting no more than forty pounds and could only return to medium level work. Dr. Carroll determined petitioner had received appropriate treatment to date.

Dr. Charles Carroll June 20, 2016 Report (RX.4)

Dr. Carroll re-evaluated petitioner on June 20, 2010. He determined petitioner could return to full-duty work and that the prognosis was good.

Dr. Charles Carroll July 19, 2016 Report (RX.5)

Dr. Charles Carroll performed an impairment rating of petitioner's left hand injury. Dr. Carroll determined petitioner had an impairment rating of 17% of the Upper Extremity, or 10% man as a whole.

Dr. Wellington Hsu April 29, 2019 Deposition (RX.6).

Dr. Wellington Hsu, board certified orthopaedic surgeon, testified in behalf of respondent. Dr. Hsu examined petitioner at respondent's request on February 13, 2017, and reviewed certain medical records from Midwest Orthopaedics at Rush and Dr. Drake, as well as ATI physical therapy records and the MRI report of August, 2016.

Dr. Hsu determined there was no causal connection between the work accident of May 26, 2016 and the diagnosis on the MRI of August, 2016 of a herniated disc at the L5-S1 level for which petitioner underwent surgery on October 12, 2016. The basis for Dr. Hsu opinion was that petitioner did not have consistent complaints of radiating pain.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

15 WC 7877-Date of Accident September 23, 2014

With respect to the issue regarding the nature and extent of injury, the Arbitrator makes the following conclusions of law:

Petitioner sustained a Geissler grade III scapholunate ligament tear of the left hand as a result of the September 23, 2014 accident.

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

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that on July 19, 2016, Dr. Charles Carroll provided a permanent partial disability impairment rating of 17% of the upper extremity, or 10% of the person. The Arbitrator gives the appropriate weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a scanner, which requires use of his hands. Therefore, the Arbitrator gives more weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 39 years of age. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes respondent had accommodated petitioner's restrictions at the same rate of pay; albeit in a different position. In fact, petitioner's earnings increased as evident by the wages he was earning at the time of his subsequent accident of May 26, 2016. The Arbitrator, therefore, gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records substantiate petitioner underwent surgery on January 22, 2015 for left wrist Geissler grade III scapholunate ligament tear which included arthroscopic capsular debridement, scapholunate ligament thermal ligamentorrhaphy and

percutaneous scapholunate ligament pin fixation. After receiving physical therapy and undergoing a functional capacity, petitioner was released to return to work on January 4, 2016, by Dr. Metz, with restrictions which include a forty-pound lifting restriction and to avoid repetitive activities. The Arbitrator, therefore gives some weigh to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of left hand, and awards 61.50 weeks at the rate of $531.20 per week pursuant to § 8 (e) 9 of the Act.

16 WC 29541-Date of Accident May 26, 2016

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:

There is no dispute petitioner suffered an injury to his back that arose out of and in the course of his employment on May 26, 2016. The issue is whether the herniated disc that was diagnosed after an MRI was performed on August 10, 2016, for which petitioner underwent a microdiscectomy on October 12, 2016, was causally related to the work accident of May 26, 2016.

The Arbitrator, having weighed all the evidence, determines the preponderance of the evidence supports a finding that petitioner's herniated disc was caused by the work accident on May 26, 2016. In reaching this decision, the Arbitrator considered the following factors.

At petitioner's initial visit at Midwest Orthopaedics at Rush on May 26, 2016, his pain was rated at a 9. He was placed on light duty.

On May 27, 2016, when seen by Dr. David Kim, D.C., who diagnosed left lumbar strain sprain, consistent with the left-sided herniated disc.

Although petitioner's pain level was at a 3, as of June 3, 2016, he reported radiating pain into his left buttock that radiated down his left leg; again consistent with a left-sided herniated disc.

In addition, although petitioner rated his pain at only a 1 when he was discharged from Midwest Orthopeadics' care on June 10, 2016, he had not been working full-duty work until after that visit. There was no evidence petitioner had any intervening injury or incident between June 10, 2016 and July 26, 2016, when he was seen by Dr. Drake at Core Orthopedics.

The Arbitrator makes this finding despite the opinion of Dr. Hsu, who dismissed petitioner's complaints of radiating pain down the left leg as stated in the June 3, 2016 record, when reaching his conclusion that the herniated disc was not caused by the work accident of May 26, 2016.

The Arbitrator also makes this finding despite the fact petitioner was in the Army Reserves during this period of time, as there was no evidence contradicting petitioner's testimony that, although he remained in the Army Reserves, he was in the reserve of the Reserve and did not participate in drills.

Accordingly, the Arbitrator finds petitioner's herniated disc, for which he underwent a microdiscectomy on October 12, 2016, was caused by the work accident of May 26, 2016.

J. With respect to the issue regarding medical bills incurred, the Arbitrator makes the following conclusions of law:

The Arbitrator, having found petitioner's herniated disc and subsequent surgery was caused by the work accident of May 26, 2016, awards the following bills, to be paid pursuant to the fee

schedule and §8 and §8.2 with credit to be given to respondent for any bills paid directly by respondent or by the group insurance pursuant to §8 j:

$540.00 Reinforce Health & Wellness (05/27/2016-06/04/2016)
$21,114.00 Core Orthopedics (07/26/2016 to 03/21/2017)
$175.00 Amita Health Medical Group/Dr. Rittmann (10/6/2016)
$30,159.00. St. Alexius Medical Center (10/21/2016)
$2,800.00 Compass Healthcare Consolidated LLC (10/12/2016)
$52.00 Radiological Consultants of Woodstock (10/21/2016)
$33,852.11 ATI Physical Therapy (12/8/2016 to 02/10/2017 & 12/14/2017 to 03/06/2017)

K. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

Petitioner was placed on light duty by Dr. Drake as of July 26, 2016 and received further restrictions as of September 6, 2016. Respondent stipulated to the claimed period of disability from September 1, 2016 through March 21, 2017 was correct; respondent only disputed liability. The Arbitrator, having determined there was a causal connection between petitioner's herniated disc that resulted in the claimed period of disability and the work accident of May 26, 2016, awards temporary total disability for this period, which is 28-6/7 weeks at the rate of $661.86 per weeks. Respondent to be given appropriate credit for the salary continuation of $8,509.63 and $10,569.76 payments made pursuant to §8 j.

L. With respect to the issue regarding the nature and extent of injury, the Arbitrator makes the following conclusions of law:

As a result of the May 26, 2016 accident, the Arbitrator determined petitioner sustained a herniated disc, for which he underwent a microdiscectomy.

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

With regard to subsection (i) of §8.1b (b) there was no AMA rating for this injury. Therefore, the Arbitrator cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a stock keeper, which reportedly requires a lot of bending, stooping and lifting. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 41 years of age. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was able to return to work as a stock keeper, without evidence of any loss of earning capacity, although reportedly does not consistently make the picks required in this position. Therefore, the Arbitrator gives minimal weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the medical records confirm that, despite the fact petitioner underwent a microdiscectomy, he was released by his surgeon on March 21, 2017 without restrictions, had full range of motion and a pain level of 1. The Arbitrator gives some weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of person as a whole § 8 (d) 2 of the Act, and awards 75 weeks PPD at the rate of $595.67 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FLOR PINALES,

Petitioner,

vs. NO: 18 WC 23189

KOCH FOODS,

Respondent.

20IWCC0456

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 prospective medical and temporary total disability benefits and being advised of the facts and law, modifies the decision of the Arbitrator for the reasons set forth below and otherwise affirms and adopts the decision which is attached hereto and made a part thereof.

The Commission views the evidence differently than that of the Arbitrator as it relates to Petitioner's need for ongoing care and affords greater weight to the opinions of Dr. Kuritza and Dr. Silver over those of Dr. Forsyth. On September 13, 2018, Dr. Forsyth declared Petitioner at maximum medical improvement ("MMI"). Dr. Forsyth disagrees with the need for further treatment based on his own reading of the MRI of August 22, 2018 and exam of Petitioner, but little else. In contrast, Dr. Kuritza, a radiologist, found that the MRI of Petitioner's right shoulder evidenced "at least a partial thickness tear … with concomitant corroding tendonitis and or bursitis." Dr. Silver agreed with Dr. Kuritza's assessment and continues to recommend surgery after examining Petitioner on a continual basis. The Commission is persuaded by the MRI interpretation of Dr. Kuritza as he is a radiologist by specialty and his interpretation is further supported by Dr. Silver's recommendation and treatment.

The Commission finds that at the time of hearing Petitioner was not at MMI regarding the injury to her right shoulder that arose out of the accident on January 24, 2017. Petitioner is

20IWCC0456

therefore entitled to prospective medical treatment for the right shoulder per the recommendation of Dr. Silver and temporary total disability benefits for the period Petitioner was medically unable to work leading up to the date of hearing. All else is affirmed.

The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $280.00 per week for a period of 41 and 1/7 weeks ($11,520.00), representing July 31, 2018 through May 15, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $1,915.56 for temporary total disability benefits that have been paid.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide and pay for reasonable and necessary medical services for treatment of the right shoulder per the recommendation of Dr. Silver.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,620.00. 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: AUG 17 2020

D. Douglas McCarthy

LEC/cak

D: 061720
043

Stephen Mathis

DISSENT

I, respectfully, dissent. I would affirm and adopt the Arbitrator's well-reasoned opinion in its entirety.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

PINALES, FLOR
Employee/Petitioner

Case# **18WC023189**

KOCH FOODS
Employer/Respondent

20IWCC0456

On 9/6/2019, 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 1.82% 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:

2902 LAW OFFICES OF PETER G LEKAS
5357 W DEVON AVE
CHICAGO, IL 60646

0075 POWER & CRONIN LTD
NIGEL S SMITH
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

FLOR PINALES
Employee/Petitioner

v.

KOCH FOODS
Employer/Respondent

Case # 18 WC 23189

Consolidated cases:
20 1 11 CC 0456

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **May 15, 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 _____

20IWCC0456

FINDINGS

On the date of accident, **July 30, 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 ***was*** causally related to the accident, but the Petitioner reached maximum medical improvement as of September 21, 2018.

In the year preceding the injury, Petitioner earned **$25,480.00**; the average weekly wage was **$420.00**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Respondent shall be given a credit of **$1,915.56** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,915.56**.

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

ORDER

The Arbitrator finds that the Petitioner sustained accidental injury to the right shoulder on July 30, 2018 which arose out of and in the course of her employment with Respondent. The Arbitrator further finds that the Petitioner's right shoulder condition was causally related to the July 30, 2019 accident through the date of September 21, 2018, when she reached maximum medical improvement.

The Petitioner's average weekly wage in the year prior to the accident was $420.00.

Respondent shall pay Petitioner temporary total disability benefits of **$280.00 per week** for **7-4/7 weeks**, commencing **July 31, 2018 through September 21, 2018**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$1,915.56** for temporary total disability benefits that have been paid.

Medical benefits were not at issue per the parties (Arbx1).

The Petitioner has failed to prove entitlement to prospective medical services.

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

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

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

Signature of Arbitrator

September 4, 2019
Date

STATEMENT OF FACTS

The Arbitrator initially notes that the parties have indicated that, while the case at bar (18 WC 231 89) has been consolidated with case number 17 WC 12465, the hearing on 5/15/19 only addresses issues related to the case at bar, not 17 WC 12465.

Petitioner testified, via an interpreter, that she has worked for the Respondent for 9 years. Respondent's business involves preparing chicken products for fast food restaurants, and on 7/30/18 Petitioner was working there as a packer. This involved putting 5 to 10 ounce chicken breasts into square "frames" on a running conveyor line, where they are then moved to the next stage of processing.

The Petitioner testified that on 7/30/18, she split two frozen chicken breasts by hand and felt a strong pain in her right shoulder. She testified she used her hands out in front of her and pulled the chicken breasts apart. She would have to do this only when the breasts would come down as attached "doubles", which she indicated would occur frequently. The chicken is always cold, but the one she split that day was frozen, which happens sometimes. She testified this incident occurred at approximately 6:30 p.m., and that she reported it to her supervisor, Elida Loyo. She was taken into the lunch area after which a human resource office person, whom she testified spoke only English, came and took her into her office. Petitioner testified the Respondent did not provide her with a form or document to complete. She testified that she asked to go back to work to work only with her left hand, but she was not allowed to. She was initially sent for treatment at a hospital that she didn't know, so she didn't want to go there, and the next day (7/31/18) went to Physician's Immediate Care (PIC).

Based on pre-trial discussions with both parties, they were not seeking a determination regarding the issues of accident and causation in case number 17 WC 12465, which involved a 1/24/17 work injury. Records regarding treatment related to this prior case were submitted into evidence by both Petitioner and Respondent. A 3/21/18 pre-operative MRI was not part of the records. A SLAP tear was ultimately diagnosed and Petitioner underwent a 9/20/17 surgery with Dr. Biafora which involved extensive debridement of anterior capsulitis, a low-grade undersurface rotator cuff tear, bicep tenotomy, as well as repair of the SLAP tear and acromioplasty. A 2/7/18 right shoulder MR arthrogram was noted to show post-operative changes, residual irregularity of the superior labrum that was possibly post-operative in nature or degenerative, suspicion of a small tear at the posterior inferior labrum and mild articular surface fraying involving the supraspinatus tendon anteriorly with background mild supraspinatus tendinosis with no discrete rotator cuff tear. On 5/17/18, Dr. Biafora noted that Petitioner was eight months status post-surgery. Physical exam demonstrated mild tenderness over the biceps muscle belly. Active forward flexion was to 120 degrees, and to 160 degrees passively. External rotation was to 70 degrees and internal rotation was to the sacrum. Dr. Biafora indicated that Petitioner was having more pain in the shoulder than he would expect considering the MRI findings and the procedure he performed. Petitioner at that time asked Dr. Biafora for permanent work restrictions, which he declined to provide. (Px2; Rx3).

At PIC on 7/31/18, Petitioner reported a right arm injury that occurred on 7/30/18 while splitting apart chicken pieces. She complained of pain in the right shoulder, upper arm and into the right forearm and hand, as well as

worsening pain with any movement of the arm. She reported her pain was worse than prior to her surgery, at 8 out of 10 (8/10) in the posterior shoulder. The physician's assistant who saw her noted right shoulder tenderness, moderate tenderness over the trapezius, sternocleidomastoid, and anterior aspect of the shoulder, reduced range of motion and right AC joint tenderness. Petitioner underwent a right shoulder X-ray, which was negative for fracture. The diagnosis was right shoulder pain, medication was dispensed and Petitioner was placed on light duty with no use of the right arm. She also was advised to apply ice 2-3 times per day and to follow-up with Dr. Biafora. On 8/7/18, Petitioner was again examined at PIC and Dr. Menon noted she reported right shoulder pain that was worse than it was prior to her surgery. Petitioner was again restricted to left-handed work only and was advised to follow-up with Dr. Biafora on 8/9/18. (Px1). Petitioner testified that the Respondent could not accommodate her restrictions and that she instead sought treatment that same day, 8/7/18, with orthopedic surgeon Dr. Silver.

Dr. Silver's report states that the Petitioner was tearing apart chicken breasts and felt pain and tearing in her right shoulder. Examination found tenderness over the rotator cuff insertion anterolaterally. Petitioner had 90 degrees of forward flexion and 70 degrees of lateral abduction with barely any internal rotation. Dr. Silver noted positive impingement, Hawkins and drop arm tests. X-ray was within normal limits. His impression was rotator cuff impingement with a possible tear. Dr. Silver prescribed topical diclofenac, topical lidocaine and tercin patches along with Ultram, Flexeril and protonix. Dr. Silver further instructed the Petitioner to remain off work, begin a course of physical therapy and undergo a right shoulder MRI. (Px2).

Petitioner then began treating at La Clinica on 8/9/18. The report noted the accident history, that Petitioner's work duties include lifting, fine manipulation and a lot of overhead work, and that she had a prior right shoulder injury but went back to work five weeks post-surgery and had continued to work since that time. She stated she was physically well and was working without difficulties prior to the 7/30/18 incident. (Px3).

The 8/22/18 MRI reflected slight irregularity of the articulating undersurface of the distal supraspinatus tendon. The radiologist suspected that there was at least a partial-thickness tear in that area. The MRI also showed some mild surrounding inflammatory changes in this region, probably concomitant tendonitis and/or bursitis. (Px2).

Petitioner followed up with Dr. Silver on 8/24/18. He reviewed the MRI and diagnosed a partial thickness tear of the right rotator cuff. Dr. Silver recommended arthroscopic surgery and indicated the Petitioner remained temporarily disabled pending this surgery. On 9/13/18, Dr. Silver again recommended arthroscopic right shoulder surgery, indicating the partial rotator cuff tear accounted for Petitioner's pain due to her work injury on 7/30/18. Dr. Silver continued the Petitioner off work and continued the physical therapy recommendation.

Petitioner underwent a Section 12 examination at the request of Respondent with orthopedic surgeon Dr. Forsythe on 9/13/18. Dr. Forsythe reviewed the 8/22/18 MRI films and found rotator cuff tendinosis with no evidence of a rotator cuff tear. Following his examination of Petitioner, Dr. Forsythe diagnosed an acute right shoulder strain as a result of the 7/30/18 work incident, which had since resolved, and opined that the Petitioner's prognosis was good. He did opine that the medical treatment rendered to date had been reasonable, necessary and causally related to the incident. He indicated that the x-rays he obtained that day all demonstrated a well-positioned and well-centered glenohumeral joint. Dr. Forsythe further opined that the Petitioner's subjective complaints were not supported by the objective findings. His findings included severe symptom magnification during physical examination and active guarding with range of motion testing. He also reported diffuse non-physiologic tenderness to palpation and demonstrated give way effort with strength testing. Dr. Forsythe found the Petitioner to be at maximum medical improvement (MMI) with regard to the 7/30/18 injury and that she was capable of full, unrestricted duty employment. (Rx3).

Petitioner previously underwent Section 12 examinations with Dr. Forsythe following her 1/24/17 work injury on 7/11/17 and on 3/13/18, which followed the prior 9/28/17 right shoulder surgery. (Rx1, Rx2). With regard to the 3/13/18 examination, Dr. Forsythe found at that time that the claimant's subjective complaints were not supported by the objective findings. He reported that Petitioner exhibited noted wincing and guarding throughout the physical examination. She also reported diffuse and severe tenderness to palpation, which was non-localizing and nonanatomic in nature. He stated that: she "winces and groans with light palpation" and "reports diffuse, nonspecific pain with special testing, including Neer and Hawkins impingement, Speed's, O'Brien's, valgus shear, and Yergason's exams." Dr. Forsythe also opined that, given his exam findings, Petitioner had reached MMI as to the 1/24/17 work injury and was capable of returning to full, unrestricted work duties. (Rx2). Dr. Biafora apparently agreed with this assessment and, per the Petitioner, returned her to work full duty with no restrictions on 6/11/18. His 5/17/18 report notes that Petitioner had more pain than would be expected given the MRI and the procedure performed, and that Petitioner had asked him for permanent restrictions, which he declined to provide.

On 10/18 and 12/4/18, Dr. Silver noted that he was awaiting approval for the right shoulder surgery, continued Petitioner off work and recommended continued physical therapy and use of various medications. She saw Dr. Silver on 1/8/19, 3/4/19 and 4/23/19, at which times he continued to make the same exam findings and continued to prescribe therapy and off work status. (Px2). Petitioner testified she was scheduled to return to Dr. Silver on 5/21/19.

The treatment record of the chiropractor, Dr. Yehya, dated 4/11/19 (La Clinica) contains a diagnosis of right shoulder impingement. (Px3). The treatment record of Dr. Silver's March 2019 visit continued to diagnose a partial rotator cuff tear. (Px2).

Utilization review (UR) reports entered into evidence by Respondent indicate that prescribed treatments consisting of Terocin patches, Meloxicam, Cyclobenzaprine, Protonix, Tramadol, Diclofenac, and 5% Lidocaine ointment were not certified during the UR process, as the treatment was not medically necessary or appropriate. (Rx6). Additional UR reports entered into evidence by Respondent indicate that the treatment consisting of continuing physical therapy/chiropractic sessions were not certified, as the Petitioner had already attended 72 sessions and the continuing treatment was not medically necessary or appropriate, although the initial 12 sessions were certified. (Rx7 and Rx8).

The medical records of La Clinica show that the majority of treatment rendered to Petitioner was provided by Dr. Yehya. (Px3). The re-examination report from La Clinica authored on 1/10/19 stated that Petitioner did not appear to be in any acute distress and had only generalized tenderness over the right shoulder. Yet the report also states that the pain in her left shoulder was usually at a severity of 7-8/10, and that she reported being unable to carry a 2-month-old child. (Px3).

Petitioner testified she has continued to follow up with Dr. Silver on an approximate monthly basis and that he has continued to recommend therapy and surgery. Dr. Silver has also continued to prescribe medications and pain patches, which the Petitioner testified she does not use. Her therapy took place at La Clinica starting on 8/9/18, and she noted her last visit was on 5/1/19, going approximately three times per week. At La Clinica, she testified she was made to lift two-pound weights, to use a bicycle-type machine with her hands/arms, as well as cold packs and ultrasound. Petitioner indicated that while her arm is more mobile in therapy, her pain on the top of her right shoulder is ongoing. She demonstrated that she could raise her right arm upwards to about 100 degrees, maybe a bit more. She has a lot of pain trying to put her arm overhead. Currently, Petitioner testified her right shoulder hurts a lot after therapy. She has pain when she lays on her right side. She doesn't have the same strength in her arm as she had before and there are certain movements she just cannot do, such as putting her arm behind her back. She testified she also cannot lift a pan from the stove and has to use her left arm more

often when she needs strength to perform an activity. She is right hand dominant and testified she wants to undergo the recommended surgery.

Petitioner acknowledged that she received TTD through 9/21/18. She also acknowledged that she had a prior right shoulder injury and had undergone the prior surgery with Dr. Biafora on 9/20/17 for a labral tear. She continued to follow up with Dr. Biafora until he ultimately released her to return to full duty work in June 2018, noting she had no scheduled visits with him after that date. She testified that she continued to work as a full duty packer until 7/30/18.

On cross examination, Petitioner agreed that she had two separate claims/injuries with Respondent for the right shoulder. The initial injury was accepted by the Respondent and benefits were paid, including the 9/20/17 surgery. On 5/17/18, Petitioner agreed she asked Dr. Biafora for permanent restrictions because she was continuing to have right shoulder problems, but that the doctor refused to do so and instead returned her to unrestricted work. She also agreed she had been examined by Dr. Forsythe three times prior to the 7/30/18 injury for the right shoulder, and that in March 2018 she told him that she couldn't move her right arm, despite having already undergone the surgery with Dr. Biafora. Petitioner acknowledged that after the 7/30/18 when she was splitting chicken she sought treatment with Dr. Silver instead of Dr. Biafora, indicating one of the reasons she didn't see him was because he was on vacation at that time in July. She could not say if he was still on vacation or not but testified she didn't return to him for treatment because already had seen Dr. Silver. The Petitioner agreed she understood the Respondent had not authorized treatment for the right shoulder following the 7/30/18 accident, testifying she did not know how she had therefore been able to continue treating, and that she didn't really know if the treatment has been paid for or not, or by whom.

CONCLUSIONS OF LAW

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

The Arbitrator concludes that the Petitioner sustained accidental injuries to her right shoulder that arose out of and in the course of her employment with Respondent on 7/30/18.

Petitioner testified that she injured her right shoulder on 7/30/18 when she felt significant right shoulder pain while pulling apart two frozen chicken breasts. She further testified that she notified her supervisor and then met with a representative from human resources. She provided a consistent history of the incident when she sought treatment at PIC the following day, as well as subsequently to Dr. Silver and at La Clinica.

Petitioner was examined by Dr. Forsythe on 9/13/18 at the request of the Respondent, and the history of incident noted in his report also indicates Petitioner injured her right shoulder on 7/30/18 while tearing chicken breasts on a line, that this was reported to Respondent and that Petitioner was referred to occupational medicine.

Based on the above, the Arbitrator finds the Petitioner's 7/30/18 activity of breaking apart frozen pieces of chicken constituted an increased risk under the Act, and that she therefore sustained accidental injury to her right shoulder on 7/30/18 which arose out of and in the course of her employment with the Respondent.

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

As to the issue of causation, as noted above, the Arbitrator has determined that Petitioner sustained an injury that arose out of and in the course of her employment on 7/30/18. The Arbitrator further finds that the Petitioner's current right shoulder condition is causally related to the 7/30/18 accident. Dr. Silver, Petitioner's current treating surgeon, has opined that the right shoulder MRI shows a partial thickness tearing of the rotator cuff, and that this is what is accounting for Petitioner's right shoulder pain. Petitioner previously underwent a right shoulder MRI on 2/7/18, and the radiologist's report from this diagnostic test indicates that no discreate rotator cuff tear was identified. Respondent's Section 12 examiner Dr. Forsythe on 9/13/18 opined that the Petitioner minimally sustained a right shoulder strain on 7/30/18 that was causally related to the accident. While these physicians differ in their opinions regarding the credibility of the Petitioner's ongoing complaints, both agree that the pain increase the Petitioner experienced on 7/30/18 was due to the accident which occurred on that date.

The Arbitrator concludes that petitioner's current condition of ill-being in her right shoulder is causally related to her July 30, 2018 work accident.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Petitioner's earnings of $21,840.00 in the year preceding the injury, the Arbitrator finds that, based upon the method prescribed under section 10 of the Act, the Petitioner's average weekly wage was $420.00.

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 parties did not indicate this to be a disputed issue in the case per Arbx1.

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

As to the issue of prospective medical treatment, the Arbitrator finds that Petitioner sustained an injury that arose out of and in the course of her employment. This finding is based in part upon the IME report of Dr. Forsythe of September 13, 2018, as mentioned above.

However, given the documented findings of both Dr. Biafora and Dr. Forsythe which they indicate are not supported by objective findings, the Arbitrator concludes that the Petitioner has reached maximum medical improvement and is in no further need of medical treatment. The La Clinica records, in the Arbitrator's view, also show a continuation of a level of exaggerated subjective complaints of pain. The records of Dr. Silver and of Dr. Yehya contain a level of inconsistent diagnoses, (partial rotator cuff tear versus shoulder impingement) which call into question what is actually wrong with the Petitioner's right shoulder, if anything, and what treatment, if any, is required. Dr. Silver's records note benefits to the Petitioner based on his ongoing treatment recommendations which are not borne out by the records of La Clinica, resulting in further inconsistency. Additionally, Dr. Forsythe personally reviewed the MRI and concluded that there was no significant rotator cuff tear. The findings of the radiologist in the 8/22/18 MRI itself indicate only a slight irregularity of the articulating undersurface of the distal supraspinatus tendon with a suspicion of a partial thickness tear in the same area. Other findings include some mild surrounding inflammatory changes in the area, which was

believed to probably be concomitant tendonitis or bursitis. The MRI did not reveal any full thickness rotator cuff tears or impingement.

Based on the above facts, it is the finding of the Arbitrator that the Petitioner has reached maximum medical improvement, is in need of no further medical treatment, and may return to work full duty with no further restrictions. Accordingly, no prospective medical care is awarded.

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

The Respondent indicates that TTD benefits were terminated as of 9/21/18, following receipt of the 9/13/18 report of Dr. Forsythe. The Arbitrator incorporates the findings noted with regard to the issue of prospective medical as the findings applicable to this issue as well. Accordingly, the Arbitrator finds that the Petitioner is entitled to TTD benefits from 7/31/18, the day after the accident date, through 9/21/18, a period of 7-4/7 weeks. Dr. Forsythe opined that the Petitioner had reached MMI and was able to return to unrestricted work duties, and the Arbitrator finds this opinion to be more persuasive than that of Dr. Silver with regard to the need for surgery and to be off work based on a review of the supporting records of Dr. Biafora and La Clinica.

Based upon the evidence contained within Rx5 and the stipulation of the parties, the Respondent paid TTD benefits subsequent to the 7/30/18 accident totaling $1,915.56 and is entitled to credit for same against the awarded TTD benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE B. MARTINEZ,

Petitioner,

vs. NO: 17 WC 1358

OLYMPIA FOODS & ATLAS EMPLOYMENT SERVICES,

Respondent.

20IWCC0457

DECISION AND OPINION ON REVIEW

Petitioner timely filed a Petition for Review of the Decision of the Arbitrator finding Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment or that his condition of ill-being is causally related to a work injury. Notice having been given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary disability, prospective medical, penalties and fees, and the bifurcation of the hearing, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of his employment on November 18, 2016 and his condition of ill-being is causally related to that work injury. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

FINDINGS OF FACT:

Petitioner is a Spanish-speaking gentleman; he testified through an interpreter. T. 7. Petitioner was hired by Respondent, Atlas Employment approximately one year prior to the incident at issue. T. 11. Prior to working at Respondent Atlas, Petitioner had no history of back pain, had not experienced low back pain traveling down his legs, and never had an MRI of his low back. T. 14-15. Petitioner's first assignment through Respondent Atlas was laborer at

Supremo Cheese. T. 12, 60-61. In this job Petitioner performed frequent heavy lifting and was required to push racks and carts weighing 200 to 250 pounds. T. 12-13. Petitioner worked at Supremo Cheese for approximately five months; he testified he was able to complete his work duties and low back pain never prevented him from performing his work. T. 15, 61.

In October 2016, Atlas placed Petitioner at Respondent, Olympia Foods. T. 11. Olympia is a food production company, and Petitioner worked as a laborer. T. 13. He described his job duties: "I would pack. I placed the boxes onto pallets. I would stretch wrap them, wrap plastic around them. All type of work that needs to be done. If you needed to mix food, I would do that." T. 13-14. The boxes Petitioner packed and stacked weighed 40 to 50 pounds. T. 14.

Petitioner alleges he sustained an accidental injury on November 18, 2016. ArbX1. Petitioner testified he was 15 to 20 minutes into his shift when he tripped and fell while wrapping a pallet of boxes: "I was going backwards with the roll. So I was stretch wrapping, and they ask you to work fast. So, you know, I was working pretty fast. I saw - - there was a pallet behind me. I don't know where it came from, and I tripped with the pallet." T. 16-17. Petitioner fell on his buttocks and felt pain in his mid back and lower mid back. T. 17. Afterwards, Petitioner was "a little off" and could not stand back up. T. 17. Petitioner testified the boss, Jonathan, "saw me and he went to help me get up, and he asked me if I was okay"; Petitioner indicated he felt fine and continued working. T. 18. As he did so, his back became increasingly bothersome, "but after I rested from lunch, then I felt more pain." T. 18. When Petitioner finished his shift, he informed the supervisor his back pain had worsened and he wanted to go to the clinic. T. 19. The supervisor sent Petitioner to the company clinic. T. 19.

The November 18, 2016 record from Occupational Health Centers of Illinois reflects a chief complaint of an injury to the waist. Petitioner was evaluated by Dr. Stanley Simon who memorialized the following history of injury: "Occurred while at work. Patient states that he was wrapping a pallet when he tripped over a skid and fell backwards. He developed pain in his lower back. Complaint of back pain. There is bilateral lower back pain." Dr. Simon further documented Petitioner denied previous problems with his back. On examination, Dr. Simon noted tenderness to palpation at L3-4 and full but painful range of motion. Diagnosing a lumbar strain, Dr. Simon prescribed Naproxen and directed Petitioner to apply muscle rub cream as well as cold packs; Petitioner was released to full activity with instructions to return to the clinic in three days. PX1. Petitioner testified he returned to work as directed; as he performed his job duties, his back pain worsened and he had to take pain medication. T. 20.

When Petitioner followed up at the company clinic on November 21, 2016, he complained of persistent bilateral lower back pain; Petitioner's symptoms were noted to be intermittent and exacerbated by bending, with Petitioner describing increased pain at the end of his shift. Examination was again positive for tenderness to palpation and pain with range of motion. The physician recommended continuing with conservative care in the form of pain medication and stretching exercises, and released Petitioner to full activity. PX1.

On November 28, 2016, Petitioner was re-evaluated by Dr. Simon who documented the following interval history: "He states that he felt better and stopped taking the medication. He states that he was pain free over the week-end [*sic*] but the pain recurred today after working. He

stopped taking the med because he had no pain." Examination findings included tenderness to palpation as well as mild pain with range of motion. Refilling Petitioner's prescription, Dr. Simon reinforced the importance of Petitioner being compliant with his pain medication and directed Petitioner continue his home exercise program. Dr. Simon released Petitioner from care with the caveat that Petitioner should return to the clinic "if not resolving or new symptoms develop." PX1. Petitioner continued working at Respondent Olympia and he testified he took his pain medication as Dr. Simon directed and this helped his symptoms. T. 21.

Shortly after Christmas, Petitioner's pain medication ran out; he asked for approval to return to Dr. Simon for a prescription refill, but no such authorization was provided. T. 21-22. He continued working for Respondent Olympia, but his back pain persisted. T. 22. Petitioner testified he made a second request for treatment and was fired the next day:

> So I again went to human resources and asked for this note, this document, because I needed to take those pills because I couldn't work without them...They didn't give it to me. Then the following day I showed up to work at 7:00 a.m. So around 7:15 Jonathan's boss, somebody bigger than Jonathan, went there and told me I can no longer work with us. T. 22-23.

Petitioner testified he was off work while awaiting a new assignment from Respondent Atlas.

As he was not permitted to follow up with Dr. Simon to address his ongoing pain, Petitioner obtained a second opinion. On the recommendation of his friend Jose Carrera, on January 17, 2017, Petitioner was evaluated by Dr. Farooq Khan of Modern Pain Consultants. Petitioner testified Dr. Khan's secretary, Maria, acted as interpreter. T. 52. Petitioner reported an acute onset of symptoms following a work-related injury on November 18, 2016; Petitioner provided a consistent description of falling while wrapping a pallet and impacting his lower back and right spinal region. Dr. Khan noted Petitioner's symptoms included lumbar pain with associated radiation predominantly into the right lower extremity traversing the buttock and hip region and into the anterior and lateral portion of the lower leg towards the foot and ankle. PX2. Petitioner testified the radiating pain developed one or two months after the accident. T. 45. Dr. Khan's examination findings included moderate loss of lumbar lordosis; decreased, painful range of motion, right rotation and right lateral bending; tenderness to palpation at the bilateral L4-S1 facet joints and lower lumbar paraspinous muscles; antalgic gait; and positive seated slump test. Diagnosing lumbago, thoracic/lumbosacral neuritis/radiculitis, work related accident, and myofascial pain, Dr. Khan ordered a lumbar spine MRI and physical therapy, prescribed Meloxicam and Terocin patches, and imposed work restrictions: no lifting/carrying greater than 10 pounds, no pushing/pulling greater than 15 pounds, no lifting above waist, no bending/squatting, no kneeling/crawling, change positions as necessary. PX2.

On January 18, 2017, the recommended MRI was completed, and Petitioner commenced physical therapy at Universal Health Care later that same day. T. 25. Therapy continued through February 14, 2017. T. 25.

On January 23, 2017, Petitioner started a new work assignment through Respondent Atlas, this at Star Hydraulics. T. 23-24. His job is measuring small pieces: "Yes, just measure

them. I would put them into boxes. They were just little pieces." T. 26. Petitioner confirmed it is a light job, and he can change positions while doing it: "If I want I can sit, if I want I can stand…I have to sit. I have to stand. I have to walk around because I cannot be remaining in one position for too long." T. 26. He has to change positions after 15 to 20 minutes. T. 26.

On February 14, 2017, Petitioner followed up with Dr. Khan and reported substantial but transient improvement with the Terocin patch and Meloxicam as well as mild benefit from physical therapy. On review of the MRI images, Dr. Khan observed posterior disc protrusions at L1-2, L2-3, L3-4 and L5-S1; evidence of bilateral foraminal narrowing, mild, at L3-4 and L5-S1 secondary to disc bulging as well as posterior element hypertrophy and mild facet arthrosis; and loss of disc height, minimal bulging and bilateral neural foramen narrowing at L4-5. Dr. Khan recommended proceeding with a series of transforaminal epidural steroid injections; in the meantime, Petitioner could continue working restricted duty while undergoing therapy and taking pain medications. PX2.

On February 28, 2017, Dr. Khan performed bilateral L4-5 lumbar transforaminal injections. PX2. At the March 18, 2017 re-evaluation, Petitioner reported the injection provided 80% initial relief and 50% sustained relief, but his pain had started to return. Dr. Khan concluded that given the success of the initial epidural injection with slight return of symptoms and known pathology identified on MRI, it was reasonable to perform a repeat injection and continue physical therapy, however Respondent Atlas placed treatment on hold pending an examination pursuant to Section 12 of the Act. Dr. Khan maintained Petitioner's work restrictions. PX2.

On March 22, 2017, Dr. Edward Goldberg performed an examination and record review pursuant to Section 12 of the Act at Respondent Atlas' request. A translator was present for the examination. The report reflects Petitioner stated he had no lumbar problems prior to the November 18, 2016 accident, and since that fall, he had ongoing low back pain with intermittent paresthesia. Dr. Goldberg noted his review of the MRI films revealed a degenerative disc with minimal foraminal narrowing at L4-5; no herniation or stenosis centrally was observed. Dr. Goldberg further documented Petitioner's Waddell's test was negative and concluded Petitioner "aggravated his degenerative disc L4-5 and foraminal narrowing on the right. This is a competent cause for his back and right leg pain," and Petitioner's "condition of ill-being is due to the accident of 11/18/2016." As to further treatment, the doctor recommended physical therapy and an additional epidural injection if Petitioner's radicular pain increased. Dr. Goldberg opined Petitioner could work with a 20-pound lifting restriction. PX17.

When Petitioner followed up with Dr. Khan on April 4, 2017, he renewed his recommendation for a repeat injection and further physical therapy. PX2. On May 2, 2017, Dr. Khan performed lumbar transforaminal epidural steroid injections at L4-5 and L5-S1. PX2. Physical therapy recommenced the next day. PX3.

On June 6, 2017, Petitioner presented to Dr. Khan and stated he had substantial pain relief after the repeat injection. Dr. Khan directed Petitioner transition to over-the-counter pain medications and a home exercise program, and authorized a trial return to work full duty: if Petitioner tolerated work, he would be released from care; however, if Petitioner experienced an exacerbation in pain, he was to return for further evaluation. PX2.

Salehi documented Petitioner again wished to think about the proposed surgery; in the meantime, Dr. Salehi increased Petitioner's activity restrictions to no lifting greater than 20 pounds, no pushing/pulling greater than 35 pounds, no bending/twisting more than three times per hour, and alternate sitting/standing every 30-45 minutes as needed. PX4.

On January 22, 2018, Petitioner followed up with Dr. Salehi and advised he wished to proceed with surgery. Petitioner explained why he wanted to proceed: "I can no longer do activities that I would normally do. So with my right foot, even if it's unlevel, to like an inch or half an inch, I will trip. I can't raise it." T. 38. Dr. Salehi maintained Petitioner on light duty pending surgery, which would be scheduled once authorization was obtained. PX4.

Respondent Atlas sent Petitioner for a second examination pursuant to Section 12 of the Act with Dr. Alexander Ghanayem. On April 9, 2018, Dr. Ghanayem authored his report indicating Petitioner may have sustained an aggravation of his lumbar disc degeneration from his described work injury. Dr. Ghanayem acknowledged Petitioner's residual low back pain but opined he was not a surgical candidate given the lack of a surgical lesion. Dr. Ghanayem noted there was nothing compressive on the MRI and indicated he could not explain Petitioner's leg symptoms. Dr. Ghanayem further indicated Petitioner exhibited some nonorganic pain behaviors with multiple positive Waddell signs and concluded Petitioner was at maximum medical improvement and agreed a 35-pound restriction was appropriate. RX1.

Upon receipt of Dr. Ghanayem's report, Dr. Salehi authored a letter expressing his disagreement with Dr. Ghanayem's opinions:

> I respectfully disagree with Dr. Ghanayem's opinion as Mr. Martinez has low back pain due to L4-5 annular tear and degenerative disc disease with referred pain to the right lower extremity (not radicular) causally related to the described injury by way of aggravation of a preexisting L4-5 disc disease/spondylosis. This causal connection is backed by the fact that he had no history of back [*sic*] prior to this work injury in November 2016. Furthermore, he is a candidate for a single level decompression and fusion at L4-5 to address his mechanical low back pain which is intolerable despite conservative care. It is also noted that in a prior IME by Dr. Goldberg of 3/22/17 he does agree that the patient aggravated L4-5 disc disease and foraminal narrowing on the right as a result of the injury. I do not agree that patient is at MMI. PX4.

On June 11, 2018, Dr. Salehi evaluated Petitioner for the final time prior to arbitration. Dr. Salehi reiterated his conclusion Petitioner had "ongoing mechanical back pain secondary to disc disease at L4-5 rendered permanently symptomatic by the described work injury as he had no prior history of such complaints before the work injury" and again recommended proceeding with right L4-5 transforaminal lumbar interbody fusion. Dr. Salehi maintained Petitioner's work restrictions pending surgery. PX4.

Petitioner testified his life is not normal since the accident. Before the accident, "I would go out with my kids, run around the park. We play football. We would run"; if he tries to run now, "I feel that if I force myself to run that my leg will not respond." T. 39. Petitioner testified

he is physically unable to be intimate with his wife: "So after the accident till [*sic*] this day, I have not been able to perform sexual activity. It's a big problem with my wife, but I mean, I can't." T. 40. He can no longer go dancing with his wife, which is something they did every weekend prior to the accident. T. 40. He has difficulty showering and using the toilet because of the moving to the side and twisting to the side. T. 41. Petitioner testified he tries not to take any pills, but he takes Advil: "When I work, and I work hard and I have to do a lot of movement, I get home and I am in pain. I have to take the pills to be able to relax." T. 41. This is usually once or twice a week. T. 42. His pain gets to 8-8.5/10 before he takes pills. T. 42. Prior to the accident, he never experienced back pain like that. T. 42.

Petitioner testified he has a primary care physician, Dr. Elias Murciano, whom he sees once or twice a year. T. 58-59. Petitioner testified he has not seen Dr. Murciano for back pain: "No. So I see him because of physical exam also because of refill for my blood pressure and cholesterol." T. 60.

At the close of Petitioner's testimony, Petitioner's Counsel indicated Petitioner had been moving back and forth in his chair and asked why; Petitioner responded, "Because I can't stand to be in one position for too long. I am not getting up because I am respecting what the setting here, what we are doing." T. 63-64.

Salvador Barriga testified on Petitioner's behalf. Mr. Barriga is a medical biller. T. 69. He is COE and biller for Proficient Medical Billing. T. 69. Mr. Barriga billed on behalf of Petitioner's medical providers. T. 70. Mr. Barriga testified as to his efforts to get the bills paid, with numerous phone calls and emails with the adjuster. Thus far no payments have been received. T. 77.

After the parties' exhibits were admitted into evidence, Respondent's Counsel requested proofs remain open "until I receive compliance with subpoenas that I am going to issue in light of Petitioner's testimony of prior treatment at PrimeCare which we never knew about; his employment at Supremo Cheese which we never knew about, and his surgery with the prior claim that we didn't know about." T. 129. Over Petitioner's Counsel's objection, the Arbitrator granted the request for bifurcation solely for the purpose of subpoenaing the primary care physician records. T. 135.

When the hearing reconvened on July 24, 2018, Petitioner was recalled to the stand. He testified he has been treating with Dr. Murciano for about four years. 7.24.18 Trans. p. 7. Dr. Murciano's records were admitted into evidence as Respondent's Exhibit 3. The records detail Petitioner's treatment from 2014 to 2017.

On March 26, 2014, Petitioner consulted with Dr. Murciano for the first time. The office note reflects Petitioner presented to establish care. Dr. Murciano documented Petitioner had a three year history of hypertension and hyperlipidemia, and these conditions had been managed by another physician until two months prior. Petitioner reported he used to have dizziness but that resolved after increasing the medication dose; Petitioner further reported sexual dysfunction, complaining of decreased libido. Diagnosing hypertension, hyperlipidemia, decreased libido, and overweight body habitus, Dr. Murciano ordered blood work including comprehensive metabolic

panel, CBC, lipid panel, and testosterone total, and prescribed lisinopril and lovastatin. RX3.

On May 27, 2014, Petitioner followed up with Dr. Murciano. Dr. Murciano noted Petitioner was in overall good condition; on review of the lab results, Dr. Murciano increased Petitioner's hypertension medication. RX3.

Petitioner next saw Dr. Murciano on November 21, 2014. The impetus for this visit was an upper respiratory infection and cough. RX3.

On December 22, 2014, Petitioner presented to Dr. Murciano with a new problem of left flank pain. The record reflects Petitioner had an acute onset of pain after a fall seven days prior: "he planted his foot in a step and lost his footing, he fell hitting affected area." Dr. Murciano documented Petitioner had pain in the posterior midback and radiating forward over the ribcage, with associated chest pain in the area of trauma. Examination was positive for tenderness in the "thoracic back"; on the accompanying diagram, Dr. Murciano indicated Petitioner's tenderness was located on the left side of the thoracic spine, midway between Petitioner's waist and his armpit. Dr. Murciano diagnosed "left flank pain [secondary to] trauma after accidental fall. + contusion +/- rib [fracture.]" Noting Petitioner deferred x-ray, Dr. Murciano advised Petitioner to take over-the-counter pain medication and apply heat, and return for re-evaluation in three to four weeks if he remained symptomatic. RX3. When questioned about Dr. Murciano's December 22, 2014 office note, Petitioner confirmed the record accurately reflects he complained of midback pain radiating to the ribcage. Petitioner testified that pain was different than the pain he had after his work accident. 7.24.18 Trans. p. 8. Petitioner demonstrated that his current complaints are to the middle of his low back at about his belt line, and the 2014 pain was at his left side above the left rib cage area. 7.24.18 Trans. p. 9-10.

Petitioner did not see Dr. Murciano again until March 28, 2015, this for routine medication management. The note indicates Petitioner's "rib trauma healed, doing well." Dr. Murciano refilled Petitioner's lisinopril and lovastatin and ordered repeat labs. RX3.

On September 11, 2015, Petitioner presented to Dr. Murciano with complaints of headache and dizziness which he attributed to running out of his blood pressure and cholesterol medications; he had since restarted his medications, though he reported his symptoms were already improving. Dr. Murciano directed Petitioner continue with his medications. RX3.

Petitioner next saw Dr. Murciano on April 20, 2016. The record reflects the visit was for medication management; Petitioner also reported left shoulder pain associated with cleaning sewers and lifting heavy trays at work. Dr. Murciano prescribed Naproxen and refilled Petitioner's lisinopril and lovastatin. RX3.

Petitioner's last visit with Dr. Murciano prior to his work injury took place on September 21, 2016. Dr. Murciano memorialized this was an annual exam and labs were ordered to monitor Petitioner's chronic medical conditions. RX3.

On February 27, 2017, Petitioner returned to Dr. Murciano for routine monitoring of his hypertension, lipids and mood; this was Petitioner's first visit with Dr. Murciano after his work

20IWCC0457

accident. In addition to discussing his chronic problems, Petitioner reported issues and cessation of sexual activity for the past several months; Petitioner's symptoms were both mental and physical: decreased libido, erectile dysfunction, and precocious ejaculation. Noting Petitioner's mood disorder could be exacerbated by the recently developed sexual dysfunction, Dr. Murciano refilled Petitioner's medications and recommended updated in labs in six months. RX3.

On November 24, 2017, Petitioner presented to Dr. Murciano for complaints of right elbow and shoulder pain after falling through the attic floor. Petitioner reported he briefly lost consciousness but recovered spontaneously and EMS was not contacted; he further reported he was able stand and walk and continued his work, including repairing the hole in the ceiling by himself. Dr. Murciano diagnosed right elbow and shoulder pain and ordered x-rays. RX3. When questioned about Dr. Murciano's November 24, 2017 note, Petitioner confirmed he fell while working in the attic and had pain in his head, side, and right arm and shoulder. 7.24.18 Trans. p. 10-11. He did not hurt his low back when he fell; when he saw the doctor, his complaints were right elbow and shoulder pain with movement. 7.24.18 Trans. p. 11. Petitioner testified he did not mention the incident before "[b]ecause I didn't even remember it. It wasn't serious. I didn't even remember. It was not important." 7.24.18 Trans. p. 11. Petitioner stated the fall did not affect his low back "at all." 7.24.18 Trans. p. 12. Petitioner did not have any follow-up treatment after that fall. 7.24.18 Trans. p. 12.

CONCLUSIONS OF LAW:

I. Bifurcation

Petitioner argues the Arbitrator improperly granted Respondent's request for bifurcation and erred in admitting Dr. Murciano's records. The Commission disagrees.

Commission Rule 9030.20(g) provides, "Bifurcated hearings will be allowed only for good cause. Examples of good cause include, but are not limited to, situations in which the number or location of witnesses makes it impossible to conclude the hearing in one day or the testimony of a witness must be taken prior to a deposition." *50 Ill. Adm. Code 9030.20(g)*. The granting or denial of a motion for a continuance lies within the sound discretion of the arbitrator or Commission, whose decision will not be reversed absent an abuse of that discretion. *South Chicago Community Hospital v. Industrial Commission.* 44 Ill. 2d 119, 123, 254 N.E.2d 448 (1969); *LeFebvre v. Industrial Commission,* 276 Ill. App. 3d 791, 795, 659 N.E.2d 1 (1995). The Commission emphasizes an arbitrator is granted wide latitude in managing the hearings over which s/he presides. Here, the Arbitrator indicated bifurcation served the interest of fairness and would aide in evaluating Petitioner's testimony of having no prior low back treatment. While procedurally infrequent, the Commission finds the Arbitrator's granting of Respondent's request for bifurcation was not an abuse of discretion. We further find the admission of Dr. Murciano's records was not reversible error.

20IWCC0457

II. Accident

In finding Petitioner failed to prove he sustained an accidental injury arising out of his employment on November 18, 2016, the Arbitrator made an adverse credibility determination. In particular, the Arbitrator found Dr. Murciano's records "quite illuminating as to Petitioner's lack of credibility." The Commission views the evidence differently. See *R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870 (2010) ("[W]hether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence. A resolution of the question can only rest upon the reasons given by the Commission for the variance."). The Commission finds Petitioner was credible: his testimony was straightforward and forthright, including openly offering undoubtedly uncomfortable details of his post-accident physical relationship with his wife; is consistent with the medical records; and is, in fact, corroborated by Dr. Murciano's records. The Commission finds two aspects of the Arbitrator's accident analysis require a direct response.

The Arbitrator found Dr. Murciano's December 22, 2014 record contradicted Petitioner's testimony of no prior history of back pain. We disagree. The Commission observes the December 22, 2014 injury was to the "left flank"; Dr. Murciano's diagnosis was "left flank pain [secondary to] trauma after accidental fall. + contusion +/- rib [fracture.]" RX3. Moreover, that flank injury resulted in a single medical visit with no follow-up care, and Dr. Murciano's next office note, a March 28, 2015 medication management visit, reflects "Rib trauma healed, doing well." RX3 (Emphasis added). The Commission finds the December 22, 2014 note does not contradict Petitioner's testimony of having no prior history of low back pain.

The Arbitrator found Dr. Murciano's records established Petitioner's long history of sexual dysfunction, thereby casting doubt on Petitioner's testimony of the significant toll his injury had on his relationship with his wife. Again, we disagree. The Commission first notes the significance of this testimony to the determination of whether Petitioner sustained an accidental injury arising out of and in the course of his employment is tenuous at best. More importantly, the Commission finds that, far from impugning Petitioner's credibility, the medical records clearly demonstrate a change in Petitioner's complaints; to be clear, decreased libido, *i.e.*, the lack of motivation or interest in sexual activity, is completely different than erectile dysfunction and precocious ejaculation, *i.e.*, the physical inability to engage in sexual activity. The Commission finds Dr. Murciano's records are wholly consistent with Petitioner's testimony.

"Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.'" *Id.* Here, Petitioner alleges he sustained an accidental injury on November 18, 2016 when he tripped over a pallet while shrink-wrapping, *i.e.*, while performing his assigned job duty. Petitioner testified his boss, Jonathan, witnessed the fall and helped him stand back up; as Petitioner continued with his shift his pain increased, so he spoke to his supervisor and asked to be sent to the company clinic. The Commission observes the record is devoid of

anything which contradicts Petitioner's version of events. We further emphasize the medical records all document a consistent history of tripping over a pallet followed by an acute onset of low back pain which thereafter progressed to include radiating right leg pain; this is true not only for the treating physicians, but also for both of Respondent Atlas's chosen examiners: Dr. Simon, November 18, 2016, "He states that he was wrapping a pallet when he tripped over a skid and fell backwards. He developed pain in his lower back"; Dr. Khan, January 17, 2017, "As he was wrapping the pallet in plastic and attempting to back up he tripped over another shipping pallet that was empty and impacted his lower back and right spinal region"; Dr. Goldberg, March 22, 2017, "He states that he was wrapping plastic around a pallet. He tripped over a pallet when he was bending forward to wrap the plastic that was behind him. He fell striking his right buttock on the pallet and then he fell back hitting his low back on the ground"; Dr. Salehi, October 2, 2017, "He pulled a pallet stacked with product and was in the process of wrapping it with plastic when he stepped backwards not knowing that there was another pallet behind him. He ended up falling backwards onto his back"; and Dr. Ghanayem, April 9, 2018, "He was wrapping a pallet when he tripped over one that was behind him and landed backward."

Petitioner's credible and unrebutted testimony as well as the medical records all demonstrate Petitioner suffered a trip and fall while shrink-wrapping a pallet. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of his employment on November 18, 2016.

III. Causal Connection

The Commission finds the medical evidence establishes Petitioner's condition of ill-being remains causally connected to the work injury. Initially, we observe the medical records corroborate Petitioner's testimony of persistent low back pain since the accident.

On the date of accident, Petitioner was evaluated at Respondent Olympia's company clinic. The records reflect Petitioner had "no previous problems with his back" but that day had developed pain in his lower back following a trip and fall. Dr. Simon diagnosed a lumbar strain and recommended conservative management. Petitioner thereafter followed up at the company clinic on two occasions, the last being November 28, 2016. The office note reflects Petitioner reported improvement in his symptoms such that "he was pain free over the week-end [*sic*] but the pain recurred today after working." On examination, Dr. Simon noted ongoing tenderness to palpation as well as mild pain with range of motion. The Commission observes Dr. Simon refilled Petitioner's prescription and emphasized the importance of Petitioner being compliant with his pain medication. We further note Dr. Simon released Petitioner from care but specifically directed Petitioner to return to the clinic "if not resolving or new symptoms develop." PX1.

Petitioner testified he continued working but his back pain continued. When his pain medication ran out, he requested that Human Resources at Respondent Olympia approve a return visit to Dr. Simon to get a refill. This was denied. When he repeated the request, he was terminated. At that point, on the recommendation of a friend, Petitioner sought a second opinion from Dr. Khan. Dr. Khan's report from the January 17, 2017 consultation documents Petitioner had an acute injury on November 18, 2016 and since that event had complaints of lumbar pain

20IWCC0457

with associated radiation predominantly into the right lower extremity. PX2. Under Dr. Khan's care, a lumbar spine MRI was obtained on January 18, 2017, and Petitioner attended physical therapy and underwent a transforaminal epidural steroid injection on February 28. Dr. Khan documented Petitioner had 50% sustained relief with the injection and recommended a repeat injection, but Petitioner's treatment was on hold pending a Section 12 examination. Thereafter, Petitioner underwent a repeat epidural steroid injection on May 2, and this was noted to have provided substantial pain relief. On June 6, 2017, Dr. Khan authorized a trial return to work full duty: if Petitioner tolerated work, he would be released from care; however, if Petitioner experienced an exacerbation in pain, he was to return for further evaluation. PX2. Petitioner testified his pain quickly came back after he resumed full duty; he returned to see Dr. Khan in July and the doctor recommended proceeding with a repeat injection. The third epidural steroid injection was performed on August 1, 2017, and at the August 29 re-evaluation, Dr. Khan noted Petitioner's lumbar pain was improved but his right leg pain persisted; Dr. Khan referred Petitioner to Dr. Salehi for a surgical evaluation.

Dr. Salehi's records reflect Petitioner described the November 2016 work accident and "since then he has had pain in the low back with pain radiating into the right lateral thigh." PX4. Following an examination and review of the diagnostic imaging, Dr. Salehi's impression was "mechanical back pain secondary to disc diseases at L4-5 rendered permanently symptomatic by the described work injury." As Petitioner had failed conservative treatment, Dr. Salehi recommended surgical intervention in the form of right L4-5 transforaminal lumbar interbody fusion. PX4. Dr. Salehi continues to recommend this procedure to address Petitioner's ongoing symptoms.

To summarize, the treating records document Petitioner had no history of low back problems prior to the November 18, 2016 accident, has voiced consistent complaints since the work accident, and there is nothing to suggest a break in the chain of causation. We further note Respondent Atlas has not provided a contrary causation opinion. Rather, both of Respondent Atlas's chosen examiners agree the November 18, 2016 accident aggravated Petitioner's underlying degenerative disc disease. Dr. Goldberg opined Petitioner "aggravated his degenerative disc L4-5 and foraminal narrowing on the right," noted this was a "competent cause for his back and right leg pain," and concluded Petitioner's "condition of ill-being is due to the accident of 11/18/2016." PX17. Likewise, Dr. Ghanayem opined the work injury aggravated Petitioner's lumbar disc degeneration. RX1. The Commission finds Petitioner's condition of ill-being remains causally related to the November 18, 2016 work accident.

IV. Temporary Disability

On the Request for Hearing, Petitioner alleged he was temporarily and totally disabled from January 17, 2017 to January 22, 2017. ArbX1. The Commission observes this corresponds to the period between Dr. Khan's imposition of light duty restrictions and the start date for Petitioner's new assignment at Star Hydraulics, and as such, we find Petitioner proved entitlement to Temporary Total Disability benefits.

Section 8(b) provides, "If the period of temporary total incapacity for work lasts more than 3 working days, weekly compensation as hereinafter provided shall be paid beginning on

20IWCC0457

the 4th day of such temporary total incapacity and continuing as long as the total temporary incapacity lasts." *820 ILCS 305/8(b)*. Pursuant to §8(b), Petitioner's TTD benefit period commences January 20, 2017 and continues through January 22, 2017. The parties stipulated Petitioner's average weekly wage is $492.70. ArbX1. This yields a Temporary Total Disability benefit rate of $328.47. Therefore, the Commission finds Petitioner entitled to Temporary Total Disability benefits of $328.47 per week for a period of 3/7 weeks.

V. Medical

Petitioner offered into evidence multiple medical bill exhibits (PX5-PX12) detailing the charges for the treatment rendered by Dr. Khan, Northwest Chicago Medical Center and Surgical Center, Universal Healthcare, Edgebrook Radiology, Dr. Virenda Desai, Network Durable Equipment, and Dr. Salehi. The Commission finds these charges were incurred for reasonable and necessary treatment related to the November 18, 2016 accident.

VI. Prospective Medical

Dr. Salehi concluded Petitioner has failed conservative management and his ongoing complaints are significant enough to necessitate surgical intervention. Dr. Ghanayem, in contrast, opined Petitioner is not a surgical candidate because he does not have a surgical lesion. In his report, Dr. Ghanayem indicated the MRI revealed end-stage disc degeneration but no compressive pathology. Dr. Ghanayem further noted Petitioner exhibited some non-organic pain behaviors. Dr. Ghanayem acknowledged Petitioner has residual low back pain but nonetheless opined further treatment was unnecessary and instead Petitioner had reached maximum medical improvement with a 35-pound restriction. RX1.

Dr. Salehi was provided with Dr. Ghanayem's report and authored a letter expressing his disagreement. Therein, Dr. Salehi explained Petitioner's low back pain emanated from an L4-5 annular tear and degenerative disc disease with referred pain to the right lower extremity, and a single level decompression and fusion at L4-5 was necessary to address his "mechanical low back pain which is intolerable despite conservative care." PX4.

The Commission finds Dr. Salehi's conclusions are consistent with the evidence and persuasive. The Commission further finds Dr. Ghanayem's opinion is not persuasive. We note Dr. Ghanayem's assertion of multiple positive Waddell signs is inconsistent with the findings of all the treating physicians as well as those of Dr. Goldberg.

The Commission finds the surgery recommended by Dr. Salehi is reasonably required to relieve the effects of the November 18, 2016 accidental injury. The Commission orders Respondent to provide and pay for surgical intervention as recommended by Dr. Salehi.

VII. Penalties and Attorney's Fees

In *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998), the Supreme Court of Illinois explained the compensation authorized by §19(l) is in the nature of a

late fee:

> The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.

In contrast to Section 19(l), Section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory, and "is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms 'vexatious,' 'intentional' and 'merely frivolous.'" *McMahan*, 183 Ill. 2d at 515. Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. *820 ILCS 305/16* (West 2012).

The rationale for the Act's penalties provisions is well known. The Act "provides an income stream to an injured worker, who is typically left without income while he is disabled. (Citation omitted.) The penalty sections attempt to prevent bad faith and unreasonable withholding of compensation benefits from employees. (*Board of Education v. Industrial Com.* (1982), 93 Ill. 2d 1, 442 N.E.2d 861.)" *Ford Motor Co. v. Industrial Commission*, 140 Ill. App. 3d 401, 405, 488 N.E.2d 1296 (1986). It is equally clear, however, those sections are "not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation; they are intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives. A failure to pay because of a good faith belief that no payment is due will not warrant a penalty." *Avon Products v. Industrial Commission*, 82 Ill. 2d 297, 412 N.E.2d 468 (1980). The focus of Petitioner's request for penalties and attorney's fees is Respondent Atlas's failure to pay medical bills. While it appears there was some initial delay in payment, the Commission does not believe this rises to the level of unreasonable, and we decline to impose penalties and fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and in the course of his employment on November 18, 2016, and his condition of ill-being is causally related to that work injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $328.47 per week for a period of 3/7 weeks, representing January 20, 2017 through January 22, 2017, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses incurred in the care and treatment of Petitioner's lower back injury as detailed in Petitioner's Exhibits 5 through 12, pursuant to §8(a), subject to §8.2 of the Act.

20IWCC0457

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for the surgical intervention recommended by Dr. Salehi as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees is hereby denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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 $69,800.00. 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: AUG 17 2020

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

D: 7/8/2020

Stephen J. Mathis

Stephen Mathis

43

D. Douglas McCarthy

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTINEZ, JOSE B
Employee/Petitioner

Case# **17WC001358**

OLYMPIA FOODS & ATLAS EMPLOYMENT SERVICES
Employer/Respondent

20IWCC0457

On 6/27/2019, 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 2.03% 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:

1922 STEVEN B SALK & ASSOCIATES LTD
DAMIAN R FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

5001 GAIDO & FITZEN
ALEX OTTENHEIMER
30 N LASALLE ST SUITE 3010
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

Jose B. Martinez
Employee/Petitioner

v.

Olympia Foods & Atlas Employment Services
Employer/Respondent

Case # **17** WC **01358**

Consolidated cases: _____

20IWCC0457

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course, of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☐ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Prospective medical pursuant to Section 8(a) of the Act.**

FINDINGS

On **11/18/2016**, 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 $**14,478.04**; the average weekly wage was $**517.07**.

On the date of accident, Petitioner was **58** 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** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Petitioner did not prove that he sustained accidental injuries arising out of and occurring in the course, of the employment on November 18, 2016.

Temporary disability compensation, prior and prospective medical, and penalties and fees are denied.

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

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

Signature of Arbitrator

June 27, 2019
Date

JUN 27 2019

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

Jose B. Martinez
Employee/Petitioner

Case # **17 WC 1358**

v.

20IWCC0457

Olympia Foods & Atlas Employment Services
Employer/Respondent

MEMORANDUM OF DECISION OF THE ARBITRATOR

The disputed issues are:

(C) Accident:

(F) Causal Connection;

(J) Medical Bills;

(K) TTD;

(M) Penalties and Fees; and

(O) Prospective Medical Care

STATEMENT OF FACTS

Petitioner, Jose B. Martinez, was employed by a temporary help agency, Atlas Employment Services ("Atlas") on November 18, 2016. Atlas had him placed at Olympia Foods ("Olympia") on that date. Petitioner worked for Atlas for approximately one year, and had been working at Olympia since approximately October of 2016. (Tr. 11). Petitioner's job duties for Olympia involved packing and placing boxes onto pallets. (Tr. 13-14). Petitioner also described lifting boxes weighing 40-50 pounds and pushing carts weighing around 200 pounds. (Tr. 14).

Petitioner testified that prior to his employment with Atlas, he had no prior low back pain. (Tr. 14). Petitioner testified that on the date of the alleged incident, his health was "perfect, normal". (Tr. 16). Petitioner testified that he started work on November 18, 2016, 7:00 am. (Tr. 16). Petitioner claims that on this date, after 15 – 20 minutes of working, he fell. (Tr. 16). Petitioner testified that he was stretch wrapping a pallet full of boxes, holding the stretch wrap with both hands, moving backwards with the roll, when he tripped over a pallet that was behind

him. (Tr. 16-17). Petitioner testified that he fell on his buttock and back. (Tr. 17). Petitioner testified that he felt a little off and that he couldn't get up. (Tr. 17). Petitioner also testified that he felt pain in his mid-back and lower mid back. (Tr. 17).

Petitioner testified that despite his pain at 2 or 3 out of 10. (Tr. 17) Petitioner testified that his Jonathan had to help him get up. (Tr. 17-18). Petitioner testified that his boss saw him fall and asked him if he was okay to which Petitioner indicated that he was fine. (Tr. 18). Petitioner testified that although the pain increased throughout the day, he finished his shift that day at 3:30 pm. (Tr. 18-19). Petitioner stated that he told his supervisor that he was in pain and that he was sent to the company clinic, Occupational Health Centers of Illinois in Franklin Park. (Tr. 19). Petitioner testified that he went to the Occupational Health Centers at 2:45 pm. (Tr. 19).

OCCUPATIONAL HEALTH CENTERS OF ILLINOIS

Petitioner initially presented to medical care with Occupational Health Centers of Illinois in Franklin Park on November 18, 2016. (PX 1). Petitioner testified on direct examination that a translator was provided for this appointment. (Tr. 65). On cross-examination, Petitioner testified that he wasn't sure whether a translator was present. (Tr. 65-67). The Arbitrator recognized the inconsistent testimony during cross-examination. (Tr. 67). Petitioner testified that he told the treating physician, Dr. Simon that he had an injury to his waist. (Tr. 48). The records indicate that Petitioner reported bilateral low back pain that did not radiate with intermittent symptoms. (PX 1). Petitioner testified that the pain would come and go. (Tr. 49). Petitioner was initially diagnosed with a lumbar strain and released to full duty work without restrictions. (PX 1). Petitioner returned back to work and testified that he felt increased pain as the work day progressed and took pain medication. (Tr. 20-21).

Petitioner returned to Occupational Health on November 21, 2016 and the records indicate that Petitioner reported pain of 8/10 aggravated by bending. (PX 1). Petitioner was advised to continue his medications and back stretches. (PX 1). No work restrictions were issued. (PX 1). The medical records indicate that prescription medications were dispensed to the Petitioner. (PX 1).

Petitioner testified he continued working full duty and testified that his pain did not get any better. (Tr. 20). He returned to Occupational Health Centers on November 28, 2016. (PX 1). He advised that he felt better – reported pain at 4/10 – since the last appointment and had stopped taking the pain medications, but that the pain recurred after working on November 28, 2016. (PX 1). Petitioner was advised to resume taking his medication as instructed, to continue with his home exercise/back stretches, and no restrictions were recommended. (PX 1). He was advised to return to the clinic if his pain was not resolving of and if he had new symptoms develop. (PX 1). Petitioner did not return to Occupational Health during the next month. (PX 1).

Petitioner continued working without restrictions. (Tr. 21). Petitioner testified that he felt increased pain after he ran out of the prescribed medication. (Tr. 21). Petitioner testified that he requested authorization to return to the Occupational Health Centers on January 2, 2016, but was denied this request from his supervisor at Olympia. (Tr. 22). He testified that he continued to work from Olympia but that his back pain did not resolve. (Tr. 22). He also testified

that his assignment with Olympia was terminated on January 11, 2017, and that he was provided another assignment with Atlas. (Tr. 23). He testified that he is currently working under the new assignment, with Star Hydraulics, since January 23, 2017. (Tr. 24).

DR. FAROOQ KHAN

Prior to starting his new assignment, Petitioner presented to Dr. Farooq Khan with Northwest Chicago Medical Center on January 17, 2017. (PX 2). Petitioner testified that a friend of his recommended that he seek care from Dr. Khan, a back specialist. (Tr. 51, 52). He described lumbar pain with associated radiation to the right lower extremity. (PX 2). Petitioner testified that the right leg pain did not begin immediately and that he could not remember when it began (Tr. 45) and that his right leg pain commenced "[a]fter I fell, after the accident." (Tr. 24). Petitioner advised that no physical therapy had previously been done and no medications had been prescribed. (PX 2). He was diagnosed with lumbosacral radiculitis, myofascial pain and was prescribed an MRI, therapy and prescription medications. (PX 2). Work restrictions were also recommended. (PX 2).

The next day, Petitioner underwent an MRI of the lumbar spine with the radiologist report indicating posterior disc protrusions at L1-2, L2-3, L3-4, and L5-S1 with evidence of bilateral foraminal narrowing which was mild at L3-4 and L5-S1 secondary to disc bulging as well as posterior element hypertrophy and mild facet arthrosis, L4-5 level identified loss of disc height minimal bulging and bilateral neural foramen narrowing as well. (PX #2).

Petitioner returned to Dr. Khan on February 14, 2017 for a follow-up. (PX 2). Petitioner advised that he had substantial, but transient improvement with medications and mild benefits from therapy, with no significant increase in pain complaints. (PX 2). Dr. Khan recommended a transforminal epidural steroid injection at the right L4 and L5 level. He also recommended that Petitioner continue therapy at 2-3 times per week for 4 weeks. (PX 2). Petitioner testified however that he stopped his therapy at this point. (Tr. 29).

On February 28, 2017, Petitioner underwent the recommended injection and would return to Dr. Khan on March 18, 2017 for a follow-up. (PX 2). He testified that the injection helped significantly with his back and leg pain. (Tr. 29). The records indicate an 80% initial relief with a 50% sustained relief. (PX 2). An additional injection was requested by Petitioner and recommended by Dr. Khan. (PX 2). The records also indicate that Dr. Khan wished to consider an independent surgical referral pending the Independent Medical Examination (IME). (PX 2).

Petitioner testified that the IME was scheduled with Dr. Goldberg on March 22, 2017. Dr. Goldberg's report was admitted for the limited purpose of notice and penalties. (Tr. 120).

Petitioner returned to Dr. Khan on April 4, 2017 for a follow up. (PX 2). Petitioner advised that he continued to work with restrictions. (PX 2). Treatments were placed on hold pending the completion of the IME report. (PX 2). A repeat injection was recommended and Petitioner was advised to continue therapy, transitioning to a home improvement exercise program as tolerated. (PX 2).

On May 2, 2017, Petitioner returned to Dr. Khan for a follow-up and a second injection. (PX 2, Tr. 32). Petitioner returned to therapy from May 3, 2017 through June 6, 2017, with a follow-up with Dr. Khan on June 6, 2017. (Tr. 32, PX 2). He advised that therapy provided moderate benefits to his pain complaints. (PX 2). He also indicated that overall, his pain had improved and that he was tolerating light work duties. (PX 2). Physical examination revealed minimal tenderness in the facet and paraspinous musculature only, with range of motion being grossly intact. (PX 2). The treatment plan at this time was to return Petitioner to full duty work, and for him to continue with therapy and transitioning to a home exercise program. (PX 2). Petitioner testified that he felt better after his return to full duty employment. (Tr. 33).

Petitioner eventually returned back to Dr. Khan on July 18, 2017. (PX 2). He advised that he had been working without restrictions but began to experience moderate to severe pain in the lumbar region radiating down the right lower extremity. (PX 2). Petitioner advised that his job duties included sweeping, bending, lifting, prolonged ambulation and siting. (PX 2). On cross-examination, however, Petitioner testified that he did not sweep. (Tr. 54-55). Petitioner requested a repeat injection due to the pain complaints. (PX 2). Petitioner underwent the repeat injection on August 1, 2017. (Tr. 34, PX 2).

Petitioner followed up with Dr. Khan on August 29, 2017 advising of substantial improvement in his lumbar pain. (PX 2). He reported that he was only experiencing lumbar pain with bending and prolonged standing. (PX 2). He was also working full duty without restrictions. (PX 2). Petitioner was referred to an independent spinal surgeon for an evaluation at this point as well as a discography. (PX 2).

DR. SEAN SALEHI

Petitioner would eventually present to Dr. Sean Salehi with Neurological Surgery and Spine Surgery for a surgical consultation. (PX 4). Petitioner advised that since the alleged incident, he had undergone three (3) injections and physical therapy. (PX 4). He rated his pain at this time as 3/10. (PX 4). Straight leg raise was positive on the right in the back only. (PX 4). Petitioner was diagnosed by Dr. Salehi with degenerative disc disease of the lumbar spine. (PX 4). Dr. Salehi recommended Petitioner undergo a right L4-5 transforaminal lumbar interbody fusion due to failed conservative treatment. (PX 4). He also recommended a medium duty work restriction. (PX 4). Petitioner testified that he did not wish to undergo the surgery initially. (Tr. 36-37).

Petitioner advised Dr. Salehi that he had a prior work injury which required a left shoulder arthroscopy. (PX 4, Tr. 56). Petitioner testified that the surgery was due to his left shoulder hurting because of an incident at work approximately 18 years ago. (Tr. 56-57).

On October 30, 2017, Petitioner returned to Dr. Salehi for a follow-up evaluation. (PX 4). He advised of continued pain radiating down the right leg to the thigh. (PX 4). Surgery was again recommended despite Petitioner's refusal to undergo same. (PX 4).

On January 22, 2018, Petitioner presented to Dr. Salehi for a follow-up. (PX 4). Petitioner testified that he continued to work in the interim, between office visits. (Tr. 37).

Petitioner advised of pain at 5-6/10 mostly on the right side with intermittent radiation into the right posterior thigh. (PX 4). Physical examination revealed normal gait, posture, no paraspinal muscle spasms, and relatively normal strength. (PX 4). At this time, Petitioner wished to undergo the recommended surgery. (PX 4, Tr. 37).

On June 11, 2018, Petitioner returned to Dr. Salehi for a follow-up evaluation. (PX 4). He advised of continued pain with radiation down the right lateral thigh. (PX 4). He again rated his pain at 5-6/10. (PX 4). Physical examination revealed reduced range of motion and tenderness, and work restrictions at medium duty remained in place. (PX 4). Surgery was again recommended and Petitioner testified that he wished to undergo the recommended surgery. (PX 4, Tr. 39). Petitioner testified that he did not know what kind of surgery was being recommended but that he just wanted the pain to go away. (Tr. 61).

In regard to his life activities, Petitioner testified that when he tries to engage in activities like running he would fall, though on follow-up questioning he testified that he doesn't actually fall. (Tr. 39). Petitioner further testified that his injury affected his relationship with his wife, in that he is not able to perform sexual activity and that it is a big problem with his wife. (Tr. 39-40). He testified that he was not currently taking any prescription medications, only over-the-counter Advil once a week. (Tr. 41).

DR. GHANAYEM, IME

Following the January 22, 2018 appointment with Dr. Salehi, Petitioner testified that he also underwent an independent medical examination with Dr. Ghanayem on April 9, 2018. (Tr. 38, RX 1). Petitioner advised that he hurt his back in November 2016 and had low back pain predominantly to the right side of his back. (RX 1). He noted some referral into the buttock and upper thigh on the right. (RX 1). He advised that he had three (3) epidural injections and two (2) months of physical therapy which had helped (RX 1). Petitioner denied any prior low back injuries. (RX 1).

Physical examination revealed tenderness to the right lower lumbar base with a little bit of tightness at the end range of flexion and extension. (RX 1). His tension sign was negative for radicular pain, but he did have low back pain axial compression of the head and truncal rotation through the knees and distraction of the shoulder. (RX 1). Dr. Ghanayem reviewed the MRI scan of January 2017 and indicated that it revealed end-stage disk degeneration at L4-L5, but that there was no compression.

Dr. Ghanayem's impression was that Petitioner sustained an aggravation of his lumbar disk degeneration from his work injury but there was no compression. (RX 1). He could not explain the leg symptoms. (RX 1). He also noted that Petitioner exhibited some non-organic pain behaviors with multiple positive Waddell signs. (RX 1). Per Dr. Ghanayem, Petitioner had reached maximum medical improvement and though he had residual back pain, it was not surgical in nature. (RX 1). Petitioner was not a surgical candidate given he did not have a surgical lesion. (RX 1). He did not require any further care and could continue to work in his capacity as a saw operator. (RX 1).

DR. MURCIANO, PCP

At trial, Petitioner testified that he presented to Dr. Elias Murciano, his primary care physician on May 18, 2018 for a physical exam. (Tr. 58-59). He testified that he sees Dr. Murciano once or twice a year for his physical and to refill his blood pressure and cholesterol medication. (Tr. 59-60).

At the close of testimony, and after Petitioner had rested his case, attorney for Respondent requested that proofs remain open so that he may obtain the medical treatment records from Dr. Murciano. (Tr. 127, 129). The Arbitrator granted Respondent's attorney's request, over the objection of Petitioner's attorney, for the limited purpose of subpoenaing the practice group of Petitioner's primary care physician, Dr. Murciano. (Tr. 135).

At the continued trial setting, and closing of proofs, Respondent's attorney objected to Petitioner's testimony as to the contents of Dr. Murciano's medical records on the grounds that the matter was continued for the limited purpose of obtaining Petitioner's primary care physicians records and Petitioner's attorney already had an opportunity to rehabilitate Petitioner's testimony and discuss Dr. Murciano's treatment records at the time of the prior hearing.

Medical records from Dr. Murciano obtained via subpoena indicate that Petitioner had initially presented to Dr. Murciano on March 26, 2014, to establish care for management of hypertension/hyperlipidemia. (RX 3). The records indicate that Petitioner also advised of sexual dysfunction with decreased libido. (RX 3). The assessment was of hypertension, hyperlipidemia, and decreased libido. (RX 3).

On December 22, 2014, Petitioner presented to Dr. Murciano complaining of posterior midback pain radiating forward over the ribcage. (RX 3). He advised that he fell when he planted his foot on a step and lost his footing. (RX 3). He described the pain as severe with symptoms aggravated by bending, coughing, laying down, siting, standing and twisting. (RX 3). He was diagnosed with left flank pain. (RX 3).

On April 20, 2016, Petitioner presented to Dr. Murciano complaining of a work-related incident with pain in the left shoulder. (RX 3). He advised that the incident occurred while lifting, pulling, pushing and cleaning sewers. (RX 3). He described the pain as moderate and fluctuating since the incident. (RX 3). Symptoms were positive for arthralgias. (RX 3). Physical examination revealed decreased range of motion, tenderness and pain to the left shoulder. (RX 3). Petitioner was assessed with left shoulder pain. (RX 3).

Petitioner presented to Dr. Murciano on February 27, 2017 for a follow-up regarding his hypertension, hyperlipidemia, and sexual dysfunction. (RX 3). Petitioner noted decreased libido, erectile dysfunction and precocious ejaculation. (RX 3). Physical examination revealed no musculoskeletal edema or neurological deficits. (RX 3). The Arbitrator also notes that there is no mention in this record of the alleged work-incident of November 18, 2016 nor complaints involving Petitioner's low back.

On November 24, 2017, Petitioner returned to Dr. Murciano complaining of pain in the right shoulder and right elbow. (RX 3). He advised that this was a result from a fall from his roof, when he was working in his attic. (RX 3). Petitioner indicated that he was working on his attic and stepped on drywall, falling a floor down. (RX 3). He advised he had lost consciousness for approximately four (4) minutes. (RX 3). Physical examination revealed decreased range of motion of the right shoulder, tenderness and pain. (RX 3). He also had decreased range of motion, swelling and deformity of the right elbow and lacerations to the right wrist. Petitioner was diagnosed with right elbow pain and acute pain of the right shoulder. (RX 3). The Arbitrator again notes that there is no mention in this record of the alleged work-incident of November 18, 2016 nor complaints involving Petitioner's low back.

Petitioner returned to Dr. Murciano on May 18, 2018, with complaints of a tingling sensation on his left arm which started approximately three (3) months prior. (RX 3). Petitioner reported no recent history of trauma or injury except for the incident in September 2017 when he fell from the attic of his house, through the roof and onto the floor. (RX 3). He also reviewed a history of a fracture of a fifth left finger and right finger due to trauma at work. (RX 3). There was also concern with low libido, which had been brought up in the past. (RX 3). Petitioner advised he had no muscle aches. (RX 3). Spinal examination of the back revealed no tenderness, spasms or bony abnormalities, full range of motion and normal curvature. (RX 3). Petitioner was assessed with paresthesia of the upper limb, reduced libido, and hypertension. (RX 3).

SALVADOR BARRIGA

Petitioner also called Mr. Salvador Barriga to testify at trial. (Tr. 69). Mr. Barriga is employed as a medical biller for Proficient Medical Billing. (Tr. 69). He testified that his job consisted of reviewing reports and procedures recommended by medical providers and generating bills and mailing them to the appropriate insurance carriers. (Tr. 69-70). Mr. Barriga testified that Petitioner's Exhibit 13 was an itemized bill of treatment with Universal Health Care, Northwest Chicago Medical, Network Durable Medical Equipment, and Stat Meds RX from Proficient Medical Billing. (Tr. 71-73). Mr. Barriga testified that attempts were made to collect payments on the bills for these providers with Atlas, but that no payments had been received at the time of trial. (Tr. 77). Mr. Barriga testified that he discussed the bills with Ms. Galarza from Atlas, who advised that she was looking into the case and requested that Mr. Barriga send her the bills and medical notes in question. (Tr. 80, 85). After continued communications, Mr. Barriga testified that Ms. Galarza advised the bills were unpaid as they were in dispute. (Tr. 93).

On cross-examination, Mr. Barriga testified that he was not aware if any denial letters were sent to the medical providers directly. (Tr. 103). He further testified that it was rare that he would not be aware of denial letters being sent to providers without his knowledge but that it is possible. (Tr. 104). He also testified that he mailed each bill to Ms. Galarza, but upon further questioning testified that he did not physically put the bills in the envelopes, just that he dropped off the envelopes allegedly containing the bills at the Post Office. (Tr. 107-108). Mr. Barriga testified that the only bills he could confirm Ms. Galarza received were the bills for Ambulatory Surgical Center, Northwest Medical. (Tr. 108-109). Mr. Barriga testified that it was unclear when Ms. Galarza received these bills. (Tr. 109).

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Commission*, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hegeler Zinc. Co. V. Industrial Board,* 284 Ill. 378 (1918).

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

C. ACCIDENT

A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course, of the employment. 820 ILCS 305/2. Both elements must be present in order, to justify compensation. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill. 2d 478 (1989).

The phrase "in-the course of" refers to the time, place, and circumstances under which an incident occurred. *Orsini v. Industrial Commission*, 117 Ill. 2d 38 (1987). The words "arising out of" refer to the origin or cause of the incident and presuppose a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Commission,* 129 Ill. 2d 52 (1989).

"Preponderance of the evidence is evidence which is of greater weight, or more convincing than the evidence offered in opposition of it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Houck v. Nationwide Rail Service*, 11 IWCC 249, citing, *Jones v. J. Rubin*, 02 IIC 142; [Note, the compensability holding in *Houck* was overturned at the Circuit Court on other grounds] *Parro v. Industrial Commission*, 630 N.E.2d 860 (1st Dist. 1993); *Central Rug & Carpet v. Industrial Commission,* 838 N.E.2d 39 (1st Dist. 2005).

Among the factors to be considered in determining whether a claimant has sufficiently carried his burden, is the credibility of declarant. See, *Houck*, supra. Credibility is the quality of a witness which renders his evidence worthy of belief. The arbitrator, whose province it is to

evaluate witness credibility, evaluates the demeanor of the witness and any external inconsistencies with his testimony. Where a claimant's testimony is inconsistent with his actual behavior and conduct, the Commission has held that an award cannot stand. *McDonald v. Industrial Commission,* 39 Ill. 2d 396 (1968); *Swift v. Industrial Commission,* 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d 213 (1980). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks,* 08 ILWC 004187 (2010).

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

After considering the entirety of the evidence, including Petitioner's testimony and the medical treatment records, including that from his treating physician, Dr. Murciano, the Arbitrator finds that Petitioner is not credible regarding his ongoing complaints of pain in his lower back as related to work. The Arbitrator finds that Petitioner's testimony does not match the facts or the medical records, and his testimony cannot be believed.

Shell Oil v. Industrial Commission, 2 Ill. 2d 590 (1954), is instructive here. In that case, it was astutely observed that "declarations of an injured person to a treating physician as to his physical condition, and the cause thereof, are admitted into evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid." *Id.* citing *Shaughnessy v. Holt*, 236 Ill. 485 (1908).

Similar language was cited by the Supreme Court in *Jensen v. Elgin, Joliet and Eastern Railway Company*, 24 Ill. 2d 383 (1962), for the proposition that the desire for proper treatment outweighs any motive to falsify. By way of general evidentiary concepts, greater weight is ordinarily afforded to contemporaneous medical records and histories, instead of later, less reliable and self-serving histories by those who have had time to formulate statements.

There are several examples throughout Petitioner's testimony that are inconsistent with the medical record evidence. First, Petitioner advised Dr. Khan at his initial appointment, that he had not previously been prescribed medication for the treatment of his low back complaints. However, the medical records from Occupational Health Centers indicate that Petitioner was prescribed medications. In fact, the records indicate that Petitioner advised that he had stopped taking the medications as instructed because he was pain free. Petitioner also testified that part of his job duties with Star Hydrohaulics did not involve sweeping, however, he advised Dr. Khan that he sweeps, bends and lifts.

Petitioner testified that he denied a history of back pain, however, per the medical records from Dr. Murciano, on December 22, 2014, Petitioner presented to Dr. Murciano complaining a posterior midback pain. The Arbitrator further notes Dr. Murciano's records are quite illuminating as to Petitioner's lack of credibility here.

Petitioner testified that as a result of the alleged incident, his relationship with his wife had been affected, in that he is not able to perform sexual activity and that it is a big problem with his wife. However, the Arbitrator notes that according to Dr. Murciano's records, Petitioner had a long history of sexual dysfunction with decreased libido beginning with his initial evaluation with Dr. Murciano. The Arbitrator finds that any issues regarding Petitioner's sexual activity, clearly pre-dated the alleged work-incident.

The Arbitrator also finds it curious that Petitioner would mention to Dr. Murciano, a work-related incident resulting in left shoulder pain from lifting heavy objects in April 2016, as well as an injury in November 2017, when Petitioner fell through his attic, but made no mention to Dr. Murciano of the alleged November 18, 2016 incident. The Arbitrator finds this inconsistency troubling and significantly calls into question Petitioner's credibility and representations to Occupational Health Centers, Dr. Khan, Dr. Salehi, and Dr. Ghanayem.

Furthermore, the Arbitrator finds Dr. Murciano's records at odds with Petitioner's testimony and his representations to Dr. Khan and Dr. Salehi of on-going complaints of back and right leg pain. In particular, Petitioner made no mention of any low back or right leg complaints at his appointment of February 27, 2017, despite advising Dr. Khan of complaints of pain between 5-10/10, lumbar pain, and paresthesia in the lower extremity just a few weeks prior. Most concerning here, is that Dr. Murciano's records of May 18, 2018, indicate that Petitioner demonstrated full range of motion and no tenderness with regard to his back during a spinal exam, but three (3) weeks later, when presenting to Dr. Salehi, demonstrated reduced range of motion and tenderness. Not only does the Arbitrator find this inconsistency to discredit Petitioner, but also significantly calls into question the findings and opinions of Dr. Salehi.

After reviewing the evidence in its entirety, weighing the credibility of the Petitioner and his testimony, and examining the medical records provided by the Petitioner and Respondent, the Arbitrator concludes the Petitioner has failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and occurring in the course of the employment. The Arbitrator notes it is well established that a Petitioner carries the burden of proving his case by a preponderance of the evidence. Consistent with the case law referenced herein, Petitioner failed to prove his accident arose out of and in the course of his employment with Respondent. The Arbitrator finds Petitioner to not be credible in light of the contemporaneous medical treatment records from his primary care physician, Dr. Murciano. All other issues are moot.

F. CAUSAL CONNECTION

The Arbitrator has separately decided on the issue of accident, as above. However, causal connection as it relates to Petitioner's alleged condition of ill-being in the lumbar spine was placed in dispute and is important for discussion, particularly as it relates to Petitioner's credibility and the issue of "accident." Petitioner carries the burden of proving his case by a

preponderance of the evidence. The Arbitrator does not find Petitioner to be credible, and concludes that Petitioner has failed to establish that his current condition of ill-being in the back is causally connected to the alleged November 18, 2016, work event.

Petitioner testified that he told the treating physician, Dr. Simon, when he first presented to medical care, that he had an injury to his waist. He also advised that he had bilateral low back pain that did not radiate with intermittent symptoms. Furthermore, when he returned to Occupational Health Centers, the records indicate that Petitioner advised the medical provider that he felt better and stopped taking the medications and that he was pain free. He was advised to return to the clinic if he had new symptoms develop. Even if the Arbitrator were to find Petitioner credible here, by his own testimony, Petitioner did not request a follow-up appointment until over a month later.

Additionally, the Arbitrator has previously found Dr. Murciano's records at odds with Petitioner's testimony and his representations to Dr. Khan and Dr. Salehi of on-going complaints of back and right leg pain. As such, the Arbitrator finds the records and representations of Dr. Khan and Dr. Salehi are given little weight because Petitioner did not give full and accurate histories to either physician. Therefore, the Arbitrator gives far greater weight to the opinions of Dr. Ghanayem.

Dr. Ghanayem noted that the MRI revealed degenerative changes of Petitioner's lumbar spine. The Arbitrator has already found Petitioner not to be credible in regards to the alleged work-incident. Furthermore, Dr. Ghanayem stated that there was nothing compressive in terms of his lumbar spine and that he could not explain Petitioner's leg symptoms. He also noted that Petitioner exhibited nonorganic pain behaviors and multiple Waddell signs.

As above, the Arbitrator has separately decided on the issue of accident, which renders all other issues moot. However, after taking into account Petitioner's treatment records with Dr. Murciano, which make no reference to the work-incident despite indications to other significant injuries, his lack of credibility in regard to his trial testimony and representations to the relevant treating and examining physicians, and references to non-organic pain behaviors and multiple positive Waddell's signs by Dr. Ghanayem, the Arbitrator concludes that Petitioner did not sustain an injury to his lumbar spine that is causally related to his employment with Respondent. In other words, the Arbitrator finds Petitioner's current condition is not related to the alleged November 16, 2016 accident.

J. MEDICAL BILLS

At trial, Petitioner claimed medical bills from Dr. Khan, Stat Med RX, Universal Healthcare, Edgebrook Radiology, Dr. Desai Virendra, NW Chicago Medical, Network Durable Equipment, and Dr. Sean Salehi.

The Arbitrator has separately decided on accident and causal connection. Petitioner has not proven, by a preponderance of the evidence, entitlement to medical services not otherwise provided by Respondent. Accordingly, the Arbitrator concludes Respondent is not liable for nor ordered to pay any of the disputed medical charges, which were not otherwise paid.

K. TTD

Petitioner claims he is entitled to temporary total disability benefits for the period of January 17, 2017 to January 23, 2017. For an employee to be entitled to temporary total disability benefits under the Illinois Workers' Compensation Act, he must prove he is "totally incapacitated for work by reason of the illness attending the injury." *Mt. Olive Coal Co. v. Industrial Commission*, 129 N.E. 103, 104 (Ill. 1920).

The Arbitrator has rendered a Decision, separately, on the issues of accident and casual connection. Petitioner has not proven by a preponderance of the evidence that the alleged accident arose out of her employment with Respondent. Moreover, he has failed to prove that any alleged condition of ill being that may be present in the lumbar spine is *causally related* to the isolated work accident of November 18, 2016. Additionally, Petitioner testified that the reason of his absence from employment during the requisite period was due to a transfer in assignments with Atlas from Olympia to Star Hydraulics. Petitioner presented no evidence that Respondent was unable to accommodate any recommended work-restrictions here. In fact, Petitioner testified that he continued to work from the date of the incident to present, with the only gap in employment from the period when his assignment with Olympia was terminated and he was provided another assignment with Star Hydraulics. Petitioner has failed to prove he is totally incapacitated for work by reason of the illness attending the injury.

The Arbitrator concludes that no TTD is due and owing to Petitioner.

M. PENALTIES and FEES

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein. The Arbitrator has decided, separately, on the issues of accident and casual connection.

Petitioner is not entitled to any Penalties or Fees. The imposition of Penalties and Attorneys' Fees under Section 19(k) and Section 16, in particular, is discretionary. *McMahan v. Industrial Commission*, 183 Ill.2d 499 (1998). The standard for Awarding Penalties and Attorneys' Fees under Sections 19(k) and 16 is higher than the standard for Awarding Penalties under Section 19(l). Id. The Supreme Court has held that it is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause to Award Penalties under Sections 19(k) and 16.

On June 28, 2018, Petitioner filed his Petition for Penalties and Fees pursuant to Sections 19(k), 19(l) and 16. The Petition for Penalties and Fees was served on Respondent on June 28, 2018. Respondent filed its Response to the Petitioner for Penalties and Fees on June 29, 2018, and on the same date, served a copy on Petitioner's counsel. In its Response, Respondent made specific denials to Petitioner's allegations and averments.

Petitioner sought Penalties and Fees based upon Respondent's denial for interim benefits and non-payment of medical bills. Here, Respondent received reliable evidence from its Section 12 expert, Dr. Ghanayem, on Petitioner's diagnosis, the necessity of prior medical treatment and further care, including surgery, Petitioner's ability to return to work in any capacity, and an assessment as to maximum medical improvement. Respondent relied upon the opinions and conclusions of its expert physician and did not engage in unreasonable and vexatious delay in any benefit payment.

As such, the Arbitrator finds that Petitioner has not proved that penalties or fees should be imposed on Respondent.

O. PROSPECTIVE MEDICAL

The Arbitrator has found Petitioner has not proven accident and casual connection. Therefore, no prospective medical care is awarded.

STATE OF ILLINOIS)
COUNTY OF PEORIA) SS:

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES SINGER,
Petitioner,

vs. No. 14 WC 36106

STATE OF ILLINOIS/ DEPARTMENT OF TRANSPORTATION,
Respondent.

20IWCC0458

DECISION OF OPINION ON REVIEW UNDER SECTION 8(a)

Timely Petition for Review Under Section 8(a) having been filed by Petitioner herein and notice given to all parties, the Commission, after being advised of the facts and law, finds that Petitioner's lumbar spine condition has materially worsened since the entry of the Arbitrator's Decision filed on November 18, 2016. Petitioner is entitled to additional medical treatment and surgery as recommended by Dr. Patrick O'Leary. Specifically, a decompression and fusion at L3-4 for treatment of segment degeneration and left leg radiculopathy that has occurred secondary to an L4-5 fusion performed on March 21, 2014.

On February 27, 2015 Arbitrator McCarthy filed a Decision on Petitioner's 19(b) Petition, finding that Petitioner sustained accidental injuries to his left leg, hip and buttocks on August 28, 2013 when he slipped and fell from a truck wheel. He was diagnosed with aggravation of an underlying spinal stenosis at L4-5, and acute rupture of the L4-5 disc in the neuroforamen causing his left L4 radiculopathy. On March 21, 2014 Dr. O'Leary performed a left sided hemilaminectomy at L4-5, a left sided partial medial facetectomy at L4-5 and left sided discectomy at L4-5.

Petitioner continued to have significant symptoms which included bilateral leg weakness. groin pain and pain in the anterior thighs and shins. On January 9, 2015 Petitioner underwent a second surgery. The surgery included a posterior spinal fusion for combined interbody fusion at L4-5; right sided laminectomy with decompression; revision decompression left side L4-5; supplemental instrumentation at L4-5, using a

20IWCC0458

chrome rod; application of biomedical device PEEK capsule and cage; local spinal autograft and crushed spinal autograft. Dr. O'Leary opined that both the first and second spinal surgeries were reasonable, necessary and causally related to the original work accident of August 28, 2013. Arbitrator McCarthy awarded medical expenses, and temporary total disability benefits through January 23, 2015.

On November 17, 2016 Arbitrator Gallagher filed a Decision on the issues of Nature and Extent of Disability only. The Arbitrator concluded that Petitioner was permanently and totally disabled as the result of the work accident of August 28, 2013.

On February 15, 2018 Petitioner timely filed a Petition for Review Under Section 8(a). On March 11, 2020, Commissioner Mathis held a hearing on the matter. Both sides were represented by Counsel.

Petitioner testified that in June 2017 he began to experience a resurgence of pain in his back that radiated to his hips and groin. There was no inciting event that caused the return of symptoms. He returned to Dr. O'Leary, his longtime treating orthopedic specialist on September 5, 2017. An MRI was performed on September 28, 2017 and Dr. O'Leary recommended a trial of conservative treatment. An epidural spinal injection was performed that provided relief only for a period of several days.

On January 2, 2018 Dr. O'Leary noted facet hypertrophy and lateral recess stenosis at L3-4, above his prior fusion at L4-5, with worsening left leg radiculopathy. Dr. O'Leary commented that Petitioner's condition represents a premature, early acceleration of disease at the L3-4 level that can occur in 30% of patients, although more typically at 7-10 years following fusion surgery. He characterized Petitioner's condition as progressive. Dr. O'Leary recommended decompression and fusion at the L3-4 level.

Respondent refused authorization and sent Petitioner for a Section 12 examination with Dr. Van Fleet in January 2019. Dr. Van Fleet examined Petitioner on only one occasion. He opined that Petitioner has an underlying condition of preexisting degenerative disc disease and there is no causal connection to the work accident.

Dr. O'Leary reviewed the Section 12 report of Dr. Van Fleet and in his August 22, 2019, note stated that he violently disagreed with Dr. Van Fleet's opinions. Dr. O'Leary opines that Petitioner has adjacent spinal disease accelerated by spinal fusion. His charting references an asymmetric leftward tilt at L3-4, visible on x-ray with a clear foraminal collapse of the left side.

The Commission finds the opinions of Dr. O'Leary that Petitioner requires a fusion and decompression at L3-4 and that the recommended surgery is related to the prior surgery and related to the August 28, 2013 work accident to be more persuasive that

20IWCC0458

the opinions expressed by Dr. Van Fleet by virtue of Dr. O'Leary's long course of treatment with Petitioner and his familiarity with the progression of his condition.

Petitioner's Petition for Review Under Section 8(a) of the Act is hereby granted for the foregoing reasons.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical treatment and surgery recommended by Dr. O'Leary including but not limited necessary and appropriate pre-operative testing and post-operative medical care and rehabilitation.

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

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

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

DATED: AUG 17 2020
SJM/msb
O:7/21/20
44

Stephen Mathis

Thomas J. Tyrrell

L. Elizabeth Coppoletti

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Misty Long,

Petitioner,

20IWCC0459

vs.

NO 18 WC 20250

J. Draper Glass,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 23, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,600.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: AUG 17 2020
SJM/sj
o-6/23/2020
44

Stephen J. Mathis

Douglas D. McCarthy

20IWCC0459

SPECIAL CONCURRENCE/DISSENT

I concur with the Majority's opinion save its award of permanent partial disability benefits and the award of the medical expenses. I find Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left hand pursuant to Section 8(e)9 of the Act. Further, I would award the reasonable and necessary medical expenses of $28,693.33 for expenses previously paid pursuant to the negotiated rate and $1,545.00. for outstanding bills pursuant to Sections 8(a) and 8.2 of the Act. Therefore, I respectfully dissent.

Permanent Partial Disability Benefits

Pursuant to Section 8.1b of the Act, I weigh the following five factors accordingly (*820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101):

Section 8.1b(b)(i) – level of impairment

Neither party obtained an impairment rating; as such, I assign no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

At the time of the March 28, 2018 accident, Petitioner was employed as a studio manager for glass blowing. T. 57. Such occupation is hand intensive. I find this factor weighs in favor of an increased permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 30 years-old on the date of accident. I observe her youth allows for a quicker recovery from her injury. I find this factor weighs in favor of a decreased permanent disability.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner testified while waiting to proceed with her surgery, she suffered some loss of income. Petitioner testified at time of trial, she was unemployed but provided no additional explanation regarding her employment status. As such, there is no evidence that her future earning capacity was adversely impacted as a result of her injury. I assign no weight to this factor.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner testified as follows regarding her current condition of ill-being: "Um, I feel almost back to normal, I am just not as strong. And, like I said, an occasional aching happens when I wake up. I think that's just due to surgery has happened so its going to be like that. But

20IWCC0459

almost 100 percent." T. 81-2. On May 22, 2019, Petitioner was discharged from physical therapy with "Great [range of motion] of the fingers and wrists with excellent grip strength. Grip is equal on both [upper extremities]." On May 23, 2019, Dr. Williams released Petitioner to return to work without restrictions. Given Petitioner's minimal residual complaints as corroborated by her treatment records, this indicates Petitioner experienced a positive surgical outcome. I find this factor weighs in favor of a decreased permanent disability.

Based on the above, I find Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left hand pursuant to Section 8(e)9 of the Act.

Medical Expenses

I believe the Majority's award to Petitioner of medical expenses in excess of the negotiated rate fails to comply with the Act. The matter of *Perez v. Illinois Workers' Compensation Commission*, 2018 IL App (2d) 170086WC, is directly on point. In *Perez*, the Commission awarded medical expenses of $17,597.86 which represented the total amount paid by the claimant's husband's health insurance carrier. On appeal the claimant argued that the employer should not realize the benefit of the negotiated rate if such rate was negotiated by a third-party insurance carrier and not the employer. The Appellate Court disagreed. In reviewing Section 8(a) of the Act, the Court noted "the employer is required to pay (1) the negotiated rate, if applicable, or (2) the lesser of the health care provider's actual charges, or (3) according to a fee schedule." *Perez* at ¶ 19. The Court went on to state: "The statute clearly requires the employer to pay '*the* negotiated rate.' (Emphasis added.) Had the legislature intended to limit negotiated rates and agreements to those between the employer or the employer's own insurance carrier, it could have included this restriction; however, the legislature declined to do so." *Id.*

The Majority completely ignores the Act and the clear holding in *Perez* by awarding medical expenses to Petitioner in excess of the negotiated rate paid by Petitioner's spouse's health insurance carrier, BC/BS. Petitioner offered into evidence charges from three providers: 1) Midwest Orthopaedics; 2) UnityPoint Health; and 3) Associated Anesthesiologists.

Midwest Orthopaedics total itemized charges equals $13,472.00 of which $6,226.83 were paid pursuant to the negotiated rate and $1,545.00 remains with no payment made. UnityPoint Health total itemized charges equals $27,275.28 of which $22,466.50 were paid pursuant to the negotiated rate. A balance of $4,808.78 remains for the adjusted amounts. Associated

20 IWCC0459

Anesthesiologists total charges equals $1,340.00 with a $00.00 balance as the bill notes insurance payment is pending.

Pursuant to Section 8(a) of the Act, Respondent is responsible for bills paid limited to the negotiated rate as well as any unpaid bills. As such, Respondent is liable for payment to 1) Midwest Orthopaedics in the amount of $6,226.83 previously negotiated by BC/BS and $1,545.00 to be paid pursuant to the fee schedule; 2) UnityPoint Health in the amount of $22,466.50 previously negotiated by BC/BS; and 3) Associated Anesthesiologists in the amount of $00.00 as no balance is due Petitioner.

As the Court noted in *Perez*, "To award claimant any amount for medical expenses beyond the amount actually paid to the medical service providers would result in a windfall to claimant." 2018 IL App (2d) 170086WC, ¶ 22. Moreover, the medical expenses should be paid directly to the providers. Section 8(a) of the Act states, in part, "If the employer does not dispute payment of first aid, medical, surgical, and hospital services, the employer shall make such payment to the provider on behalf of the employee." *820 ILCS 305/8(a)* (West 2013). The rules of statutory construction are well-established:

> Our primary goal, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. [citation omitted]. We determine this intent by reading the statute as a whole and considering all relevant parts. [citation omitted]. We must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous [citation omitted], avoiding an interpretation which would render any portion of the statute meaningless or void [citation omitted]. We also presume that the General Assembly did not intend absurdity, inconvenience, or injustice. [citation omitted]. The Workers' Compensation Act is to be interpreted liberally [citation omitted], to effectuate its main purpose-providing financial protection for interruption or termination of a worker's earning power. [citation omitted]. *Sylvester v. Industrial Commission*, 197 Ill. 2d 225, 232, 756 N.E.2d 822 (2001).

In assessing legislative intent "the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought. [citation omitted]." *People v. Donoho*, 204 Ill. 2d 159, 172, 788 N.E.2d 707 (2003).

20IWCC0459

In assessing legislative intent "the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought. [citation omitted]." *People v. Donoho*, 204 Ill. 2d 159, 172, 788 N.E.2d 707 (2003).

In construing the language of Section 8(a), ordering payment directly to the providers is consistent with underlying intent of the Act- providing financial protection to an injured employee. Once the matter proceeds to hearing and the decision is final, the medical bills awarded are compensable and no longer in dispute. As such, the employer is mandated by Section 8(a) to pay the providers directly on behalf of the employee.

More importantly, Section 8.2 of the Act was amended on November 27, 2018 and January 20, 2019 creating a cause of action in favor of the medical providers solely against employers for any interest accrued due to non-payment of medical bills thereby releasing any obligation on the employee's behalf for interest. It would seem unjust to hold employers liable for interest on unpaid medical bills if they have no control in paying those bills. In the present matter, conceivably, Petitioner could choose to forgo payment of the bills from the monies he receives for the awarded medical expenses which would expose Respondent to interest and a potential civil complaint. As such, ordering payment to the providers directly is consistent with the language and intent of the Act.

For the above-stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LONG, MISTY
Employee/Petitioner

Case# **18WC020250**

J DRAPER GLASS
Employer/Respondent

20IWCC0459

On 9/23/2019, 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 1.87% 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:

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT F DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

20 IWCC0459

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Misty Long
Employee/Petitioner

v.

J. Draper Glass
Employer/Respondent

Case # **18** WC **20250**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Peoria**, on **July 15, 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 the date of accident, **3/28/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,000.00**; the average weekly wage was $**500.00**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

- The Petitioner sustained a work accident while working for the Respondent on March 28, 2018.
- The Petitioner's condition of ill-being is causally related to the accident of March 28, 2018.
- The Respondent is responsible for paying the outstanding medical bills incurred in this case subject to the fee schedule. Any monies paid by a secondary source shall be paid to the Petitioner directly.
- The Petitioner is entitled to an award of 20% loss of use of the hand for injuries she sustained as a result of the work injury.
- The Petitioner is entitled to temporary total disability benefits from January 25, 2019, to February 7, 2019, a total of 2 weeks at a rate of $333.50.

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

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

Signature of Arbitrator

August 31, 2019
Date

ICArbDec

SEP 23 2019

STATEMENT OF FACTS:

Testimony of Katie Cottingham

Ms. Cottingham was hired by the employer in March of 2016. (A.T.13) Ms. Cottingham was employed with the employer on March 28, 2018. Ms. Cottingham's employment was that of an administrative assistant to the owner, Janet Draper. (A.T. 16) Ms. Cottingham's duties included helping with keeping the digital files tidy and answering the phones. At one point she had kept the company cellphone while working from home with the company cellphone. Ms. Cottingham helped customers, answered a lot of calls, and filed bills occasionally. (A.T.15)

On March 28, 2018, Ms. Cottingham was working with the Petitioner performing demonstrative activities for a class. (A.T.19) Ms. Cottingham testified she was videotaping the Petitioner performing the activities. Ms. Cottingham testified that she heard a horrible pop to the Petitioner's wrist while performing the activity (Id.). Ms. Cottingham testified that she noticed the Petitioner appeared to be in pain after that injury. (A.T. 20)

Ms. Cottingham identified the type of tools the Petitioner worked with on the day of the accident. (A.T.23) Ms. Cottingham also confirmed Petitioner's Exhibit 6 illustrated the work station of the Petitioner at the time of the accident. (A.T. 24)

Ms. Cottingham testified that, when the accident occurred at work, she documented the accident on video on her iPad. Ms. Cottingham testified shew gave the film of the accident the owner of the business, Janet Draper. (A.T.25-26) Ms. Cottingham testified that the Petitioner reported this accident to Ms. Janet Draper. Ms. Cottingham testified that she instructed the Petitioner to go to Athletico for medical care. (A.T. 27)

Ms. Cottingham testified that she further instructed the Petitioner to seek treatment from Dr. James Williams at Midwest Orthopedic Center for her left wrist problems. (A.T. 27-28)

Ms. Cottingham testified she was familiar with the job activities of the Petitioner. (A.T. 34) Ms. Cottingham testified that the weight of the rod did not equate to the force that is require to use the rod while making glass. (A.T. 35) Ms. Cottingham explained that the further the "punty rod" is extended from one's body, the heavier the rod feels. (A.T. 36)

Ms. Cottingham testified during re-direct examination the Janet Draper was informed about the work accident immediately after it occurred. (A.T. 49)

Testimony of Petitioner

The Petitioner's employment began with the employer in May 2013. The Petitioner's job duties included demonstration of glass making, making glass, performing activities in the art field, and working with glass. The Petitioner's job duties also required her to clean up the studio and turning all the equipment in the morning. (A.T. 55)

The Petitioner testified that prior to March 28, 2018, she never had any left wrist or hand issues. (A.T. 54-55) The Petitioner testified that prior to March 28, 2018, she did not have any

treatment to her left wrist. (Id) The Petitioner further testified that prior to March 28, 2018, she never missed any work for any left wrist problems. (Id)

The Petitioner did testify that on occasion she would wear a left wrist brace pre-dating March 28, 2018. (A.T. 64) The left wrist brace was worn due to fatigue while performing normal work activities. (A.T. 62) On March 28, 2018, when the Petitioner arrived to work, she did have left wrist brace on. (A.T.61)

The Petitioner testified that on March 28, 2018, while performing a demonstration of making glass, she felt a pop to her left wrist. (A.T 63-64) Specially, the Petitioner testified that she was rotating a punty rod that weighed 3 lbs. and fully extended the rod outstretched to her body. The Petitioner testified that there was molten glass on the end for the purposes of making a paper weight. (A.T. 64-65) The Petitioner testified that she felt immediate pain to her left wrist at the time she felt the pain on March 28, 2018. (A.T. 66) The pain the Petitioner felt to her wrist at the time of the accident was completely different from anything she has felt in the past. (A.T. 69)

The Petitioner testified that she discussed the work injury with Katie Cottingham. A.T. 70) The Petitioner testified that Ms. Cottingham referred her to Athletico to get her left wrist checked out. (A.T. 70-71)

The Petitioner testified that she chose to go to Athletico due to the fact that there was a one-time free examination period. This was not going to cost any money for this examination. (A.T. 71)

The Petitioner did report to Athletico on March 30, 2018 (Pet. Ex. 2). The Petitioner provided a history of injury to her left wrist. Athletico reviewed the Petitioner's left wrist. The Petitioner had positive findings on exam. Athletico's records indicate that they encouraged the Petitioner to seek treatment from a hand specialist. (Pet. Ex. 2)

Petitioner first saw Dr. Williams on April 11, 2018. The reason for the delay of seeing Dr. Williams was due to scheduling. (A.T.72-73) On May 4, 2018, the Petitioner underwent an MRI to her left wrist. (A.T. 73) Dr. Williams informs the Petitioner that the diagnosis was that of a TFCC tear to her left wrist. (A.T. 74) Dr. Williams recommended surgery to the Petitioner's left wrist on August 8, 2018. (A.T. 75) The Petitioner underwent surgery to her left wrist on January 25, 2019. (A.T. 76)

The Petitioner was taken off work completely by Dr. Williams from January 25, 2019 until February 9, 2019. (A.T. 77) Otherwise, the Petitioner was able to work within the restrictions placed upon her by Dr. Williams.

The Petitioner testified that surgery did help her left wrist, but the left wrist is not as strong as it was. (A.T.79) There is an occasional aching in my wrist. (Id) The Petitioner had not fully got to blow glass again, but it is better than when I had not had surgery, so surgery made it better. (Id)

Testimony of Jeremie Draper

Ms. Draper is the owner of J. Draper Glass. (A.T. 107) Ms. Draper was aware there was a claimed work injury on the day of the accident. (A.T. 108) (A.T.133) Ms. Draper noticed a left wrist brace on the Petitioner's left hand when the Petitioner came into work the day of the accident. (A.T. 109)

Ms. Draper weighed the rod used by the Petitioner, and testified it weighed 3 pounds. (A.T. 111) Ms. Draper confirmed that the molten glass at the end of the rod weighs about 2 pounds. Thus, total weight would be no more than five pounds. (A.T.113)

Ms. Draper had no knowledge of the Petitioner hurting her left wrist while working at ISU. (A.T. 129) Ms. Draper had no knowledge of the Petitioner hurting her left wrist while snow sculpturing. (A.T. 130) Ms. Draper had no knowledge of the Petitioner hurting her left wrist anywhere leading up to the day of the accident March 28, 2018. (Id) Ms. Draper had no knowledge of the Petitioner injuring her left wrist anywhere ales other than at work. (A.T. 134)

Ms. Draper confirmed that she has worn a brace on her wrist in the past due to overuse and fatigue from work activities. (A. T. 145)

Medical Records of Atheletico

On March 30, 2018, The Petitioner was seen on this day at Athlectio. (Pet. Ex. 2) The history given to Athletico was that the Petitioner sustained an injury two days prior. (March 28, 2018) (Pet. Ex. 2) The described injury was that the Petitioner was demonstrating to a student rotating a long stick teaching a student how to create a glass object working at a glass blowing company. Felt a pop along her wrist and noticed swelling along the ulnar aspect of her wrist. Has aches along the ulnar aspect with pain increasing to 7/10 with attempting to grip an object or using her L arm. Using ice since that time. (Id)

The assessment at Athletico was "Pt presents with signs and symptoms consistent with possible wrist sprain and may benefit from seeing MD if symptoms continue. Pt instructed on rest, ice and compression". (Pet Ex. 2) The medical plan was to refer to Midwest Ortho. (Id)

Testimony of Dr. James Williams

Dr. Williams first saw the Petitioner on April 11, 2018 (Petitioner's Ex. 5, pg. 13). The history Dr. Williams obtained from the Petitioner was that the Petitioner injured her left wrist while working/making glass (Petitioner's Ex. 5, pgs. 13-14). The specific accident was that the Petitioner was instructing people to make glass. She felt a pop to her left wrist when her left wrist was extended in front of her (Petitioner's Ex. 5, pgs. 14-15). The diagnosis of Dr. Williams's initial examination was that of a TFCC tear (Petitioner's Ex. 5, pg. 16).

The treatment recommendation of Dr. Williams was to have an MRI of the Petitioner's left wrist. The MRI was completed. Dr. Williams next saw the Petitioner after the MRI of May 4, 2018, on May 14, 2018 (Petitioner's Ex. 5, pg. 19).

Upon the second examination by Dr. Williams on May 14, 2018, the diagnosis did not change. The Petitioner had a TFCC tear to her left wrist (Petitioner's Ex. 5, pg. 20). Dr. Williams recommended physical therapy and a cortisone injection and placed restrictions on the Petitioner's work activities (Petitioner's Ex. 5, pgs. 21-22).

The Petitioner underwent physical therapy from June 2018 to August 13, 2018. Dr. Williams testified that physical therapy did not improve the Petitioner's condition (Petitioner's Ex. 5, pg. 21).

Dr. Williams recommended the surgery for the Petitioner's left wrist. On January 25, 2019, Dr. Williams performed the surgery on the Petitioner's left wrist (Petitioner's Ex. 5, pg. 25). The surgery performed by Dr. Williams was a left wrist arthroscopy, partial tear of TFCC, with significant synovitis and inflammation in the wrist (Petitioner's Ex. 5, pg. 26).

Dr. Williams took the Petitioner off work completely from January 25, 2019 to February 7, 2019. The Petitioner followed up with Dr. Williams and went to physical therapy until May 23, 2019. The Petitioner testified that on May 23, 2019, Dr. Williams released her from care and to full unrestricted duty.

Dr. Williams testified that the Petitioner's condition of ill-being was related to the work accident of March 28, 2018. (A.T. 34-35) Dr. Williams testified the described work accident caused the TFFC and the need for surgery. (A.T. 35-36) Dr. Williams testified that the fact the Petitioner wore a brace to work prior to the work accident did not change his opinion on causation (A.T. 39)

Dr. Williams testifies on cross examination that the weight of the rod did not influence his opinions on causation. The reasoning of Dr. Williams was that the Petitioner suffered a pop while rotating the rod, and that was a specific injury. (A.T. 54 & 56) Dr. Williams testified that the force used while turning the rod was sufficient to cause the TFCC tear. (A.T. 58)

Testimony of Dr. Carroll

The Petitioner was examined by Dr. Charles Carroll at the Respondent's request. Dr. Carroll saw the Petitioner on September 12, 2018 (Rep. Ex. 1, pg. 8). Dr. Carroll testified that wearing a wrist brace could be a preventive from sustained a TFCC tear (Resp. Ex.1, pg. 12). Dr. Carroll's diagnosis is that of a TFCC tear (Resp. Ex. 1, pg. 12). Dr. Carroll did not causally relate the TFCC tear to the described work activities the Petitioner performed for the Respondent (Resp. Ex. 1, pg. 15).

Dr. Carroll agreed with Dr. Williams that rotating or placing weight outstretched from the body, could multiple the force for an individual performing such work activities (Resp. Ex. 1, pg. 20).

Dr. Carroll affirmed that he had no evidence of prior injury or condition to the Petitioner's left wrist prior to the date of the described work injury (Resp. Ex. 1. pg. 24). Dr. Carroll agreed that the treatment of Dr. Williams was reasonable and necessary (Resp. Ex. 1. Pg. 24). Dr. Carroll confirmed that considering a causation of activity with injury it is not only the weight to be considered, but also the combined force utilized while performing the activity (Resp. Ex. 1. pg. 26).

Dr. Carroll testified that he had not seen any pictures or video of the Petitioner performing work activities (Resp. Ex. 1. pg. 28). Dr. Carroll agreed that the farther away the activity is from the individual's body, the heavier a relative weight might be (Resp. Ex. 1. pg. 29). Dr. Carroll agreed that if an item the Petitioner was working with weighed 10 lbs., then if it was fully extended with the Petitioner's body, that could equate to 40 lbs. of force utilizing the multiplier (Resp. Ex. 1. pg. 30).

Dr. Carroll testified that his opinions were based off the assumption that the Petitioner's wrist would not involve flexion extension of the wrist (Resp. Ex. 1. pg. 31). Dr. Carroll testified that if the force the Petitioner was utilizing at the time of the occurrence was closer to 30-40 lbs., then it would change his opinion on causation. (Id) Dr. Carroll agreed that a popping sound of the wrist would be evidence of an acute injury (Resp. Ex. 1. pg. 32). Dr. Carroll agreed that if the Petitioner had no evidence of prior injury to the left wrist, was using 30 lbs. of force, had an injury and evidence of swelling 40 hours within that injury, then the described injury could be work related (Resp. Ex. 1. pg. 33-34).

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

The Petitioner testified as to a work accident occurring on March 28, 2018. This accident was witnessed by Katie Cottingham. Ms. Draper, owner of the business, was not in the room when the accident occurred. Ms. Draper had no knowledge of any other injuries to the Petitioner's left wrist. There was no evidence that the Petitioner injured her wrist while working at ISU or making a snow sculpture away from work.

The petitioner met her burden of establishing a work accident arising out of and in the course of her employment with the respondent on March 28, 2018.

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

The petitioner sustained a work accident on March 28, 2018. The petitioner sought medical care from Athletico two days after the work accident. The history contained in Athletico records is consistent with a work injury on March 28, 2018. There was a diagnosis of left wrist injury. Atlhletico referred the Petitioner to Midwest Orthopedic.

Dr. James Williams was the treating physician in this case. Dr. Williams causally related the diagnosis of TFCC tear to the described work injury of March 28, 2018. Dr. Williams testified that the motion and force required to rotate the rod was enough to cause the TFFC tear.

There was no evidence of any prior injured to the petitioner's left wrist. There was no evidence of any intervening accidents to the petitioners left wrist.

Dr. Carroll was the Independent examiner. Dr. Carrol confirmed that the popping sound to the Petitioner's left wrist is evidence of an acute injury to the Petitioner's left wrist. Dr. Carroll agreed that higher "force" on the left wrist the more likely an injury could occur to the Petitioner's left wrist.

The petitioner established that her condition of ill-being is related to the work injury of March 28, 2018.

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 petitioner established a work accident and a causal relationship with the same. Dr. Williams and Athletico provided medical care for that condition. The respondent agreed in Dr. Williams's deposition that the treatment was reasonable and necessary. Dr. Carroll agreed with the medical treatment of Dt. Williams.

Thus, the respondent is responsible for the medical treatment provided in this case. The respondent is responsible for the following medical expenses:

Midwest Orthopaedic	= $13,472.00
Unity Point	= $27,275.28
Assoc. Anesthes.	= $1,340.00
Total	= $42,087.28

The Arbitrator notes that $28,693.33 was paid by an insurance carrier not associated with the respondent. Thus, no 8(j) credit applies. The respondent is ordered to pay to the petitioner directly $28,693.33, that being the amount paid by the non-respondent related insurance provider. The respondent is further ordered to pay directly to the Petitioner $4,808.78, that being remaining outstanding medical bills. Total to be paid to the petitioner by the respondent is $33,502.11.

K) What temporary benefits are in dispute? TTD.

The evidence established that the petitioner was of work from date of surgery January 25, 2019, until February 7, 2019. Otherwise, the petitioner was able to work light duty with the Respondent.

Thus, the petitioner is entitled to temporary total disability benefits from January 25, 2019, to February 7, 2019.

L) What is the nature and extent of the injury?

Sec. 8.1b. Determination of permanent partial disability. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

As it relates to (i), there was no AMA performed; therefore, the Arbitrator gives this factor no weight.

As it relates to (ii), the petitioner is a glass maker/blower. All the testimony establishes that this occupation is very hand intensive. This factor is given greater weight in favor of the petitioner with the anticipation of much more use of her left hand performing her normal occupation.

As it relates to (iii), the petitioner was 30 years old at the time of the injury. The petitioner has at least 30 more years until she reaches retirement age. The Arbitrator affords this factor greater weight.

As it relates to (iv), the petitioner did testify that she lost some earnings due to her termination from employment and the pain that she had from the injury. The Arbitrator gives this factor some weight.

As it relates to (v), the petitioner testified that surgery did help her left wrist, but the left wrist is not as strong as it was. (A.T.79) There is an occasional aching in my wrist. (Id) The petitioner had not fully returned to blowing glass again, but it is better than when I had not had surgery, so surgery made it better. (Id) The diagnosis was a TFCC tear, that resulted in surgery to the left hand.

Thus, the petitioner is entitled to an award of 20% loss of use of the left hand under section 8(e) of the Act for injuries she sustained as a result of the work injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RUSSELL TURNER,

Petitioner,

vs.

NO: 15 WC 2670
15 WC 2554

CATERPILLAR, INC.,

Respondent.

20IWCC0460

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 23, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $66,800.00. 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.

20IWCC0460

DATED: AUG 19 2020

D. Douglas McCarthy

DDM/tdm
O: 6/23/20
052

Stephen Mathis

DISSENT

I respectfully dissent. As the Court noted in *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." "There is no requirement that a certain percentage of time be spent on a task in order for the duties to meet the legal definition of 'repetitive.'" *Edward Hines Precision Components v. Industrial Commission*, 356 Ill. App. 3d 186, 192, 825 N.E.2d 773 (2005). Instead, the Commission may review the manner and method of a claimant's job to determine if such duties are sufficiently repetitive to establish a compensable accident under a repetitive trauma theory of recovery. See *Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993), citing *Perkins Product Co. v. Industrial Commission*, 379 Ill 115, 120 (1942) ("[T]he claimant's injury 'was directly connected with the manner and method in which she was required to do her work, and to use her arm in the discharge of her duties.'").

Petitioner failed to prove a causal relationship between his work duties and his resulting condition of ill-being, a surgically repaired rotator cuff tear. Petitioner testified he worked as a heat-treat operator and had been doing so for the past nine years. T. 18. As part of his job duties he utilized a handler which allowed him to manipulate parts inside the furnace to move to a quencher. T. 21. Petitioner testified the use of the handler required his arms to be at or above chest level five to six hours per day. T. 24. On cross-examination, Petitioner agreed the furnace doors are opened and closed with a push button, and the handler is power assisted. T. 34.

Mr. Aaron Compton was called to testify on behalf of Respondent. Mr. Compton testified he is a group manager in Building KK heat treat. T. 43. Mr. Compton explained the process used by a handler which required the handler to push a button three times and use a foot pedal once for each part in the furnace; each part would also require the handler to push three times and pull three times. T. 46, 54. The process runs 20 minutes for four parts and 32 minutes for two parts; therefore, a handler can process two to twelve parts per hour. T. 50. Mr. Compton viewed Respondent's Exhibit 3 which was a video of Mr. Compton performing the duties of a handler. Mr. Compton further explained the parts weighed between 40 and 140 pounds and the force required to move a 140-pound part ranged between 23 and 26 pounds which he likened to pushing a grocery cart. T. 52-3. Mr. Compton testified the handler's arms would typically "be slightly above your belly button, below mid chest." T. 61.

Following Mr. Compton's testimony, Petitioner provided rebuttal testimony. Petitioner disagreed with Mr. Compton's description of the job duties specifically when he was required to stack five parts, the last part would require him to lift his arms "slightly over your chest." T. 65. Mr. Compton disputed five parts were stacked and stated the maximum was four. T. 68.

On July 12, 2017, Dr. Garst provided his causation opinion via evidence deposition. PX8. Dr. Garst testified he found a relationship between Petitioner's job duties as described to him by Petitioner and his resulting shoulder condition. PX8, p. 23-24. After viewing the job video (RX3), his opinion did not change and was reinforced by the hypothetical description of the job duties provided by Petitioner's attorney. PX8, p.24.

On March 30, 2018, Dr. Newcomer provided his causation opinion via evidence deposition. PX9. Dr. Newcomer testified Petitioner's job duties as described to him by Petitioner were either the cause or an aggravating cause for the shoulder surgery previously performed by Dr. Garst. PX9, p. 15. Dr. Newcomer also viewed the job video (RX3) and did so with Petitioner who disputed the accuracy of the video. PX9, p. 9. As such, Dr. Newcomer based his opinion on the description provided to him by Petitioner as to work above chest level and the force required which according to Petitioner was significant. T. 20. Dr. Newcomer stated his opinion might change if Petitioner's work duties required his arms to be below chest level. *Id.*

On September 27, 2018, Dr. Kornblatt provided his causation opinion via evidence deposition. RX2. Dr. Kornblatt testified Petitioner's job duties did not cause his shoulder condition, and such condition was due to a degenerative process. RX2, p. 17. In formulating his opinion, Dr. Kornblatt relied sole on the job video which evidence all arm movements were at or below shoulder level. RX2, p. 18.

Unlike the Majority, I would afford greater weight to the opinions of Dr. Kornblatt over those of Drs. Garst and Newcomer. Dr. Kornblatt relied on the objective evidence- the job video which clearly demonstrates Petitioner's job duties do not require use of his arms above shoulder level. Moreover, Dr. Newcomer conceded his opinion might change if Petitioner's description of his job duties was inaccurate. To that end, I find the job video and the testimony of Mr. Compton more credible than that of Petitioner. Mr. Compton explained the job duties in detail as to the weights and force required in using the handler which were corroborated by the job video; this is opposed to Petitioner who provided a blanket assertion that his arms were at or above shoulder height 5 to 6 hours per day. I find Petitioner failed to prove a causal relationship between his job duties and his resulting condition of ill-being.

For the above state reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TURNER, RUSSELL
Employee/Petitioner

Case# **15WC002670**

15WC002554

CATERPILLAR INC
Employer/Respondent

20IWCC0460

On 8/23/2019, 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 1.84% 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:

0708 JOHN LESAGANICH PC ATTY AT LAW
416 MAIN ST
823 COMMERCE BANK BLDG
PEORIA, IL 61602

2851 CATERPILLAR INC
ELIZABETH C LeBARON
PO BOX 348
AURORA, IL 60507

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Russell Turner
Employee/Petitioner

v.

Caterpillar, Inc.
Employer/Respondent

Case # **15** WC **02670**

Consolidated cases: **15 WC 02554**

20IWCC0460

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Peoria**, on **April 17, 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 ***October 5, 2014,* and *December 3, 2014***, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of these repetitive accidental injuries ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to these repetitive accidental injuries.

In the year preceding the injuries, Petitioner earned ***$38,485.20***; the average weekly wage was ***$740.10***.

On the date of manifestation ***October 5, 2014***, Petitioner was **53** years of age, ***married*** with *1* dependent child. On the date of the second manifestation ***December 3, 2014***, Petitioner was **54** years of age, ***married*** with *1* dependent child.

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

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

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

Respondent shall be given a credit of ***$25,158.68*** in non-occupational indemnity disability benefits pursuant to Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of ***$41,378.25***, as provided in Section 8(a) of the Act pursuant to fee schedule.

Respondent shall pay Petitioner temporary partial disability benefits ***of $493.40***/week for ***61 5/7th*** weeks.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken has a whole, Respondent shall pay Petitioner the sum of $444.06 per week for 45 weeks because the injuries sustained caused the 9% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

August 16, 2019
Date

AUG 23 2019

FINDINGS OF FACT

Petitioner testified that, for the nine years prior to October 5, 2014, he worked for Respondent as a heat-treat operator. The parties and the Arbitrator viewed what Respondent labeled as a work-place job video which, in the Arbitrator's estimation, lasted a minute or less. Petitioner testified in detail about the duties of a heat-treat operator for Respondent.

Petitioner testified that the video depicted a man working with the handler. Petitioner testified that his hands would be on the handler about seven hours per day because he did get one 30-minute break and a 30-minute lunch, as well as a couple of 10-minute breaks. When questioned as to what he did with the handler, Petitioner testified that he would go into the furnace to pull out steel, gears, pinions and that they were different in size. So, it would vary as to the load which would be brought out of the furnace. These parts were secured by the jaws of the handler. Petitioner testified that, while using the handler, he would not only pull out gears, but also pinions. Pinions were set up on a grid which he likened to a bowling alley, and he would take the handler, turn the jaw around and grab it and pick it up and pull it out. However, Petitioner testified to all different sized gears – some the size of truck tires, others the size of a laptop computer.

Petitioner testified further that, when he would work with gears the size of a laptop computer or just a little bit larger, they came to the furnace on racks and would be stacked four or five per rack. Otherwise, if he had to work with a larger gear such as those the size of a tire, it would come singularly because of the weight of the gear. Petitioner went on to explain that the other gears came on racks, and the operator has to go in the oven with the handler and the jaws to pick them out one at a time, lift it, bring it back, turn it around and put it in the quencher so that the part might be cooled. Petitioner testified that much of the time while performing these work duties his arms were in a flexed position with his hands at or above chest level about 5 to 6 hours per eight-hour shift.

Respondent called as a witness its group manager in building KK Heat Treat, Aaron Compton. Mr. Compton testified that he began working at the respondent in 2003, and he started as a supplemental heat-treat operator. In 2005, Mr. Compton became a heat-treat checker. After that he began a technical heat-treat job. In 2011, Mr. Compton became a supervisor in building KK. Mr. Compton testified that he was familiar with the area Petitioner routinely worked. Mr. Compton explained that the purpose of heat-treat was to take a normal gear fire it until it is very hot, around 1800 degrees Fahrenheit, and then add atmosphere to the metal with carbon to increase the properties of the heated part. Mr. Compton referred to the area in which Petitioner worked as the quench deck.

Respondent's witness testified that the process followed by an operator at the quench deck is as follows: the parts are presented already loaded; they come to the door on the deck. The operator hits the button on the handler, the door opens, the employee pushes the handler in

and pushes a button to clamp onto the part. The part comes out, and the operator then pushes another button to rotate to the right. Next, the operator pushes a button to lower it down to set it onto the quench press. The operator uses a step on the foot pedal to allow the part to go through the quench press. Parts are quenched for several seconds up to a couple of minutes. The cycle then finishes. The tray comes back on the quench press.

When questioned as to how many parts a heat-treat operator could complete per hour at the quench deck, Mr. Compton replied that the process went every 20 minutes to 32 minutes with the most being twelve per hour or two per hour.

Mr. Compton viewed Respondent's work place job video. (Rx 3) He described the video as depicting the quench deck and the use of a handler, manipulator. He described the device as basically two I-beams in the ceiling on what resembles a train track as there are wheels to which the handler itself is mounted. Mr. Compton testified to the range of weight of the parts handled at the quench deck as between roughly 140 pounds for the biggest part and as little as 40 pounds for the smaller parts. Upon further questioning, Mr. Compton testified that, if a 140-pound part is clamped in the manipulator, it would take 23 to 26 pounds to push that part forward or pull it back. Mr. Compton testified to performance of a force analysis which was not entered into evidence at arbitration. Mr. Compton compared pushing the manipulator with a 140-pound part to pushing a grocery cart with groceries in it. Mr. Compton also testified that the force required to operate the manipulator did not change significantly between whether there was a part on it or whether the manipulator had no part.

On cross-examination, Respondent's witness admitted that the video he viewed during his direct examination was actually a simulation of the duties of a heat-treat operator and not the actual performance of the job. Respondent's witness testified to observing Petitioner perform the duties of a heat-treat operator 3 to 5 days each month. The record is void of any further specificity with respect to the frequency of his observations. Otherwise, Mr. Compton testified that Petitioner was a good heat-treat operator. When questioned with respect to the positioning of the hands and arms of the heat-treat operator while performing heat-treat operation, Mr. Compton testified that the operator's hands would always be on the handles, and that, in a normal operation of the handler, the operator's arms would be slightly above belly button below mid chest.

Petitioner was recalled to the witness stand. Petitioner remained in the hearing room during the testimony of Aaron Compton. Petitioner disagreed with Mr. Compton's description of the physical duties of a heat-treat operator. Petitioner testified that Aaron Compton failed to realize that, when parts come out of the furnace on the rack as Petitioner previously testified, the operator's arms are never going to stay in the same position going in the furnace and removing the parts from the rack. Petitioner added that Mr. Compton was correct that the final part from the rack could be lifted up, and you could bring it back down. But, the operator still had to get that last part from the top of the rack and then bring it over and let it down. Petitioner testified

that, of course, his arms are going to be slightly over his chest when he would be retrieving medium sized gears five on a rack, four or five on the rack, and the operator would have to get the last one off the rack and then lower it to clear. Petitioner added that, when using his arms at chest level, he could be cleared at all times because you are looking right at the work to be done. Petitioner testified that his described positioning of his arms is how he was taught to perform the tasks of heat-treat operator.

Respondent's witness was then recalled to the witness stand. When questioned with respect to whether gears in the furnace had ever been stacked five high, Mr. Compton could not recall.

Petitioner testified further that during the weeks and months prior to October 5, 2014, he started to notice a lot of pain in his shoulder and it seemed like it was a shooting pain. On October 5, 2014, Petitioner completed his first Caterpillar Employee Incident Report. (Pg. 1 of Px 1) In the narrative section of the Initial Licensed Healthcare Professional Incident/Injury Form Respondent's medical personnel wrote, in part:

> "EE to Medical (with) c/o neck pain which spreads across shoulders." (Pg. 3, Px 1)

Petitioner continued to work through October 28, 2014 with restrictions. (Pg. 6, Px 1)

On October 24, 2014, Petitioner was seen at the emergency department of UPH Peoria Methodist. At that time Petitioner complained of pain in the left side of his neck and left upper shoulder. (Pg. 2, Px 2) Petitioner was examined at the emergency department. (Pg. 4, Px 2) Nursing notes from the emergency department visit of October 24, 2014, include the following notation:

> "Pt states he feels his neck is in more pain due to the type of work his does. PT has left side neck pain with no injury or fall noted." (Pg. 6, Px 2)

Petitioner returned to the emergency department of UPH Peoria Methodist on October 28, 2014. (Px 3) The reason for this second emergency department visit as noted by Unity Point Health Methodist recorded:

> "Pt here for ER f/u for neck and shoulder pain. Patient was given a rtw slip that his employer cannot accept." (Pg. 1, Px 3)

Petitioner was examined at the emergency department on October 28, 2014. Examination of his left shoulder performed at that time exhibited decreased range of motion in both flexion and abduction, tenderness to palpation during range of motion and spasm. (Pg. 2, Px 3)

On November 19, 2014, Amanda L. Whaley, D.O., of Unity Point Health Methodist Family Medicine issued a restricted duty return to work note contemplating restrictions of lifting 20 pounds max infrequently, frequently lifting and or carrying objects weighing up to 10 pounds. (Px 3(a))

At the referral of Amanda Waylay, D.O., Petitioner was seen at Unity Point Health Methodist Outpatient Therapy Services on December 2, 2014, for initial evaluation. A course of treatment continued through December 30, 2014. (Pgs. 1, 7, Px 4)

Petitioner completed his second Caterpillar Employee Incident Report on December 3, 2014, reporting:

> Having Problem with Neck and shoulder. Pain comes and goes overtime caused by the Forceful repetitive nature of my work. (Pg. 1, Px 5)

Petitioner treated with Respondent's medical department through December 12, 2014. (Pg. 7, Px 5)

Petitioner was first seen by Daniel R. Hoffman, M.D. on January 13, 2015. At that time, Dr. Hoffman recorded history contemplating, among other things, severe pain in Petitioner's left shoulder while pushing and pulling steel at work. Dr. Hoffman examined Petitioner's extremities finding tenderness of the left AC joint and restricted range of motion above the horizontal. Dr. Hoffman assessed Tendinitis vs. Tear and ordered MRI. (Pg. 1, Px 6)

On January 23, 2015, Petitioner underwent MR left shoulder without contrast at Unity Point Health Methodist. The interpreting radiologist wrote:

> Impression:
> 1. Advanced osteoarthritis of the acromioclavicular joint with mild surpraspinatus myotendinous impingement.
> 2. Rotator cuff tendinosis with partial tearing detailed above. No complete tear is seen.
> 3. Labral degenerative fraying as described. There is a sub-labral foramen, biceps brachii tendinosis and mild inferior glenoid arthritis. No muscle atrophy is seen". (Pg. 2, Px 6(a))

Petitioner was next seen by Dr. Hoffman on January 30, 2015, when Dr. Hoffman recommended orthopedic referral. (Pg. 5, Px 6)

Petitioner first treated with Jeffrey Garst, M.D., of what was then known as Great Plains Orthopaedics on March 2, 2015. Dr. Garst is a board-certified orthopedic surgeon with

additional qualifications with hand and arm surgeries. The evidentiary deposition of Dr. Garst was taken by agreement of the parties herein on July 12, 2017. The Arbitrator has read the entirety of the transcript of the testimony of Dr. Garst. (Px 8)

On March 2, 2015, Petitioner's history to Dr. Garst included complaints of trouble with his left shoulder that started several months prior. (Pg. 5, Px 8) On March 2, 2015, Petitioner was examined by Dr. Garst. The left shoulder demonstrated some limitation of motion of 150 degrees of flexion and 140 degrees of abduction, as well as moderately positive impingement sign on the left. (Pg. 6, Px 8) On March 2, 2015, Dr. Garst's records include notations that he went through the MRI cuts with Petitioner in the doctor's office. (Pg. 7, Px 8) Dr. Garst's interpretation of the January 23, 2015, left shoulder MRI included:

> "I thought it showed a partial rotator cuff tear with some acromioclavicular joint arthritis and evidence of impingement, which I believe is essentially is what the report says as well. Also, the report suggests some labral fraying, but otherwise my independent review was keeping with this." (Pgs. 7-8, Px 8)

Dr. Garst testified that Petitioner had had adequate conservative care and therefore recommended arthroscopy to Petitioner's left shoulder. (Pg. 8, Px8) On March 2, 2015, Petitioner and Dr. Garst discussed Petitioner's work for Respondent with Dr. Garst concluding that it sounded rather strenuous and repetitive on his arms as it involved a lot of heavy lifting with that left arm. Based upon Petitioner's description of his job, Dr. Garst opined that Petitioner's problem was related to his work. Dr. Garst recommended continuance of therapy and kept Petitioner off work. (Pg. 9, Px8) Petitioner was next seen by Dr. Garst on March 30, 2015. Petitioner's examination of that date was essentially the same. Dr. Garst's treatment plan remained unchanged. Dr. Garst continued to keep Petitioner off work. (Pg. 10, Px 8)

Subsequent to March 30, 2015, Petitioner was seen by Dr. Garst on April 27, 2015, June 22, 2015, July 20, 2015, and August 17, 2015. On each of these occasions Petitioner's examination, work status, and Dr. Garst's treatment plan remained the same as that of March 2, 2015. (Pg. 10-14, Px 8)

On August 28, 2015, Petitioner underwent surgery at OSF Healthcare at the hand of Dr. Garst. That surgery contemplated:

> OPERATION: LEFT SHOULDER ARTHROSCOPY WITH ACROMIOPLASTY, DISTAL CLAVICLE EXCISION, AND DEBRIDEMENT OF PARTIAL ROTATOR CUFF TEAR. (Pg. 2, Px 7(a))

At deposition, Dr. Garst testified that his visualization of the partial rotator cuff tear at surgery revealed a 10% thickness tear of the tendon. (Pg. 15, Px 8)

Post-surgery Petitioner was seen by Dr. Garst on September 14, 2015, October 12, 2015, and November 9, 2015. On November 9, 2015, Dr. Garst's examination revealed almost full range of motion, but not quite full and still a little bit of stiffness. Petitioner was also a little weak at the left shoulder compared to the right, but he was improved. At that point, Dr. Garst recommended further range of motion and strengthening to Petitioner's left shoulder and to stay off work. Dr. Garst has no records of having seen Petitioner after November 9, 2015. (Pgs. 6-18, Px 8)

Dr. Garst viewed the work place job video which is Respondent's Exhibit 3 on two occasions. The doctor viewed the video at the time he authored his August 15, 2016, narrative report which is Deposition Exhibit 5 attached to Petitioner's Exhibit 8. The doctor then viewed the video again about one half hour prior to his deposition. In response to a hypothetical drawn from the history Petitioner gave to Petitioner's examining physician, Joseph Newcomer, M.D., Dr. Garst testified that, at the time he authored his narrative report of August 15, 2015, he thought that Petitioner's left shoulder problem was related; and, having seen the video, that was still his opinion. (Pgs. 21-24, Px8)

At the request of Respondent, Petitioner was examined by Ira Kornblatt, M.D. on June 1, 2015. Dr. Kornblatt is board-certified in orthopedic surgery and has been retired from the practice of medicine since January 1, 2016. (Pg. 6, Rx 2) The evidentiary deposition of Dr. Kornblatt was taken by agreement of the parties herein on September 28, 2018. The Arbitrator has read the entirety of the transcript of the testimony of Ira Kornblatt, M.D.

Dr. Kornblatt testified that he had no independent recollection of his examination of Petitioner performed on June 1, 2015, and that his answers at deposition would depend on his utilization of his dictated report to refresh his recollection. (Pg. 7, Rx 2) On June 1, 2016, Dr. Kornblatt took a history from Petitioner which concerned predominantly Petitioner's complaints and history of treatment to June 1, 2015. (Pgs. 9-10, Rx 2) Dr. Kornblatt does recall Petitioner stating that he does strenuous work with his arms and a lot of heavy lifting involving the left arm and that he felt his left shoulder problems were due to the injury of the job. (Pg. 9-10, Rx 2) Dr. Kornblatt examined Petitioner on June 1, 2015, finding Petitioner to be cooperative. (Pg. 11, Rx 2) Dr. Kornblatt's diagnosis: degenerative rotator cuff tendinitis partial-thickness tear with degenerative arthritis of the AC joint and early degenerative arthritis of the glenohumeral joint with an associated labral tear. (Pgs. 15-16, Rx 2) Dr. Kornblatt's opinion with respect to causality relied solely on his review of Respondent's work place job video testifying that it was his opinion that there was no evidence of the job activities resulted in any symptomology or pathology that has been seen. (Pgs. 16-17, Rx 2). It was further the opinion of Dr. Kornblatt that the cause of Petitioner's condition was a degenerative process. (Pgs. 16-17, Rx 2) Elaborating, Dr. Kornblatt testified further that from the video he interpreted all the motions that were

required were at or below shoulder level and that this was all hydraulically powered which appeared to need almost no force to move the machine from what he could see from the video. (Pgs. 18-19, Rx2)

Dr. Kornblatt also testified that based upon his examination of June 1, 2015, Petitioner did require additional medical treatment and that the treatment recommendations of Dr. Garst were appropriate. (Pg. 20, Rx 2)

Upon cross examination, Dr. Kornblatt confirmed that the totality of his understanding of Petitioner's work duties for Respondent were based "100%" on Respondent's work place job video. (Pg. 24, Rx 2) Dr. Kornblatt did not know the name of Petitioner's job for Respondent at the time of the manifestations at issue. (Pg. 24, Rx 2) When questioned as to whether a physician who had occasion to review Respondent's work place job video with Petitioner might be in a better position to opine with respect to causation, Dr. Kornblatt replied that he did not believe that was his job to look at something like that along with Petitioner because that allows the Petitioner to color his opinion. (Pgs. 28-19, Rx 2)

Finally, Dr. Kornblatt testified that an individual with the degenerative condition in Mr. Turner's left shoulder could be relatively asymptomatic with respect to the use and function of that shoulder and that such degenerative conditions do predispose one to shoulder injury. (Pgs. 31-32, Rx 2)

Petitioner was examined at the request of Petitioner's counsel on May 20, 2016, by Joseph Newcomer, M.D., of Premier Orthopedics. Dr. Newcomer is a board-certified orthopedic surgeon who concentrates on surgeries to the shoulder and knee. (Pg. 1, Dep.x 1, Px 9 and Pg. 4, Px 9) The evidentiary deposition of Dr. Newcomer was taken by agreement of the parties herein on March 30, 2018. The arbitrator has read the entirety of the transcript of the evidentiary deposition of Dr. Newcomer. (Px 9)

On May 20, 2016, Dr. Newcomer took a detailed history from Petitioner with respect to the physical duties of heat-treat operator. (Pgs. 6-8, Px 9) Dr. Newcomer viewed Respondent's work place job video with Petitioner on May 20, 2016. (Pg. 8, Px 9) Upon completion of the mutual viewing of the video Petitioner shared disputes with respect to the accuracy of the video with Dr. Newcomer as far as what was depicted in the video. Specifically, Dr. Newcomer recalls Petitioner indicating that the video depicted cranes without actual parts within the jaws and that most of the time Petitioner had the crane up to chest level or higher. Petitioner indicated to Dr. Newcomer that he had to use a pushing and pulling force in a flexed position of both arms in and out of the furnace stating that he has to control 40 to 50 percent of the weight at times and that the parts can get up to about 125 pounds. Dr. Newcomer concluded that to perform the job as heat-treat operator required fairly significant force when Petitioner would put the parts in the furnace and pull them out of the furnace and into the quenching tank which was depicted on the video. (Pgs. 8-9, Px 9)

Dr. Newcomer examined Petitioner's left shoulder finding it to be essentially a normal shoulder exam. (Pg. 10, Px 9)

Dr. Newcomer also performed a records review which included Petitioner's arbitration exhibits 1-8(b). Dr. Newcomer testified that these records were of the type on which a physician could reasonably rely when entertaining questions sounding in diagnosis, treatment and addressing the issue of causal relationship. (Pgs. 10-12, Px 9) Dr. Newcomer also reviewed the operative report of Dr. Garst dated August 28, 2015, stating that he had performed that surgery thousands of times in the last 20 years. (Pgs. 14-15, Px 9) When questioned based upon history, the doctor's examination of Petitioner on May 20, 2016, the doctor's two video viewings, one with and one without the benefit of Petitioner's presence, and based on a records review; Dr. Newcomer also answered that there is a causal relationship between the effects of Petitioner's work for Respondent on and before October of 2014, and the necessity of the surgery that Dr. Garst performed on August 28, 2015. (Pg. 15, Px 9)

On cross examination, Dr. Newcomer elaborated on the relationship between Petitioner's positioning of his arms at work and the loading of the rotator cuff testifying:

> "So, rotator cuff eccentrically loads from 110 degrees of flexion to 70 degrees of flexion. At that point then below70 degrees typically people aren't going to load the cuff, except for in activating abduction or activating external rotation with a loaded arm; right? So, you can still load the cuff. So, you're still loading the cuff, but new position you are describing at 90 degrees I would argue that is certainly a position that will potentially cause impingement syndrome or aggravate a condition of impingement, but it doesn't have to be that high.
> Q. And its –
> A. It can be lower.
> Q. Is.70 about chest level?
> A. A little bit lower." (Pg. 21, Px 9)

Petitioner did not return to Dr. Garst after November 9, 2015, as he retired from the employ of Respondent in early January of 2016, to move to Texas. Petitioner now works as a chef for an assisted living home in Arlington, Texas for unknown wages. When questioned with respect to the condition of his left arm and shoulder Petitioner testified that it got fairly better. He has good days and bad days, but for the most part it got fairly better.

CONCLUSIONS

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

The Arbitrator finds that, based on the entirety of the evidence of record, the testimonial evidence discussed above, all the documentary evidence, medical, reports, and expert deposition transcripts; Petitioner met his burden of proof by the preponderance or greater weight of the evidence that he sustained an accident arising out of and in the course of his employment with Respondent for which compensation is payable.

The petitioner testified that his job required that he use some force, as well as lift, push, and pull in order to operate the handler. The respondent's testimony and video job description entailed an admitted simulation only and not the actual performance of the petitioner's job as he described it. The petitioner testified credibly, and his medical records histories corroborate his testimony.

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

The Arbitrator closely observed Petitioner's manner and demeanor while testifying and finds Petitioner credible. The Arbitrator also accords greater weight to the testimony of Petitioner's Section 12 examiner, Joseph K. Newcomer, M.D., than Respondent's Section 12 examiner, Ira Kornblatt, M.D. The Arbitrator makes these findings based on the mutual viewing of the video had with Petitioner and Dr. Newcomer and the foundation which that accorded Dr. Newcomer for his opinions with respect to causation. The Arbitrator finds that Petitioner sustained repetitive accidental injuries manifesting on October 5, 2014, and December 3, 2014, and that Petitioner's current condition of ill-being is causally related to those manifestations.

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?

Petitioner introduced evidence of medical bills incurred as a result of repetitive trauma manifestations of October 5, 2014, and December 3, 2014, totaling $41,378.25 as set forth in Petitioner's Exhibit #11.

Based upon the Arbitrator's findings on accident and causation, the Arbitrator finds the medical treatment rendered to Petitioner in regard to his left shoulder was reasonable and necessary and causally related to the repetitive accidental injuries manifesting October 5, 2014, and December 3, 2014.

Issue (K.) What temporary benefits are in dispute?

The parties to this arbitration stipulated to a period of temporary total disability commencing October 29, 2014, through January 4, 2016, but Respondent disputes liability. (AX1)

Based on the Arbitrator's findings on accident and causation, the Arbitrator finds Petitioner is entitled to temporary total disability benefits commencing October 29, 2014, through January 4, 2016, a period of 61 5/7ths weeks. Respondent is entitled to a credit of $25,158.68 in non-occupational indemnity disability benefits.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employees future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that at the time of the repetitive accidental injuries manifestations at issue Petitioner had worked for Respondent as a heat-treat operator for 9 years prior to the aforementioned manifestations. In early January of 2016, Petitioner retired from the employ of Respondent and relocated to Texas where he works as a chef for an assisted living home in Arlington, Texas. The Arbitrator therefore gives less weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was fifty-three (53) and fifty-four (54) years of age at the times of the repetitive accidental injuries' manifestations at issue. The Arbitrator notes that in early January of 2016, Petitioner retired from the employ of Respondent and relocated to Texas where he works as a chef for an assisted living home in Arlington, Texas. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that in early January of 2016 Petitioner retired from the employ of Respondent and relocated to Texas where he works as a chef for an assisted living home in Arlington, Texas. The Arbitrator, therefore, gives less weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the repetitive accidental injuries manifesting October 5, 2014 and December 3, 2014 necessitated a left shoulder operation contemplating arthroscopy with acromioplasty, distal clavicle excision, and debridement of partial rotator cuff tear. Additionally, Petitioner missed 61 5/7th weeks of time from work. Petitioner's shoulder examination with Dr. Newcomer on May 20, 2016 was normal. At arbitration Petitioner testified that his arm was in general better, but he had good and bad days. The Arbitrator, therefore, gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 9% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SONYA LITTLE,

Petitioner,

vs. NO: 16 WC 16038

STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS,

Respondent.

20IWCC0461

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, and being advised of the facts and law, provides additional discussion as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

"The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "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, Inc. v. Industrial Commission,* 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). To determine whether a claimant's injury arose out of her/his employment, "we must first determine the type of risk to which [s/he] was exposed." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶27, 990 N.E.2d 284.

The first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk. *Steak and Shake v. Illinois Workers' Compensation Commission,* 2016 IL App (3d) 150500WC, ¶38, 67 N.E.3d 571. Risks are distinctly associated

with employment when, at the time of injury, "the employee was performing acts [s/he] was instructed to perform by [her/his] employer, acts which [s/he] had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to [her/his] assigned duties." *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 58, 541 N.E.2d 665 (1989). Here, Petitioner testified she was walking toward Sergeant Mager to discuss an inmate concern and as she walked westward on the sidewalk, her right foot rolled off the drop-off on the north edge of the sidewalk. T. 15.

There is no question the incident occurred on Respondent's premises, and moreover Major Burns testified Respondent maintains the yard. As such, the first question the Commission must answer is whether the height difference between the sidewalk edge and the gravel constitutes a defect or hazard. There was testimony from both Petitioner and Major Burns regarding the sidewalk edging. Petitioner testified the sidewalk is "somewhat" flanked by gravel: "It was a very - - I don't want to call it a drop off because that's not what it is but Gene Myers used to take care of the facilities there and the trench next to the sidewalk was dug pretty deep and they backfilled it with gravel." T. 44. Petitioner explained that at the place her foot rolled off the edge, the gravel level was not flush with the sidewalk but rather there was an approximately two-inch drop. T. 45. Petitioner further explained the gravel "had been washed out really bad" (T. 45), something which had been subsequently repaired: "They have since fixed the trench and filled it back - - backfilled it in with dirt and gravel again." T. 47. Respondent's witness, Major Burns, confirmed the existence of a drop from the edge ("Yes, there's - - always seems to be a lip in any part of the sidewalk, not just this location." T. 61) and estimated the height differential "varies from half an inch to an inch." T. 61. Major Burns further confirmed the gravel levels drop after rain. T. 61. While the evidence indicates the level of the gravel edging along the sidewalk was not uniform, the Commission does not believe the described variations constitute a defect. Therefore, as we find Petitioner was not exposed to an employment risk, we proceed with a neutral risk analysis.

Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795 (2000). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800 (2011). Without expressly labeling it as such, the Arbitrator employed a neutral risk analysis and concluded Petitioner's traversing of the sidewalk was both qualitatively and quantitatively different. The Commission agrees, though our focus is on the quantitative aspect of the analysis.

The evidence demonstrates Petitioner performs two simultaneous jobs during her shift: in addition to being assigned to either the gym or entrance control, Petitioner is also the primary placement officer; Petitioner explained that "means any minute, any second I have I'm to be dealing with inmates; their beds, their assignments, any troubles they were having they come to me." T. 12. The record reflects Petitioner's additional responsibilities as primary placement officer result in her repeatedly traversing the sidewalk. Asked how many times she walks the

20IWCC0461

sidewalk during a given shift, Petitioner stated, "many, many times because the problem with that is I'm the placement officer and if I'm assigned to gym I'm expected to get in and out of the placement office, get all the work done on my lunch hour. Every free minute that I'm not at the gym on my regular post." T. 56. Petitioner testified that as a consequence of having dual responsibilities, she moves quickly: "I'm always in a fast pace because when I'm expected to be doing two jobs I'm always on my guard, I'm always busy, coming and going." T. 14. On the date in question she was performing vehicle searches at the entrance when she was required to re-traverse the sidewalk to address an inmate concern: "he was having some trouble with someone in his room and he said he talked to Sergeant Mager about it…I then saw Sergeant Mager, the sergeant that the offender was referring to, walk out and greet the hospital [sic]. I had told the offender that I would immediately go talk to Sergeant and I proceeded to go to my left to walk west." T. 12-13. Petitioner confirmed she was re-traversing the sidewalk at her usual hurried pace when her foot landed on the edge drop-off: "…at my normal pace, which is brisk…I walk fast, yeah, it's my normal pace." T. 48. While Petitioner did not estimate a specific number of the daily treks she must make across the sidewalk, the Commission finds her testimony of "many" crossings of the sidewalk per shift represents a quantitatively increased risk over that faced by the general public. As such, we find Petitioner sustained an accidental injury arising out of and in the course of her employment.

As a final matter, the Commission feels it necessary to address the tenor of Respondent's Statement of Exceptions and the attacks levied against the Arbitrator therein. Such accusations are not well taken and the Commission cautions Respondent's Counsel against repeating this conduct in the future.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 24, 2019, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $842.61 per week for a period of 16 5/7 weeks, representing April 4, 2016 through July 29, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $9,750.08 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred for treatment of Petitioner's right ankle through July 19, 2016 and of Petitioner's right shoulder through July 29, 2016, pursuant to §8(a), subject §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $755.22 per week for a period of 12.525 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the right foot.

20 IWCC0461

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

Stephen Mathis

D. Douglas McCarthy

DISSENT

I, respectfully, dissent. I find Petitioner failed to prove her fall arose out of her employment. Therefore, I would reverse the decision of the arbitrator and deny all benefits.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [she] has suffered a disabling injury which arose out of and in the course of [her] employment. [citations omitted]. 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Sisbro Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). "Arising out of" speaks to risk- is the risk encountered by the employee a risk incidental to the employment as not all injures suffered while at work are compensable. See *e.g. Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 552, 578 N.E.2d 921 (1991) ("This court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the Act"). "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* at 203.

Regarding falls, "a claimant must present evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. After all, the 'arising out of' requirement contemplates 'a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill [her] duties.' *Stapleton, 282 Ill. App.*

3d at 15. Awarding compensation for a purely unexplained fall would eviscerate this requirement." *Builders Square v. The Industrial Commission*, 339 Ill. App. 3d 1006, 1010, 791 N.E.2d 1308 (2003).

The matter of *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 541 N.E.2d 665 (1989), is on point and controlling. In *Caterpillar*, the claimant, while traversing a sidewalk on the employer's premises stepped off a curb into the parking lot twisting his ankle. The Court reviewed the necessary elements to establish when an injury arises out of employment *i.e.* an employment-related risk or a neutral/personal risk where exposure is to a greater degree than the general public. As to the employment-related risk specifically that being the condition of the employer's premises, the Court noted a height differential of 7 to 8 inches between the sidewalk and the parking lot as well as a sloping incline to the curb but found neither of these conditions represented a defect or hazard. *Id.* at 61.

The Court then analyzed whether the claimant was exposed to a risk to a greater degree than the general public. The claimant argued, much like in the present case, he was regularly required to traverse the offending curb while the general public was not. The Court rejected this argument holding as follows:

> We do not find that claimant has established that he was exposed to a risk not common to the general public. The object of comparing between the exposure of the particular employee to a risk and the exposure of the general public to the risk is *to isolate and identify the distinctive characteristics of the employment* (emphasis added). (See 1 A. Larson, The Law of Workmen's Compensation § 8.42 (1985).) Curbs, and the risks inherent in traversing them, confront all members of the public. The claimant is no more liable to twisting his ankle than he would have been had he been engaged in any other business. While it is true that he regularly crossed this curb to reach his car, there is nothing in the record to distinguish this curb from any other curb. As noted previously, the mere fact that the duties take the employee to the place of the injury and that, but for the employment, he would not have been there, is not, of itself, sufficient to give rise to right to compensation. [citation omitted]. The claimant has the burden of establishing, by a preponderance of the evidence, some causal relationship between the employment and the injury. [citation omitted]. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 62-63, 541 N.E.2d 665 (1989).

The Majority in its decision fails to even acknowledge the holding in *Caterpillar* instead focusing its analysis on Petitioner's testimony that she traversed the sidewalk "many" times during her shift. Whether Petitioner traversed the sidewalk once a day or ten times is immaterial. As the Majority correctly noted, the curb in question was neither hazardous nor defective in any

20IWCC0461

manner. Therefore, crossing a non-defective sidewalk or curb one time or ten times simply does not quantitatively increase Petitioner's risk of injury.

Further, as the Court highlighted in *Caterpillar*, in comparing the risk of injury between an employee and the general public, the purpose is to examine the risk in relationship to the specific requirement of an employee's job. Petitioner is an officer in charge of inmates at the Department of Corrections. As part of her job duties, she is assigned to either the gym or entrance control; she is also the primary replacement officer which requires her to respond to the inmates' various needs. T. 12. In performing the requirements of her job, she certainly must walk on sidewalks and over curbs, but so too does the general public on a daily basis. Her job duties as a correctional officer have no bearing on the non-defective sidewalk/curb she crossed.

Petitioner testified she was walking at her normal brisk pace, but there is no evidence she was hurried or rushed due to her job duties as a correctional officer. As previously discussed, there is no evidence the sidewalk or curb was defective or hazardous. More importantly, Petitioner testified as to what she believed caused her to fall- "I believe I stepped a little on the edge and my ankle twisted." T. 47. The Majority's decision is a thinly veiled attempt to adopt the positional risk doctrine in the guise of a quantitative risk analysis. I find Petitioner failed to prove her fall arose out of her employment with Respondent.

For the above state reasons, I respectfully dissent. I do concur with the Majority's admonishment of Respondent's Counsel's conduct. Personal attacks towards Arbitrators and/or Commissioners are not acceptable. Attorneys should base their arguments on the facts and the law as that is what determines the outcome of the case.

DATED: AUG 19 2020

L. Elizabeth Coppoletti

LEC/mck

O: 6/23/2020

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, SONYA
Employee/Petitioner

Case# **16WC016038**

ILLINOIS DEPT OF CORRECTIONS
Employer/Respondent

20IWCC0461

On 6/24/2019, 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 2.13% 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:

1315 DWORKIN AND MACIARIELLO
TIMOTHY F WINSLOW
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 24 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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

☐ 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

SONYA LITTLE,
Employee/Petitioner

v.

ILLINOIS DEPARTMENT OF CORRECTIONS,
Employer/Respondent

Case # **16** WC **16038**

Consolidated cases: _____

20IWCC0461

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Quincy**, on **6/5/19**. 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 _____

FINDINGS

On **4/3/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**65,723.55**; the average weekly wage was $**1,263.91**.

On the date of accident, Petitioner was **56** 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 $**9,750.08** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**9,750.08**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $842.61/week for 16-5/7 weeks, commencing 4/4/16 through 7/29/16, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services for petitioner's right ankle through 7/19/16, and for petitioner's right shoulder through 7/29/16, 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 for the right ankle through 7/19/16 and for the right shoulder through 7/29/16, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act

Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week for 12.525 weeks, because the injuries sustained caused the 7.5% loss of the right foot, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week for 0 weeks, because the injuries sustained caused petitioner no loss of the right shoulder, 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.

Kaureen M Dulin

Signature of Arbitrator

6/20/19
Date

ICArbDec p. 2

JUN 24 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 56 year old Corrections Officer, alleges she sustained an accidental injury to her right ankle and right shoulder, that arose out of and in the course of her employment by respondent on 4/3/16. Petitioner works at the Pittsfield Work Camp. She has worked there for 18 years. Her duties include safety and security of staff and offenders. In this capacity petitioner regularly walks the sidewalks inside the fenced area to all the different areas of the Camp, including the housing units, gym and dietary locations. Depending on her specific duties she could walk these sidewalks may times a day. Petitioner testified that fellow employees, as well as inmates and visitors who are escorted by employees, transverse the sidewalk where petitioner fell.

Prior to the incident on 4/3/16 petitioner underwent a right shoulder arthroscopy with arthroscopic subacromial decompression, debridement of the superior labrum, and biceps tenodesis performed by Dr. Derhake on 4/30/15. She was released to full duty work for her right shoulder 6 months before the incident on 4/3/16.

On 4/3/16 petitioner called an offender up to discuss trouble this offender was having with his roommate. While discussing this with the offender petitioner noticed that a vehicle had pulled up in the parking lot prior to visiting hours. This vehicle was at the west end of the sidewalk and fenced in area. Sergeant Mager was down the sidewalk nearer to the fenced in area. Petitioner called out to him and started walking towards him in an attempt to talk to him with respect to the issue the offender was having.

As petitioner was walking briskly, which was her normal pace, towards Sergeant Mager westward down the sidewalk toward the pedestrian gate, she stepped off the edge of the sidewalk into the gravel area, which was about an inch or two lower than the sidewalk, and twisted her right ankle and fell, primarily on her right side. She stated that she was walking briskly because she was expected to do 2 jobs. Petitioner had nothing in her hands, and was wearing the standard uniform which included ankle high boots, pants, radio and keys. After she fell, she sat there until Sergeant Mager helped her up. She stated that she was sore all over, but her right ankle hurt the worst. Petitioner testified that the sidewalk had no defects or debris where she fell. She also testified that it was a clear day.

Petitioner reported the injury to Sergeant Mager, who did not see her fall. She testified that Officer Miller was in the bubble and saw her fall. Sergeant Mager helped petitioner inside and reported the incident to the Major who was the shift commander. Paperwork was filled out. Petitioner put ice on her right ankle and completed her shift. She did visitor and vehicle shakedowns for the remainder of the day.

Petitioner completed an accident report on 4/3/16. She reported that she was performing central control at the time of the injury. The place where the injury occurred was identified as sidewalk east of pedestrian gate. Petitioner wrote that the injury occurred while she was walking towards the pedestrian gate and stepped on the edge of the walk twisting her right ankle and falling to the ground. She reported that she injured her right ankle, and that the injury was witnessed by Officer William Miller.

That same day Major Alton Thompson completed a Supervisor's Report of Injury. He noted that petitioner was walking towards the entry gate of the institution and stepped off the edge of sidewalk and rolled and twisted her right ankle and fell to the ground.

William Miller also completed a Workers' Compensation Witness Report. He wrote that on 4/3/16 he observed petitioner walking on the sidewalk, stepping on the side of the concrete, twisting her ankle and falling to the ground. He identified the sidewalk as being between Control and the pedestrian gate.

On 4/3/16 Samantha Carmona, with TriStar, completed an Employer's First Report of Injury. She noted that petitioner slipped on the edge of the sidewalk and twisted her right ankle and fell to the ground while walking towards the pedestrian gate.

On 4/4/16 petitioner presented to Dr. Hibbert at Quincy Medical Group. She reported that she stepped off the sidewalk wrong at work on 4/3/16 and fell to the side. She complained of pain through the entire ankle, but more so on the lateral portion. She reported that it was worse with weight bearing and moving her ankle side to side. She denied any prior ankle injuries. Following an examination of the right foot/ankle, and x-rays of the right ankle that showed an avulsion fracture of the distal fibula, petitioner was diagnosed with a minimally displaced lateral malleolar fracture and referred to orthopedics. Petitioner was placed in a walking boot, and taken off work until 4/9/16. At that time she was told she could return to work with restrictions of no climbing of stairs or ladders, sitting 50% of the time, and no running or jumping.

On 4/7/16 petitioner presented to the orthopedic department and was seen by Jon Humiston, a physician's assistant. Petitioner gave a consistent history of the accident. She rated her pain at a 3/10. Following an examination petitioner was diagnosed with a right distal fibula fracture. It was determined that the injury could be treated conservatively in a walking boot. She was told to avoid any high impact activity and heavy lifting. She was authorized off work for the next 10 days to ice, elevate and heal. She was told to avoid NSAIDs because they may delay bone healing. The collaborating physician was Dr. Crickard.

On 4/8/16 Kristina Samson, a physician's assistant, completed a medical report noting that petitioner twisted her right ankle stepping off sidewalk on 4/3/16. She noted that the nature and extent of her injury was a

closed fracture of the right fibula. The treatment was identified as walking book, and avoidance of high impact activities and heavy lifting. She authorized petitioner off work for 10 days. She also noted that the petitioner needed to be seen on 4/18/16 by orthopedics. She discharged petitioner from treatment as of 4/7/16.

On 4/18/16 petitioner returned to the orthopedic department. She was seen by Dr. Crickard and Jon Humiston, the physician's assistant. She was there for follow-up and x-rays. She denied any calf pain or numbness or tingling to the right lower extremity. X-rays of the ankle showed a very mildly displaced fracture of the distal aspect to the lateral malleolus with a slight healing fracture. Less soft tissue swelling was noted. Petitioner was taken off work for another 3 weeks. However, the Work Ability Report signed by Huminston continued petitioner off work until released.

On 4/25/16 petitioner was seen by Dr. Ronald Johnson for a complaint of right shoulder pain. She reported undergoing a right shoulder arthroscopy a year ago. Petitioner reported that the pain in the right shoulder had progressively worsened after her fall earlier that month. She described a constant ache to the anterior and posterior shoulder without radiation. She also complained of occasional sharp sensations. There was no decreased range of motion, and petitioner had normal strength. She stated that she had not been lifting heavy objects. She denied any swelling. She stated that she had a subacromial corticosteroid injection a few months after her surgery with significant improvement in pain. She was assessed with a right shoulder injury and right shoulder pain. Dr. Johnson was of the opinion that petitioner may need a repeat steroid shot to her right subacromial. Dr. Johnson referred petitioner to Dr. Derhake. He also recommended ice and Tylenol as needed for pain. Range of motion exercises were encouraged, and she was instructed to avoid lifting.

On 4/29/16 Humiston continued petitioner off work.

On 5/10/16 petitioner followed up with Dr. Crickard and Humiston for her right ankle. Petitioner reported that she was doing very well in the walking boot. Dr. Crickard noted that he gave petitioner a steroid injection on 4/29/16 which did not seem to provide any significant relief. She stated that her right ankle pain seemed to lessen as each day went by. She stated that her right ankle felt a little better. She reported that her right shoulder was still quite bothersome with overhead movement and lifting away from the body. X-rays of the right ankle showed a very mildly displaced fracture of the distal aspect to the lateral malleolus with increased healing fracture seen. Less soft tissue swelling was noted. Dr. Crickard wanted to transition her to a lace up type ankle brace and see her back in a month. He released her to work on 5/16/16 with restrictions that included no inmate contact. The respondent could not accommodate these restrictions. Dr. Crickard also wanted to send petitioner to work hardening for her ankle. With respect to the right shoulder, he recommended an MRI.

On 6/7/16 petitioner returned to Dr. Crickard and Humiston for follow-up of her right ankle fracture. Petitioner was reexamined and x-rays were taken that still showed a very mildly displaced fracture of the distal aspect of the lateral malleolus with increased healing fracture. The alignment was unchanged. Petitioner still reported right shoulder pain and noted that the MRI had not yet been approved. Therapy twice a week was recommended. Petitioner was released to work sitting 50% of the time and not being around heavy machinery. It was also still recommended that petitioner have no inmate contact. Dr. Crickard noted that petitioner could wean from the ankle brace after her physical therapy assessment on 6/16/16.

On 6/29/16 petitioner presented to Dr. Derhake for her right shoulder. Petitioner had surgery on her right shoulder on 4/30/15 with Dr. Derhake. She complained of recurrent right shoulder pain. Dr. Derhake noted that petitioner had done excellent after her surgery, and was largely pain free until she tripped and fell on 4/3/16. Dr. Derhake noted that at the time of the surgery petitioner had significant underlying osteoarthritic changes of her glenohumeral joint. Post-operatively, petitioner required an intra-articular corticosteroid injection that seemed to calm down some of her pain and symptoms. An examination revealed full active forward flexion and abduction of the shoulders bilaterally, full internal and external rotation with negative liftoff, belly press, and Napoleon's bilaterally. Only very subtle tenderness was noted throughout the anterolateral aspect of the right shoulder. There was no tenderness of the AC joint. Her cross arm exam was negative bilaterally, and there was no Popeye deformity bilaterally. Petitioner had excellent biceps strength with resisted biceps flexion and supination on the right. This reproduced no pain or symptoms. Petitioner also had no instability or apprehension of the shoulders bilaterally. She had excellent 5/5 strength with resisted forward flexion and abduction on the right as compared with the left side. Some palpable crepitus was noted throughout range of motion on the right. X-rays of the right shoulder demonstrated mild degenerative changes of the AC joint. There was no evidence of humeral head elevation or significant degenerative changed of the glenohumeral joint. Dr. Derhake reviewed the results of the MRI of the right shoulder and noted that the right rotator cuff, subscapularis tendon, and the long head of the biceps to its attachment at the tenodesis appeared intact. It also showed severe osteoarthritic changes of her AC joint, at least some Grade III chondromalacia changes of the humeral head, and significant subacromial bursitis.

Following his examination and record review, Dr. Derhake was of the opinion that petitioner's pain was most likely coming from the glenohumeral joint. He was of the opinion that at the time of her surgery petitioner had significant chondromalacia changes of the humeral head and this was why she was not responding to initial conservative management in the form of a subacromial injection. He recommended an intra-articular corticosteroid injection. He believed it was possible that the fall stirred up her underlying osteoarthritis of the

right shoulder. He had a low suspicion of any recurrent injury to her biceps or rotator cuff. He noted symptoms in her AC joint on exam.

On 6/30/16 respondent suspended petitioner's temporary total disability benefits. Between 7/1/16 and 7/29/16 petitioner used her personal, vacation, holiday and sick leave to get paid for her time off.

On 7/6/16 petitioner was discharged from physical therapy after meeting all her short and long term goals. She was discharged from skilled physical therapy to a home exercise program.

On 7/19/16 petitioner returned to Dr. Crickard and Humiston for her right ankle. Petitioner was getting along well and making good progress. She stated that her ankle occasionally gets a little sore, although it was mild. She believed she could go back to work full duty as far as her right ankle was concerned. An examination showed no swelling or ecchymosis of the right ankle. There was no tenderness medially. Deep palpation at the fracture site showed absolutely no tenderness. There was no tenderness over the ligamentous structures to the lateral ankle. The ankle appeared ligamentously stable. Petitioner had no pain over palpation of the syndesmosis. Range of motion was within normal limits, and her strength was proper. X-rays of the right ankle showed improved consolidation of the previous visualized distal fibular fracture with acceptable alignment. Ankle mortise was well preserved. Dr. Crickard's impression was healed right distal fibula fracture. Petitioner was released from care and to full duty work without restrictions.

On 7/29/16 petitioner last followed up with Dr. Derhake for her right shoulder. He noted that petitioner was sent to interventional radiology for an intra-articular corticosteroid injection on 7/1/16 that seemed to help her out a lot with her pain or symptoms. He noted that as a result petitioner has been able to use her right arm more regularly with her activities of daily living. An examination revealed excellent full active range of motion of the shoulder, full internal and external rotation with negative liftoff, belly press, and Napoleon's. Petitioner demonstrated excellent 5/5 strength with resisted forward flexion and abduction on the right as compared with the left side. There was no residual tenderness at the anterolateral aspect of the right shoulder, or tenderness at the AC joint. Petitioner had no Popeye deformity. She had excellent 5/5 strength with biceps testing without any significant reproduction of pain or symptoms. Dr. Derhake noted that petitioner had complete resolution of pain or symptoms after her intra-articular corticosteroid injection to treat the underlying osteoarthritic changes of the glenohumeral joint. He instructed petitioner to concentrate on a home exercise program to maintain strength and stability of the joint as this can limit recurrent episodes, especially with traumas or falls. Dr. Derhake released petitioner on an as needed basis.

Respondent offered into evidence pictures of the sidewalk where petitioner fell (PX5). The sidewalk slopes downward south to north, and there is a border of gravel on both sides of the sidewalk to the pedestrian gate. Major Burns testified that after it rain sometimes there is gravel on the sidewalk, and the gravel on the north side of the sidewalk could be washed away a bit, thus resulting in a larger lip from the sidewalk to the gravel on the north side. He testified that the lip may be ½ to one inch from the sidewalk to the gravel.

Respondent paid temporary total disability benefits from 4/11/16 through 6/30/16, for a total of $9,750.08. Respondent has paid $2,563.22 in medical expenses for treatment from 4/7/16 through 6/29/16 at Quincy Medical Group, and Quincy Physician and Surgeons Clinic.

Petitioner testified that she can no longer do things that she used to. She stated that she can no longer ride her motorcycle because it hurts her right ankle. She also testified that she can no longer swim, walk, or play golf. She testified that her right shoulder will always hurt to some degree. She testified that if she can keep the swelling down then it is fine. She testified that she cannot reach overhead or type like she used to. She also reported difficulty lifting what she used to. Petitioner testified that she works for an attorney one day a week doing title searches. She stated that lifting books is difficult. She reported that she has difficulty with activities of daily living. Petitioner testified that she mentioned all these things to Dr. Derhake. Petitioner testified that after her surgery in 2015 her right shoulder never returned to 100%.

Petitioner testified that she had an allergic reaction to the corticosteroid injection and had hives for 9 days. She testified that she has allergies to anti-inflammatories.

Since returning to full duty work petitioner testified that she can perform all her job duties.

Major Frederick Burns, shift commander for respondent, was called as a witness on behalf of respondent. He testified that his duties include setting up and running the shift and assignments. He testified that he is aware of the grounds and walks the grounds every day. He testified that any problems with the grounds are reported to the maintenance craftsman or grounds crew officer. Major Burns testified that the workers, as well as escorted inmates and visitors walk the sidewalk where petitioner fell. He testified that there has always been a lip of about ½ to 1 inch between the sidewalk and the gravel inch. He testified that he noticed gravel on the sidewalk at times. He testified that the sidewalk slopes down from east to west toward the parking lot, and pitches downward south to north. He stated that the lip is consistent along the entire sidewalk. Major Burns testified that there is no lip on the south side of the sidewalk along the gravel. He stated that the lip exists on the north side of the sidewalk because the rain sometimes washes away the gravel on the north side of the sidewalk.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner alleges that she sustained an accidental injury to her right ankle and right shoulder that arose out of and in the course of her employment by respondent on 4/3/16. While petitioner was walking briskly on the sidewalk towards Sergeant Mager who was down near the fenced in area she stepped on the edge on the north side sidewalk, twisted her right ankle, and fell on her right side. Both petitioner and Major Burns testified that the sidewalk slopes downward toward the fence, and pitches downward south to north. They both also testified that there is gravel on both sides of the sidewalk. Major Burns testified that when it rains the gravel on the north side of the sidewalk gets washed away and there is a step down of about ½ to one inch from the sidewalk to the gravel. Petitioner testified that this step down was about 2 inches.

Petitioner testified that depending on her duties she can walk this sidewalk many times a day. She also testified that other than respondent's employees the only other people that walk this sidewalk are inmates and visitors, but they must be escorted since this sidewalk is inside the respondent's fenced in area. Petitioner testified that there was no defect or debris on the sidewalk. She also testified that it was a clear day and she was not carrying anything. She did testified that she was wearing her standard uniform which included high ankle boots, pants, radio and keys.

The arbitrator finds that given that the fact that petitioner was walking briskly on the sidewalk; that the gravel on the north side of the sidewalk was ½ to 2 inches lower than the sidewalk, causing a drop off the pitched sidewalk; that petitioner walks this sidewalk many times a day depending on her job duties; that only respondent employees are allowed to walk this sidewalk alone; that visitors and inmates only walk this sidewalk when they are escorted by a Correction's Officer; that the area where petitioner was a fenced in area that the general public is not allowed unless escorted by a Correction's Officer during visiting hours; and that petitioner was in the performance of her duties at the time of injury since she was walking towards Sergeant Mager to discuss an inmate issue, the arbitrator finds the petitioner was at a greater risk than the general public, and therefore sustained an accidental injury that arose out of and in the course of her employment by respondent on 4/3/16 when she fell off the edge of the sidewalk onto her right side.

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

It is unrebutted that when petitioner stepped on the north edge of the sidewalk she twisted her right ankle and fell on her right side. Having found the petitioner sustained an accidental injury on 4/3/16 that arose out of and in the course of her employment by respondent, and that petitioner twisted her right ankle when she stepped on the edge of the sidewalk where the gravel was not flush with the sidewalk, the arbitrator finds the petitioner's current condition of ill-being as it relates to her right ankle is causally connected to the injury on 4/3/16.

The petitioner also claims her current condition of ill-being as it relates to her right shoulder is causally related to the fall on 4/3/16. The arbitrator notes that prior to the injury on 4/3/16 the petitioner had undergone a right shoulder arthroscopy with arthroscopic subacromial decompression, debridement of the superior labrum, and biceps tenodesis on 4/30/15. About six months prior to the injury on 4/3/16 petitioner was released to full duty work without restrictions.

Following the injury on 4/3/16 petitioner made no mention of any right shoulder complaints until 4/25/16, about three weeks following the injury. She reported that the pain in her shoulder had progressively worsened after her fall earlier that month. She described a constant ache and occasional sharp sensation. She had normal range of motion and strength. Petitioner followed up with Dr. Derhake, who did her surgery in 2015. Dr. Derhake noted that petitioner did excellent after her surgery, and was largely pain free until she tripped and fell on 4/3/16. He noted that at the time of the surgery petitioner had significant underlying osteoarthritic changes of her glenohumeral joint. On examination Dr. Derhake noted full active forward flexion and abduction, full internal and external rotation with negative liftoff, belly press, and Napoleon's bilaterally. He noted that she only had very subtle tenderness throughout the anterolateral aspect of the right shoulder, no tenderness of the AC joint, excellent biceps strength with resisted biceps flexion and supination on the right, no instability or apprehension of the shoulders, and excellent 5/5 with resisted forward flexion and abduction on the right.

X-rays of the right shoulder showed mild degenerative changes of the AC joint. There was no evidence of humeral head elevation or significant degenerative changes of the glenohumeral joint. The MRI of the right shoulder showed that the rotator cuff, subscapularis tendon, and the long head of the biceps to its attachment at the tenodesis, appeared intact. It also showed severe osteoarthritic changes of the AC joint, and at least some Grade III chondromalacia changes of the humeral head. It also showed significant subacromial bursitis.

Dr. Derhake believed petitioner's pain was coming from the glenohumeral joint. He recommended an intra-articular corticosteroid injection. He was of the opinion that the fall stirred up her underlying osteoarthritis of the right shoulder. He did not believe she had any recurrent injury to her biceps or rotator cuff.

Petitioner had the injection on 7/1/16 that seemed to help her out with a lot of her pain or symptoms. Dr. Derhake noted that after the injection petitioner was able to use her arm more regularly with her activities of daily living. On 7/29/16 her examination revealed excellent full active range of motion of the right shoulder, full internal and external rotation with negative liftoff, belly press, and Napoleon's. She demonstrated excellent 5/5 strength with resisted forward flexion and abduction on the right. She had no residual tenderness at the anterolateral aspect of the right shoulder, or tenderness at the AC joint. She had not Popeye deformity. She had excellent 5/5 strength with biceps testing without any significant reproduction of pain or symptoms. Dr.

Derhake was of the opinion that petitioner had complete resolution of pain or symptoms after her intra-articular corticosteroid injection to treat the underlying osteoarthritic changes of the glenohumeral joint. Petitioner was given a home exercise program and was released at maximum medical improvement to full duty work. Petitioner never returned to Dr. Derhake.

Based on the above, and especially the opinions of Dr. Derhake, the arbitrator finds the fall on 4/3/16 stirred up petitioner's underlying osteoarthritis of her right shoulder, but did not cause any recurrent injury to her biceps or rotator cuff. Based on this, the arbitrator finds the petitioner sustained a temporary aggravation of her preexisting osteoarthritis in her right shoulder as a result of the injury on 4/3/16, that resolved by 7/29/16.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found on the issues of accident and causal connection in favor of the petitioner the arbitrator finds all treatment to petitioner's right ankle through 7/19/16, and all treatment to petitioner's right shoulder through 7/29/16, was reasonable and necessary to cure or relieve petitioner from the effects of her injury on 4/3/16.

The respondent shall pay reasonable and necessary medical services for petitioner's right ankle through 7/19/16, and for petitioner's right shoulder through 7/29/16, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, and respondent shall hold petitioner harmless from any claims by any providers of the services for which respondent is receiving this credit, as provided in Section 8(j) of the Act

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner is entitled to temporary total disability benefits from 4/4/16 through 7/29/16, a period of 16-5/7 weeks. Respondent shall receive credit for the $9,750.08 it has already paid in temporary total disability benefits through 6/30/16. Respondent is not entitled to a credit for the personal, vacation, holiday and sick leave petitioner used in order to be paid for the period in which respondent failed to pay her temporary total disability benefits from 7/1/16 through 7/29/16.

The arbitrator finds the respondent is not entitled to any credit for the personal, vacation, holiday and sick leave petitioner had to use in order to receive payment while she was off work from 7/1/16 through 7/29/16, unless respondent reimburses petitioner's personal, vacation, holiday and sick leave banks for whatever time petitioner cashed in in order that she be paid through 7/29/16 when temporary total disability benefits were not being paid by respondent. Otherwise, any credit to respondent for these benefits during a period in which they

failed to pay petitioner temporary total disability benefits she was entitled to would amount to a windfall for the respondent.

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

For injuries that occurred after 9/1/11, according to 820 ILCS 305/8.1B(b) the Commission shall base its determination of permanent partial disability based upon five factors including an AMA report, the occupation of the injured employee, the age of the employee at the time of injury, the employee's future earning capacity and evidence of disability corroborated by treating medical records.

With regard to subsection (i) of §8.1b(b), neither party offered into evidence an AMA impairment report into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the petitioner was a Corrections Officer at the time of the injury. On 7/19/16 and 7/29/16 petitioner was released from care for her right ankle and right shoulder, respectively. Petitioner was released to full duty work without restrictions and testified that she is able to fully perform the regular duties of her job. Petitioner has worked continually since her release from care without any issues or further treatment. For these reasons the arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was a 56 year old Corrections Officer who had not sought any treatment for her right ankle, and had not sought treatment for her right shoulder since 2016, and has continued to perform her full duty job without restrictions or accommodations. Petitioner does have some subjective complaints as it relates to her right ankle and right shoulder. The Arbitrator notes that given her age, petitioner has significantly less work years ahead of her than say someone in their 30's or 40's. For these reasons the arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that petitioner was released to full duty work without restrictions. No credible evidence was offered into the record with respect to this issue. Therefore, the arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds the petitioner sustained an injury to her right ankle and right shoulder. With respect to the right ankle, on 7/19/16 petitioner was getting along well and making good progress. She stated that her ankle occasionally gets a little sore, although it was mild. She believed she could go back to work full duty as far as her right ankle concerned. An examination showed no swelling or ecchymosis of the right ankle. There was no tenderness medially. Deep palpation at the fracture site showed absolutely no tenderness. There was no

tenderness over the ligamentous structures to the lateral ankle. The ankle appeared ligamentously stable. Petitioner had no pain over palpation of the syndesmosis. Range of motion was within normal limits, and her strength was proper. X-rays of the right ankle showed improved consolidation of the previous visualized distal fibular fracture with acceptable alignment. Ankle mortise was well preserved. Dr. Crickard's impression was healed right distal fibula fracture.

With respect to her right shoulder, on 7/29/16 Dr. Derhake noted that petitioner was sent to interventional radiology for an intra-articular corticosteroid injection on 7/1/16 that seemed to help her out a lot with her pain or symptoms. He noted that as a result, petitioner has been able to use her right arm more regularly with her activities of daily living. An examination revealed excellent full active range of motion of the shoulder, full internal and external rotation with negative liftoff, belly press, and Napoleon's. Petitioner demonstrated excellent 5/5 strength with resisted forward flexion and abduction on the right as compared with the left side. There was no residual tenderness at the anterolateral aspect of the right shoulder, or tenderness at the AC joint. Petitioner had no Popeye deformity. She had excellent 5/5 strength with biceps testing without any significant reproduction of pain or symptoms. Dr. Derhake noted that petitioner had complete resolution of pain or symptoms after her intra-articular corticosteroid injection to treat the underlying osteoarthritic changes of the glenohumeral joint.

Following July 2016 petitioner never sought any further treatment for her right ankle or right shoulder, and continues to work full duty without restrictions. Nonetheless, petitioner testified that she has ongoing subjective complaints with her right ankle and right shoulder. The arbitrator finds the degree of these subjective complaints less than credible given her full duty release from care three years ago, her failure to seek any further treatment, and her ability to continue to work for three years without restrictions.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the petitioner sustained a permanent partial disability to the extent of 7.5% loss of use of the right foot pursuant to Section 8(e) of the Act, and no loss of use of the right shoulder pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RODNEY GRAY,

Petitioner,

vs. NO: 18 WC 000714

SUPERIOR EXPRESS, INC.,

Respondent.

20IWCC0462

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $678.00 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 15% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

20IWCC0462

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 19 2020

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

LEC/cak

D: 7/21/2020

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRAY, RODNEY
Employee/Petitioner

Case# **18WC000714**

SUPERIOR EXPRESS INC
Employer/Respondent

20IWCC0462

On 5/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% 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:

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0000 RUSIN & MACIOROWSKI LTD
R MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rodney Gray
Employee/Petitioner

v.

Superior Express, Inc.
Employer/Respondent

Case # 18 WC 00714

Consolidated cases: _____

20IWCC0462

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 Mt. Vernon, on March 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. ☐ 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 4, 2017, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did 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 $n/a; the average weekly wage was $1,130.01.

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

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $34,869.04 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $34,869.04. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $678.00 per week for 75 weeks because the injuries sustained caused the 15% loss of use 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.

William R. Gallagher, Arbitrator

May 4, 2019
Date

ICArbDec p. 2

MAY 7 - 2019

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 August 4, 2017. According to the Application, Petitioner "Fell between dock and trailer while closing door" and sustained an injury to the "Right arm/hand/shoulder, body as a whole" (Arbitrator's Exhibit 2). Petitioner and Respondent stipulated Petitioner sustained a work-related accident on August 4, 2017, which caused an injury to his right shoulder and that temporary total disability benefits had been paid in full. Respondent disputed liability for Petitioner's right elbow and hand condition on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a truck driver and was a long term employee, having worked for Respondent for almost 25 years. On August 4, 2017, Petitioner was in the process of making a delivery and he had backed his vehicle into a loading dock area. Petitioner had just unloaded a box which weighed approximately 50 pounds and was in the process of reaching up to grab the strap to shut the door to the trailer. When he did so, Petitioner stepped in between the dock and trailer and fell to the ground with his right arm extended outward. When Petitioner fell, his right armpit struck the loading dock. At trial, Petitioner testified that at the time of the accident, he experienced shooting pain and numbness down his arm and into his hand. Petitioner denied any prior injuries/symptoms in the right shoulder and right arm.

Subsequent to the accident, Petitioner was taken to the ER of St. Anthony's Hospital in Effingham. Petitioner was diagnosed with a right shoulder dislocation. Initially, two unsuccessful attempts were made to reduce the dislocation. The third attempt to reduce the dislocation was successful, but was performed with Petitioner under sedation (Petitioner's Exhibit 3).

Petitioner was subsequently seen at the Bonutti Clinic by Dr. Timothy Gray, an orthopedic surgeon. Dr. Gray saw Petitioner on August 10, 2017. At that time, Petitioner's primary complaint was right shoulder pain. Dr. Gray prescribed medication and ordered physical therapy (Petitioner's Exhibit 4).

When Dr. Gray saw Petitioner on October 5, 2017, Petitioner continued to complain of right shoulder symptoms. Further, the record of that date noted "The patient is still having numbness and tingling down to the hand." Petitioner's condition was not improving with medication and physical therapy, so Dr. Gray referred Petitioner to Dr. Alexander Aleem, an orthopedic surgeon who specialized in treating shoulders (Petitioner's Exhibit 3).

Dr. Aleem initially saw Petitioner on October 23, 2017. At that time, Petitioner complained of right shoulder pain as well as numbness/tingling down into Petitioner's long, ring and little fingers. Dr. Aleem opined Petitioner may have sustained a rotator cuff injury and ordered an MRI scan of Petitioner's right shoulder. Dr. Aleem also noted Petitioner had pain down the ulnar nerve so he ordered and EMG/nerve conduction study and referred Petitioner to Dr. Christopher Dy for his ulnar nerve issues (Petitioner's Exhibit 6).

The MRI was performed on October 26, 2017. According to the radiologist, the MRI revealed a tear in the anterior one third of the supraspinatus tendon, degeneration within the mid aspect of

the infraspinatus tendon and findings suggesting inferior soft tissue Bankert deformity with a possible HAGHL deformity (Petitioner's Exhibit 7).

EMG/nerve conduction studies were performed on November 6, 2017. The tests revealed no electrodiagnostic evidence of right brachial plexopathy, right ulnar neuropathy or right median/radial neuropathy (Petitioner's Exhibit 6).

Dr. Dy saw Petitioner on November 14, 2017, and noted that nerve studies were negative. However, Dr. Dy opined Petitioner had ulnar neuritis and noted it was likely due to irritation of the medial cord following the injury and during the closed reduction process. Dr. Dy recommended conservative treatment and observation (Petitioner's Exhibit 6).

Dr. Aleem saw Petitioner on November 15, 2017, and he reviewed the MRI. Dr. Aleem opined Petitioner had a right shoulder subscapularis rupture following shoulder dislocation. Dr. Aleem recommended Petitioner undergo surgery (Petitioner's Exhibit 6).

On December 7, 2017, Dr. Aleem performed surgery on Petitioner's right shoulder. He initially attempted to perform an arthroscopic procedure, but subsequently decided to perform an open surgical procedure. The surgery consisted of removal of adhesions, repair of the subscapularis and biceps tenodesis (Petitioner's Exhibit 6).

Dr. Dy saw Petitioner on January 22, 2018. At that time, Petitioner continued to complain of tingling in his middle, ring and small fingers as well as, on occasion, the index finger. Petitioner also complained of pain in the forearm that radiated both toward the shoulder and wrist. Dr. Dy noted in the record that Petitioner "...is having continued right upper extremity parasthesias, most likely related to swelling of his median and ulnar nerves after his prior shoulder injury." Dr. Dy recommended Petitioner undergo surgery consisting of a release of the carpal tunnel, lacertus, ulnar nerve at the elbow and Guyon's canal (Petitioner's Exhibit 6).

Dr. Dy performed surgery on February 21, 2018. The procedure consisted of a right carpal tunnel release, right median nerve decompression, right ulnar nerve decompression at the elbow and right Guyon's canal release (Petitioner's Exhibit 6).

Following the surgeries on Petitioner's right shoulder and right arm, Petitioner received physical therapy. Dr. Dy opined Petitioner was at MMI in regard to his right arm/hand on March 30, 2018. Dr. Aleem opined Petitioner was at MMI in regard to his right shoulder on July 16, 2018 (Respondent's Exhibits 4 and 6).

At the direction of Respondent, Petitioner was examined by Dr. W. Chris Kostman, an orthopedic surgeon, on March 27, 2018. In connection with his examination of Petitioner, Dr. Kostman reviewed medical records provided to him by Respondent. Dr. Kostman opined that, as a result of the accident of August 4, 2017, Petitioner sustained a right shoulder dislocation, supraspinatus tear and Bankert deformity. In regard to Petitioner's right elbow and hand condition, Dr. Kostman noted that the EMG/nerve conduction studies were normal. He noted Dr. Dy opined that Petitioner had sustained a neuropraxic injury of his brachial plexus. Dr. Kostman opined there were no objective findings to support that diagnosis (Respondent's Exhibit 7).

Dr. Kostman was deposed on July 18, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kostman's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Kostman testified that Petitioner's complaints of numbness/tingling referable to his right hand were not causally related to the accident of August 4, 2017. Dr. Kostman's opinion was based, in part, on Petitioner not having any complaints of numbness/tingling until October 5, 2017, approximately two months after the accident. He also testified the diagnosis of brachial plexopathy was not supported by the electrodiagnostic findings (Respondent's Exhibit 9; pp 19-20, 26).

On cross-examination, Dr. Kostman agreed that Petitioner did not have any other risk factors for the development of bilateral compression neuropathies. When questioned whether Petitioner's symptoms in his wrist and elbow occurred coincidentally with Petitioner's shoulder injury, Dr. Kostman stated it was his opinion Petitioner did not have objective findings consistent with peripheral nerve entrapment (Respondent's Exhibit 9; pp 33, 38).

At the direction of Respondent, Petitioner was examined by Dr. James Williams, a physical medicine/rehabilitation specialist, on October 26, 2018. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent. Dr. Williams opined as to the causal relationship of Petitioner's right shoulder, right elbow and right hand conditions and also provided an AMA impairment rating in regard to Petitioner's right shoulder injury.

In regard to Petitioner's right shoulder, Dr. Williams opined Petitioner sustained a right shoulder dislocation, partial thickness subscapularis tear which required an open surgical repair and open biceps tenodesis. In regard to Petitioner's right elbow/hand condition, Dr. Williams opined Petitioner may have experienced a very mild brachial plexopathy the caused by the shoulder dislocation and subsequent surgery/treatment, but Petitioner only had symptoms without objective evidence of pathology. He noted that the right ulnar neuropathy and right median neuropathy were based on subjective symptoms which did not support the medical necessity of the procedure performed on February 21, 2018 (Respondent's Exhibit 10; Deposition Exhibit 2).

Dr. Dy was deposed on January 30, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Dy's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Dy testified he diagnosed Petitioner with ulnar neuritis and some components of a brachial plexus injury which he attributed to the accident of August 4, 2017. Dr. Dy noted Petitioner had no symptoms prior to the accident and he developed symptoms that match the mechanical issue at his shoulder with subsequent trauma to the brachial plexus. In regard to the normal EMG/nerve conduction studies, Dr. Dy testified that nerve studies do not always detect injuries to nerves and patients can have normal nerve studies, but still have symptoms consistent with a nerve injury. Dr. Dy also noted that following surgery, Petitioner's symptoms of numbness/tingling resolved (Petitioner's Exhibit 10; pp 10-11, 15-16).

On cross-examination, Dr. Dy was questioned about Petitioner not having the numbness/tingling until more than three weeks after the accident. Dr. Dy testified this did not necessarily mean the

symptoms were related to something else because it could take that amount of time for the inflammation of the nerve to progress distally (Petitioner's Exhibit 10; pp 22-23).

Dr. Williams was deposed on February 15, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Williams' testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to causality of Petitioner's elbow and hand condition, Dr. Williams testified the diagnosis was based solely on subjective symptoms without objective evidence of pathology or a mechanism of injury that occurred at the time Petitioner sustained the shoulder dislocation. Dr. Williams' AMA impairment rating of four percent (4%) of the upper extremity or two percent (2%) of the whole person was limited to Petitioner's shoulder injury (Respondent's Exhibit 10; pp 22-23, 25, 29).

On cross-examination, Dr. Williams agreed Petitioner had no right upper extremity symptoms prior to the accident. He also conceded that nerve conduction studies do not always detect injuries to the nerves (Respondent's Exhibit 10; pp 54-55).

At trial, Petitioner testified he still has right shoulder complaints, in particular, some limitation of the range of motion and pain on active use. Petitioner also stated he has to be careful when loading/unloading his truck and requires assistance with heavier products. In regard to his elbow/wrist, Petitioner testified he has no symptoms or complaints whatsoever even upon active use while at work. He stated that the surgery performed by Dr. Dy made his right arm completely normal.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of August 4, 2017.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner's right shoulder condition was related to the accident of August 4, 2017.

Petitioner's testimony that he had no right elbow/hand symptoms prior to the accident of August 4, 2017, was unrebutted.

In regard to Petitioner's right elbow/hand symptoms, the earliest reference in the medical record that Petitioner had complaints of numbness/tingling down to the hand was in the Bonutti Clinic record of October 5, 2017. However, the record stated Petitioner was "still having" numbness and tingling which suggested Petitioner had the complaints sometime prior even though they were not recorded.

Even though the EMG/nerve conduction studies were normal and did not reveal electrodiagnostic evidence of right brachial plexopathy, right ulnar neuropathy or right

medial/radial neuropathy, Dr. Dy testified nerve conduction studies do not always detect injuries to nerves.

Respondent's first Section 12 examiner, Dr. Kostman's opinion in regard to causality was, based, in part, on Petitioner having no complaints of numbness/tingling until October 5, 2017; however, as noted herein, Petitioner may have had such complaints sometime prior. Further, Dr. Kostman could not identify any other risk factors which would have contributed to the development of compression neuropathies.

Respondent's second Section 12 examiner, Dr. Williams, opined Petitioner may have sustained a very mild brachial plexopathy as a result of the shoulder dislocation and subsequent surgery/treatment, but opined that Petitioner's neuropathies were based solely on subjective symptoms. However, Dr. Williams conceded that nerve conduction studies do not always detect injuries to nerves.

Subsequent to the surgery being performed by Dr. Dy, Petitioner had a complete resolution of all symptoms referable to the right elbow/hand.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Dy to be more persuasive than the opinions of Dr. Kostman and Dr. Williams in regard to causality.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes Petitioner had sustained permanent partial disability to the extent of 15% loss of use of the person as a whole in regard to the injury to Petitioner's right shoulder.

The Arbitrator further concludes that based upon the fact Petitioner had no symptoms/complaints and a complete resolution of same in regard to his right arm/hand as a result of the treatment provided by Dr. Dy, the Arbitrator concludes Petitioner sustained no permanent partial disability to the right arm/hand.

Dr. Williams opined Petitioner had an AMA impairment rating of four percent (4%) of the right upper extremity or two percent (2%) of the whole person. The Arbitrator gives this factor minimal weight.

Petitioner was employed as a truck driver at the time of the accident and he continues to work for Respondent in that capacity. Petitioner continues to experience pain and some restriction of the range of motion of the right shoulder on active use. Petitioner now exercises greater caution when loading/unloading his truck and requires assistance with heavier products. The Arbitrator gives this factor significant weight.

Petitioner was 49 years old at the time of the accident. Petitioner will have to continue to work with the effects of this injury for an extended period of time. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

The medical evidence revealed Petitioner sustained a right shoulder dislocation which required three attempts to reduce the dislocation, the last of which was performed under sedation. Petitioner ultimately required an open surgical procedure which included removal of adhesions, repair of the subscapularis tendon and biceps tenodesis. Petitioner continues to have complaints consistent with the injury he sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Pamela Pistorius,

Petitioner,

vs. NO: 14 WC 25274

Zurich North America,

Respondent.

20IWCC0463

DECISION AND OPINION ON REMAND

This matter now comes before the Commission on remand from the Circuit Court of Cook County. The Commission, in relevant part, affirmed the Arbitrator's ruling that Petitioner did not sustain an accident that arose out of and in the course of employment. On administrative review, the Circuit Court of Cook County reversed the Commission's decision, and remanded the matter for further consideration consistent with its opinion. Having considered the issues of accident, causal connection, average weekly wage, medical expenses, and temporary total disability, and being advised of the facts and law, the Commission modifies the Decision of the Arbitrator in accordance with the circuit court's order as stated below.

I. FINDINGS OF FACT

The Commission hereby incorporates by reference the findings of fact contained in the arbitration decision to the extent it does not conflict with the circuit court's order dated June 20, 2019. The Commission also incorporates by reference the circuit court's order, attached hereto and made a part hereof. Any additional findings of fact in this Decision and Order on Remand will be specifically identified in the discussion of particular issues.

II. CONCLUSIONS OF LAW

A. Accident

In this case, the Commission affirmed and adopted the Decision of the Arbitrator finding that Petitioner had failed to prove an injury compensable under the Act. 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 her 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.*

The Commission adopted the Arbitrator's finding that Petitioner was injured "in the course of" her employment, but found that her injury when an elevator door struck her right shoulder and upper back did not "arise out of" her employment. Illinois courts considering the latter issue have determined that "[t]here are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed." *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31. "'Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public.'" *Id.* (quoting *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27.

The Circuit Court agreed with the Arbitrator and the Commission that this case involved a neutral risk and that Petitioner was not exposed to a *qualitatively* greater risk than the general public. However, the court found that the determination that Petitioner was not exposed to a *quantitatively* greater risk was against the manifest weight of the evidence. The court reasoned that because the stairs to the building were locked, the elevator was the sole means of entering and exiting her workplace. The court thus concluded that Petitioner was forced to encounter the risk attendant to the elevator at a greater frequency than the general public.

Given the circuit court's determination, the Commission finds that Petitioner's injury not only occurred in the course of her employment, but also arose out of her employment with Respondent. Accordingly, the Commission concludes that Petitioner established that she suffered an injury compensable under the Act.

B. Causal Connection

The Commission thus turns to consider the remaining issues raised by the parties in this case, beginning with whether Petitioner established a causal connection between her injuries and current condition of ill-being. In order to obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

In this case, Petitioner claims both physical injuries and psychological injuries resulted from the accident. Psychological injuries are compensable under the Act when they are related to and caused by a work-related physical injury. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 171 (2001). In these "physical-mental" cases, even a minor physical contact or injury may be sufficient to trigger compensability. *Id.*; see *Marshall Field & Co. v. Industrial Comm'n*, 305 Ill. 134 (1922); *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 842 (1994). Moreover, an employer takes its employees as it finds them, even in cases involving mental stress. See, *e.g.*, *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 199 (2002). The work-related physical trauma need not be the sole causative factor, but need only be *a* causative factor of the subsequent mental condition. *City of Springfield v. Industrial Comm'n*, 291 Ill. App. 3d 734, 738 (1997); see *Amoco Oil Co. v. Industrial Comm'n*, 218 Ill. App. 3d 737, 747 (1991). Accordingly, "[a] pre-existing condition does not preclude an award of compensation where the Industrial Commission may legitimately infer from the evidence that the claimant's occupational activity was a causative factor in the injury." *Smith v. Industrial Comm'n*, 161 Ill. App. 3d 383, 391-92 (1987). Whether a psychological condition is causally related to a physical work injury is a factual question that is uniquely in the province of the Commission. *City of Springfield*, 291 Ill. App. 3d at 739.

Petitioner claims physical injuries to her right shoulder, as well as her cervical, thoracic and lumbar spine. Respondent observes that Petitioner submitted no direct medical testimony or written causation opinion connecting the accident to her current condition. Petitioner relies on a "chain of events" analysis regarding these injuries.

At the outset, the Commission observes that it is far from clear that Petitioner has established that she was in good health with respect to her spine prior to the incident at issue. On April 10, 2014, less than two weeks before her accident, Petitioner sought treatment for left shoulder and right ankle pain. She specifically reported to her therapist that her dog yanked her

arm and "she went flying to the ground," causing immediate pain. The shoulder pain apparently was connected to the fall which occurred while walking her dog, while the right ankle injury was the subject of the companion case 14 WC 25275. Petitioner here claims spinal injuries resulting from the elevator door striking her right shoulder and upper back. Absent medical testimony or opinion, the Commission cannot conclude with certainty that Petitioner's spinal symptoms are unrelated to her prior injuries, given the nature of each incident and the possibility that spinal symptoms do not necessarily manifest immediately after an incident.

Nevertheless, assuming for the sake of argument that Petitioner's orthopedic claims are separable from the possible effects of her prior physical injuries, the record as a whole leads the Commission to reject Petitioner's chain of events theory and accept the opinions of Respondent's orthopedic Section 12 examiners, Dr. Michael Jacker and Dr. Carl Graf.

In June 2014, Dr. Gregory Brebach noted that there were no acute or significant problems disclosed by Petitioner's lumbar MRI. As of July 10, 2014, Dr. Brebach noted that he did not have much to offer Petitioner beyond physical therapy. On July 14, 2014, Dr. Craig Cummins diagnosed Petitioner with a right shoulder contusion and recommended conservative treatment. On August 7, 2014, Dr. Brebach noted that he had no diagnosis he could offer Petitioner and had no surgical option for her lumbar spine, indicating that he would be interested in the results of Petitioner's then-recent Section 12 examination by Dr. Jacker.

On August 29, 2014, Dr. Cummins diagnosed Petitioner with right shoulder impingement syndrome. However, on September 16, 2014, after noting the MRI results and the lack of benefit from an injection, Dr. Cummins indicated that he did not believe there was much more to offer with regard to Petitioner's shoulder.[1] (PX4, pp. 73-74.) Dr. Cummins concluded that the majority of Petitioner's symptoms appeared to be cervical and determined that further management would be provided by Dr. Brebach. Although Petitioner continued to treat with Dr. Brebach in the succeeding months, receiving an epidural injection in October 2014, Dr. Brebach recommended continued therapy in January 2015 because he had nothing more to offer. Later in 2015, Dr. Brebach observed only degenerative and osteophytic changes that might be contributing to Petitioner's symptoms.

Petitioner's treatment records are thus broadly consistent with the findings and conclusions in Dr. Jacker's July 28, 2014 Section 12 report. Dr. Jacker's review of the June 13, 2014 lumbar spine MRI is consistent with Dr. Brebach's assessment of that MRI. Dr. Jacker's review of X-rays taken on May 28, 2014 revealed: (1) no evidence of any significant bony abnormality or joint abnormality in the right shoulder; (2) slight disk space narrowing at T12-L1 in the lumbar spine; (3) minimal degenerative changes in the thoracic spine; and (4) nothing remarkable in the cervical spine beyond the prior fusion surgery. Dr. Jacker concluded that Petitioner sustained a contusion involving her right shoulder and upper chest wall, an assessment similar to what Dr. Craig Cummins found two weeks earlier. Dr. Jacker further found that Petitioner had "exquisite hypersensitivity to touch over her upper back and lower back with pain

[1] The Commission notes that on February 8, 2016, Dr. Cummins performed a minimal labral debridement, a bursectomy, and an acromioplasty. However, the treatment records submitted into evidence do not establish that any impingement syndrome was causally related to the work-related accident, particularly where Dr. Cummins noted at the time that he did not have much more to offer regarding the shoulder other than to recommend therapy.

on motion of the right shoulder which is inconsistent [with] the degree of injury reported and imaging studies." (RX10.) Notably, Dr. Diana Goldstein, the psychological Section 12 examiner, in diagnosing Petitioner with a somatoform or conversion disorder that causes physical symptoms which cannot be explained by any organic or medical condition, testified that one example of conversion disorder would be, "I have exquisite pain when you touch me or my back hurts." (RX5, Tr. 37.) As the Arbitrator observed in the Decision: "This explains the findings of Dr. Graf and Dr. Jacker that Petitioner's subjective complaints were not consistent with their objective findings."

Similarly, Dr. Graf's Section 12 report, dated February 23, 2015, indicated that the physical examination demonstrated multiple inconsistencies with multiple non-organic pain signs, as well as pain out of proportion to the evaluation. Dr. Graf also noted that the imaging studies disclosed no notable nerve root compression in the cervical or thoracic spine. Dr. Graf further observed that Petitioner's treating physician had recently noted there was nothing he could do for her. The doctor questioned causation as a whole. However, Dr. Graf acknowledged it was possible that Petitioner had suffered a cervical or thoracic strain, while concluding that Petitioner was at maximum medical improvement. (RX4, Ex2.)

Moreover, Petitioner's psychological treatment records for this period do not support a causal connection between Petitioner's accident and her orthopedic claims. The June 3, 2014 record of Petitioner's first post-accident session with Leanna Dekhytar-Gerdov (Petitioner's therapist),[2] does not mention the accident. The June 9, 2014 record of Petitioner's first post-accident session with Dr. Taras Didenko, Petitioner's treating psychiatrist from December 2012 through January 2016, similarly does not mention the accident, while indicating that Petitioner denied any discomforts. On August 20, 2014, Petitioner mentioned shoulder and back pain to her therapist, claiming she had sciatic nerve damage which – as the Arbitrator noted – had not been diagnosed. The record for Petitioner's August 21, 2014 session with Dr. Didenko makes no reference to the work accident or increased symptoms related to it. While Petitioner mentioned workers' compensation concerns to her therapist on September 8, 2014, she did not mention them to Dr. Didenko on September 18, 2014.

Lastly, there is the video recording of the accident. The Commission previously adopted the Arbitrator's findings of fact describing the contents of the recording. The Arbitrator observed that as Petitioner entered the elevator, "she basically walks into the closing door to her right, bumps it and takes a step back, and the door reopens." After Petitioner boarded the elevator, "[n]othing appears out of the ordinary." A passenger with a cart exited the elevator, at which point "[s]he then touches and kind of rubs her right arm, them [sic] lifts the sleeve and looks at her bicep area, as if looking for a mark, before exiting the elevator at her floor." The Arbitrator's description is consistent with the description in Dr. Graf's June 6, 2015 addendum to his Section 12 report, which notes that the accident as depicted in the recording differs significantly from Petitioner's description of the accident during his examination. (RX4, Ex.3.) Dr. Graf later testified that the recording further supported his opinions. (RX4, Tr. 19.) Dr. Goldstein similarly described the recording while noting that Petitioner's description of the accident was not consistent with the contents of the recording. (RX5, Tr. 23.) The Commission

[2] The Arbitrator's Decision spells this name as Liana as it appears in deposition testimony. Petitioner's exhibit list spells the name as Leanna. The treatment records only bear her signature and do not provide a definitive spelling.

reaffirms the Arbitrator's findings of fact describing the contents of the video recording, which is consistent with the similarly described observations by Drs. Graf and Goldstein. The Commission further observes that Petitioner's testimony that the elevator door striking her caused severe pain in the shoulder and a shaking pain in her back is also not evident from the recording.

For all of the aforementioned reasons, the Commission finds that Petitioner's current condition of ill-being is not causally connected to Petitioner's work-related accident with respect to her orthopedic injuries. Rather, the record as a whole supports the conclusion that Petitioner suffered a shoulder contusion which resolved at some point between Dr. Jacker's Section 12 examination, which did not find that Petitioner was at maximum medical improvement (but suggested the maximum therapeutic benefit would be achieved after another four weeks of physical therapy), and Dr. Graf's Section 12 examination finding Petitioner had reached maximum medical improvement. Given the inherent difficulties in assessing Petitioner's precise physical condition presented by the unusual circumstance of Petitioner's conversion disorder, the Commission concludes that Petitioner reached maximum medical improvement on February 23, 2015, the date of Dr. Graf's examination.

The Commission now turns to consider whether Petitioner further established a causal connection regarding her "physical-mental" claim. Petitioner contends that her pre-existing psychological condition was aggravated by her work-related accident. Respondent replies that there is no evidence that a physical condition exists which aggravated Petitioner's pre-existing psychological condition. As noted earlier, even a minor physical contact or injury may be sufficient to trigger compensability. Petitioner's medical records and even Dr. Jacker's Section 12 report establish that Petitioner suffered at least a minor physical contact or injury.

Petitioner relies on Dr. Didenko's testimony that while her condition significantly deteriorated from 2012 through April 2014, the accident "definitely contributed to it." (PX12, p. 8.) Dr. Didenko also testified that the work-related accident contributed to Petitioner's major depression. (PX12, p. 10.) He explained that Petitioner became completely incapacitated and very depressed because she had worked all her life but experienced an abrupt change in her life because she was unable to do much and was home alone. (PX12, pp. 9-10.) Noting that Petitioner was struggling with a number of stressors, Dr. Didenko described the accident as a "last straw" which "probably, you know, exacerbated her level of depression and anxiety to [a] severe extent." (PX12, p. 11.)

Respondent relies on Dr. Goldstein's opinion that Petitioner had not sustained any psychological injury, directly or indirectly, from the May 27, 2014 incident. Dr. Goldstein also opined that the accident had not caused any mental health condition or significantly exacerbated any pre-existing mental health condition. Dr. Goldstein observed that Petitioner has suffered from major depression since at least 2002. The doctor also observed that Petitioner's somatoform disorder has consistently caused Petitioner to misattribute pre-existing and post-accident symptoms, both emotional and physical, to the accident. According to Dr. Goldstein, the records clearly establish that Petitioner began to decompensate from a psychiatric standpoint in the weeks before the accident, in association with her father being diagnosed with cancer. RX5, Ex2. In her testimony, Dr. Goldstein stressed that Petitioner blamed Respondent for her

20IWCC0463

back pain preventing her from visiting her father on his last Father's Day, which Dr. Goldstein did not believe was Respondent's fault. (RX5, Tr. 44.) The doctor also testified that "[t]he bottom line is that we don't see any evidence, objective evidence, in treating notes of any change. There's no exacerbation, there's no new onset disorder, et cetera." (RX5, Tr. 41.)

Given the record as a whole, the Commission is persuaded by the opinion of Dr. Goldstein over the opinion of Dr. Didenko. Petitioner's disorder may have caused her to experience pain in her shoulder and spine following the work-related accident. However, the issue is whether the minor contact Petitioner had with the elevator door aggravated Petitioner's complicated and severe pre-existing psychological condition. Dr. Goldstein testified that the somatoform disorder was a pre-existing condition since approximately 2012, when Petitioner began to have seizures (though the record indicates these are more aptly referred to as pseudo-seizures). (See RX5, Tr. 42). As Dr. Goldstein testified, there is no evidence that Petitioner's somatoform disorder was itself exacerbated by the accident. The Commission also concludes that given Dr. Didenko's testimony that Petitioner significantly deteriorated prior to May 2014 and was struggling with a number of stressors, including stress related to her father's terminal illness diagnosis as reported just six days before the accident, Petitioner failed to establish that the accident aggravated her longstanding major depressive disorder. Rather, reviewing the record as a whole, the Commission concludes that Petitioner's condition is the result of a degenerative process of a multifaceted and severe preexisting psychological condition that deteriorated sharply as a result of non-occupational factors. Accordingly, the Commission concludes that Petitioner failed to establish a causal connection between the accident and her current condition of psychological ill-being.

C. Average Weekly Wage

The parties dispute the Petitioner's average weekly wage (AWW) for the year prior to the accident. Petitioner claims the AWW should be $1,759.48, seemingly based on the $90,612.02 "grand total" of compensation listed in Respondent's wage statement. (See RX9.) The Arbitrator calculated an AWW of $1,294.42, apparently based on the $67,309.66 listed as "regular compensation" in Respondent's wage statement. (See RX9.) The Arbitrator ruled that Petitioner failed to establish which portion of her total annual earnings constituted a bonus that would not be included in the AWW calculation. Respondent's wage statement lists $9,378.77 of "bonus" payments. (RX9.)

The claimant in a workers' compensation proceeding has the burden of establishing her average weekly wage. *Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n*, 2011 IL App (1st) 102180WC, ¶ 31. The determination of a claimant's average weekly wage is a question of fact for the Commission. See *id.*

Section 10 of the Act defines "average weekly wage" in relevant part as:

> "[T]he actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of his injury, illness or disablement excluding overtime, and bonus

20 IWCC0463

divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." 820 ILCS 305/10 (West 2014).

On review, Petitioner's primary argument is that the Arbitrator should have included bonus compensation in the calculation of the AWW. The Illinois Appellate Court has defined a "bonus" as a payment which an employee receives for no consideration or in consideration of overall performance at the sole discretion of the employer, as distinguished from incentive-based pay that an employee receives in consideration for specific work performed as a matter of contractual right. *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶ 40.

In this case, Petitioner testified regarding Respondent's performance management program, particularly diary management. Petitioner testified that Respondent used diaries to follow up on other carriers, check on demands, prepare demands, prepare case summary reports, schedule telephone calls, and whatever tasks were necessary to work a file. She also testified that she had monthly meetings with her manager regarding diary management and how much money she had recovered versus the goal amount. Petitioner further testified that diary management had a direct impact on her bonuses and compensation. She additionally testified that untimely completing the diary entries affected the performance reviews or bonus compensation. Tr. 68-70. The Commission finds Petitioner's unrebutted testimony sufficiently specific to establish that her bonus compensation was part of a formal, incentive-based pay program. Accordingly, the Commission concludes that the bonus compensation must be included in calculating the AWW.

It does not follow, however, that the AWW must be based on the "grand total" listed on the Respondent's wage statement, which also includes paid time off (PTO), "other income," and a short-term disability (STD) payment. The Illinois Appellate Court has ruled that vacation pay is to be included in the AWW calculation. *General Tire & Rubber Co. v. Industrial Comm'n*, 221 Ill. App. 3d 641, 652 (1991). Therefore, the Commission finds that the $6,964.09 in PTO must be included in the AWW calculation. However, Petitioner adduced no evidence or testimony regarding the "other income" or STD payment, and presented no argument regarding these payments on review. Thus, the Commission finds Petitioner has failed to carry her burden of proving they should be included in the AWW calculation. Accordingly, the Commission determines that Petitioner annual earnings were $83,652.52 (the sum of the regular compensation, PTO and bonus compensation).

The Commission further observes that Respondent's wage statement indicates that Petitioner did not receive regular compensation for the two weeks from July 16, 2013 through July 31, 2013. Accordingly, dividing Petitioner's annual earnings by 50, the Commission determines that Petitioner's AWW is $1,673.05.

D. Medical Expenses

Regarding the issue of necessary and reasonable medical expenses, the Commission finds Respondent responsible for the payment of Petitioner's unpaid charges for reasonable and necessary medical services related to her physical injury for the period from May 27, 2014 through February 23, 2015, as reflected in Petitioner's Exhibit No. 13, excepting the charges incurred from Bakal Dermatology Associates, which were withdrawn. The Commission also awards a credit to Respondent for payments of medical bills related to Petitioner's physical injury through Respondent's group medical plan for the period from May 27, 2014 through February 23, 2015, as reflected in Respondent's Exhibit No. 8, pursuant to §8(j) of the Act.

E. Temporary Total Disability Benefits

Regarding the issue of temporary total disability (TTD) benefits, Petitioner claims she is entitled to TTD benefits for the period from June 18, 2014 through September 1, 2014 and from September 26, 2014 through the February 23, 2017 hearing date. The medical records indicate that Petitioner was placed off work by Dr. Brebach on June 18, 2014. (PX4, p. 36.) Dr. Brebach released Petitioner back to work on September 2, 2014. (PX4, p. 59.) Petitioner testified without rebuttal that her final day of work for Respondent was between September 25 and 27, 2014. (See Tr. 72.) Petitioner's testimony is corroborated by the Social Security Administration's determination that Petitioner became disabled on September 26, 2014. (PX14.) Accordingly, the Commission awards TTD benefits for the period from June 18, 2014 through September 1, 2014 and from September 26, 2014 through February 23, 2015 (the date on which Petitioner reached maximum medical improvement).

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved she sustained an accident arising out of and in the course of her employment with Respondent on May 27, 2014.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner did not prove that her current condition of ill-being is causally connected to the May 27, 2014 accident after February 23, 2015 when she reached MMI.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's average weekly wage was $1,673.05.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay Petitioner's necessary and reasonable medical expenses related to her physical injury for the period from May 27, 2014 through February 23, 2015, as reflected in Petitioner's Exhibit No. 13, excepting the charges incurred from Bakal Dermatology Associates, pursuant to §8(a) and §8.2 of the Act and the fee schedule. The Commission also awards a credit to Respondent for payments of medical bills for Petitioner's physical injury through Respondent's group medical plan for the period from May 27, 2014 through February 23, 2015, as reflected in Respondent's Exhibit No. 8, pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

20IWCC0463

the sum of $1,115.37 per week for the period from June 18, 2014 through September 1, 2014 and from September 26, 2014 through February 23, 2015, a period of 32 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is awarded a credit of $9,384.40 for temporary total disability benefits already paid.

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $26,900. 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: AUG 20 2020
d: 08/06/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tara Higgins,

Petitioner,

vs.

NO: 10 WC 44427
10 WC 44431

State of Illinois,
Department of Veterans Affairs,

Respondent.

20IWCC0464

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, permanent partial disability and loss of trade, 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 hereby incorporates by reference the Findings of Fact contained in the arbitration decision, which delineate the relevant facts and analyses. However, as it pertains to two issues, temporary total disability and maintenance, the Commission views the evidence differently than the Arbitrator and modifies these awards as stated below.

Pertaining to temporary total disability, the record reflects that Petitioner, a CNA, was taken off work by Dr. Kettner on November 4, 2010, and due to her ongoing disability was unable to return to her pre-injury employment. The record also reflects that Petitioner last saw her treating physician, Dr. Stuck, on September 9, 2014. This visit was after her final Section 12 examination at Respondent's request with Dr. Perns. Dr. Stuck indicated that Petitioner's condition had not changed, maintaining that she was at maximum medical improvement. The September 9, 2014 visit was also the last treatment date prior to Petitioner beginning vocational rehabilitation.

Then, on January 30, 2015, Petitioner underwent an initial vocational evaluation and

Labor Market Survey with Respondent's vocational case manager, Tracy Peterlin. At that meeting Ms. Peterlin determined Petitioner was incapable of working as a CNA. She considered Petitioner's restrictions and professional experience and found a number of jobs outside of the CNA field. She requested Petitioner create a resume, obtain references, complete a transferable skills scale, register with the Illinois Department of Employment Security ("IDES") and begin creating a network/community list and possibly identify potential employers she would have interest in working for in anticipation of their next meeting.

Petitioner attended a second meeting with Ms. Peterlin on February 17, 2015. An accompanying report drafted by Ms. Peterlin the following day indicated that although Petitioner had not yet registered with IDES, she had registered with Central Management Services for the purposes of job searching. She also indicated she may have a job lead to take over a campground/trailer park facility in Olney, Illinois. Petitioner's compliance was described as "minimal," but Ms. Peterlin was hopeful that Petitioner would improve in the future.

Petitioner missed the next scheduled session on February 27, 2015. At that time her file was placed on hold. Prior to this session, Petitioner's Counsel had informed Ms. Peterlin that Petitioner had no interest in continuing vocational rehab and would not be present at this meeting.

Based on the foregoing, the Commission modifies the temporary total disability benefits award to include November 4, 2010 through September 9, 2014. Petitioner had been evaluated one last time by her physician, Dr. Stuck, after Respondent had Petitioner re-evaluated by its Section 12 examiner, Dr. Perns. Dr. Stuck maintained that Petitioner's condition had not changed, and the Commission finds that she was at maximum medical improvement as of that date.

Petitioner then engaged in a vocational rehabilitation program with Ms. Peterlin. Petitioner has several sessions in which she was given guidance and instructions to successfully participate in the program. Petitioner's Counsel eventually informed Ms. Peterlin that Petitioner had no interest in continuing vocational rehabilitation and would not be present at this meeting set for February 27, 2015. Moreover, Petitioner testified at the hearing that at that time (in 2015) she had decided to discontinue vocational rehabilitation.

When there is a lack of "good faith" cooperation with vocational rehabilitation efforts, the termination of benefits is justified. *Hayden v. Industrial Comm'n*, 214 Ill.App.3d 749, 756 (1991). It is the Petitioner's obligation to make "good-faith efforts to cooperate in the rehabilitation effort." *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill.2d 107, 561 (1990).

Petitioner admittedly discontinued efforts to participate in vocational rehabilitation. Thus, the Commission finds that Petitioner is only entitled to maintenance benefits from September 10, 2014 through February 27, 2015.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

20IWCC0464

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $426.30 per week for a period of 200 and 6/7ths weeks, commencing November 4, 2010 through September 9, 2014, 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 $426.30 per week for a period of 24 and 3/7ths weeks, commencing September 10, 2014 through February 27, 2015, as provided in §8(a) of the Act, that being the period of Maintenance.

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

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

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

DATED: AUG 20 2020
o: 7/9/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HIGGINS, TARA
Employee/Petitioner

Case# **10WC044427**

10WC044431

ILLINOIS VETERAN'S HOME-LASALLE
Employer/Respondent

20IWCC0464

On 9/9/2016, 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 0.47% 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:

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

5705 ASSISTANT ATTORNEY GENERAL
CAITLIN PAPADOPOULOS
100 W RANDOLPH ST 13 TH FL
CHICAGO, IL 60601

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 9 - 2016

RICHARD A. RAGONA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tara Higgins
Employee/Petitioner

v.

Illinois Veteran's Home-LaSalle
Employer/Respondent

Case # **10** WC **44427**

Consolidated cases: **10 WC 44431**

20IWCC0464

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 **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 7, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/10/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,252.00**; the average weekly wage was $**639.46**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**57,762.49** for TTD and maintenance, $**0** for TPD, and $**0** for other benefits, for a total credit of $**57,762.49**.

Respondent is entitled to a credit of $**3,348.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits at the rate of $426.30/week for 228 weeks, commencing 11/4/10 through 3/19/15, as provided in Section 8(b) of the Act, less a credit in the amount of $57,762.49 for TTD benefits already paid, for a net total due of $39,433.91.

Respondent shall pay all outstanding reasonable and necessary medical services related to Petitioner's injuries pursuant to the medical fee schedule, including $2,766.00 to OSF Saint Elizabeth Medical Center, $387.00 to Central Illinois Radiology, $3,440.55 to Loyola University Medical Center, and $1,082.32 to Newsome Physical Therapy, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also reimburse Petitioner $160.17 in out-of-pocket costs for reasonable and necessary medical treatment. Respondent shall also hold petitioner harmless from any claims by any providers of the services for which Respondent received a credit ($3,348.00), as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits at the rate of $383.67/week for 200weeks, because the injuries sustained caused a 40% 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.

Robert E. Dalin — **September 8, 2016**

Signature of Arbitrator — Date

SEP - 9 2016

Tara Higgins v. Illinois Veteran's Home-LaSalle
10WC44427

FINDINGS OF FACT

The Arbitrator notes that this case was consolidated for trial with case 10 WC 44431, and that both cases were tried at the same hearings. Due to consideration of the facts as set forth below, the Arbitrator awards all benefits and credits in the present case, and declines to make any award in case 10 WC 44431.

The Petitioner, Tara Higgins, was employed by the Respondent, Illinois Veteran's Home, in LaSalle, Illinois, as a Certified Nursing Assistant, "CNA". Ms. Higgins testified her typical work day began at 7 AM and her job duties included: waking up nursing home residents, assisting in feeding them their meals, bathing them, and taking them to do activities. The job required Petitioner to spend most of the day on her feet. She reports being responsible for the care of 10 assigned residents at a time.

On July 15, 2010, Ms. Higgins was asked by a resident for help putting on a sweater. Px. 7. As Ms. Higgins was in the process of assisting the resident, his electric wheelchair moved forward and on top of Petitioner's right foot and then unintentionally the wheelchair shut off. Id. Petitioner testified her foot remained crushed under the weight of the resident and his wheelchair for approximately 45 seconds as she waited for the wheelchair to reboot so it could be moved. Petitioner estimates the electronic wheelchair weighed approximately 200 lbs. The resident weighed approximately 300 lbs. As such, a portion of the 500 lbs. of combined weight was at rest on her foot. Ms. Higgins testified she immediately felt pain in her foot with a burning sensation in her big toe. She reported the incident to a nurse and Respondent's safety coordinator but did not seek immediate medical care out of the hope it would get better.

On July 19, 2010, Petitioner presented to the emergency room at Ottawa Regional Hospital. Px. 5. Ms. Higgins complained of sharp pain rated 9/10 at the top of her right foot and base of her great toe since being run over by an electronic wheelchair several days prior. Id. X-rays were taken and demonstrated no bony abnormalities. Id. She was discharged with medication and an Ace Bandage. Id.

Ms. Higgins testified she continued to work through the pain in her right foot and first two toes during the weeks that followed. The pain forced her to sit during many portions of her shifts and other CNAs had to help pick up the slack.

On September 10, 2010, Ms. Higgins suffered a similar injury to her left foot. Px. 10. Petitioner testified that she and three other nurses were transferring the same resident from his bed to his electric wheelchair using a Hoyer lift. As they were lowering the resident into the wheelchair, his arm struck the controls, causing it to reverse over her left foot and wedge itself under the closet door handle. The wheelchair remained on top of Petitioner's left foot for approximately one minute. Ms. Higgins testified she felt instant pain in her left foot and immediately reported the incident to the charge nurse and safety coordinator. After trying to live with the pain and discomfort in both feet, she sought the assistance of Dr. Larry Ketner, a podiatrist. Px. 4.

Ms. Higgins visited Dr. Ketner on September 23, 2010, with complaints of pain, soreness and burning in both feet following work injuries to her right foot on 7/15/10 and left foot on 9/10/10. Id. Dr. Ketner noted both injuries occurred in a similar way with a patient operating his powered wheelchair onto the Petitioner's feet. Id. Ms. Higgins explained her employer put the injuries through their Worker's Compensation program but was slow in getting her approval for this visit. Dr. Ketner, following an examination, noted her chief complaints were in the dorsal

aspect of each foot with the pain worsening with weight bearing and activity. Id. He indicated the question here is whether Ms. Higgins has a nerve injury or a weight bearing problem. Id. He prescribed Lyrica, ordered left and right foot bone scans, and indicated he would consider a NCS and EMG study to determine if she suffers from a nerve injury. Id.

Petitioner's symptomology remained unchanged when she followed up with Dr. Ketner on or about October 14, 2010. Id. Dr. Ketner diagnosed Ms. Higgins with tendonitis in both feet, ordered a course of physical therapy, and referred Petitioner to Dr. Rakesh Garg for an EMG. Id. The EMG performed by Dr. Garg on October 19, 2010 was normal. Px. 8.

Physical therapy records indicate Petitioner continued to experience pain and discomfort in both feet during the weeks that followed. Px. 5. She returned to Dr. Ketner on November 4, 2010 after completing six sessions of physical therapy and reported continued pain, soreness, and burning in both feet that worsens with weight-bearing and ambulation at work. Px. 4. Dr. Ketner noted Petitioner receives some relief with Lyrica pain medication but saw no improvement from physical therapy. Id. He noted that both feet were very painful and she experienced ongoing shooting pain on the left 5th metatarsal and bottom of the right foot. Id. Upon physical examination of the right foot, Dr. Ketner noted enlargement of the dorsal medial eminence of the 1st metatarsal head, metatarsophalangeal joint pain and the presence of a painful bunion. Id. Examination of the left foot revealed muscle pain along the dorsal extensor digitorum longus tendons and into the lower leg and forefoot area. Id. Dr. Ketner's differential diagnosis for the right foot was a nerve injury versus hallux abductovalgus (bunion) aggravated by injury. Id. As for the left foot, Dr. Ketner's differential diagnosis was extensor digitorum longus tendon tendinitis vs. a nerve injury. Id. Dr. Ketner fit and dispensed high density accommodative

orthotics, ordered an MRI of the right foot, and discontinued physical therapy. Id. Petitioner was also ordered to remain off work for one month and follow up in 3 weeks. Id.

An MRI of the right foot proceeded on November 8, 2010, and demonstrated a possible bunion deformity at the first metatarsophalangeal joint with possible minimal overlying degenerative changes. Px. 4. X-rays of the right foot were also taken and demonstrated a mild bunion deformity at the first digit, some mild degenerative changes at the first tarsometatarsal joint, and a small ossicle adjacent to the cuboid. Id.

Ms. Higgins next saw Dr. Ketner on December 2, 2010. Px. 4. Dr. Ketner noted an 85% improvement in Petitioner's foot pain since she has been off work. Id. The right foot made the most improvement and demonstrated no pain other than the bunion. Id. Petitioner continued to experience occasional shooting pain in the left foot but only every 2-3 days. The pain was made less intense with Voltaren. Id. Dr. Ketner diagnosed Ms. Higgins with right foot bunion pain aggravated by the July 15, 2010 trauma, and left foot 5th metatarsal nerve entrapment dorsal lateral distal sural nerve. Id. Dr. Ketner recommended surgery to correct the bunion on the right foot, prescribed neuropathy steroid cream, and continued Lyrica. Id. He also kept Petitioner off work and provided her with a referral to see Dr. George Holmes at Rush University Medical Center. Id. Petitioner's symptoms remained unchanged during her follow-up with Dr. Ketner on December 21, 2010, and she continued to be kept off work. Id.

On January 27, 2011, Ms. Higgins was evaluated by Dr. Holmes. Px. 7(2).[1] The records indicate Ms. Higgins presented with right great toe pain and lateral left foot pain. Id. After a review of Ms. Higgins medical history and diagnostic imaging, Dr. Holmes performed a physical examination of Petitioner's feet. Id. On the right foot, Petitioner demonstrated increased

[1] Petitioner mistakenly submitted two exhibits marked Px.7. Accordingly, references to Midwest Orthopedics at Rush will be identified herein as Px.7(2).

sensitivity with palpation over the right mild bunion deformity and an area of pain over the first MTP joint in line with the superior or dorsal and plantar digital nerves to the great toe. Id. On the left foot and ankle, Petitioner demonstrated mild neuritis in the distribution of the sural nerve and possibly the superficial peroneal nerve with some proximal radiation. Id. Dr. Holmes reviewed the x-rays and noted mild bilateral bunions with some lateralization of the sesamoids. Id. Mild Morton's foot was also noted but the x-rays showed no arthritic changes in the first MTP joints and were otherwise unremarkable. Id.

Dr. Holmes diagnosed the Petitioner with neuritis of the first MTP joint of the right foot and neuritis involving the sural nerve. Id. Possibly the superficial peroneal nerve of the left ankle as well. Id. He opined Petitioner's symptoms were unrelated to the bunion deformity and did not believe a bunionectomy was indicated. Id. With regard to the sural nerve and superficial peroneal nerve neuritis, Dr. Holmes believed Ms. Higgins would benefit from the use of a Lidoderm patch and nerve stimulator. Id. He recommended she undergo a series of desensitization techniques that could be directed by physical therapy and stated it might take 6-12 months for Petitioner's symptoms to improve. Id. Finally, Dr. Holmes wrote that Ms. Higgins would benefit from a functional capacity evaluation (FCE) in terms of her work status. Id.

Ms. Higgins remained off work and her symptoms were unchanged when she visited with Dr. Ketner on February 3 and February 17, 2011. Px. 4. On the latter date, Dr. Ketner reviewed and followed Dr. Holmes conservative treatment recommendations, but noted his disagreement with Dr. Holmes opinion as to the bunionectomy. Id. Ms. Higgins was provided with Lidoderm patches and a RS 4 nerve simulator. Id. An FCE and physical therapy for nerve desensitization were ordered. Id. Petitioner's pain medication, which he noted she could not live without, was continued and she was kept off work. Id.

Ms. Higgins underwent a FCE at Illinois Valley Community Hospital on March 10, 2011. Px. 6. The records indicate she was very cooperative and demonstrated consistent performance. Id. The test demonstrated significant deficits and pain with lift and carry, lift from floor to center, lift from center to shoulder, push/pull, elevated activities and stair climbing. Id. The recommendation of the FCE states: "Due to the pain that this lady is experiencing of both feet, she would benefit from an aggressive physical therapy program concentrating on muscle strengthening of the lower extremities and the intrinsic foot muscles." Id.

Following the FCE, Ms. Higgins was kept off work with no improvement in her symptoms. Px. 4. She continued to regularly follow-up with Dr. Ketner for treatment. Id. At her April 14, 2011 visit, Dr. Ketner provided Petitioner with a referral to see Dr. Rodney Stuck, whom she saw at Loyola University Medical Center on May 26, 2011. Id & Px. 2. Dr. Stuck noted that " Ms. Higgins has pain in the bunion area of her right foot extending into her great toe and pain in her left foot mainly in the arch area beneath the metatarsals and around the 5th metatarsal base area. Id. She uses a TENS unit that helps for short periods of time and has some relief with Lyrica, but it may be causing her migraines." Id.

Upon physical examination, Dr. Stuck noted a positive Tinel's sign on the dorsal medial nerve as it runs over the right 1st metatarsal head and radiates into the tip of the toe along the dorsal margin. Id. On the left, a positive Tinel's sign was noted in the distal canal and rolling a spot of the tarsal canal caused radiation into the forefoot in the symptomatic nerve distribution. Id. Moderate hallux valgus deformity on the right foot was noted on exam and on the radiographs. Id. Dr. Stuck diagnosed Ms. Higgins with hallux valgus of the right foot with neuritis and probable tarsal tunnel in the left foot. Id. He recommended a bunionectomy with osteotomy on the right foot, along with an evaluation for Regional Pain Syndrome from Dr.

Meda Raghavendra at the pain clinic. Id. As for the left foot, Dr. Stuck noted that Petitioner may require some treatments for tarsal tunnel, including tarsal tunnel injections versus a Richie-type brace to keep her from everting to provide more sagittal plane motion control, as well as evaluation from the pain clinic as to any other neuritic components causing her difficulties. Id. Dr. Stuck expressly disagreed with Dr. Holmes opinion as to the need for a bunionectomy and opined it might be the only solution to her right foot problems at that point. Id.

Dr. Raghavendra evaluated Ms. Higgins on June 6, 2011 and assessed the Petitioner with right big toe/metatarsal pain with hallux valgus and possible neuralgia pain from a single nerve, but did not believe the left foot pain was neuropathic in nature. Id. Dr. Raghavendra recommended tapering Lyrica, starting Gabapentin (Neurontin), and discontinuing Lidoderm, which was ineffective. Id. At Ms. Higgins next visit with Dr. Stuck on June 9, 2011, he reviewed the need for bunionectomy with 1st metatarsal osteotomy with screw fixation to treat the right foot, prescribed Tramadol and Neurontin per the recommendation of the pain clinic, and ordered Petitioner to wear a Tri-Lock brace on the left side. Id. If the Tri-Lock Brace did not provide relief, Dr. Stuck noted Petitioner might consider an injection in the left tarsal canal. Ms. Higgins continued to remain off work throughout this time. Id.

Petitioner's right side remained unchanged at her next appointment with Dr. Stuck on June 28, 2011. Id. Dr. Stuck noted Neurontin provided no relief and resumed Lyrica. Id. As for the left foot, the Tri-Lock brace helped with some of Petitioner's lateral foot pain, but she continued to have pain in her arch. Id. Dr. Stuck noted a trigger point within the tarsal tunnel which caused radiation into the arch and proceeded with a steroid injection to both areas. Id. He noted that this injection caused a moderate steroid flare at his next visit with Ms. Higgins on July 5, 2011. Id. Despite the injection, Ms. Higgins continued to have pain and aching in her left

midfoot and demonstrated persistent neuritis in both feet. Id. Dr. Stuck referred Petitioner to a neurologist to assess whether she needs an updated nerve conduction study or other test and evaluate potential treatment options. Id.

Ms. Higgins was next seen by Dr. Michael Merchut, a neurologist, on July 29, 2011. Id. Dr. Merchut noted a patient rolled an electric wheelchair over Petitioner's right foot in July, 2010, and later her left foot in September, 2010, and wrote: "There is a 'pulling apart' pain in the lateral left foot, little toe, mid sole and medial ankle; not much tingling or numbness. Id. Dr. Stuck gave her a steroid (Kenalog) injection at the medial left ankle without relief and, in fact, she had a reaction to it which included severe swelling, numbness of the left little toe and worse pain. Id. The right foot is less affected – pain at the medial foot near the great toe, and a shooting pain. Id. Pain is 3/10 on the right and 7/10 on the left. Id. X-rays and scans show no fractures in her feet. Id. She has instant pain when putting weight on her left foot and the left ankle feels like it can give out. Id. He noted Ms. Higgins has been on Lyrica which helps the pain about 50%. Id. Orthotic inserts in the right shoe and an ankle brace on the left appear to help. Id.

Upon physical examination, Dr. Merchut noted a "prominent" right 1st MTP joint with positive Tinel's sign at the dorsal joint, causing an electrical sensation shooting to the tip of the great toe when tapped. Id. He also documented a more painful positive Tinel's sign on the left foot, just inferior to the medial ankle that shoots to the medial and lateral sole. Id. Dr. Merchut determined she had tarsal tunnel syndrome at the left foot, a Tinel's sign at the medial malleolus and weak toe abduction. Id. As for the right foot, he opined the pain involves a smaller nerve near the first MTP joint. Id. Dr. Merchut recommended a repeat EMG to rule out left tarsal tunnel syndrome or plantar neuropathy, noting that Dr. Garg's October 19, 2010 EMG did not include plantar sensory studies or EMG of foot muscles other than the EDB. Id. This EMG took

place on August 10, 2011 and was normal. Id. In light of this, Dr. Merchut determined the left foot pain may be related to inflammation or irritation of tendons, ligaments or other soft tissue structures. Id.

Dr. Stuck next saw Ms. Higgins on August 18, 2011. Id. He reviewed Dr. Merchut's opinion that Petitioner does not have tarsal tunnel syndrome but noted she continues to have significant plantar lateral foot pain through the midtarsal joint area and proximal to where she had her left foot run over. Id. Her right foot was stable but sore. Id. Given Ms. Higgins ongoing symptoms and the relative instability that causes sudden pain with movement, Dr. Stuck recommended Ms. Higgins undergo an MRI to assess the left lateral midfoot. Id. Dr. Stuck continued to keep Ms. Higgins off work, noting she is markedly limited in her ability to ambulate. Id. The MRI of the left ankle took place at OSF St. Francis Medical Center on August 30, 2011, and was read normal. Px. 9.

Ms. Higgins symptoms were essentially unchanged when she next saw Dr. Stuck on September 6, 2011, except that her pain increased and started to radiate from the lower anterior shin to the lateral left side of the knee, which Dr. Stuck attributed to her difficulties walking. Px. 2. Following the results of the MRI, Dr. Stuck's impression of Ms. Higgins' condition was chronic neuritis post crush injury. Id. Dr. Stuck opined Ms. Higgins required a multidisciplinary approach to her care and recommended treatment from the Rehabilitation Institute of Chicago ("RIC") for pain management, which was denied by the workers' compensation carrier. Id.

On October 6, 2011, Dr. Stuck noted Ms. Higgins wanted to proceed with the right bunionectomy with 1st metatarsal osteotomy. Id. Dr. Stuck discussed the possible risks and benefits of surgery with Petitioner, and both were hopeful that it would improve her situation. Id.

On October 25, 2011, Ms. Higgins underwent an IME at the request of the Respondent performed by Dr. Stephen Perns. Rx. 2. After a review of her medical history, Dr. Perns performed a physical examination. Id. He noted increased pain on light touch to the dorsal, medial, and plantar aspect of the left foot but not the right. Id. Musculoskeletal evaluation showed slight prominence to the medial and dorsal aspects of both first metatarsal phalangeal joint accentuated with weight bearing, as well as prominence of the fifth metatarsal head with varus rotation of the fifth digits. Id. Abduction and valgus rotation of the hallux was also noted bilaterally. Id. Pain was elicited with attempted motion of left foot and pedal joints as well as the left ankle joint. Id.

Dr. Perns, as Respondent's IME physician, wrote the Petitioner's "current diagnosis is crush type injury with limb pain and neuritis. I do feel her current condition was related to her accidents on 7/15/10 and 9/10/10." Id. He wrote further treatment would be pain management either via local anesthetic injection or medication, such as the Lyrica she is currently taking for pain. Id. She is capable of returning to work performing her duties as a nursing assistant once a pain management consult and treatment have been implemented. Id. Pending a pain management consult and FCE, she would then reach maximum medical improvement. Id.

Dr. Perns subsequently filed an addendum to his IME report on November 14, 2011. Id. After reviewing right foot x-rays and radiology reports dated 11/9/10, and a nuclear bone scan from 9/20/10, he stated "the crush injury and neuritis should have gotten considerably better at this point, and if not, I would recommend pain management". Id.

Tara Higgins symptomology was unchanged when she followed with Dr. Stuck on November 3, 2011. Px. 2. Her left lateral plantar nerve symptoms had increased by her next visit with him on December 1, 2011. Id. At this visit, Dr. Stuck noted it was imperative the Petitioner

see RIC for an assessment of her feet because of likely Regional Pain Syndrome that had yet to be approved. Petitioner was also still awaiting approval of the right bunionectomy. Id.

On January 6, 2012, Ms. Higgins did get approval to see Dr. Raghavendra at RIC. Id. Dr. Raghavendra's assessment of Ms. Higgins was right foot pain with neuritis, left foot pain in posterior tibial region as well as lateral foot/ankle and allodynia. Id. Dr. Raghavendra recommended continuing Lyrica and considering a left posterior tibial nerve block under local anesthetic with additional attempts if warranted. Id. If no improvement is noted from the nerve block, then a left lumbar sympathetic nerve block should be considered. Id.

Dr. Stuck provided Ms. Higgins with a left tibial nerve block on January 10, 2012, which gave her relief lasting until late that evening. Px. 2. At her next appointment on January 24, 2012, Ms. Higgins reported a 50% improvement in her pain after the first week and rated her pain 5/10 as opposed to the 7/10 from her previous visit. Id. Because of the positive reaction, a repeat tibial nerve block was provided at that time. Id. A third injection was administered on February 7, 2012 and it provided 5 days of relief. Id. A fourth injection was given on February 21, 2012 and provided 4 days of relief that tapered off over the following 6 days. Id. A fifth injection on March 6, 2012 provided 4 days of total relief before the pain gradually returned 2 1/2 weeks later. Id. Another nerve block occurred on March 31, 2012 and again provided 2-3 weeks of relief. Id. Dr. Raghavendra noted the good, albeit temporary, response to the nerve blocks and recommended additional injections on April 13, 2012. Id. Additional injections were provided April 19, June 7, August 2, and August 21, 2012. Id.

On September 10, 2012, Dr. Raghavendra noted Ms. Higgins continues to have pain in the left medial ankle/tarsal tunnel region status post crush injury and posterior tibial neuropathy. Id. She has been receiving left posterior tibial nerve blocks from Dr. Stuck, but the injections

have begun to lose their efficacy in terms of relief duration. Id. Dr. Raghavendra recommended a pulse radiofrequency ablation of the left posterior tibial nerve. Id. The following day, Ms. Higgins was seen by Dr. Domek with Dr. Stuck and they agreed with the same. Id. At this visit, it was also noted Petitioner's right foot continued to have persistent neuritis at the medial dorsal cutaneous over the bunion site, but they decided to leave it alone at that time. Id. Ms. Higgins underwent the suggested left posterior tibial nerve pulsed radiofrequency neuromodulation on October 1, 2012. Id.

Petitioner followed with Dr. Stuck on October 18, 2012. Id. He wrote Ms. Higgins had radio frequency ablation of the nerve branch on her left foot. Id. She states that overall the lateral aspect of the left foot feels significantly better. Id. Her lateral foot hypersensitivity is markedly improved and there is no longer a Tinel's sign at the tibial nerve of this foot. Id. There is marked pain right where she had the probe placed, but states this is also significantly better than it was. Id. On the right foot, she has persistant pain around the neuritic area overlying the bunion site. Id. She has a lateral deviation of the great toe with marked medial prominence of the 1st metatarsal head. Id. There is a moderate sized medial dorsal cutaneous nerve that traverses this 1st metatarsal head and snaps over this area causing her significant soreness. Id. Because of the persistent pain, Dr. Stuck ordered the right bunionectomy surgery. Id.

Ms. Higgins remained off work and followed with Dr. Stuck and Dr. Raghavendra before her right foot bunionectomy and osteotomy with hardware surgery on January 22, 2013. Id. At her post-op visit of January 29, 2013, Ms. Higgins had toe numbness and moderate pain, but radiographs showed good alignment and hardware placement. Id. A week later, Petitioner reported the right foot felt much improved but her left was feeling worse. Id. By her February 26, 2013 appointment, Petitioner was only partial weight bearing with a CAM walker and boot. Id

She reported fibular sesamoid pain radiating up to the hallux nail with ambulation. She also had irritation of the 5th metatarsal head from her walking boot. Id. Ms. Higgins was provided an injection for her complaints and ordered to begin physical therapy. Id.

Petitioner's right foot symptoms markedly improved the post-surgery physical therapy. Id. On April 26, 2013, Dr. Sarah Dickey of Loyola wrote Ms. Higgins had a bunionectomy to take pressure off the nerve being entrapped in her right great toe. Id. Symptoms have improved following the procedure but she continues to have pain in the ball of her foot, plantar aspect at the first metatarsophalangeal joint. Id. Ms. Higgins reports use of stairs causes debilitating pain in her right foot. Id. Dr. Dickey noted the Petitioner has a bunion deformity on her left foot which has been giving her some symptoms on the lateral column and outside of her foot like due to compensatory pain. Id.

Upon physical examination, Dr. Dickey wrote Ms. Higgins has pain with palpation of the fibular sesamoid and first interspace plantar aspect of the right foot, as well as, with passive and active range of motion of the right first metatarsal of the right hallux. Id. Upon weight-bearing, there is a marked collapse of the subtalar joint and subluxation of the talonavicular joint producing a valgus position of the heel bilaterally and valgus position of the foot with relationship to the leg. Id. X-rays of the right axial sesamoid demonstrated adequate reduction of the hallux valgus deformity with two well-placed internal fixation screws but showed the fibular sesmoid peeking out into the interspace and a 40% uncovering of the talar head with an anteriorly displaced cyma. Id. The radiologist read this x-ray as a fracture of the tibia sesamoid of the right foot. Id. However, on clinical exam Ms. Higgins did not have pain with palpation of the tibial sesamoid, only pain with palpation of the first interspace and the fibular sesamoid. Id.

Dr. Dickey felt Ms. Higgins would benefit from custom orthoses due to her talonavicular uncovering, as well as her asymmetric feet and continuing progressive hallux valgus deformity of the left foot and sesamoiditis of the right. Id. Dr. Dickey also recommended Petitioner return for an ultrasound of her first metatarsophalangeal joint space in order to verify or evaluate the nerve to see if it is being compressed dynamically. Id.

Ms. Higgins' right foot condition had not improved by her return to Loyola on April 30, 2013 when she was seen by Dr. Stuck and Dr. Bryce Paschold. Id. At that time, an MRI was recommended to evaluate Petitioner's right foot for sesamoiditis vs. AVN tibial sesamoid. Id. At her next visit of May 9, 2013, Dr. Stuck noted Ms. Higgins had an increase in her symptoms a few weeks prior. Id. Her pain with the initial postop neuritis resolved in the sulcus area but she has continued pain on the inner aspect of the right foot at the great toe joint and on the top of her foot. Id. There is some redness now present on the top of the right foot as well. Id.

On physical exam, Petitioner demonstrated pain at the medial plantar nerve branch beneath the medial aspect of the first metatarsal head causing radiation into the toe. Id. Hypersensitivity along the intermediate dorsal cutaneous nerve dorsally was found. Id. However, her sesamoid pain appeared to have lessened. Id. Dr. Stuck provided Ms. Higgins with an intermediate right dorsal cutaneous nerve block injection and recommended she follow up with Dr. Dickey for an ultrasound of the nerve to make sure it is not bound or neuromatous in appearance. Id. He also recommended she return to Dr. Raghavendra at the pain clinic for reassessment of her right foot due to increased pain and redness. Id.

Ms. Higgins underwent an ultrasound of the right first metatarsal phalangeal joint performed by Dr. Dickey on May 16, 2013. Id. The ultrasound showed no apparent signs of hardware irritation or backing out of the screws. Id. Minor edema was found intracapsularly

within the first metatarsal phalangeal joint. Id. Slight inflammation surrounding the intersesamoid ligament and surrounding fibular sesamoid plantar aspect of the right foot were also noted. Id. This demonstrated possible entrapment of the first common digital nerve branch of the medial plantar nerve to the first interspace. Id. This nerve was slightly enlarged and hypoechoic with range of motion of the first metatarsal phalangeal joint, indicating that it is moving and being slightly impinged by the fibular sesamoid. Id. At that time, Dr. Dickey's assessment was neuritis or neuroma of the first interspace of the plantar common digital branch of the medial plantar nerve secondary to fibular sesamoid impingement, fibular sesamoiditis, pes plano valgus with talonavicular subluxation, and complex regional pain syndrome. Id. Dr. Dickey again recommended custom orthotics to help eliminate further pressure of the sesamoid and nerve impingement. Id. Dr. Dickey further recommended an ultrasound guided local nerve block to determine if it alleviates the ball of foot symptoms, followed by possible sclerosing injections or surgical removal of the enlarged nerve. Id.

On May 17, 2013, Ms. Higgins was seen by Dr. Raghavendra at the pain clinic. Id. X-rays of the right foot were taken and revealed a fracture of the sesamoid bones. Id. The tibial sesamoid is slightly more sclerotic than the fibular sesamoid. Id. This can be seen with avascular necrosis. Id. Dr. Raghavendra noted a temperature difference, supportive of a diagnosis of complex regional pain syrndrome (CRPS), also known as reflex sympathetic dystrophy syndrome (RSDS). Id. Dr. Raghavendra recommended continued nerve blocks of the foot/ankle as long as they provide relief and to consider a sympathetic lumbar nerve block along with pulsed radiofrequency of the right ankle peripheral nerves, if necessary. Id.

On June 14, 2013, Dr. Dickey performed cortisone injections of the right foot under ultrasound guidance but this provided only short-term relief. Id. On June 18, 2013, Dr. Stuck

noted Ms. Higgins complaints of left and right foot pain. He wrote the left issue is tarsal tunnel and is essentially unchanged. Id. On the right side, the neuritis that was treated with the bunionectomy is gone but she has plantar lateral and medial pain in the joint. Id. The lateral side was injected previously by Dr. Dickey but Ms. Higgins had a full return of pain. Id. Dr. Stuck believed the right foot symptoms were complex regional pain syndrome and explained the neuritis and lateral sesamoid might be treated with AminoFix by injection. Id. He also recommended a Medrol DosePak and, again, custom orthotics. Id.

Dr. Stuck discussed the AminoFix injection with the Petitioner on July 23, 2013. Id. He wrote the injection would make her hurt worse for a few days but expected noticeable improvement 2-3 months later. Id. This AminoFix injection to the medial plantar nerve within the first interspace and medial digital branch of the plantar nerve right hallux of the right foot was performed under ultrasound guidance by Dr. Dickey on August 2, 2013. Id. The injection caused Ms. Higgins significant pain for a few days as expected but she showed improvement by August 13, 2013 visit. Id. On that date, Dr. Stuck continued to recommend custom orthotics and resubmitted the paperwork for approval. Id.

Ms. Higgins reported little additional improvement on her return visit with Dr. Stuck on September 17, 2013. Id. At this visit, Petitioner was casted for orthotics. Id. Dr. Stuck noted Petitioner remains unfit for work and will need to get the orthotics prior to considering a sedentary-type job. Id. These orthotics were still not approved by her original scheduled pick up of December 10, 2013. Id.

Petitioner reset her orthotic pick up for February 4, 2014. Id. At this visit, she was provided the orthotics. It was also reported she continued to have pain around her right 1st metatarsophalangeal joint and her left hindfoot. Id. X-rays were taken of the right foot and

demonstrated an intact healed bunionectomy and first metatarsal osteotomy with soft tissue swelling. Id. Her orthotics were adjusted by Dr. Stuck on March 4, 2014, and Ms. Higgins reported improvement of her left pain with their use. Id. However, her right foot problems continued around the sesamoid area. Id.

On April 22, 2014, Dr. Stuck wrote Ms. Higgins' orthotics have helped a small amount but she continues to have pain on a daily basis. Id. She gets pain shooting in the left heel and arch about 10 to 15 times per day. Id. On the right, she has more tingling and that gets worse with standing but no new swelling or symptoms. Id. On physical examination, soreness was noted through the fibular sesamoid area on the right and along the medial dorsal cutaneous nerve of the great toe. Id. Dr. Stuck wrote: "I think she has reached MMI. I would like her to see Dr. Ragavendra to see if he concurs with this. Id. She would need continued Lidoderm patches to use occasionally. She also would need her TENS unit supplies on a regular basis as well as oral medications of Lyrica, Ibuprofen and Bellevue topical pharmacy medications as all of these provide relief in variable fashions for her symptoms." Id. He also wrote Ms. Higgins would need new orthotics every 1-2 years as well. Id. Dr. Ragavendra agreed with Dr. Stuck's plan for multimodal approach to pain management including home exercises, heat/ice, and follow up with the pain clinic as needed. Id.

On May 12, 2014, Dr. Stuck cleared Ms. Higgins to return to work with permanent restrictions of sedentary level work with walking no more than 5-10 minutes per hour and no lifting, pushing, or pulling greater than 10 lbs. Px. 3. Petitioner was advised to follow-up with Dr. Stuck as needed. Id.

At Respondent's request, Ms. Higgins returned to see Dr. Perns for a third IME on August 27, 2014. Rx. 5. At that time, Petitioner reported continued bilateral foot pain including

tingling and burning pain that starts on the inside of the left ankle and shoots underneath the arch of the foot to the outside of the bottom of the front of the foot. Id. The burning and tingling pain on the right had gone away following her bunionectomy, but she continued to report sharp pain under the right big toe joint that feels like she is walking on glass. Id. Petitioner's pain increases with activity and walking on uneven surfaces. Id. Dr. Perns diagnoses were crush injuries to feet, neuritis to dorsal right foot, resolved; and tarsal tunnel syndrome to left foot. Id.

Dr. Perns wrote: "The diagnoses and current condition of tarsal tunnel syndrome of the left foot are in direct relationship to her work-related injuries sustained on 7/15/10 and 9/10/10. Id. I do believe that since the bunionectomy did eradicate the neuritic symptoms in Tara's right foot, the accident was detrimental and the preexisting bunion condition was exacerbated and caused the neuritis. Id. I also believe that has been fully rectified and the unfortunate complication of sesamoiditis and limited first MTP joint motion on the right side was from the scarring and adhesions that occurred around the sesamoidal apparatus after the bunion surgery. Id. Any further treatment should involve manual continued range of motion exercises and shoe gear with appropriate orthotics to help manage the sesamoiditis." Id. As for the left, Dr. Pern opined: "I do believe that the tarsal tunnel syndrome is also related to the work injury and I feel that another Emg and nerve conduction velocity test would be beneficial to see if there is any neuroma or neuropathy to the tibial nerve on the left lower extremity." Id.

Dr. Perns wrote Ms. Higgins had reached MMI and was capable of working within physical restrictions of "no long periods of standing or walking, no climbing or squatting, and no work on uneven surfaces." Id.

At her September 9, 2014 visit at Loyola, Dr. Stuck wrote Ms. Higgins still has tarsal tunnel symptoms on the left side and had relief of neuritis from her bunionectomy but induced

deep peroneal or plantar nerve neuritis on the right. Id. Her physical examination was unchanged from her prior visit. Her pain remains chronic between 3-6/10. Id.

Because the Petitioner was not released to return to work to her prior job as a CNA by her treating doctors or the Respondent's IME physician, Ms. Higgins underwent an initial vocational evaluation and Labor Market Survey performed by the Respondent's Vocational Case Manager (VCM), Tracy Peterlin, on January 14, 2015. Px. 13. Using the physical restrictions recommended in Dr. Perns' 8/27/14 IME, her report found a number of potential jobs. None were for a CNA position. Id. The Labor Market Survey ("LMS"), per Ms. Peterlin, considered the Petitioner's restrictions as determined by her treating doctor, the Respondent's IME, and also took into account Ms. Peterlin's professional experience. Id. Her LMS determined Ms. Higgins could not perform the job of a CNA anymore. Id. at pp 32 & 33. Ms. Higgins subsequently attended two sessions of vocational rehabilitation with Ms. Peterlin. Rx. 7, 8, 9, 10. On or about March 18, 2015, she subsequently decided to no longer participate in vocational rehabilitation. When asked at trial why she ended vocational rehabilitation early, Ms. Higgins testified she was very passionate about being a CNA, and was very frustrated she would be unable to work as one again. TTD was no longer paid after ending vocational rehabilitation.

Petitioner returned to Dr. Stuck on February 3, 2015, and reported jolting pain rated 8-9/10 in her right foot that has occurred multiple times over the prior 6 weeks. Id. Dr. Stuck noted she might be able to do a day's worth of significant walking and standing, but she would need to stay off her feet the next day because they hurt so badly. Id. The right continues to bother her more than the left. Id. X-rays and physical exam were essentially unremarkable but for noted soreness along the scar on the right. Id. Dr. Stuck provided her with Norco for pain and Lidoderm patches at that time. Id.

Ms. Higgins testified about her ongoing symptomology and restrictions at her hearing on April 7, 2016. Petitioner testified she remains under the same restrictions recommended by Dr. Stuck and Dr. Perns. She stated she is unable to do stairs or be on her feet for more than 20 minutes at a time. Daily activities are challenging due to these restrictions, especially as the mother of three children. Ms. Higgins further testified she has not worked since shortly after the date of the second foot injury on September 15, 2010. Records submitted by Respondent indicate Petitioner was paid TTD/maintenance from 11/4/10 through 3/18/15 when vocational rehabilitation was terminated. Rx. 12.

At the April 7, 2016 hearing, Ms. Higgins testified she recently moved to Winter, Wisconsin two months prior and has been looking for a job within her restrictions since that time. She has applied for 4-6 jobs per week, including everything from gas stations to local family-owned businesses. However, she has not been successful in finding a job that does not require her to be on her feet.

Through the date of hearing, Ms. Higgins incurred gross medical bills of $57,622.50 (OSF Saint Elizabeth Medical Center: $8,550.08; Central Illinois Radiology: $1515.00; Midwest Emergency Northern Illinois: $594.00; Dr. Garg: $620.00; Midwest Orthopedics at Rush/Dr. Holmes: $499.80; Family Foot Care/Dr. Ketner: $1,075.00; IVCH: $1,079.00; Prescriptions: $100.17; OSF St. Francis Medical Center: $5,229.00; Loyola University Physicians/ Stuck, Merchut, Raghavendra: $21,292.00; Loyola University Medical Center: $11,070.45; Newsome Physical Therapy: $5,398.00). Px. 1. Of this amount, $7,675.87 remains outstanding (OSF Saint Elizabeth Medical Center: $2,766.00; Central Illinois Radiology: $387.00; Loyola University Medical Center: $3,440.55; Newsome Physical Therapy: $1,082.32). Id.

The parties closed proofs in this matter before Arbitrator Falcioni on August 29, 2016.

Issues

F. Is Petitioner's current condition of ill-being causally related to the injury?
L. What is the nature and extent of the injury?

It is undisputed that Tara Higgins sustained two separate work-related crush injuries to her feet. The first occurred on July 15, 2010 when an electric wheelchair ran over her right foot. The second occurred on September 10, 2010 when an electric wheelchair ran over her left foot. Prior to those foot injuries, the testimony and evidence presented demonstrate Ms. Higgins had no prior history of injuries involving her feet.

The right foot injury occurred on July 15, 2010, when a nursing home resident weighing approximately 300 lbs. rolled a 200 lb. motorized electric wheelchair over Petitioner's foot and turned the wheelchair off, where it remained for approximately 45 seconds before it could be rebooted and driven off Ms. Higgin's foot. Ms. Higgins testified that she immediately felt a burning sensation in the big toe of her right foot so she reported the incident to another nurse and Respondent's safety coordinator. She continued to experience pain in her right foot and sought treatment at the emergency room of Ottawa Regional Hospital on July 19, 2010. Px. 5. Petitioner attempted to work through her right foot pain in the weeks that followed but was required to sit a lot during her shifts and other staff helped pick up the slack.

A similar injury occurred to her left foot on September 10, 2010. While Ms. Higgins and other nursing staff were transferring a resident from a bed to his motorized wheelchair, the chair reversed over Petitioner's left foot and wedged itself under a closet door handle. This time, the

chair remained atop of Ms. Higgin's foot for approximately one minute. Ms. Higgins testified she felt instant pain in her left foot and immediately reported the incident to the charge nurse and safety coordinator.

Ms. Higgins subsequently entered a course of complicated continuous treatment of both foot injuries. With respect to her right foot, Ms. Higgins was diagnosed with a crush injury with neuritis, hallux abductovalgu (bunion) aggravated by injury, sesamoid bones fracture, and other nerve-related injuries. Px. 2. As for the left, Ms. Higgins received diagnoses of chronic neuritis post crush injury and left tarsal tunnel syndrome. Id. Petitioner received regular treatment for these injuries including, *inter alia*, medications, nerve block injections, physical therapy, radiofrequency ablation, nerve desensitization, right foot bunionectomy with osteotomy on January 22, 2013 as well as the use of ankle braces, custom orthotics, and medication. Id.

Ms. Higgins saw very little improvement in the condition of each of her feet in the years that followed. On April 22, 2014, Dr. Stuck noted that she continues to have bilateral foot pain on a daily basis, including shooting pain in the left heel and arch 10-15 times per day and tingling on the right that worsens with standing. Px. 2. On that date, Dr. Stuck wrote: "I think she has reached MMI. I would like her to see Dr. Ragavendra to see if he concurs with this. She would need continued Lidoderm patches to use occasionally. She also would need her TENS unit supplies on a regular basis as well as oral medications of Lyrica, Ibuprofen and Bellevue topical pharmacy medications as all of these provide relief in variable fashions for her symptoms." Id. He further noted Ms. Higgins would need new orthotics every 1-2 years. Id. On May 12, 2014, Dr. Stuck cleared Ms. Higgins to return to work with permanent restrictions of sedentary level work with walking no more than 5-10 minutes per hour and no lifting, pushing, or pulling greater than 10 lbs. Px. 3. Those restrictions have continued through the present.

Ms. Higgins unrebutted testimony indicates her symptomology is essentially unchanged. It is undisputed that Ms. Higgins has a permanent medical condition that causes her constant pain and limits her ability to efficiently work or perform activities of daily living. It is undisputed that the labor market survey prepared by Respondent's own vocational rehabilitation specialist found that Petitioner's physical restrictions would prevent her from returning to work at her customary employment as a CAN. It is also undisputed that Ms. Higgins is unable to return to work as a CNA or to her prior position with Respondent. Any future employment of the Petitioner must meet the physical restrictions and limitations suggested by Dr. Stuck, her treating doctor, and Dr. Perns, the Respondent's IME physician.

This Arbitrator has considered the Act, in particular Section 8(d)(2) that provides, in part, "if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but not do result in an impairment or earning capacity, the employee.... shall receive compensation for that percentage of 500 weeks that the partial disability resulting from the injury covered by this paragraph bears to total disability". When applying the circumstances to the Petitioner's loss where the facts demonstrate her injuries do not keep her incapacitated from employment but do incapacitate her from pursuing the duties of her usual and customary line of employment, the Petitioner has demonstrated that she has lost her prior trade that was held at the time of the work injury.

When considering that the Petitioner is incapable of performing her prior usual and customary line of employment or trade, the Petitioner has experienced a loss of 40% loss of a man.

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?

Following consideration of the undisputed testimony and evidence presented, this Arbitrator finds the medical services provided to Petitioner were reasonable and necessary. Respondent failed to produce evidence that any treatment received by Petitioner was not reasonable and necessary. This Arbitrator further finds Respondent has not paid all appropriate charges for the reasonable and necessary medical services provided to Petitioner.

Through the date of hearing, Ms. Higgins incurred gross medical bills of $57,622.50 (OSF Saint Elizabeth Medical Center: $8,550.08; Central Illinois Radiology: $1515.00; Midwest Emergency Northern Illinois: $594.00; Dr. Garg: $620.00; Midwest Orthopedics at Rush/Dr. Holmes: $499.80; Family Foot Care/Dr. Ketner: $1,075.00; IVCH: $1,079.00; Prescriptions: $100.17; OSF St. Francis Medical Center: $5,229.00; Loyola University Physicians/ Stuck, Merchut, Raghavendra: $21,292.00; Loyola University Medical Center: $11,070.45; Newsome Physical Therapy: $5,398.00). Px. 1. Of this amount, Petitioner paid $160.17 out of pocket, Respondent paid 23,281.72, Petitioner's personal insurance paid $3,348.00, insurance discounts of $23,156.74 were received and $7,675.87 remains outstanding (OSF Saint Elizabeth Medical Center: $2,766.00; Central Illinois Radiology: $387.00; Loyola University Medical Center: $3,440.55; Newsome Physical Therapy: $1,082.32). Id. Respondent shall reimburse Petitioner for her out-of-pocket expenses, pay all outstanding medical expenses pursuant to the Medical Fee Schedule, and hold Petitioner harmless from any repayment obligations of group insurance for bills paid relative to this matter pursuant to Section 8(j) of the Act.

K. What temporary benefits are in dispute?

Petitioner claims to be entitled to 228 weeks of TTD from 11/4/10 to 3/19/15, the date which she testified to ending her participation in vocational rehabilitation. Respondent disputes and claims Petitioner is entitled to TTD from 11/4/10 to 12/31/14 and 3/16/15 to 3/18/15, a total

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HIGGINS, TARA
Employee/Petitioner

Case# **10WC044431**

10WC044427

ILLINOIS VETERAN'S HOME-LASALLE
Employer/Respondent

20IWCC0464

On 9/9/2016, 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 0.47% 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:

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

5705 ASSITANT ATTORNEY GENERAL
CAITLIN PAPADOPOULOS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 9 - 2016

RANDALL A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tara Higgins
Employee/Petitioner

v.

Illinois Veteran's Home-LaSalle
Employer/Respondent

Case # **10** WC **44431**

Consolidated cases: **10 WC 44427**

20IWCC0464

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 **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 7, 2016**. 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 _____

20 IWCC0464

FINDINGS

On **7/15/10**, 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 $**33,252.00**; the average weekly wage was $**639.46**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

ALL BENEFITS AWARDED IN CASE 10 WC 44427. SEE MEMORANDUM OF DECISION ATTACHED THERETO FOR FURTHER EXPLANATION.

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.

Robert E Dalton
Signature of Arbitrator

September 8, 2016
Date

SEP - 9 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melissa Defries,

Petitioner,

vs. NO: 18 WC 30871

American School Bus Company, LLC,

Respondent.

20IWCC0465

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, average weekly wage, medical expenses, prospective medical care, and temporary disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Regarding the issue of Petitioner's average weekly wage (AWW), a claimant has the burden of proving by a preponderance of the evidence the elements of her claim, including her average weekly wage. *Zanger v. Industrial Comm'n*, 306 Ill. App. 3d 887, 890 (1999). At the time of the injury, section 10 of the Act stated in relevant part:

> "The basis for computing the compensation provided for in Sections 7 and 8 of the Act shall be as follows:
>
> The compensation shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness[,] or disablement excluding overtime, and bonus divided by 52; *but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the*

> *number of weeks and parts thereof remaining after the time so lost has been deducted.* Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness[,] or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. * * * When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." (Emphasis added.) 820 ILCS 305/10 (West 2018).

In this case, the Arbitrator calculated that the Petitioner's gross earnings for the 52 weeks prior to the injury were $18,753.39 should be divided by the $16.25 hourly wage stated by Mr. Poole to conclude that Petitioner worked 1,154.05 hours during the year. The Arbitrator then divided 1,154 by the 40 hours per week which Petitioner stated she was ready, willing and able to work, concluding that Petitioner worked 28.85 actual weeks during the prior year. The Arbitrator then divided $18,753.39 by 28.85 to arrive at an average weekly wage of $650.53. The Arbitrator asserted that this calculation was made in accordance with the second method of calculation specified by the Act as elaborated by the Illinois Supreme Court in *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225 (2001).

Respondent argues that the Arbitrator's calculation is incorrect because Petitioner worked for another employer during the "time lost" in this case (during Summer 2018). Respondent argues that Petitioner worked 46 of the 52 weeks at issue, as evidenced by wage payment records of bi-weekly payments submitted into evidence. Accordingly, Respondent maintains that the proper calculation is to divide $18,753.39 by 46 weeks, resulting in an average weekly wage of $407.68.

The underlying dispute is whether "time lost" under the Act is to be measured in this case by a 40-hour work week. In *Sylvester*:

> "Petitioner testified that his job required him to be on call for Acme all week, year-round, and if work were available, he would work a 40-hour week. He stated that when he worked a full week, he worked eight hours per day, five days per week. Petitioner introduced into evidence his union contract, which stated that he had to be paid overtime if he worked more than 10 hours per day or 40 hours per week. The contract also stated that a normal workday would be from 8 a.m. to 4:30 p.m., subject to change by agreement between the employer and employees, and that the lunch period was 'one-half hour only.' The contract further provided that the regular workweek would 'consist

of 10-hour or less than the 10-hour work days, Monday through Friday, with a make-up day on Saturday.'" *Sylvester*, 197 Ill. 2d at 228.

In contrast, in this case, Petitioner was a part-time employee of Respondent. Petitioner testified that she was ready and willing to work 40 hours per week, but Mr. Poole testified that Petitioner was hired as a part-time seasonal employee with a 20-hour guarantee for route pay.[1] In general, for a part-time employee, the average weekly wage calculation is based on the total earnings divided by the number of weeks in which there were earnings.

Moreover, Illinois case law takes account of the desire to avoid calculating the average weekly wage in a manner that provides a windfall. See *Sylvester*, 197 Ill. 2d at 235. It is one thing to calculate the average weekly wage by ascertaining the number of days worked and combining them into weeks (as has been done in some decisions) and another to convert a part-time worker into a full-time worker by starting with the hours worked, as the Arbitrator did here. Petitioner, working a 20-hour week at $16.25, would be expected to make $325.00 per week. The Arbitrator's award effectively doubled that amount, as would be expected by the assumption that the calculation should be based on a 40-hour week. That doubling is not the 500% windfall rejected by the Illinois Supreme Court in *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 52 (1983), but it is substantially greater than the 32% increase at issue in *Sylvester*. See *Sylvester*, 197 Ill. 2d at 235-36. Accordingly, the Commission modifies the average weekly wage calculation to $407.68 as calculated by Respondent.

Regarding the issue of temporary disability, the Commission affirms the award, but modifies the amount to reflect the Commission's recalculation of the average weekly wage.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS FOUND BY THE COMMISSION that Petitioner proved she sustained an accident arising out of and in the course of her employment with Respondent on October 10, 2018.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved her current condition of ill-being is causally connected to the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent is liable to pay Petitioner's outstanding reasonable and necessary medical expenses to Dr. Blair Rhode and Physicians Immediate Care, pursuant to the fee schedule and §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED THAT Petitioner is awarded prospective medical care as prescribed by Dr. Blair Rhode in the form of arthroscopic right shoulder surgery for Petitioner's right rotator cuff injury and all reasonable and necessary post-operative medical care required for

---

[1] The Commission notes that the wage statement indicates that Petitioner was paid more – perhaps approaching a full-time wage – during an approximately six-week period in which Petitioner also worked as a dispatcher. While not precedent, in similar cases, the Commission generally has included both full-time and part-time wages and divided by the number of weeks worked, considering the "employment" by a single employer. See, *e.g.*, *Stults v. Villa Health Care West*, 15 IWCC 569; *Tamburrino v. Village of Oak Park*, 99 IIC 370. In this case, the Commission also observes that Petitioner stopped working as a dispatcher prior to Petitioner's injury.

20IWCC0465

her to achieve maximum medical improvement pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $271.79 per week for the period from October 15, 2018 through January 29, 2019, for a period of 15 and 2/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $32,900. 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: AUG 20 2020
d: 7/23/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

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

DEFRIES, MELISSA
Employee/Petitioner

Case# **18WC030871**

AMERICAN SCHOOL BUS COMPANY LLC
Employer/Respondent

20IWCC0465

On 1/9/2020, 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.

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

1067 ANKIN LAW OFFICE
SCOTT GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

1739 STONE & JOHNSON CHTD
BONNIE BIJAK
111 W WASHINGTON ST SUITE 1800
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
19(b)

MELISSA DEFRIES
Employee/Petitioner

v.

AMERICAN SCHOOL BUS COMPANY, LLC
Employer/Respondent

Case # **18** WC **30871**

Consolidated cases: **n/a**

20 IWCC0465

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

FINDINGS

On the date of accident, **OCTOBER 10, 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 $**18,753.39**; the average weekly wage was $**650.03**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of $**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

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

- The Arbitrator finds the Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $202.48 to Physicians Immediate Care, and $18,594.96 to Dr. Blair Rhode, as provided for in Sections 8(a) and 8.2 of the Act.; and,

- The Arbitrator finds the Respondent shall pay temporary total disability benefits of $433.35/week for 15 2/7 weeks, commencing on October 15, 2018 through January 29, 2019, as provided for in Section 8(b) of the Act.; and,

- The Arbitrator finds the Petitioner is awarded prospective medical care as prescribed by Dr. Blair Rhode in the form of arthroscopic right shoulder surgery for her right rotator cuff injury and all reasonable and necessary post-operative medical care required for her to achieve maximum medical improvement (MMI) status pursuant to Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

JANUARY 9, 2020
Date

ICArbDec19(b)

JAN 9 - 2020

MELISSA DEFRIES v. AMERICAN SCHOOL BUS COMPANY, LLC.

18 WC 30871

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b)/8(a) Petition before Arbitrator Steffenson on January 29, 2019. The issues in dispute were accident, causal connection, average weekly wage, medical bills, TTD benefits, and prospective medical care. (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. (Transcript at 7-8 *and* Arbitrator's Exhibit (*hereinafter*, AX) 1).

FINDINGS OF FACT

The Petitioner is employed as a school bus driver for the Respondent. The Petitioner drives school children to and from school every day. Petitioner's bus requires the use of a handle to manually open the school bus door when children get on and off the bus (Transcript (*hereinafter*, T.) at 15). On October 10, 2018 Petitioner started to get significant pain in her right shoulder (T. at 18). Petitioner was opening and closing her school bus door when the pain in her right shoulder manifested (T. at 18).

Petitioner began driving two routes in the morning (taking the children to school) and two routes in the afternoon (taking the children home from school) approximately a week before October 10, 2018 (T. at 15). Prior to that time, Petitioner only drove one route in the morning and one route in the afternoon (T. at 15).

Petitioner reported the injury to her right shoulder to one of the Respondent's supervisors on October 11, 2018 (T. at 18). Petitioner was sent by the Respondent to Physicians Immediate Care and she was evaluated there for right upper arm and elbow pain on October 11, 2018 (Petitioner's Exhibit 2). Respondent's witness, Mr. Timothy Poole, is Respondent's operations manager. Mr. Poole testified that Respondent sends employees who report a work injury to Physicians Immediate Care (T. at 74). Mr. Poole testified that the Respondent only uses the Physicians Immediate Care Clinic for work injury matters only (T. at 74).

Petitioner sought follow up care at Orland Park Orthopedics with Dr. Blair Rhode, an orthopedic physician starting October 15, 2018 (Petitioner's Exhibit (*hereinafter,* PX) 3). Petitioner testified she remains under Dr. Rhode's care to present (PX 3). Petitioner testified to Orland Park Orthopedics treating her with physical therapy and a right shoulder cortisone injection for her work injury to date (T. at 25). Petitioner testified to only minimal symptomatic relief from her shoulder injection and physical therapy that did not last (T. at 25).

Petitioner had a right shoulder MRI on October 31, 2018 (PX 3). Dr. Rhode prescribed right shoulder surgery to treat Petitioner's right shoulder rotator cuff injury on November 30, 2018 following review of her right shoulder MRI films (PX 3). Petitioner testified she wants to have the prescribed right shoulder surgery because she wants to get better and get back to work (T. at 26-27). Petitioner testified to continued significant pain in her right shoulder since October 10, 2018 and no prior medical history of shoulder injury prior to that date (T. at 27-28).

Petitioner testified that she is not provided forty (40) hours of work by the Respondent each week, but she stands ready, willing, and able to work 40 hours every week if assigned (T. at 31-32). Respondent's witness testified Petitioner's hourly wage is $16.25 or $16.35 an hour (T. at 70).

CONCLUSIONS OF LAW

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

Issue C: *Accident*

The Petitioner did have a work accident on October 10, 2018 that arose out of and in the course of her employment by the Respondent. The Petitioner testified to injuring her right shoulder area that day using the school bus door handle repeatedly to open and close the school bus door (T. at 17-18). The Petitioner testified that she uses her right arm only to open and close the door of the bus (T. at 17). There are medical records from Physicians Immediate Care from October 11, 2018 that have a history of injury consistent with the Petitioner's description of her work injury at trial (PX 2 and T. at 17-18) bolstering the Petitioner's testimony on the issue of accident. Further, the employee injury form filled out by Petitioner describes the mechanism of Petitioner's right shoulder injury consistently with Petitioner's trial testimony (PX 2). Lastly, the Petitioner's medical records from Orland Park Orthopedics also consistently describe Petitioner's mechanism of injury (PX 3). The Petitioner testified credibly about how the

injury occurred in detail at trial and the records in the case are consistent with Petitioner's credible testimony.

The Respondent's witness, Timothy Poole, testified that Petitioner's schedule changed October 5, 2018 from one route in the morning and one route in the afternoon to two routes in the morning and two routes in the afternoon (T. at 75). Starting October 5, 2018 Petitioner had 20 stops in the morning and 19 stops in the afternoon (T. at 75). At every stop, Petitioner is required to manually open and close the school bus door (Id.). The Petitioner's testified her right shoulder pain started October 10, 2018 while manually opening and closing the school bus door. The Petitioner's testimony on the issue of accident was consistent with the medical evidence and is credible. Accordingly, the Arbitrator finds the Petitioner did have a work accident on October 10, 2018 that arose out of and in the course of her employment by the Respondent.

Issue F: *Causal connection*

The Petitioner's current condition of ill-being in her back is causally related to her October 10, 2018 work injury. The Petitioner's medical records all point to a causal link between her current condition and her October 10, 2018 work injury. Specifically, Dr. Blair Rhode's records indicate a causal connection between her current condition in her right shoulder and her October 10, 2018 work injury (PX 3). The initial office note from Dr. Rhode incorrectly indicates Petitioner's accident on August 10, 2018 but corrects the error at the end of the note and lists the accident date as October 10, 2018 (PX 3). Further, Petitioner has no history of prior right shoulder pain or right shoulder injury before her October 10, 2018 work injury.

The IME physician the Respondent sent Petitioner to for evaluation, Dr. Ajay Balaram, notably indicated in his report that: (1) the Petitioner's treatment to date was appropriate, (2) she may be a surgical candidate in the future after conservative treatment is exhausted, but (3) he did not feel her right shoulder condition was causally related to her work for the Respondent (Respondent's Exhibit 5). Dr. Balaram's opinion on causation is speculative and does not consider that Petitioner had a healthy right shoulder prior to her October 10, 2018 work injury. Accordingly, the Arbitrator finds the opinions of Petitioner's treating physician, Dr. Blair Rhode, to be more credible than the opinions of Dr. Balaram on the issue of causation. The Arbitrator finds that the Petitioner's current condition of ill-being in her right shoulder is causally related to her October 10, 2018 work injury.

20 I W C C 0 4 6 5

Issue G: *Average Weekly Wage*

The Petitioner's gross earnings for the 52 weeks preceding the injury were $18,753.39 (Respondent's Exhibit (*hereinafter*, RX) 6) and her average weekly wage (AWW) is $650.03. The Respondent's witness Mr. Poole testified Petitioner's wage was $16.25 an hour or $16.35 an hour. $18,753.39 divided by $16.25 an hour shows Petitioner worked 1,154.05 hours during the year. Petitioner testified she was "ready, willing, and able" to work 40 hours a week but was not always provided the hours by Respondent (T. at 31-32). 1,154.05 hours worked by Petitioner divided by forty (40) hours a week that Petitioner was "ready, willing, and able" to work for Respondent equates to 28.85 actual weeks worked by Petitioner. Her gross earnings of $18,753.39 divided by 28.85 weeks equals $650.03 as an AWW for Petitioner.

This is the second method of calculating AWW that the Illinois Supreme Court delineated in *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 756 N.E. 2d 822 (2011). Using this method, if an employee loses 5 or more calendar days in a work year, whether or not the days are in the same work week, the employee's earnings are not divided by 52 weeks but by "...the number of weeks and parts thereof...". In this case the Petitioner lost well over 5 days of work in the year as her wage statement shows (RX 6). Accordingly, the AWW calculation of $650.03 is correct pursuant to *Sylvester*. The Arbitrator finds the Petitioner's gross earnings for the 52 weeks preceding the injury were $18,753.39 (RX 6) and her AWW is $650.03.

Issue J: *Medical bills*

The medical services provided to the Petitioner have been both reasonable and necessary. The Petitioner's medical treatment has consisted of physical therapy, doctor's visits, diagnostic testing, and an injection. These treatment measures constitute a course of reasonable and necessary medical treatment for the Petitioner's right shoulder injury. Therefore, the Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $202.48 to Physicians Immediate Care, and $18,594.96 to Dr. Blair Rhode, as provided for in Sections 8(a) and 8.2 of the Act.;

Issue K: *Prospective medical*

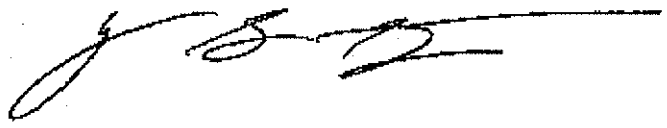
The Petitioner is awarded continuing prospective medical care prescribed by Dr. Blair Rhode in the form of arthroscopic right shoulder surgery for her rotator cuff injury and all reasonable and necessary post-operative care required for her to achieve maximum medical improvement (MMI) status. The Petitioner has completed appropriate conservative treatment for her right shoulder injury but the treatment to date has not alleviated her symptoms. The

Petitioner continues to have significant pain in her right shoulder despite the conservative care she has received to date (T. at 27). The Arbitrator awards Petitioner right shoulder arthroscopic surgery prescribed by Dr. Rhode and all further necessary and reasonable related medical care required for the Petitioner to achieve MMI status.

Issue L: *Temporary Total Disability benefits*

The Petitioner is awarded temporary total disability (TTD) benefits from October 15, 2018 through January 29, 2019, a period of 15 2/7 weeks. This is the time the Petitioner has been off work since her October 10, 2018 work injury. The Petitioner has medical documentation indicating she should refrain from work activities for this period (PX 3). She is currently off work waiting for surgical authorization (PX 3). Accordingly, the Arbitrator awards the Petitioner TTD benefits from October 15, 2018 through January 29, 2019, a period of 15 2/7 weeks.

Additionally, 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.



Signature of Arbitrator

JANUARY 9, 2020
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 COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Laura Wurtz,

Petitioner,

vs. NO: 17 WC 3805

Central States Pension Fund,

20IWCC0466

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical treatment, and temporary total disability, and being advised of the facts and law, modifies the Arbitration Decision Form and corrects a scrivener's error. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission solely seeks to correct a clerical error. On page nine (9) of the Decision, the Arbitrator wrote, "…**Dr. Howard** offered the opinion that Petitioner now suffers her current problems as a result of the accident (PX #7, pp. 18-19)…" This is a scrivener's error. The Commission thus modifies the above-referenced sentence to read as follows:

> Further, following up on the issue above, **Dr. Stone** offered the opinion that Petitioner now suffers her current problems as a result of the accident (PX #7, pp. 18-19) because she did not have this problem prior to this injury – "from what I remember." (pg. 9 of the Decision).

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

20IWCC0466

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 11, 2019, is modified as stated herein.

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

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

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

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: AUG 2 1 2020

d: 6/30/20
TJT/jds
51

Maria Elena Portela

Maria E. Portela

Kathryn A. Doerries

Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator in part. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving by a preponderance of the evidence her current condition of ill-being regarding her right foot is causally related to the October 31, 2016, work accident.

It is undisputed that on the date of accident, a coworker in a motorized wheelchair accidentally rolled over Petitioner's right foot twice. Petitioner credibly testified that the wheelchair weighed approximately 150 pounds and her coworker weighed approximately 300 pounds. Petitioner had previously undergone a right foot fusion surgery but was released from her surgeon's care in February 2016. Petitioner credibly testified that between her release from care in February 2016 and the October 31, 2016, work accident, she experienced no problems with her right foot. There is no medical evidence showing Petitioner complained of or sought treatment for any concerns relating to her right foot during those eight months. Following the work accident, Petitioner returned to Dr. Stone, the surgeon who provided treatment for her earlier right foot

20IWCC0466

complaints, with complaints pain in her right foot rating a 10/10. Petitioner complained of pain at the top of the right foot including pain at the site of her pre-accident fusion surgery. On March 13, 2017, Dr. Stone performed a revision fusion surgery on the right foot. Six months later, he placed Petitioner at MMI and told Petitioner to continue wearing orthotics. In February 2018, Petitioner began complaining of pain on the bottom of the right foot. Dr. Stone determined these new complaints were causally related to the work accident. He has recommended a second surgery to remove the prominent bone at the inferior aspect of the right first metatarsal-cuneiform joint.

After reviewing the evidence, I believe Dr. Stone provided the most credible expert testimony regarding Petitioner's right foot condition, the need for prospective medical treatment, and the causal connection of Petitioner's current condition of ill-being to the October 31, 2016, work accident. I believe at the very least, Petitioner met her burden of proving causation through the "chain of events" theory of causation. While there is no question that Petitioner's right foot had undergone extensive pre-accident treatment including a fusion surgery, there is no credible evidence disputing Petitioner's testimony that in the eight months before this work accident, she had no complaints regarding her right foot. Furthermore, Dr. Stone testified that from his best recollection, Petitioner did not return to his office with any complaints during those months before the work accident. He also did not remember her complaining of any pain at her original surgery site when he released her from his care in February 2016. Without any credible evidence refuting this testimony that Petitioner experienced no complaints regarding her right foot in the eight months before the work accident and sought no treatment relating to her preexisting foot condition, there is no question that Petitioner met her burden of proof regarding the causal connection of her current condition of ill-being to the work accident. After all, the credible evidence shows Petitioner's preexisting condition was stable and asymptomatic for eight months before this unfortunate work accident.

For the forgoing reasons, I would reverse the Decision of the Arbitrator in part. Petitioner clearly met her burden of proving her current condition of ill-being is causally related to the October 31, 2016, work accident. She further proved that her medical treatment was reasonable, necessary, and related to the work accident. Finally, I would award the recommended prospective medical treatment and additional temporary disability benefits.

Thomas J. Tyrrell

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

WURTZ, LAURA
Employee/Petitioner

Case# **17WC003805**

CENTRAL STATES PENSION FUND
Employer/Respondent

20IWCC0466

On 3/11/2019, 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:

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2837 LAW OFFICE OF JOSEPH MARCINIAK
JAMES MIRRO
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

20 IWCC0466

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Laura Wurtz,
Employee/Petitioner

v.

Central States Pension Fund,
Employer/Respondent

Case # **17** WC **3805**

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 **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **January 22, 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 31, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**55,473.60**; the average weekly wage was $**1,066.80**.

On the date of accident, Petitioner was **57** 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 $**16,459.20** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**16,459.20**.

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 $711.20/week for 23-1/7 weeks, commencing 11/2/2016 through 12/4/2016, and 3/13/2017 through 7/19/2017 as provided in Section 8(b) of the Act. Petitioner has not proven entitlement to any additional period of TTD benefits.

Respondent shall be given a credit of $16,459.20 for temporary total disability benefits that have been paid.

Petitioner's current condition of ill-being is not causally related to the agreed accident; therefore, her claim for payment of claimed unpaid medical expenses to Northwestern Medicine for $2,752.00 is denied.

Petitioner's current condition of ill-being is not causally related to the agreed accident; therefore, her claim for prospective medical treatment is denied.

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

March 11, 2019
Date

ICArbDec19(b)

MAR 11 2019

Laura Wurtz v. Central States Pension Fund – 17 WC 3805

Memorandum of Decision of Arbitrator

Statement of Facts

Petitioner sustained an agreed injury to her right foot on October 31, 2016 when a co-worker riding a motorized wheelchair ran over her foot. Petitioner testified and demonstrated at hearing that her foot was run over by the wheel of the wheelchair along the width of her foot at the base of her toes. Petitioner has had prior foot injuries, with treatment including a right foot fusion surgery in October 2015 by podiatrist Dr. Howard Stone, and removal of screw, fifth metatarsal osteotomy in November 2013. Petitioner testified and demonstrated at hearing that the prior foot fusion surgery and scar ran lengthwise up her first metatarsal joint, and that is where her current pain complaints are as well. Petitioner first saw Dr. Stone after the work incident on November 1, 2016. (PX #2) Exam findings were bruising and swelling of the dorsal right foot. Dr. Stone's records indicate X-rays were negative for fracture or dislocation, and she was put in a cast boot for two weeks. (PX#2)

Petitioner returned to Dr. Stone on November 16, 2016 and swelling was improved, ecchymosis had resolved, and she had mild pain in the second and third metatarsals. (PX#2) Dr. Stone's records indicate X-rays were again negative and Petitioner was to continue using the cast boot. (PX#2)

On November 30, 2016, Petitioner returned to Dr. Stone and the diagnosis was bone bruise right foot, and now the big toe joint was hurting. The exam found resolving ecchymosis and edema on the second and third metatarsal joints. Petitioner returned again on December 28, 2016 and had continuing big toe pain and edema along the second and third metatarsal joints. (*Id.*) Petitioner complained of pain now at the old fusion site lapidus and a CT scan was performed on January 26, 2017 and it noted postsurgical changes of the first metatarsal joint with no demonstration of cortical trabecular bridging. Petitioner underwent revision of non-union of lapidus of the right foot/fusion surgery on March 13, 2017. The April 26, 2017 follow up visit noted good healing of the fusion site. No pain complaints were noted at the May 15, 2017 follow up. A repeat CT scan was done on May 24, 2017 and showed 75% joint incorporation and fusion. Petitioner returned to Dr. Stone on June 12, 2017 and was directed to undergo physical therapy. (*Id.*)

Petitioner underwent a Section 12 examination with orthopedic surgeon Dr. Anand Vora on July 26, 2017. (RX#1) Petitioner provided a history of previous foot surgery in approximately 2015 for an arthritic joint, and that her foot was run over by a co-worker on October 31, 2016. Dr. Vora opined the only diagnosis in

relation to the work injury is a foot contusion forefoot, and the need for revision of the first tarsometatarsal arthrodesis malunion/non-union has no relationship to the work injury. (*Id.*) Dr. Vora found the clinical pictures and documentation showed ecchymosis in the forefoot only. Further, Dr. Vora opined the mechanism of work accident described could not be a causative factor in aggravating or causing a non-union of the first tarsometatarsal arthrodesis. Dr. Vora testified that clear non-union was noted on the day that the initial radiographs were taken following the reported work injury, which is consistent with that of a pre-existing non-union of the arthrodesis with malunion. Dr. Vora opined the surgical intervention required to address that had no relationship to the work-related condition, and further the description of pain and location of the pain documented on initial visit and follow up visits is inconsistent with that of non-union or traumatic disruption of the pre-existing non-union of the first tarsometatarsal arthrodesis. (*Id.*) Dr. Vora further opined the need for revision surgery had no relationship to the work incident, but rather to the underlying disease process and previous surgical intervention with previous non-union of an attempted tarsometatarsal arthrodesis. Regarding the work injury, Dr. Vora opined Petitioner could return to work full duty and was at MMI.

Petitioner saw Dr. Stone again on the same day as the IME, and second and third joint pain was noted along with a bone plantar along the first joint. At the August 9, 2017 follow up, continued pain at the first joint and the bone plantar was again noted.

Petitioner returned to Dr. Stone on September 11, 2017 and Petitioner was discharged from care with the fusion noted as healed.

Petitioner then returned to Dr. Stone over five months later on February 28, 2018 and complained of increased pain on the bottom of the right foot. Dr. Stone gave Petitioner an injection and now recommended a right first metatarsal-cuneiform joint exostectomy. At the April 28, 2018 pre-op exam, the diagnosis was primary osteoarthritis of the right foot.

Conclusions of Law

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

Taking into account the totality of the evidence, including all the medical records and the evidence deposition testimony of Dr. Vora and Dr. Stone, as well as Petitioner's trial testimony and her statements in the

records, the Arbitrator finds and concludes Petitioner's current condition of ill-being is **not** causally related to the agreed work injury.

The Arbitrator further finds and concludes Petitioner has **not** proven causation either by proving an aggravation of a pre-existing condition theory or by proving a "chain of events" theory.

Further, the Arbitrator emphasizes Dr. Stone's evidence deposition testimony was contradictory and confusing, as discussed in detail below. This, in part, renders his opinions less credible than those of Dr. Vora. One main point is that while Petitioner argues her **non-union** was pre-existing but was rendered symptomatic by the work accident (the Arbitrator takes this to mean "aggravated") Dr. Stone contradicts that very assertion., When Dr. Stone was asked in his evidence deposition whether Petitioner's current condition of ill-being is causally related to her work injury, Dr. Stone answered, "She did **not** have this problem prior to this injury..." (PX#7, p. 17-18), which actually contradicts Petitioner's assertions. This type of recurring problematic testimony is one of the reasons why Dr. Stone's testimony is not credible.

In support of the Arbitrator's conclusion not finding causation, the Arbitrator considered the mechanism of accident, prior treatment, current pain complaints, the requested procedure, and, very significantly, resolved the conflict in testimony between Dr. Stone and Dr. Vora, finding in favor of Dr. Vora. The Arbitrator notes with great significance his finding that Dr. Vora's opinions were highly credible, direct, consistent, rational and based on the greater amount of relevant medical evidence he reviewed available to him over that available to Dr. Stone. Dr. Stone offered inconsistent and contradictory opinions, in part because he did not review any medical records for treatment periods prior to the work accident.

The Arbitrator first notes Petitioner had a right foot fusion surgery prior to the work accident, which was done lengthwise along the first joint in October 2015. A fusion revision procedure was done in the same location a few months after the work accident in March 2017, for which Petitioner was subsequently discharged from care. Petitioner testified and demonstrated that the wheelchair ran over the width of the top of her foot at the base of her toes. Petitioner also testified and demonstrated that the scar from the foot fusion procedures ran lengthwise along the top of the first joint of the big toe. The Arbitrator notes that Petitioner's current pain complaints are also lengthwise along the first joint, **not** across the width of the foot at the base of her toes, and that the currently requested right first joint exostectomy procedure is for removal of a bone spur that is located on the bottom of her foot. It is clear from the nature of the current pathology (bone spur), the location of the

pathology (bottom of the foot), and history of no pain complaints in this area for about two months after the work accident and even after the revision fusion surgery, that her current condition of ill-being is not related to the work injury.

Even Dr. Stone agreed that when he examined Petitioner a day after the agreed accident, Petitioner did **not** complain of pain "specifically of that joint", that is, Petitioner expressed **no** pain complaint at the site of the pre-accident fusion (PX #7, pp. 23-24; 24). The record shows, and Dr. Stone agrees, Petitioner's pain complaints at the first metatarsal (inexplicably) **do not appear until about two months after the accident**, that is, on the December 28, 2016 visit (PX#7, p. 11). Dr. Stone never explained this lengthy delay in Petitioner reporting this symptom. Dr. Stone further agreed Petitioner offered different complaints to different parts of her foot at different times, further not explaining this suspicious scenario. (PX#7, pp. 26-27) This reporting delay strongly suggests the wheelchair accident did not affect/harm/aggravate the site and condition of the pre-accident prior fusion nor cause that condition and the need for further surgery. **Rather, this delay, and other evidence, suggests the late first metatarsal complaint is not related to the agreed work accident, but some other, unidentified etiology.** This is what Dr. Vora opined.

The Arbitrator further finds the testimony of Dr. Vora to be more credible and persuasive than that of Dr. Stone, and thus controlling on this issue as well as the issue of disputed medical treatment.

The Arbitrator emphasizes **Dr. Stone** - even though he was Petitioner's treating physician - **was uninformed regarding all of the relevant facts regarding his patient's history and medical condition;** e.g., **Dr. Stone admitted he was not given any information regarding Dr. Vora's Section 12 examination** (PX #7, p. 23) **nor was he informed regarding Petitioner's pre-existing conditions because he admittedly did not review any medical records for treatment dated prior to the October 31, 2016 accident** (PX # 7, p. 26, 28). This all indicates Dr. Stone's opinions are less credible than those of Dr. Vora. Further, based on Dr. Stone's lack of medical facts, and his inconsistent and confusing testimony, it is questionable whether Dr. Stone's opinions are actually based on a reasonable degree of medical and surgical certainty. This all creates an obvious point of weakness in the basis of his opinions Dr. Stone himself even admitted in his testimony that he only had medical records from the time of the injury and "**that's the problem.**" (PX #7, p. 28). The Arbitrator also agrees **that is the problem regarding the credibility of Dr. Stone's opinions.**

Further, although the diagnostic imaging studies taken the day after accident, as well as Dr. Vora's strong opinion, clearly indicate a non-union, Dr. Stone would not agree to this conclusion – **even though he apparently admitted (at one point) he did not review these same diagnostic imaging studies** (***"I'd have to see the X-rays*** but no, I wouldn't agree with that." (PX #7, p. 26). **Dr. Stone's opinion therefore cannot be given any weight or credibility, as it does not appear to be based on the facts or the evidence in the record**. This obvious weakness is indicative of the problems overall with Dr. Stone's opinions (e.g., how can he offer any opinion whether an X-ray showed something or not if he never reviewed the X-ray?)

But even if Dr. Stone did review the X-ray (his treating record seems to indicate he did, as he notes on November 1 **and** November 16 regarding X-ray "negative for fx or dislocation" but his evidence deposition testimony seems inconsistent) **there is another problem with his opinion that the wheelchair accident "caused the previous fusion site to collapse, come apart."** (PX#7, p. 18): **The problem is Dr. Stone testified the X-rays on both dates were negative for fracture or dislocation** (PX#7, p. 24). Dr. Stone's records also show this (PX #2). This issue was probed deeper, and the Arbitrator finds it hard to believe that if we adopt Dr. Stone's causation theory, this accident caused the previous fusion site to **"collapse"** on October 31, 2016, yet on November 1 and 16, 2016, per Dr. Stone, X-rays show no evidence of fracture or dislocation, **totally missing such a serious bone condition?** This does not appear to make sense. Therefore, the obvious question is raised: **Dr. Stone never explained how or why these X-rays would/could be negative, yet, according to his theory, the wheelchair accident caused a serious bony condition ("collapse") such that Petitioner needed surgery.**

Perhaps this dilemma can be explained simply by reviewing the X-ray report and Dr. Vora's opinions regarding same. In Dr. Vora's Section 12 report dated July 26, 2017, attached to his evidence deposition and admitted into evidence as Resp. Dep. Ex. #2, Dr. Vora wrote "Radiographs dated November 1, 2016, three views of the right foot with obvious non-union of previous attempted tarsometatarsal arthrodesis and dorsiflexion malunion positioning is noted." Dr. Vora further wrote, "Radiographs November 16, 2016, again clear non-union of the tarsometatarsal joint and dorsiflexion malunion with staple fixation." Dr. Vora also testified in his evidence deposition that his review of the diagnostic imaging studies support his opinion **"one hundred percent" that the malunion pre-existed the work accident** (RX #1, p. 13). **Simply put, Dr. Vora testified, "I have radiographs from November 1st, 2016, *that show a nonunion.*" (RX #1, p. 13). The Arbitrator finds this opinion highly credible and accordingly adopts it and finds it decides the matter. The Arbitrator also adopts Dr. Vora's opinion regarding what the X-rays reveal based on a**

determination that Dr. Vora is more qualified than Dr. Stone to interpret X-rays being a board certified orthopedic surgeon with a subspecialty in foot and ankle surgery; Dr. Stone admitted he has no subspecialty. Also, Dr. Stone was never asked whether he would challenge Dr. Vora regarding this opinion on what the X-rays reveal.

Further, following up on the issue above, Dr. Howard offered the opinion that Petitioner now suffers her current problems as a result of the accident (PX #7, pp. 18-19) because she did not have this problem prior to this injury – **"from what I remember."** However, Dr. Stone then testified and admitted, **"I don't have notes from before. I only have notes from the time of the injury." Again, this presents an obvious problem affecting a credibility assessment. Dr. Stone's shaky (and by definition uninformed) opinions are based *solely* on what he claims he "remembers", hardly a strong and reliable foundation on which to base causation and medical opinions**.

Also, Dr. Howard could have offered specific comments and opinions in an effort to challenge or rebut those of Dr. Vora, but he never did so - perhaps based on his admission he "**was not given any information**" regarding Dr. Vora's Section 12 examination (PX #7, p. 23).

Further, it must be noted that even Dr. Stone agreed that Petitioner did <u>not</u> complain about her first metatarsal area until her visit with him on December 28, 2016, after she had been in a cast (PX #7, p. 11). That is, not until December 28 did Petitioner complain about pain in her previous surgical site, where she had the previous fusion of the joint at the base of the first metatarsal bone (PX #7, p. 11). This two-month delay in reporting at this area raises obvious "red flags" and causation questions which were never addressed. **The Arbitrator finds and concludes this gap in complaints is another reason that Petitioner has not proven causation**. One would expect immediate complaints, just as Petitioner's other complaints were offered.

Further, even Dr. Stone agreed the location of Petitioner's pain complaints "changed" throughout her visits; Dr. Stone agreed that different parts of the foot had different complaints at different times, and now we are discussing an exostectomy, two years after the work accident (PX #7, p. 26-27). **Petitioner's different and changing reporting of her pain, acknowledged by her treating podiatrist, also raises obvious "red flags" and causation questions.** The Arbitrator finds and concludes these different and changing reports of pain present yet another reason that Petitioner has not proven causation. One would expect consistent pain reporting.

Dr. Vora physically examined Petitioner and noted an incision on the top of her foot at the first tarsometatarsal joint, being the location of her previous surgery. (RX#1, p. 9, Resp. Dep. Ex. #2 at p. 3) Dr. Vora also reviewed the diagnostic tests and noted that Petitioner had a nonunion of a previous attempted fusion that was also malunited. Dr. Vora testified Petitioner sustained a contusion of the foot from the wheelchair rolling over her foot. (RX#1, p. 17) This is consistent with the testimony of Petitioner's own treating podiatrist Dr. Stone, who testified he diagnosed Petitioner with "localized edema or swelling, basically bone contusion". (PX#7, p. 4, mini-page 8) However, Dr. Vora opined Petitioner also had a pre-existing non-union of an attempted tarsometatarsal joint arthrodesis, but this was not related to the work accident (RX#1, pp. 11-14) Dr. Vora testified in great detail how the nonunion of the foot could not have been caused by the work accident, as the radiographs taken the day after the work accident showed a non-union, and that means the bone had never mended. (RX#1, pp. 11-14) The Arbitrator finds this testimony very credible and accordingly adopts it. In further explanation, Dr. **Vora testified that, "it's impossible" for this poor healing/nonunion/malunion to have occurred in one day between the work accident on October 31, 2016 and the radiographs performed the next day.** (*Id.*) The Arbitrator also finds this testimony very credible and accordingly adopts it.

On cross-examination, when asked whether it was his testimony that there was no doubt that the nonunion or malunion pre-existed the work accident, Dr. Vora replied "that's correct". (RX#1, p. 17) It is clear from Dr. Vora's description that the bone never mended, and that this nonunion or malunion was already present before the incident with the wheelchair. Dr. Vora logically followed from this point that the mechanism of injury as described could then not be a causative factor in aggravating or causing a non-union of the first metatarsal arthrodesis that was already there before the accident. Dr. Vora further testified the description of pain and location of the pain documented by the treating physician on initial visit as well as subsequent follow up was inconsistent with non-union or traumatic disruption of the preexisting non-union of the fusion. Dr. Stone admitted in his testimony as well that in her first few visits following the accident, the petitioner did not complain specifically of any pain to the 1st metatarsal joint, only at the 2nd and 3rd metatarsals, and that the location of her pain complaints changed throughout her visits. (PX#7, p. 8; mini-page 24, 26-27). This is consistent with the wheelchair causing a contusion along the width of her foot at the base of her toes. Finally, with regard to the bone plantar (spur) on the bottom of her foot, and recommended exostectomy procedure, Dr. Vora testified on redirect that, "it's definitely not related to the work accident" and that "it's not the right treatment".

The Arbitrator notes the main issue in this 19(b) hearing is whether the right first joint exostectomy procedure Dr. Stone recommended on February 28, 2018 is related to the work accident. This requested procedure is a surgery to remove bone spurs. Petitioner has not presented any credible supporting evidence showing that this bone spur was caused or aggravated by the work accident with the wheelchair. Dr. Stone testified that the March 13, 2017 revision surgery was to refuse the first metatarsal joint, that she was subsequently discharged from care following that procedure, and that there was no recommendation for another surgery at that time. (PX#7). Dr. Stone further admitted in his deposition testimony that Petitioner returned approximately six months later in February 2018 complaining of pain in the bottom of her foot, and that it's possible the need for the currently recommended exostectomy procedure could be related to the development of preexisting conditions or underlying disease process or anything else that happened in the over five months since she was discharged from care and returned to his office. (PX#7, pp. 9-10; mini-pages 29-30)

Regardless of whether the revision foot fusion procedure was causally related to the work accident or not, the Arbitrator notes Petitioner had been discharged from care with a healed right foot fusion on September 11, 2017 and was effectively at MMI for any and all alleged work injuries at that point. The Arbitrator notes Petitioner has had a long history of foot issues pre-existing the work accident, including osteoarthritis and bone spurs. Dr. Stone's diagnosis for requesting the right first metatarsal exostectomy is primary osteoarthritis right foot. As noted above, the mechanism of injury in the work accident caused a right forefoot contusion only and could not have caused either the bone spur or nonunion of the initial foot fusion surgery. In addition, it is clear there was no aggravation of that underlying condition at that time as there were no pain complaints in that particular area on the bottom of the foot for many months after both the work accident and the subsequent revision surgery. Therefore, there is no causal connection for the exostectomy procedure with regard to the incident with the wheelchair.

For the reasons listed above, the Arbitrator finds Petitioner sustained a right forefoot contusion only which has resolved, and Petitioner's current condition of ill-being is not related to the work accident.

Finding on Issue J: Were all 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 Dr. Vora's Section 12 opinions to be persuasive. As such, the only reasonable, necessary, and related treatment was the conservative measures and treatment by Dr. Stone in the initial phases

of treatment for the right forefoot contusion. Respondent has already paid all appropriate charges for reasonable and necessary medical services and is not liable for any unpaid medical bills.

Finding on Issue K: Is Petitioner entitled to any prospective medical care?

Based in part on the credible and explanatory opinions presented in Dr. Vora's evidence deposition, as well as the weak and contradictory opinions found in Dr. Stone's evidence deposition, the Arbitrator finds Petitioner's current condition of ill-being is not related to the agreed work injury. *See supra,* Issue F. Therefore, the Arbitrator finds the requested right foot exostectomy procedure to be unrelated to Petitioner's work accident and is accordingly denied. Further, Dr. Stone testified the need for this surgery is related to her work, as follows: **"Appears so, yes."** (PX #7, p. 19). The Arbitrator finds and concludes Dr. Stone's opinion expressed here as "appears so", in conjunction with Dr. Stone's admission he was not given any information regarding Dr. Vora's Section 12 examination (PX #7, p. 23) nor was he informed regarding Petitioner's pre-existing conditions because he admittedly did not review any medical records for treatment dated prior to the October 31, 2016 accident (PX # 7, p. 26, 28) **all indicate Dr. Stone's opinion is not credible nor is it based on a reasonable degree of medical and surgical certainty.** Dr. Stone himself even admitted in his testimony that he only had medical records from the time of the injury and **"that's the problem."** (PX #7, p. 28). The Arbitrator also agrees that is the problem regarding medical issues, causation and all other issues.

Finding on Issue L: What temporary benefits are in dispute? TTD

The Arbitrator finds and concludes Petitioner was properly and fully paid TTD benefits for a total period of 23-1/7 weeks, being November 2, 2016 through December 4, 2016 and March 13, 2017 through July 19, 2017. Petitioner has not proven she is entitled to any additional period of TTD. The Arbitrator finds Dr. Vora's IME opinion that Petitioner could return to work immediately without restrictions on July 26, 2017 (as of the date of his Section 12 examination) as it relates to any work-related condition is highly credible and persuasive and is accordingly adopted.

Further, the Arbitrator emphasizes Dr. Stone testified in a confused and uninformed manner (again) regarding Petitioner's ability to work. Dr. Stone testified in his evidence deposition he did not have an opinion as to whether Petitioner can currently work, testifying, "I don't remember if I've seen her for a while. I don't remember if I've released her back or what she was doing at this point." ((PX #7, p. 19). Dr. Stone further

testified there is no current off work slip or work restrictions or anything of that nature" keeping Petitioner of work (PX #7, p. 30). Dr. Stone's evidence deposition contains no testimony or opinions regarding off-work authorizations for any period of time. The Arbitrator notes Petitioner's testimony that the IME was originally scheduled for 7/19/17 but was rescheduled to 7/26/17 per her request. As such, no additional TTD benefits are owed.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: March 11, 2019

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

Marvin Browder,

Petitioner,

vs.

NO: 13 WC 29177

City of Chicago,

20IWCC0467

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment, temporary total disability ("TTD"), and Respondent's entitlement to a credit pursuant to Section 8(j) of the Act, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below. The Commission finds Petitioner's current condition of ill-being regarding his full-thickness right shoulder rotator cuff tear, chronic lumbar spine complaints, and fracture of the left proximal fibula with a closed nondisplaced Maisonneuve fracture of the left ankle is causally related to the August 7, 2013, work accident. However, the Commission finds Petitioner's current left shoulder rotator cuff tear and bilateral knee complaints are not causally related to the work accident. The Commission further finds Respondent is entitled to a credit pursuant to Section 8(j) for the reasonable and related medical expenses paid through its group health insurer, Blue Cross Blue Shield. The Commission otherwise affirms and adopts the Decision of the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

As an initial matter, the Commission notes that Respondent does not take issue with the Arbitrator's award of prospective medical treatment in the form of the right shoulder surgery and associated care recommended by Petitioner's treating physicians. In the interest of efficiency, the Commission primarily relies on the detailed recitation of facts included in the Decision of the Arbitrator. Petitioner works for Respondent as a motor truck driver foreman. On August 7, 2013, Petitioner was rear-ended while driving a city-owned vehicle on the expressway. He experienced immediate pain in his back, bilateral shoulders, and head. While the posttraumatic headaches, upper back strain, and initial left shoulder strain resolved, Petitioner has continued to experience

significant right shoulder and lumbar spine pain.

An October 2013 right shoulder MRI revealed the following: 1) a diffuse supraspinatus tendinopathy with a 20 x 15 mm full thickness tear; 2) thickening of the coracoacromial ligament that could contribute to impingement; and 3) mild AC joint degeneration. (PX 1). A lumbar spine MRI performed that same month had the following impression: 1) at L4-L5, minimal right foraminal stenosis due to subtle disc bulge, osteophyte, and hypertrophy of facet joints; and 2) at L2-L3 and L3-L4, a subtle broad-based disc bulge that abuts the thecal sac. *Id.* Petitioner received ongoing conservative treatment for his lumbar spine and right shoulder complaints. On February 7, 2014, Petitioner complained of low back pain rating 8.5/10 as well as bilateral shoulder pain. He previously had to stop physical therapy for his low back due to his non work related uncontrolled high blood pressure. The doctor noted that Petitioner was recently cleared to resume the prescribed physical therapy.

On February 12, 2014, Petitioner suffered a lumbar spasm that caused him to lose his balance and fall down the outdoor stairs leading to his home. X-rays of the left leg revealed a partially comminuted proximal left fibular diaphyseal fracture with no malalignment. (PX 5). Dr. Romano, an orthopedic surgeon diagnosed Petitioner with a fracture of the left proximal fibula with a closed nondisplaced Maisonneuve fracture of the left ankle. (PX 7). The left ankle Maisonneuve fracture was surgically repaired on February 18, 2014. Petitioner attended physical therapy for his left ankle injury. In February 2015, Dr. Romano noted that recent left ankle x-rays revealed good alignment of the fracture as well as mild arthritis. Petitioner complained of occasional pain and swelling in his left ankle aggravated by climbing stairs and prolonged weight bearing. Dr. Romano diagnosed posterior tibial tendonitis with peroneal nerve compression of the left foot.

Petitioner has also continued to follow up with Dr. Romano regarding his chronic right shoulder and lumbar spine complaints. More recently, Petitioner began complaining of left shoulder pain as well. An April 2018 right shoulder MRI had the following impression: 1) a full-thickness retracted tear of the supraspinatus to the proximal humeral head with mild associated atrophy; 2) a likely full-thickness tear of the infraspinatus with mild associated atrophy; 3) a possible high-grade partial-thickness subscapularis tear; 4) tendinosis vs. a tear of the intra-articular long head of the biceps; 5) senescent changes of the labrum with a SLAP-like configuration; and 6) moderate acromioclavicular osteoarthritis. (PX 10). An MRI of the left shoulder taken that same day had the following impression: 1) a possible overall full-thickness supraspinatus tear, superimposed on a background of tendinosis with no associated atrophy; and 2) an anteroinferior degenerative type labral tear with senescent changes at the superior labrum.

Dr. Romano testified via evidence deposition on Petitioner's behalf on July 31, 2014, and December 13, 2018. (PX 13; PX 14). He credibly testified that Petitioner's work-related lumbar spine injury caused the balance problems that led to Petitioner falling down the stairs and injuring his left leg and ankle on February 12, 2014. He testified that Petitioner was not a candidate for spinal surgery and confirmed Petitioner's need for the recommended right shoulder surgery. Dr. Romano testified that Petitioner's right shoulder and lumbar spine conditions are causally related to the work accident. However, he testified that Petitioner's left shoulder condition is degenerative in nature and did not conclude that it is related to the work accident.

20IWCC0467

The Commission affirms the Arbitrator's conclusion that Petitioner's right shoulder and lumbar spine conditions are causally related to the August 7, 2013, work accident. The Commission affirms the Arbitrator's conclusion that Petitioner's need for the prescribed right shoulder surgery and postoperative physical therapy is reasonable, necessary, and causally related to the work accident. The Commission also affirms the Arbitrator's conclusion that Petitioner's left proximal fibula fracture with a closed nondisplaced Maisonneuve fracture of the left ankle was caused by Petitioner's lumbar spine condition and thus is causally related to the work injury. Dr. Romano testified credibly regarding the condition of Petitioner's lumbar spine on February 12, 2014, and fully explained how Petitioner's work-related lumbar spine condition contributed to his fall.

The Commission notes that Petitioner has received treatment for various conditions in the years since the date of accident. After carefully considering the totality of the evidence, the Commission finds Petitioner's current condition of ill-being regarding his right shoulder rotator cuff tear, chronic lumbar spine complaints, and Petitioner's fracture of the left proximal fibula with a closed nondisplaced Maisonneuve fracture of the left ankle are causally related to the August 7, 2013, work accident. Petitioner also initially sustained posttraumatic headaches, a left shoulder strain, and an upper back strain; however, these additional initial conditions have resolved. The Commission finds that Petitioner failed to meet his burden of proving the current condition of his left shoulder (including the findings of the April 2018 left shoulder MRI) and bilateral knees (including his diagnoses of bilateral knee osteoarthritis and a right knee medial meniscus tear) are causally related to the August 7, 2013, work accident.

Finally, the Commission modifies the Arbitrator's award of medical expenses to exclude the $48,795.00 paid by the group insurer, Blue Cross Blue Shield. (PX 15). The Arbitrator inadvertently included these payments as a bill for which Respondent is liable. It is clear that Petitioner's Exhibit 15 is a ledger of the payments made by Petitioner's group health insurer. Furthermore, the parties agreed on the record that Respondent shall receive a credit for any amounts paid through the group health insurer. Thus, the Commission accordingly modifies the Arbitrator's award of medical expenses and finds Respondent is entitled to a credit pursuant to Section 8(j) of the Act in the amount of $48,795.00 for payments made by Blue Cross Blue Shield in this matter.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 29, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being regarding his right shoulder, lumbar spine, and left ankle is causally related to the August 7, 2013, work accident. Petitioner's complaints regarding his left shoulder and bilateral knees are not causally related to the work accident.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $**952.27**/week for **6** weeks, commencing **February 13, 2014,** through **March 27, 2014**, as provided in Section 8(b) of the Act. Respondent shall receive a credit for

20IWCC0467

temporary total disability benefits previously paid to Petitioner.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges relating to the right shoulder rotator cuff tear, lumbar spine strain, fracture of the left proximal fibula with a closed Maisonneuve fracture of the left ankle, posttraumatic headaches (resolved), upper back strain (resolved), and initial left shoulder strain (resolved), as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for any expenses relating to Petitioner's bilateral knee complaints, and recent left shoulder complaints including the findings of the April 2018 left shoulder MRI.

IT IS FURTHER ORDERED that Respondent shall receive a credit in the amount of $48,795.00 for related payments made by the group health insurer, Blue Cross Blue Shield pursuant to Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay for reasonable and necessary prospective medical treatment in the form of the recommended right shoulder surgery.

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

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

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

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: AUG 2 1 2020

o: 6/30/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

BROWDER, MARVIN
Employee/Petitioner

Case# **13WC029177**

CITY OF CHICAGO
Employer/Respondent

20IWCC0467

On 8/29/2019, 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 1.84% 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:

0391 HEALY SCANLON
DAVID P HUBER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20IWCC0467

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)

MARVIN BROWDER
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **13** WC **29177**

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 **David Kane,** Arbitrator of the Commission, in the city of **Chicago**, on **July 24, 2019 and August 16, 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, 8-7-2013, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$74,276.80** the average weekly wage was **$1,428.40.**

On the date of accident, Petitioner was **49** years of age, ***married*** with **1** dependent children.

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

Orders

Respondent shall pay the unpaid medical bills contained in Petitioner's Exhibits 5, 6, 7, 9, 10, 11 and 15 pursuant to the provisions of §8(a) of the Act:

Little Company of Mary Hospital, 2800 W. 95th Street, Evergreen Park, IL 60805, 2/13/14-2/16/14, $2,087.60.
Hinsdale Orthopedics, 1 Erie Court, Suite 7120, Oak Park, IL 60302, 2/17/14-2/23/15, $5,974.00
West Suburban Medical Center, 7400 Lake Street, Suite 2190, River Forest, IL 60305, 2/12/14-5/19/14, $43,654.94;
Romano Orthopedic Center, 1 Erie Court, Suite 7120, Oak Park, IL 60302, 3/2/15-6/3/19, $15,745.00;
River Forest Advanced Imaging, 420 William Street, Building B, 1st Flood, River Forest, IL, 7/14/16-4/12/18, $20,799.94;
Athletico, 600 Oakmont Lane, Westmont, IL 60559, 5/3/17-3/29/18, $6,801.00;
Blue Cross Blue Shield, 3200 Robbins Road, Springfield, IL 62704, 5/3/17-3/29/18, $48,795.00

Respondent shall pay Petitioner TTD benefits from **2-13-2014** through **3-27-2014** representing **6 weeks** at **$952.27** for a total of **$5,713.60.**

All medical bills shall be paid pursuant to the medical fee schedule.

Respondent shall authorize and pay for prescribed surgery, including physical therapy and rehabilitation.

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

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

David A. Kane
Signature of Arbitrator

August 29, 2019
Date

AUG 29 2019

IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

MARVIN BROWDER,	)	
	)	
Petitioner,	)	
v.	)	**NO. 13 WC 29177**
	)	
CITY OF CHICAGO,	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact:

Petitioner's August 7, 2013 Back and Shoulder Injury

On August 7, 2013, Petitioner, Marvin Browder, was a 49-year-old motor truck driver foreman for Respondent, City of Chicago; married with one dependent child. At the time of the injury, Petitioner was earning $1,428.40 per week. See Arbitrator's Exhibit 1. Petitioner had been an employee with the City of Chicago for thirty-three years. On August 7, 2013, in the course of his employment with Respondent and while driving a vehicle owned by Respondent, Petitioner was driving southbound on I-94 in stop and go traffic and was rear-ended by another vehicle.

Petitioner's Medical Treatment

As a result of his accident, Petitioner experienced headaches, blurred vision and stiffness in both of his shoulders and in his back. PEX 1 p. 1. The following day, Petitioner presented to Mercy Works, Respondent's

occupational health provider, and was seen by Dr. Homer Diadula, MD, who diagnosed Petitioner with post-traumatic headaches, upper back strain, and bilateral shoulder strain. Id. Petitioner was instructed to take Aspirin, apply heat, and to take warm soaks. Id. at 2.

Petitioner presented to Dr. Diadula August 22, 2013 for a follow up visit wherein he complained of persistent frontotemporal headaches and continued pain in his shoulders, upper back, and lower back. Id. Dr. Diadula prescribed physical therapy three times a week for two to three weeks and released Petitioner to work full duty. Id. Petitioner presented to Mercy Hospital for a physical therapy evaluation on September 11, 2013. Id. at 3. At a follow up appointment on September 26, 2013, Dr. Diadula recommended Petitioner undergo an MRI of his right shoulder on October 7, 2013 at Chicago Ridge Radiology. Id.

The MRI of Petitioner's right shoulder showed diffuse supraspinatus tendinopathy with a 20mm x 15mm full thickness rotator cuff tear. Id. at 6. An October 10, 2013 MRI of Petitioner's lumbar spine showed at L4-5, right foraminal stenosis due to disc bulge, osteophyte and hypertrophy of facet joints. Id. at 7. Further, the MRI showed broad-based disc bulge that abuts the thecal sac at L2-3 and L3-4 levels. Id. Dr. Diadula diagnosed Petitioner with right shoulder rotator cuff tear, upper back strain, shoulder strain, lower back strain, and post traumatic headaches. Id. Dr. Diadula recommended Petitioner continue physical therapy and to see Dr. Heller, an orthopedic surgeon, for a consultation on his right shoulder. Id.

Petitioner presented to Midland Orthopedic Association on October 18, 2013 for a consultation with Dr. William Heller, MD. PEX 3 p. 3. Dr. Heller reviewed Petitioner's MRI and found Petitioner suffered a full thickness rotator cuff tear with retraction. Id. Dr. Heller recommended

Petitioner undergo arthroscopic repair. Dr. Heller opined that, without surgical intervention, Petitioner would experience worsening pain and weakness in his right shoulder. Id. Further, Dr. Heller provided Petitioner with an estimated recovery time of four to six months including post-operative therapy. Id. Surgery was scheduled for November 2013 pending approval by Respondent. Id.

Petitioner returned to Dr. Diadula on December 13, 2013 with surgery scheduled with for December 18, 2013. PEX 1 p. 4. Petitioner presented with previous complaints, however, was now experiencing numbness in his left hand and fingers with tingling. Id. Dr. Diadula scheduled another MRI for December 23, 2013. Id.

Petitioner underwent an MRI without contrast at Chicago Ridge Radiology on December 23, 2013 which showed circumferential bulging at C5-6 producing mild cord flattening and foraminal stenosis along with posterolateral bulges at C3-4 and C4-5 producing foraminal stenosis. Id. at 10. At a follow up visit with Dr. Diadula on February 7, 2014, Petitioner was experiencing 8/10 lower back pain and was seeking a second opinion regarding shoulder surgery. Id. at 5.

Petitioner's February 13, 2014 Leg Injury

As a result of Petitioner's August 7, 2013 injury, Petitioner had chronic back pain, which he testified occasionally caused his back to "lock up". This is confirmed by consistent complaints documented in medical records of lower back spasms. On February 13, 2013, while Petitioner descending the stairs to his house, his back locked up, he lost his balance and fell to the ground, twisting his left leg. PEX 5 p. 10. Petitioner was taken by the City of Chicago Fire Department (PEX 4) to the Emergency

Department of the Little Company of Mary Hospital and Health Care Center with complaints of severe left knee and ankle pain. PEX 5 p. 10. Petitioner was unable to move or bear weight with his left leg. Id. Dr. Salman Mamdani applied splitting and advised Petitioner to follow up with orthopedics along with providing Petitioner with crutches. Id.

On February 17, 2014, Petitioner presented to Dr. Victor Romano at Hinsdale Orthopaedics for evaluation of his left knee injury following his back spasm. PEX 7 at 48 to 50. Dr. Romano recommended surgery. The following day, Dr. Romano performed an open reduction internal fixation to Petitioner's left leg with screw. PEX 6 at 16.

Petitioner began physical therapy two days after his surgery on February 20, 2014 continued for four weeks. Id. at 21-31. Petitioner presented to Dr. Romano for a post-operative checkup on February 26, 2014. PEX 7 p. 42. Petitioner complained of aching and sharp pain, and leg pain that is aggravated by weight bearing. Id. at 43. Petitioner was ambulating with crutches and Dr. Romano recommended Petitioner to continue with physical therapy and to be off work. Id.

On March 19, 2014, Petitioner returned to Dr. Romano for a post-operative visit, wherein Petitioner had continued difficulties walking with muscle pain, cramps, stiffness, joint swelling, numbness and tingling. Id. at 39. Dr. Romano advised Petitioner to continue with physical therapy, home exercise stretching and strengthening. Id. at 15.

On May 13, 2014, Dr. Romano removed the screws from Petitioner's ankle. Id. at 8. This surgery was performed under general anesthetic.

On May 29, 2014, Petitioner presented to Dr. Romano for a follow up for his screw removal procedure. Id. at 28. Petitioner was experiencing aching and stabbing pain aggravated by sitting. Id. Dr. Romano advised

Petitioner to continue with his home exercise stretching and strengthening regime along with anti-inflammatories and acetaminophen for pain and swelling. Id. Petitioner was also written a prescription for Naproxen Id.

Petitioner's Continued Right Shoulder and Low Back Treatment

Petitioner presented to Dr. Romano on May 8, 2014 for a second opinion regarding his right shoulder pain. PEX 7 at 31. Petitioner complained of right shoulder pain, numbness and tingling in his left leg and occasionally in both hands to all fingers since the August 7, 2013 motor vehicle accident. Id. Dr. Romano diagnosed Petitioner with a rotator cuff tear and recommended physical therapy. PEX 7 at 33.

Petitioner participated in physical therapy from May 19, 2014 through June 27, 2014 at Select Physical Therapy. PEX 8. Throughout his course of physical therapy, Petitioner had consistent complaints of pain; upon discharge, Petitioner's physical therapist noted that cortisone injections or surgical intervention may be necessary. Id. At 49.

On June 2, 2014, Petitioner followed up with Dr. Romano. PEX 7 at 25. During his re-evaluation of Petitioner, Dr. Romano found that Petitioner had tenderness over the biceps tendon along with weakness of his scapular stabilizer, supraspinatus, external rotators, and internal rotators. Id. at 26. Dr. Romano suggested Petitioner consider surgery should physical therapy fail to remedy Petitioner's pain. Id. at 27. Petitioner was instructed to work with a twenty-pound lifting restriction along with limiting overhead lifting and driving only to and from work.

On July 10, 2014, Petitioner returned to Hinsdale Orthopaedics for reevaluation after being discharged from physical therapy. PEX 7 p. 20. Petitioner reported lumbar pain on both sides along with pain and stiffness

with bending. Petitioner reported experiencing lower back spasms. Id. Dr. Romano noted Petitioner had numbness in his lower back with shooting pain down his legs since his August 2013 work-accident. Id. Regarding his shoulder, Petitioner had constant aching pain aggravated by bending, squatting, lifting, laying on his side, reaching overhead, and reaching back. Id. Petitioner was again diagnosed with a right shoulder rotator cuff tear, cervical radiculopathy and lumbar spinal stenosis. Id. at 23. Due to persistent pain, Petitioner received a Kenalog injection into his right shoulder. Id.

Petitioner returned to Dr. Romano August 20, 2014 for follow-up. Id. at 18. Dr. Romano conducted an Automomic Neuro-Muscular Reflex Test, which demonstrated Petitioner has chronic pain and acute pain which caused dystrophy and a demonstrable loss of balance. Id. Petitioner was provided Arnica cream to apply to his back and in front of his ears. Id. at 19.

On June 22, 2015, Petitioner returned for follow-up to Dr. Romano. PEX 9 p. 51. At his follow up, Dr. Romano reviewed MRIs of Petitioners back and noted a displacement of Petitioner's lumbar intervertebral disc without myelopathy. Id. This displacement, Dr. Romano noted, may result in intermittent back spasms. Id.

Petitioner presented to Dr. Romano on April 17, 2017 with 8/10 pain in his anterior shoulder that radiated downward and 8/10 lower back pain that causes intermittent numbness and tingling in his extremities. Id. at 45. Upon an ANMRT examination, Dr. Romano noted a deficiency in Petitioner's balance and stability resulting from compression of Petitioners L2 disk. Id. Dr. Romano concluded that Petitioner was experiencing muscle and tendon strain of his right rotator cuff, radiculopathy of the lumbar

region, segmental and somatic dysfunction of his right arm, and segmental and somatic dysfunction of his lumbar region. Id. at 46. Dr. Romano recommended that Petitioner undergo physical therapy and rehabilitation for his right shoulder and for his lumbar region 2-3 times per week for 4-6 weeks. Id.

Petitioner followed up with Dr. Romano on June 5, 2017, wherein he identified his lower back as his main concern. Id. at 37. Petitioner stated that his lower back pain was exacerbated upon physical exertion which produced radiation, numbness and tingling down his right leg. Id. Petitioner was taking diclofenac daily for pain management. Id. Dr. Romano diagnosed Petitioner with radiculopathy of the lumbar region and spinal stenosis of the lumbar region. Id. Petitioner was administered a Kenalog Injection for pain and was instructed to undergo physical therapy for his shoulder and back. Id.

On July 10, 2017, Petitioner underwent a lumbar spine MRI without contrast at River Forest Advanced Imagining. Id. at 34. The MRI showed Petitioner had multilevel degenerative changes, multilevel disc bulging, and foraminal stenosis of his lumbar spine. Id. at 35. Petitioner presented to Dr. Romano on July 17, 2017 having not completed any of his recommended physical therapy sessions because physical therapy was not approved by Respondent's claims handler. Id. at 34. Dr. Romano opined Petitioner should participate in physical therapy for his back and shoulder, and if their conditions do not improve with therapy, Petitioner should consider an epidural injection. Id.

Petitioner returned to Dr. Romano on September 7, 2017 after having completed twelve sessions of physical therapy at Athletico. Id. at 30. Petitioner had continued pain in his right shoulder and in his lower back

and reported pain radiating across his groin, which worsened with laying down and prolonged standing. Id. Petitioner was seen by Megan McCaleb, PA-C, who recommended Petitioner participate in another 4-6 weeks of physical therapy. Id. at 31. Petitioner also underwent a cortisone injection to his right shoulder for immediate pain relief and was given a referral for an epidural injection for lumbar spine pain relief. Id.

At a follow-up with Dr. Romano on October 23, 2017, Petitioner had continued throbbing pain between his shoulders and pain in his back that radiated down his leg. Id. at 28. Petitioner saw a pain specialist, Dr. Pikovski who recommended Petitioner receive an epidural steroid injection for his back pain. Id.

Petitioner returned to Dr. Romano on February 5, 2018 with the same symptoms previously complained of. PEX 9 p. 25. Petitioner was told to continue conservative treatment and was administered bilateral shoulder cortisone injections for immediate pain relief. Id. On April 2, 2018, Petitioner returned to Dr. Romano because of pain. Id. at 19. Dr. Romano observed Petitioner had continued shoulder and lower back pain, and though he had been working fully duty, was having difficulty moving because of pain. Id. Dr. Romano suggested Petitioner continue physical therapy and ordered repeat MRIs for his shoulder and his back. Id. at 21. Petitioner was also prescribed Celecoxib. Id.

On April 12, 2018, Petitioner underwent a bilateral shoulder MRIs at West Suburban Medical Center in River Forest. PEX 10 at 7 to 10. The MRI of the right shoulder, again, showed a full-thickness retracted tear of the supraspinatus to the proximal humeral head with mild associated atrophy, an overall full-thickness tear of the infraspinatus with atrophy, a high-grade partial thickness subscapularis tear, tendinosis of the biceps,

and acromioclavicular osteoarthritis. PEX 9 at 15. The MRI of the left shoulder showed an overall full-thickness supraspinatus tear and a labral tear. Id. These results were reviewed by Dr. Romano and Petitioner was administered a cortisone injection in both shoulders on April 30, 2018. Id. at 17.

Petitioner underwent two more cortisone injections on August 23, 2018 followed by two more cortisone injections on January 7, 2019. Petitioner attempted to avoid surgery, as he did not have time to take the six-month recovery as was suggested by his treating physicians. In taking the more conservative approach, Petitioner sought additional cortisone injections on May 30, 2019. Id. at 6.

Respondent's First §12 Examination

On March 18, 2014, Petitioner presented to Dr. Guido Marra, MD, Respondent's selected Section 12 examiner. REX 3 p. 1. Dr. Marra found Petitioner's symptoms to be consistent with a full thickness rotator cuff tear. Id. at 2. He further found Petitioner's condition of ill-being to be causally related to Petitioner's work injury of August 7, 2013. Id. Dr. Marra opined Petitioner was a surgical candidate as to his right shoulder.

Respondents Second §12 Examination

Petitioner presented to Dr. Andrew Zelby MD, Respondent's second selected section 12 examiner on April 25, 2014. REX 2 p. 1. Dr. Zelby found that Petitioner suffered a spinal muscular strain. Id. at 6. He further stated that Petitioner would be a good candidate for surgery on his right shoulder.

Petitioner returned to Dr. Romano on May 8, 2014 where four x-rays were taken of his right shoulder. PEX 7 p. 33. The x-rays confirmed that Petitioner had a rotator cuff tear of his right shoulder, which has been exacerbated and lead to pain and disability. PEX 7 p. 33. After considering the recommendations of Respondents section 12 examiner, Dr. Zelby, Dr. Romano suggested that Petitioner should continue to participate in physical therapy and should consider surgery should physical therapy fail to improve his condition. Id.

Respondents Third §12 Examination

On August 24, 2017, Petitioner presented to Respondent's third §12 examiner, Dr. Kornblatt. REX 4 p. 1. Dr. Kornblatt noted that after his injury on August 7, 2013, Petitioner had continued complaints of shoulder and lower back pain. Id. at 2. Dr. Kornblatt found that Petitioner's work incident resulted in a cervical strain, lumbosacral strain, and a right rotator cuff tear. Id. at 6. He further found that Petitioner's lumbar spine pain to be related to his work accident. Id.

Evidence Depositions of Dr. Romano, Petitioner's Treating Physician

Dr. Romano testified in this matter on two occasions. PEX 13; PEX 14. Dr. Romano is a board-certified physician with a specialty in orthopedics. PEX 13 p. 5. Dr. Romano first treated Petitioner on February 17, 2014 at which time Dr. Romano diagnosed Petitioner with an ankle fracture that occurred when Petitioner's back gave out, causing him to fall. Id. at 7. Dr. Romano drew an explanatory diagram of Petitioner's ankle injury and explained that Petitioner's ankle fracture was the result of a Petitioner's knee bone hitting something, which in the case, was the ground

when Petitioner's back gave out, causing him to fall. Id. at 9. Exhibit 2 to PEX 13

Dr. Romano performed surgery on Petitioner February 18, 2014 where Petitioner's ankle was reduced anatomically. Id. at 13. The screws used in Petitioner ankle were removed four months later in May 2014 by Dr. Romano, who restricted Petitioner from using his ankle for three weeks and put him on light duty until being returned to full duty in March. Id. at 14. Dr. Romano recommended Petitioner undergo physical therapy and noted that things were progressing as expected.

On May 8, 2014, Petitioner saw Dr. Romano for his shoulder injury at which time Dr. Romano put him on modified duty with a 25-pound lifting restriction with no overhead work. Dr. Romano testified that he saw Petitioner on June 2, 2014 for a reevaluation of his right shoulder rotator cuff tear. Id. at 22. At this time, Petitioner was participating in physical therapy for both his ankle and his shoulder. Dr. Romano diagnosed Petitioner with a rotator cuff tear and continued with physical therapy. Id. at 23. Dr. Romano testified that Petitioner had been though conservative treatment for his shoulder and that Petitioner had described numbness and tingling in his left leg. Id. at 28.

Dr. Romano testified Petitioner reported numbness and tingling in his left leg, hand and fingers. Id. at 31. He further testified Petitioner had problems with his back the entire time he had been seeing Petitioner. Id. Dr. Romano did not initially focus on Petitioner's back problems because he believed Petitioner's ankle to be the more pressing of his issues. Dr. Romano notes, again, Petitioner's back and shoulder pain in early August 2014.

Dr. Romano testified that Petitioner's complaints of lower back pain, stiffness, numbness, shooting pain down his legs are consistent with a low back strain and possibly more than just a strain. Id. at 36. These pains had been present since Petitioner's August 7, 2013 work accident. Dr. Romano testified that the extensive amount of time that had passed between Petitioner's injury and his continued pain is indicative that Petitioner's back may be more severely injured than a strain. Id. at 37. Dr. Romano testified that Petitioner's lower back pains were at least consistent with a back strain and that Petitioner's shoulder pains were consistent with a rotator cuff tear.

Dr. Romano treated Petitioner for his lower back strain, rotator cuff tear, and fractured ankle, all of which stemmed from Petitioner's August 7, 2013 work related motor vehicle accident. Id. at 40. Dr. Romano opined Petitioner's work accident caused his back pain and resulted in his back giving out. Petitioner's February 13, 2014 fall occurred when Petitioner's back gave out. As a result of the fall, Petitioner fractured his ankle. Dr. Romano testified that had Petitioner not been injured in a work-related motor vehicle accident, Petitioner's back would not have been injured, and had Petitioner's back not been injured, he would not have fallen and fractured his ankle. Id. at 42. Dr. Romano testified Petitioner's left leg numbness and tingling can be attributed to his low back injury. Id. at 53.

In his second evidence deposition, Dr. Romano testified that a person's back and shoulder are related and that injury to one will aggravate the other. PEX 14 p. 12. Dr. Romano opined he did not find it unusual that Petitioner previously elected not to undergo shoulder surgery, as many people are afraid of surgery. The treatments and recommendations provided to Petitioner by Dr. Romano were reasonable and necessary

given Petitioner's injuries. Id. at 19. Dr. Romano recommended Petitioner undergo surgery on his right shoulder.

Respondent's First §12 Examiner

Dr. Guido Marra did not testify. His report, REX 3 and PEX 12, completely and unequivocally supports Petitioner's claim for benefits, including the need for right shoulder surgery. See PEX 12 at 5-7.

Testimony of Respondent's Second §12 physician, Dr. Andrew Zelby

Dr. Zelby testified that he was paid $1,500 to perform a third §12 examination of Petitioner, and was being paid $800 per hour to testify. REX 7 at 29. The records and reports that Dr. Zelby relied upon to form his opinion regarding Petitioner's health were not produced at the time of his deposition, and Dr. Zelby stated that he would prefer not to print said reports and documents for Petitioner's counsel. Id. at 33.

Petitioner moves to strike Dr. Zelby's testimony since he failed to produce his file at cross examination. See REX 7 at 33. The Arbitrator has denied this motion to strike. This motion to strike is denied.

Dr. Zelby agreed that he reviewed a record from November 14, 2013 noting Petitioner's diagnoses as rotator cuff tear, right shoulder; strain upper back, shoulder, midback, and lower back; posttraumatic headaches. Id. at 35. Given Petitioners back pains, Dr. Zelby stated that the MRI conducted of Petitioner's lumbar spine was reasonable and necessary. Id. at 36. Though Petitioner had been diagnosed with an upper, mid and lower back strain, Dr. Zelby made no reference to those in his November 14, 2013 report. Id. at 37.

Presenting with persistent back pain, Petitioner's treating Mercy Works physicians prescribed physical therapy; Dr. Zelby found these physicians' physical therapy recommendations to be unreasonable. Id. at 39. On February 7, 2014, six days before Petitioner's back "locked up" causing him to fall and fracture his ankle, Petitioner presented to Mercy Works, where he reported 8.5/10 lower back pain. Id. at 42. Dr. Zelby made no mention of this pain in his report, rather, he opined that Petitioner's spine was normal despite Petitioner's treating physician's recommendation that Petitioner see a spine orthopedic specialist. Id. at 43. Dr. Zelby testified that he believes that Petitioner's treating physicians "do not completely understand the findings of the MRI". Id. at 44.

Dr. Zelby testified that he did not ask Petitioner any questions regarding what led up to Petitioner's February 2014 fall. Id. at 46. Dr. Zelby did not review the documents from the Chicago Fire Department, who responded to Petitioner after his fall. The Chicago Fire Department documented that Petitioner's preexisting injury acted up and caused him to fall. Further, Dr. Zelby testified that he did not review the records from Little Company of Mary Hospital Emergency Department where Petitioner was transported after his fall, which also note that Petitioner's back went out, causing him to fall. Id. at 52. Dr. Zelby testified that, in forming his opinions, he did not review the records from Little Company of Mary Hospital stating that Petitioner has chronic pain and sometimes his back locks up. Id. at 55.

Dr. Zelby admitted that Petitioner did not have a history of low back pain prior to August 2013, and he testified that he had not reviewed any records that indicate what role Petitioner's lower back pain played in his February 2014 fall. Id. at 60. However, Dr. Zelby testified that when he saw

Petitioner, he circled that his back pain was at an eight. Id. at 64. The scale that Petitioner used to circle the 8/10 pain was in a six-page document that Dr. Zelby instructs §12 examinees to fill out but later shreds. Id. at 65-69. In this case, Petitioner filled out the questionnaire, and Dr. Zelby shredded it. Dr. Zelby did not make it available for review. No mention of the questionnaire had been made prior to his deposition. Dr. Zelby was forced to editorialize Petitioner's responses to his questionnaire in his deposition.

Dr. Zelby's testimony about Petitioner's history and his opinions about it are without basis in the record.

Dr. Zelby confirmed that Petitioner had sustained a back strain as a result of Petitioner work related motor vehicle accident. Id. at 84. However, after reporting 8/10 back pain, Dr. Zelby concluded that Petitioner's lower back was not related to his accident. Id. at 87. Dr. Zelby later testified that Petitioner's consistent complaints of 8/10 back pain were not important to his opinions. Id. at 88. When asked whether he reviewed Petitioner's MRI films or reports, Dr. Zelby equivocated, he testified that they were not a part of his file because he did not want to clog his server. Id. at 89-90. Dr. Zelby's interpretation of Petitioner's lumbar spine MRI notes broad-based bulging discs and thickening of the ligamentum flavum at L2-3, L3-4, L4-5, and L5-S1. Id. at 93.

Testimony of Respondent's Third §12 Examiner, Dr. Kornblatt

Dr. Kornblatt testified in this matter. REX 6. Dr. Kornblatt refused to answer questions under examination. He was extremely confrontational. Dr. Kornblatt testified that when he examined Petitioner on August 24, 2017, Petitioner presented with shoulder impingement syndrome and

degenerative disc disease of his lumbar spine. Id. at 19. Dr. Kornblatt further noted that Petitioner had anatomic cervical degrative disc disease Id. Dr. Korblatt found that Petitioner's shoulder impingement syndrome was causally related to his August 7, 2013 work accident. Id. at 21.

When Petitioner presented to Dr. Kornblatt, he was asked to fill out a questionnaire. Id. at 26. This questionnaire was never produced despite being subpoenaed. Id. Dr. Kornblatt did not produce any part of his file at his testimony. Petitioner moves to strike Dr. Kornblatt's testimony. See REX 6 at 26-27. The Arbitrator has denied this motion to strike.

Dr. Kornblatt was unaware that Dr. Heller recommended Petitioner undergo arthroscopic surgery to repair his rotator cuff. Id. at 28. When asked whether or not he believed that Petitioner's rotator cuff tear occurred as a result of his work-related motor vehicle accident, Dr. Kornblatt answered that he did, however, that "I might change my mind if you keep badgering me.". Id. at 31. Later in his cross examination when questioned about what materials he was supplied to review, Dr. Kornblatt noted that "This is bullshit." Id. at 47. He also stated to Petitioner's counsel "I'm not going to answer your question." Id. at 52.

Dr. Kornblatt testified that Petitioner's right rotator cuff tear is permanent. Id. at 44. He also testified that Petitioner's pain radiating into his back, buttock and leg is not significant in assessing Petitioner's lower back injury. Id. at 59.

Conclusions of Law:

Is Petitioner's present condition of ill-being causally related to

The Arbitrator has considered the testimony and records of both the treating and examining physicians, as noted above, in this matter. The Arbitrator notes highly contentious nature of some of the questions and answers in the depositions of the examining physicians. The Arbitrator relies on the opinions and testimony of the treating physicians in this matter to resolve all causation questions in this matter. The Arbitrator again notes that he has denied all Petitioner's motions to strike medical testimony in the depositions taken in this matter.

a. Is Respondent liable for Petitioner's unpaid medical bills?

For reasons set forth above, Respondent is liable to pay all of Petitioner's unpaid medical bills, PEX 5, 6, 7, 9, 10, 11 and 15 for a total of $143,857.48 pursuant to the Act and pursuant to the medical fee schedule.

b. Is Petitioner entitled to temporary total disability benefits from February 13, 2014 through March 27, 2014?

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from February 13, 2014 through March 27, 2014. As noted above, this conclusion is based on the Arbitrator's reliance on the treating physicians options in this matter.

c. Is Petitioner entitled to future medical treatment including right shoulder surgery?

All medical evidence, including Respondent's three §12 examiners and Petitioner's treating physicians agree Petitioner sustained a right shoulder injury at work. The physicians agree that it is reasonable and necessary for Petitioner to undergo a right shoulder surgery as recommended by Dr. Romano.

d. Is Petitioner entitled to Penalties pursuant to Section 19(l) and 19(k) of the Act and Attorney's fees pursuant to Section 16 of the Act?

The Arbitrator notes that this case presented a complex medical situation. The Arbitrator believes there were some reasonable disputes as to causation presented in this matter by the examining physicians. Therefore, the Arbitrator denies penalties and fees under sections 19(k), 19(l) and section 16 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONALD L. VANDA,
Petitioner,
vs. NO: 17WC 15443

STREATOR DEPENDABLE,
Respondent.

20IWCC0468

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 20, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 21 2020
o080620
MP/jrc
068

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VANDA, DONALD
Employee/Petitioner

Case# **17WC015443**

STREATER DEPENDABLE MANUFACTURING
Employer/Respondent

20IWCC0468

On 8/20/2019, 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 1.84% 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:

0000 SOLE PRACTITIONER
EMMANUEL F GUYON
5 E BRIDGE ST
STREATOR, IL 61364

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN A RUDD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

20IWCC0468

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

☐ 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

Donald Vanda
Employee/Petitioner

Case # **17** WC **15443**

v.

Streater Dependable Manufacturing
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 **Ottawa**, on **July 24, 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 **March 1, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**46,904.00**; the average weekly wage was $**902.00**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of $**7,727.24** under Section 8(j) of the Act.

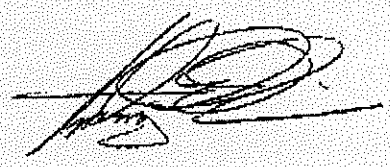
ORDER

The Petitioner failed to prove accidental injuries arising out of and in the course of his employment with Respondent on March 1, 2017. Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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

August 12, 2019
Date

AUG 20 2019

FACTS:

The Petitioner alleges accidental injuries in the form of repetitive trauma occurring on or about March 1, 2017. The Petitioner testified that he had been employed by Respondent since 1991 and that he worked as a "press brake" operator. Petitioner described that this machine formed pieces of steel that could weigh up to 800 pounds. The Petitioner testified that the steel pieces were lifted by hoists and that he had to help position the hoist lifted steel for processing. The Petitioner described his work as "heavy" but he did not testify as to how many times per day he did this procedure nor as to any exact amount of force used.

The Petitioner further testified that both his hands and right shoulder began to hurt in 2012-2013. The Petitioner also testified on cross examination that he was diagnosed with rheumatoid arthritis. The Petitioner also testified that he underwent heart surgery in 2016.

The Petitioner testified that by March 2017 he could no longer do his job due to pain in his hands. Although he claimed he was fired, Petitioner produced no supporting documentation of this allegation. Petitioner testified that he notified his supervisor, Frank Rhynes, of his hand problems.

The Petitioner also admitted that he applied for short-term disability in January, 2017. The Petitioner's treating physician is listed as Dr. Tariq Kahn.

Mr. Rhynes testified that the only hand problem mentioned by Petitioner was his rheumatoid arthritis. Mr. Rhynes further testified that the Petitioner had been blaming his hand problems on rheumatoid arthritis for years proceeding March 2017. Mr. Rhynes testified that the Petitioner did not report any work related accident involving his hands or shoulder at any time during the Petitioner's employment with Respondent.

Petitioner also called as a witness Mr. Richard Bay. Mr. Bay's testimony was limited to describing job duties. Mr. Bay's testimony was similar to that of Petitioner's. Mr. Bay did testify that he was friends with Petitioner and frequently drove the Petitioner to work or other places. Mr. Bay admitted that the steel pieces were lifted by hoists and were only repositioned by hand. He did not testify as to the frequency of hand movements nor the force used.

Petitioner testified as to the many doctor's he saw for treatment. Petitioner first saw Dr. Tariq Kahn, on October 17, 2016. The Petitioner presented to Dr. Khan noting that he had not had a primary care physician in a number of years and that he was following up on several chronic medical conditions. The active medical problem list included an aortic dissection status post repair, and rheumatoid arthritis for which he was not taking any medications when he presented to Dr. Khan. Additionally, the Petitioner had a diagnosis of hypertension with corresponding hyperlipidemia. Again, no reference was made in the subjective portion of the records to any of the Petitioner's work activity and no causal connection was made by Dr. Khan. Instead, on December 1, 2016, Dr. Khan noted that the Petitioner presented with neck pain that began over the Thanksgiving weekend in the back of his neck. This was constant for two days and worsened by inactivity. The Petitioner subjectively stated that it had improved since he returned to work.

By January 14, 2017, the Petitioner returned to Dr. Khan and complained of pain in his right arm ongoing since the prior Sunday. The Petitioner stated that the pain was sharp and burning in nature

and extending from his shoulder down to his fingers. He stated that he was sleeping when he first noticed the pain and that it was aggravated by any use of his right upper extremity. When sleeping, the Petitioner stated that the pain was alleviated by hanging his arm over the side of the bed. Once again, the Petitioner failed to make any subjective connection between his arm pain and his work activity and Dr. Khan did not provide any causal connection opinion. In fact, the Petitioner returned to Dr. Khan on February 5, 2017 and noted that the pain was present mostly when he is sleeping and once again discussed having to hang his arm off the side of the bed.

At the conclusion of the February 5, 2017 visit, Dr. Khan opined that there was concern for rheumatologic process given that Petitioner had not been on therapy for the rheumatologic condition for a number of years. Arterial occlusive disease was ruled out with CT angio of the right upper extremity that revealed no significant abnormalities of the arterial supply of the right upper extremity. The Petitioner was awaiting an appointment with a neurologist to evaluate for neurologic cause of his symptom given the findings of multi-level degenerative changes, some neuroforaminal stenosis on the MRI of the cervical spine. He would check with ESR and CRP for evaluation of inflammatory component and a Medrol Dose Pack would be issued if inflammatory markers were elevated.

On June 6, 2017, the Petitioner returned to Dr. Khan for follow-up on chronic medical conditions. Since the last office visit he had seen neurology and it had been discussed about the possibility of bilateral carpal tunnel syndrome. The Petitioner was in the process of following up with an orthopedic specialist and scheduling a carpal tunnel release of the right hand. Subjectively, the Petitioner complained of episodes of dizziness that occurred three to four times over the past week. He stated that he had three episodes and started to have double vision seeing the same objects superimposed on top of themselves vertically. He also described a sensation of a disequilibrium and denied any aggravated or alleviating factors. Once again, it was noted that the Petitioner had rheumatoid arthritis, but he was not taking any medications. He was given a prescription for an anti-TNF agent but the Petitioner stated that he did not want to start that medication until his neck pain was further evaluated. He was concerned that he may have an infection in there and the medication may worsen it.

Petitioner was also seen by Dr. Deena Raval in March 2017. (Resp Ex 3) The Petitioner was seen by Dr. Deena Raval on March 30, 2017 and it was noted that he had last been treated in July, 2015 for right arm pain and discoloration. The Arbitrator notes that this would indicate that the Petitioner's right arm complaints had been going on since at least 2015, approximately two years prior to the alleged manifestation date at work. It was noted that the Petitioner had previously treated with Dr. Hedayati in the same practice for a diagnosis of inflammatory arthritis and rheumatoid arthritis in 2013. The Petitioner reported pain in his bilateral hips and shoulders slightly worse since he was last seen. He reported right arm being more painful than anything else with numbness. He had x-rays and MRI of the arm and back and was instructed to see a neurologist on April 13, 2017 in Peru. He was given Prednisone by his primary care doctor with mild relief that was felt for only five days and also given Gabapentin and he stated he only took that prescription when needed. Previously he treated with MTX, Prednisone, and he stopped taking that after seeing Dr. Hedayati for that last visit.

The history section notes right arm pain for some time and then the addition of numbness and tingling since January, 2017. At first the primary care physician thought there was a blockage, but the CT of the arm showed no blockage was present. An MRI was performed that was noted earlier in this letter. Several medications were listed including Calcium Carb-Magnesium, Tramadol, Aspirin,

Furosemide, Hydrochlorothiazide, Lisinopril, Metoprolol, Pravastatin Sodium, and Gabapentin. The assessments were inflammatory arthritis, long-term use of drug, primary osteoarthritis involving multiple joints, history of aortic dissection. Recommendation was made to begin the drug Xeljanz.

The Petitioner also saw Dr. Edward Pegg. (Resp Ex 4) Dr. Pegg ordered an EMG and NCV which indicated bilateral carpal tunnel syndrome. This was performed in April 2017.

In an office note of April 13, 2017, Dr. Pegg wrote that the Petitioner "does not recall any type of injury at work." Dr. Pegg did not provide any indication that the Petitioner's carpal tunnel syndrome was work related.

Petitioner also saw Dr. Darwish at Hinsdale Orthopedics on May 15, 2018. (Resp Ex 6) This was the first time Petitioner gave a detailed work history to any doctor. Dr. Darwish noted in his records that Petitioner was retired. Dr. Darwish only examined the Petitioner's cervical spine. Dr. Darwish wrote Petitioner's hand conditions were not caused by any cervical spine pathology. He offered no opinion as to causation for the carpal tunnel syndrome.

At the request of Respondent, Petitioner was examined by hand specialist Sam J. Biafora on December 11, 2017. Dr. Biafora issued a report of his findings. (Resp Ex 5). Following review of all medical records and after performing a physical examination, Dr. Biafora issued his opinion. Dr. Biafora opined that the Petitioner's condition of ill-being is a history of rheumatoid arthritis and that his hand problems are related to rheumatoid arthritis. Moreover, Dr. Biafora concluded that Petitioner's job activities would not aggravate the underlying rheumatoid arthritis. Dr. Biafora even reviewed a video of Petitioner's job duties. (Resp Ex 9) Finally, Dr. Biafora concluded that rheumatoid arthritis is a known risk factor for the development of carpal tunnel syndrome. Dr. Biafora was consistent in concluding that Petitioner's condition of ill-being was not work related.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to all disputed issues, the Arbitrator finds and concludes as follows:

The Arbitrator finds that the Petitioner has failed to prove injuries arising out of and in the course of his employment with Respondent on or about March 1, 2017. The Petitioner's own testimony was lacking in establishing a claim for repetitive trauma to his hands and right shoulder. The Petitioner never testified with specificity as to his job duties. Specifically, there was no testimony as to the force necessary to do his job. Likewise, there was no testimony of this type from Richard Bray, Petitioner's witness.

Respondent's witness, Frank Rhynes, testified that all heavy lifting was done with hoists and had been done that way for many years preceding March 1, 2017. Mr. Rhynes also testified that the only medical complaints made by Petitioner were related to his rheumatoid arthritis. Again, these complaints by the Petitioner to Mr. Rhynes go back several years before March 1, 2017.

Since the testimony of Petitioner is lacking with respect to repetitive trauma and causal connection, the Arbitrator relies heavily on the medical evidence presented. The Arbitrator specifically notes that the Petitioner has failed to produce any medical evidence or opinion that his condition of ill-being is work related. Petitioner's medical exhibits 4 through 7 are merely test results and objective findings of carpal tunnel syndrome. There are no opinions whatsoever that his condition is work related.

The Arbitrator also notes that the Petitioner's own application for short term disability benefits (Resp Ex 8) fails to indicate that the claimed disability is work related. Petitioner admitted that he signed his document.

The Arbitrator notes that Respondent's exhibits of medical treatment are more comprehensive and lead to the conclusion that Petitioner's condition of ill-being are related to the rheumatoid arthritis and not his job duties with Respondent. The records of Dr. Kahn, (Resp Ex 1), Dr. Raval (Resp Ex 3), Dr. Pegg (Resp Ex 4) and Dr. Darwish (Resp Ex 6) all document the rheumatoid arthritis condition and do not relate any medical condition to Petitioner's job duties with Respondent.

The Arbitrator finds that the opinion of Dr. Biafora to be reliable, credible and persuasive. Dr. Biafora not only examined the Petitioner and reviewed available medical records, he also reviewed the video of the Petitioner's job duties. After careful consideration of all factors, Dr. Biafora concluded that Petitioner's condition of ill-being was related to his rheumatoid arthritis and was not caused or aggravated by his job duties with Respondent.

Based on the entirety of the medical evidence, the credible opinion of Dr. Biafora and the lack of any supporting medical evidence presented by Petitioner, the Arbitrator finds that the Petitioner has failed to prove accidental injuries arising out of and in the course of his employment with Respondent on or about March 1, 2017. Petitioner's claim for compensation is therefore denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Onofria Magistro,

Petitioner,

20IWCC0469

vs. NO: 11 WC 026078

Mario Tricoci,

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, temporary total disability, 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 March 9, 2018 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.

20IWCC0469

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 1 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

o072820
MEP/ypv
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAGISTRO, ONOFRIA
Employee/Petitioner

Case# **11WC026078**

MARIO TRICOCI
Employer/Respondent

20IWCC0469

On 3/9/2018, 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 1.83% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON P CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
CHRISTINE M JAGODZINSKI
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

ONOFRIA MAGISTRO,
Employee/Petitioner

Case #**11 WC 26078**

v.

Consolidated cases:

MARIO TRICOCI,
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 **KETKI STEFFEN**, Arbitrator of the Commission, in the city of **WHEATON**, on **January 25, 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

20IWCC0469

FINDINGS

On **3/18/2011**, 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 accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**21,162.80**; the average weekly wage was $**406.97**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Denial of benefits

No benefits are awarded.

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

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

KSSteffen 3/2/18

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) ss.
COUNTY OF DUPAGE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ONOFRIA MAGISTRO

Petitioner,

v.

MARIO TRICOCI

Respondent.

COURT NO. 11 WC 26078

FACTUAL HISTORY

Testimony of Onofria Magistro:

Onofria Magistro testified she worked as a hairstylist for Mario Tricoci since July 1999. She admitted she had abdominal pain, back pain, nausea, and a fever for which she sought treatment at Elmhurst Hospital Emergency room on February 14, 2011. Her husband took her to the emergency room on that date. On February 17, 2011, Ms. Magistro testified she followed up with her primary care doctor, Dr. Emmanuel Linchangco, at Elmhurst Primary Care Associates due to diarrhea and mild to moderate back pain. He authorized her off work for three days. Ms. Magistro did not return to Dr. Linchangco until March 21, 2011.

On March 18, 2011, Ms. Magistro went to work at Mario Tricoci. On that date, she stated the general manager of the store "volunteered her" to have a massage from a massage therapist in training. She stated the general manager blocked out time during her schedule and told her she needed to participate in the 80-minute therapeutic massage. Ms. Magistro testified she had no clients scheduled during that time. The general manager's name was Michelle. Ms. Magistro could not recall her last name. She stated the massage therapist was about to test out and she needed to perform this service in order to test out. Ms. Magistro could not recall the massage therapist's name. She testified she was paid by her employer when she participated in the 80-minute therapeutic massage. When asked to describe the massage, Ms. Magistro explained it

was a massage of her whole body with a lot of stretching. She reported extreme pain because of manipulations, kneading, and twisting when the massage therapist worked on her low back. Ms. Magistro testified that midway through the massage, she told the massage therapist it hurt and she wanted her to stop the massage. Ms. Magistro claimed the therapist refused to stop. Ms. Magistro then continue with her massage for another 30-40 minutes. Ms. Magistro testified she completed a written questionnaire after the massage was completed. She could not recall what she wrote in the written questionnaire.

After the massage, Ms. Magistro testified she experienced more pain in her lower back and legs. She tried Tylenol. Ms. Magistro testified she had a client and performed a Keratin blowout treatment. She then felt extreme pain down her legs and back and had to stop the service. She went around the wall and collapsed. Her co-workers helped her go to the bathroom where she threw up. Ms. Magistro thought her co-worker told the general manager that she was sick. She stated the general manager offered her a glass of water.

Ms. Magistro testified her husband took her to Elmhurst Hospital emergency room later that evening. She agreed she was open and honest when she presented for medical treatment and she was authorized off work.

Ms. Magistro testified she was open and honest with all her medical doctors. She presented to Dr. Lawrence Frank on March 30, 2011. She previously treated with Dr. Frank 5 years earlier for some back pain. He ordered x-rays on March 30, 2011. She later had an epidural steroid injection with Dr. Frank on April 28, 2011. The injection provided minimal relief for a few hours. She subsequently came under the care of Dr. Lussky for a second opinion at RLT Neurologic Associates on July 27, 2011. She also had therapy at NorthShore. She eventually presented to Chicago Pain and Orthopedics and sought treatment with Dr. Christopher Morgan on August 2, 2011. He recommended an injection. Ms. Magistro testified Dr. Neeraj Jain performed this injection on August 23, 2011. She stated she only had relief for a few hours. Ms. Magistro came under the care of Dr. DePhillips, a spine surgeon. He recommended surgery when she saw him on November 17, 2011.

Ms. Magistro testified she had unrelated issues with her left face and leg as well as clumsiness in her left arm in September, 2011. On December 15, 2011, Dr. DePhillips recommended a discogram. Dr. Jain performed the discogram on January 10, 2012. Ms. Magistro eventually underwent a spinal fusion on March 27, 2012. She attended physical therapy in June and July, 2012 at ATI Physical Therapy. After surgery, Ms. Magistro testified she still had extreme pain and her back was just as bad, if not worse, than it was prior to surgery. She eventually had a FCE at ATI Physical Therapy. Over the next few years, she treated at Chicago Pain and Orthopedic with medications and a continued recommendation for a spinal cord stimulator trial. She had underlying

health issues with her heart and she did not undergo the spinal cord stimulator trial as a result. She last presented to Chicago Pain and Orthopedic Institute on June 22, 2016. Dr. Sharma pronounced her at maximum medical improvement.

Ms. Magistro testified she has not worked since March 18, 2011 or applied for any jobs. Her current medications include Gabapentin, Tramadol, and Baclofen. Dr. Linchangco prescribes these medications. Ms. Magistro testified she wakes up every day around 9:00 a.m. Her left leg is usually painful, but not as bad as her right leg. She experiences numbness and tingling in her legs daily. Ms. Magistro denied ever having any pain or numbness in her right leg prior to March 18, 2011. She takes medications three times per day and she is unable to walk if she does not take her medications as she has so much pain in her leg. She goes to bed around 10:00 p.m. and has difficulty falling asleep. Her pain is located in her right lower back and she described it as stabbing. Ms. Magistro testified she used to read but she can no longer read because she cannot focus or sit too long. She testified her sitting tolerance was approximately 20 minutes. She lives in a single ranch home with a roommate. Her roommate performs all the chores and she does not usually cook her own meals. Her longest drive in the car has been her 40 minute drive to attend the trial. Her roommate does her laundry and brings it to her so she can fold it. She has a dog. When asked if she walks the dog, Ms. Magistro stated her dog does not walk. Ms. Magistro noted she never took pain medications regularly prior to March 18, 2011.

On cross-examination, Ms. Magistro stated that she was the only person available in the salon to participate as a model for the massage therapist. She testified there would have been no repercussions if she did not participate, but the general manager told her she had to participate. She agreed at first that she had a choice whether to participate in this massage and then changed her testimony to indicate that she was forced to be a massage model. Ms. Magistro admitted she had been a model in the past for hair color and it was on a voluntary basis. She stated that the process was usually voluntary, but, in this situation, she did not volunteer. Ms. Magistro could not recall the massage therapist's name. She admitted she did not have any clients scheduled at the time of the massage. She received her normal hourly wage on that date. Ms. Magistro could not recall the time of the massage, but she testified she had a client early in the morning and another client scheduled in the early afternoon, and the massage occurred in between her two appointments.

Ms. Magistro testified she has had dozens of massages in the past. Her massages all occurred at Mario Tricoci. She thought her last massage occurred in the months before the March 18, 2011 massage. Ms. Magistro admitted that she had a history of low back pain in 2006. She agreed that she may have had disc herniations noted at that time. She could not recall whether she had EMG studies in 2007.

When asked if she testified that she never had right leg pain prior to March 18, 2011, Ms. Magistro agreed that is what she said on direct examination. At that point, Ms. Magistro was asked about the history she conveyed to Dr. Linchangco on February 17, 2011, where she told him she had low back pain and pain radiating to her right calf. (PX 2 at 203). She testified that she did tell Dr. Linchangco that she had right leg pain radiating to her calf. When asked if her testimony on direct examination was not true, Ms. Magistro agreed that that she did not tell the truth about her prior leg pain. She then admitted she had experienced right leg pain prior to that time. Ms. Magistro explained that her back pain after March 18, 2011 was different than the pain she had in the past.

Ms. Magistro identified Respondent's Exhibit 4 as a massage evaluation completed by her right after the massage. Ms. Magistro agreed she never wrote in the massage evaluation that she asked Julia to stop the massage, even though there was an area for additional comments where she could have written this information. Ms. Magistro confirmed that she did ask Julia to stop the massage, but she refused to stop. When asked why she did not write that she asked Julia to stop the massage, Ms. Magistro did not have an answer. She then stated that she finished the questionnaire quickly because she had a client coming. She also admitted that she rated Julia's massage as "good" in all areas. When asked whether she told Julia about her low back pain and treatment the month prior to the massage, Ms. Magistro indicated that she did not. She also indicated she did not tell Julia about any of her past medical history. She claimed Julia did not ask her about this information even though she responded on the questionnaire that Julia did ask her those questions. (RX 4).

Ms. Magistro testified she has not seen a doctor for her low back since she saw Dr. Sharma on June 22, 2016. Currently, Dr. Linchangco prescribes her medications, but he does not examine her low back. Ms. Magistro admitted she does her own grocery shopping and carries her own grocery bags. Toward the end of cross-examination, she agreed she was able to sit so far during the trial for one hour and 25 minutes while testifying and she had not changed position.

On redirect examination, Ms. Magistro claimed that sitting during the trial caused her to have a lot of pain in her low back and leg. Ms. Magistro claimed that when she previously volunteered to be a model for hair color and a haircut, she was also on the clock at that time. She testified she was not sure if Julia needed to complete the massage in which she participated to get credit, but she thought she did. Ms. Magistro stated once again that her low back and leg pain after March 18, 2011 was different than the pain she had in the past. It was more extreme and she was unable to work after March 18, 2011. She further explained that her symptoms in February, 2011 were flu-like and she had her period at that time.

Testimony of Cassandra Stratton:

The Respondent called Cassandra Stratton to testify. Ms. Stratton stated she is the massage director at Mario Tricoci. She has held this position since 2011. Her job duties include hiring, coaching, and training massage trainees as well as existing staff about modalities and products. She recognized Ms. Magistro and identified her in the courtroom. She knew Ms. Magistro previously worked at Mario Tricoci as a hairstylist. When asked about the hiring process, Ms. Stratton testified that she is responsible for hiring and interviewing massage therapists. Prior to applying to work at Mario Tricoci, all massage therapists have to go through schooling at an accredited school recognized by the State of Illinois. The massage therapists also have to take State Boards in order to obtain their license from the State of Illinois. Ms. Stratton testified that some of the massage therapists she hires have experience working for prior employers and others have been through school and the licensure process with no experience.

Ms. Stratton testified Julia Vasquez was a massage therapist she hired in February, 2011. Ms. Vasquez began her training on March 1, 2011. Prior to working for Mario Tricoci, Ms. Stratton testified Julia Vasquez previously worked at Massage Envy. Ms. Stratton testified that all massage therapists go through a 4-week period of training where they practice modalities even if they previously worked for another employer. The training consists of practicing massages and learning techniques in a classroom setting. The massage therapists also practice at their individual locations performing different massages on models who volunteer. Ms. Stratton testified that the models are usually co-employees who volunteer for massages through a sign-up sheet, which is located in the employee areas. She noted that she can recall approximately two occasions where someone outside of Mario Tricoci participated in the training sessions. She indicated that usually there is no problem finding models to receive the massages, but on some occasions, there are no volunteers if the salon is very busy. If the massage therapist is unable to complete a massage, Ms. Stratton testified they will reschedule or have the person complete the massage on another date. Ms. Stratton testified they do not force employees to be a massage model.

When asked whether she is aware of a situation where a massage therapist refused to stop when a model or customer asked them to do so, Ms. Stratton noted that she has not experienced that situation ever. She noted that, depending upon the circumstances, a massage therapist who refused to stop during a massage when asked to do so, might be subject to discipline, but she has not experienced this situation. Ms. Stratton testified that the purpose of having models for massages is to have the massage therapist receive feedback on their techniques. She was not aware whether Ms. Magistro signed a sign-up sheet the day she had the massage. Ms. Stratton testified that Ms. Magistro would not have been forced to participate in the massage.

When presented with Respondent's Exhibit 4, Ms. Stratton testified this is the massage evaluation completed by Ms. Magistro following her massage with Julia

Vasquez on March 18, 2011. She previously reviewed this document after the massage and there was absolutely nothing that caused any concern. Ms. Stratton testified that there was no statement on this evaluation by Ms. Magistro indicating she was injured during this massage and she rated Ms. Vasquez as "good" in all areas. Ms. Stratton testified that Ms. Magistro suggested some areas of improvement for Ms. Vasquez as she did not work on both sides of her low back equally and she also did not give a very strong foot massage. However, Ms. Magistro did not state on this evaluation that she asked Ms. Vasquez to stop the massage or that she was injured during the massage.

Ms. Stratton testified that Julia Vasquez no longer works for Mario Tricoci. She stated she was not fired, but she left her employment to go back to school. She was not sure if Julia still resided in Illinois.

Respondent's Exhibit 4-Evaluation Sheet for Massage Trainee:

Ms. Magistro completed an "Evaluation Sheet for Massage Trainee" on March 18, 2011. (RX 4). According to the cover page, the massage tech, Julia, noted tension in Ms. Magistro's lower back. Ms. Magistro's goal was to relax her lower back. The massage occurred from 11:00 a.m. to 12:30 p.m. Ms. Magistro documented that the technician asked her medical questions, including questions about her injuries and surgeries, but she did not ask her about skin allergies or medication. Ms. Magistro admitted the technician asked her about or addressed her trouble spots when working in the concerned areas such as asking about her pain level or soreness. Ms. Magistro commented that the technician could have consistently worked the same amount of time for the left and right sides as her low right back was her trouble area and the technician worked more on her left. She noted the technician worked more on her right leg then her left leg. Her foot massage also needed work. When asked to rate the technician, Ms. Magistro rated her as a "good" which was the middle category, with one category listed as higher, "expert", and one lower category called "average." There was a space for needs improvement and Ms. Magistro only indicated the foot massage technique needed improvement.

Medical Treatment prior to March 18, 2011:

The medical records document Ms. Magistro's treatment prior to March 18, 2011 as well as after that date. On July 20, 2000, Ms. Magistro presented to Dr. Joseph Lagattuta with complaints of nausea and vomiting. (PX 2 at 11). She saw Dr. Andrew Schubkegal on July 26, 2002 with a three-year history of persistent lightheaded feeling with nausea. (PX 2 at 17). On September 18, 2006, Ms. Magistro presented to Elmhurst Hospital for back pain, vomiting, diarrhea, a history of depression and diabetes. (PX 1). Her back pain was located in her right low back. (PX 1).

Dr. Linchangco evaluated her on October 4, 2006. (PX 2 at 125). She had complaints of nausea and low back pain and Dr. Linchangco completed MetLife Disability paperwork for her. (PX 2 at 104-106).

On October 30, 2006, Ms. Magistro presented to Dr. Frank at the Chicago Institute of Neurosurgery and Neuroresearch with complaints of sharp pain in her back that started in September, 2006. (PX 2 at 23-24). The pain radiated down her right buttock as well as her right leg, anterior and posterior thigh, down to her knee, and occasionally past the knee to her ankle. On exam, she exhibited tenderness of the right low back at L4-5. Sensation was decreased to light touch on the right at L2, L3, L4, L5 and S1. Dr. Frank reviewed a CT scan which appeared unremarkable except for a mild disc bulge at L3-4 and osteophytes at that level. He opined she exhibited signs and symptoms of disc herniation at L3-4 and possibly L2-3. He recommended MRI studies of her lumbar spine. (PX 2 at 23-24).

On November 6, 2006, Ms. Magistro underwent lumbar MRI studies at Elmhurst Memorial Hospital. (PX 1). The results revealed a small right lateral disc protrusion at L2-L3, minimum bulging of the L3-4 disc, and disc degeneration at L4-5 with small central/right paracentral disc protrusion. Dr. Frank reevaluated her on December 13, 2006. (PX 2 at 25). She did not report any relief with the right L2 epidural steroid injection. Her exam was unchanged and Dr. Frank recommended an EMG/NCS studies with lab work.

On March 28, 2007, she underwent EMG/NCS studies of her bilateral lower extremities (PX 2 at 179-180). The results were normal and Dr. Frank discussed that she may have musculoskeletal anomalies of the pelvic floor as that can cause bilateral radiating leg pain. He recommended she attend physical therapy with a pelvic floor physical therapist and follow up in four weeks. (PX 2 at 179-180). Dr. Frank noted she had improved leg discomfort at the visit of May 2, 2007, following three sessions of pelvic floor physical therapy. He instructed her to take Flexeril, as well as Vicodin and Advil occasionally. (PX 2 at 27). As of July 10, 2007, Ms. Magistro reported her symptoms were 60 to 70% improved. Her therapist recommended four additional weeks of therapy once or twice per week to strengthen her core. Dr. Frank agreed and instructed her to follow up as needed. (PX 2 at 28).

On February 14, 2011, Ms. Magistro presented to Elmhurst Memorial Hospital with complaints of diarrhea times four days, low back pain, and abdominal pain. She passed out onto the carpet, stood up, and passed out again. (PX 1). She had been off work three days due to chills, fever, and back pain. Her pain was a five on a scale of ten in her low back, starting in her lower abdomen and radiating bilaterally. She was discharged from the hospital with a recommendation to follow up with Dr. Linchangco.

Dr. Linchangco examined her on February 17, 2011. (PX 2 at 203). She reported low back pain with the onset eight days earlier. The severity level was mild to moderate. Her pain was persistent and radiated to her right calf. She denied any injury. Her symptoms were aggravated by bending and standing. She also had diarrhea with fever which had resolved five days ago. Upon examination, her straight leg raise was negative bilaterally. Dr. Linchangco instructed her to use a heating pad for her low back pain and take Flexeril for ten days. He instructed her to return if her back pain persisted or worsened. He authorized her off work for three days and stated that she could return to work on February 21, 2011.

Medical Treatment after March 18, 2011:

On March 18, 2011, Ms. Magistro presented to Elmhurst Memorial Hospital with complaints of low back pain, abdominal pain, and bilateral leg pain. (PX 1). The records mention that she was having a therapeutic massage at work and started to have pain, chills, and vomiting within an hour. Upon examination, she exhibited full range of motion, her sensation was intact, her strength was strong and she exhibited a steady gait. (PX 1). She experienced several hours of nausea and vomiting associated with crampy abdominal pain. She reported that she felt nauseous and her symptoms started during a therapeutic massage at work earlier that day. She had chills, but denied any fever. Ms. Magistro stated there a lot of people sick at work at the time and she currently had her period. Her past medical history was significant for ovarian cysts and fibroids. After an exam, the doctor planned to rule out pancreatitis, viral gastroenteritis, and appendicitis. The records reflect that Ms. Magistro was very tearful and dramatic throughout her emergency room evaluation. When asked whether she was crying due to pain, she stated she was upset about the situation as her symptoms are due to her back pain and her bulging disc and in the past she has had workups for the same problem (vomiting) which she states is from her nerve damage in her back. She requested time off work, asked for narcotics, and planned to follow up with her doctor. She was referred to Dr. Linchangco and given prescriptions for Vicodin and Zofran. She was authorized off work for three days.

Dr. Linchangco evaluated her on March 21, 2011. (PX 2 at 208). She stated she was in the emergency room over the weekend after having vomiting and back pain. She reported she was used a model for a therapeutic massage and had 120 minutes of it. The massage therapist did a lot of stretching as well as a twisting maneuver of her back. She started to have low back pain and sharp pain on her thighs as well as nausea and vomiting that persisted for two hours. Her vomiting resolved and now she had low back pain. Vicodin helped. Upon examination, she exhibited no sensory loss, no motor weakness, preserved deep tendon reflexes, and a negative straight leg raise bilaterally. Dr. Linchangco prescribed Flexeril and referred her to Dr. Frank who treated her low back pain five years ago. (PX 2 at 209). Dr. Linchangco authorized her off work back to

March 19, 2011 due to low back pain. He noted she should return to work on March 28, 2011. (PX 2 at 210).

On March 30, 2011, Dr. Lawrence Frank evaluated Ms. Magistro. (PX 2 at 214). He reported that he saw her five years ago for back pain. She reported low back pain as well as a significant complaint of abdominal pain and anterior thigh pain which started in mid-February when she passed out and was taken to the emergency room. She stated that she improved and underwent a massage. In the middle of the massage, she reported cold sweats, abdominal pain and low back pain and went to the emergency room for further workup. When asked about her symptoms, she pointed to her abdominal pain and thigh pain with some right-sided low back pain. She reported frequency of bowel and bladder, but no incontinence. Her anterior thigh pain did not radiate below the knees and she denied any posterior thigh pain. Her past surgical history was significant for ovarian cyst and fibroid tumor removal in 1990, gallbladder removal in 2003, carpal tunnel surgeries, and multiple episodes of hospitalizations for dehydration and low back pain. Upon examination, Dr. Frank noted excellent lumbar range of motion in all directions, pain free and full. She was neurologically normal in her lower extremities. She reported tenderness to palpation over some of her right lumbar paraspinal muscles with some lower abdominal tenderness as well. Dr. Frank diagnosed her with mild low back pain, abdominal and pelvic pain, status-post multiple surgeries with urinary complaints. He thought her major problem was intra-pelvic since she has been assessed thoroughly and found to have no significant pathology. He recommended physical therapy focusing on pelvic floor musculature problems. He prescribed Prednisone and Mobic as well as Flexeril. He referred her for x-rays of her low back and instructed her to follow up in two to three weeks. (PX 2 at 215).

On March 30, 2011, Ms. Magistro underwent x-rays of her low back at Elmhurst Memorial Hospital. (PX 1). In the section marked "Indications" the notes reflect "right side lower back pain x month./Fell on back in November, 2010." The results revealed minimal narrowing at L4-5 and L5-S1.

On April 4, 2011, Ms. Magistro presented to Elmhurst Memorial Hospital for outpatient pelvic floor evaluation. (PX 1). The intake form reflects she had low back pain, bilateral leg pain, and abdominal pain which started on February 12, 2011 and worsened. She also had dizziness, nausea, and fainting which started on February 12, 2011 and worsened.

Dr. Frank reevaluated Ms. Magistro on April 13, 2011. (PX 10 at 12). She stated that she was 60 to 70% worse than last time. She now reported right-sided leg pain and back pain. She stated she woke up with this pain a few days ago. She had four sessions of therapy and stated it was not effective although much of her abdominal and thigh pain was gone. Prednisone did not help and she did not understand his instructions to

take two Flexeril per night. X-rays of her back revealed minimal degenerative changes of the discs. Lumbar range of motion remained full and pain free in all directions. Straight leg raising was negative. Dr. Frank diagnosed her with low back and right leg pain, possibly radicular. He referred her for MRI studies of her lumbar spine. If there was no pathology, he could not justify any further time off. Dr. Frank noted she was very tearful and possibly had a strong component of depression. He planned to refer her back to Dr. Linchangco if that was the case. (PX 2 at 216).

On April 19, 2011, Ms. Magistro underwent MRI studies at Elmhurst Memorial Hospital. (PX 1). The radiologist noted a moderate sized central disc herniation with slight caudal extrusion at L4-5, which appeared new from her 2006 comparison MRI. However, despite the size of the herniated disc, there was no significant central narrowing. A right lateral annular fissure was noted at L2-3 with minimal foraminal narrowing at L3-4 bilaterally unchanged from 2006. A 1.6 centimeter uterine fibroid was present. She also had bilateral L5 pars intra-articularis sclerosis compatible with healed bilateral pars defects.

Dr. Frank reevaluated her on April 27, 2011. (PX 2 at 15). He reviewed the MRI studies of her lumbar spine, which showed a right greater than left, moderately large L4-5 disc herniation with no spinal stenosis. She stated she was worse than before. Dr. Frank noted that her pain diagram showed her pain as seven out of ten, which was essentially what she said two weeks earlier. There was less radiation of pain into the right leg, only into the posterior aspect of her thigh. Her physical exam was unchanged. Dr. Frank noted she had possible right lumbar radiculopathy due to a herniated disc. He recommended an epidural injection with a right L5 transforaminal approach. She requested to be off work and Dr. Frank authorized her off work for two weeks. He prescribed Flexeril and Mobic. Dr. Frank performed a right L5 transforaminal epidural steroid injection on April 28, 2011. (PX 10 at 18).

Dr. Frank reevaluated her on May 12, 2011. (PX 10 at 20). She denied any improvement with the injection. Dr. Frank discussed her pain with the physical therapist who stated she was unable to alleviate or exacerbate Ms. Magistro's pain with any maneuvers. Her pain was in the right lower back down the anterior right thigh. Dr. Frank commented that her leg pain was continually changing every time he saw her. Upon examination, she exhibited good reflexes, good strength and good sensation of the lower extremities. Straight leg raising was negative and her lumbar range of motion was full. Dr. Frank diagnosed her with low back pain of elusive character, presence of a lumbar herniated disc of unclear clinical significance, and ever-changing leg pain which was inexplicable. Dr. Frank commented that she did not have any Waddell signs, but he could not explain the leg pain based on her MRI as the pain has been very inconsistent. He recommended a right lower extremity EMG to determine the presence or absence of any significant nerve injury. Ms. Magistro stated she cannot work and he

authorized her off work until her EMG appointment. He replaced her Flexeril with Doxepin and referred her to Dr. Don Lussky for a second opinion.

Ms. Magistro presented for EMG studies on May 20, 2011. (PX 10 at 23). The results were normal. Dr. Frank referred her to Dr. Lussky and noted that if he cannot come up with a good plan for her, Dr. Frank would consider psychological aspects and depression as she appeared profoundly depressed every time she presented to him. (PX 10 at 23).

On June 1, 2011, Dr. Donald Lussky evaluated Ms. Magistro. (PX 3 at 4). She reported lumbar spine pain, bilateral anterior thigh pain, and occasional medial calf pain after a massage at work on March 16. Five years earlier, she had a herniated disc evaluated at the hospital. Upon examination, she reported diffuse subjective decreased light touch in the right leg that did not correlate to a specific nerve root distribution. Straight leg raising and reverse straight leg raising signs were negative. Lumbosacral spine range of motion did not precipitate lower extremity pain. Dr. Lussky referred her to a physical therapist at the Center for Health for possible pelvic traction, which had not been performed. He diagnosed her with right L4 radiculopathy without focal neurological deficit. He prescribed Cymbalta and instructed her to return after she attended therapy.

On June 10, 2011, Ms. Magistro presented to NorthShore University Health System for an initial physical therapy evaluation. (PX 3 at 17). Her pain was constant, ranging from five out of ten to ten out of ten at her right greater than left low back and anterior thighs. She also reported occasional left groin pain. On examination, she self-reported pain at the left lateral thigh while left leg straight leg raise testing. At 25 degrees on the right, she self-reported a stretch behind her knee, with no lingering pain after testing. The therapist noted a positive right march test for pubic or iliosacral dysfunction. The physical therapy progress report on July 5, 2011 indicated that Ms. Magistro had no improvement and her pain was six to seven out of ten.

Dr. Lussky reevaluated her on July 27, 2011. (PX 3 at 7-8). At that point, he referred her to Dr. Kenneth Heiferman for a neurosurgical evaluation. She failed therapy, epidural steroid injections, and medication trials. Her present exam revealed normal strength in the lower extremities. Dr. Lussky did not have anything further to offer her at that point.

Ms. Magistro presented to Chicago Pain and Orthopedic Institute on August 2, 2011. She reported an injury on March 18, 2011 when asked by her employer to be a massage "model." She stated she had an episode of low back pain and leg pain five years earlier but this felt different. (PX 5 at 13). She had low back pain with right greater than left anterior thigh pain and tingling. Her pain sometimes radiated down her right leg to her big toe. Her pain was a 7-8 out of 10. Her lumbar range of motion

was limited for the first time on exam since her alleged accident. Dr. Morgan recommended bilateral L4-5 and L5-S1 epidural injections.

She returned to Dr. Morgan on August 30, 2011. (PX 5 at 16). She denied improvement with the epidural injections she had on August 23, 2011. She reported no benefit with the use of Nucynta and was on her third day of a Medrol Dosepak. She had not made an appointment to see a spine surgeon. Her exam was unchanged. Dr. Morgan recommended she remain off work and try Flexeril. He asked to review the EMG studies from Dr. Frank.

On September 13, 2011, she returned to Dr. Morgan indicating that she recently had a clinical stroke with numbness in her left face, arm, leg, and clumsiness in her left arm. She also had an incidental finding of a thyroid lesion and had been referred to an endocrinologist. She had not seen a spine surgeon. Dr. Morgan referred her to a spine surgeon and recommended that she continue use of her medications.

On November 17, 2011, Ms. Magistro presented to Dr. George DePhillips. (PX at 5). She reported a work-related injury on March 18, 2011. She received a massage from the therapist who was in training. During the massage, she felt acute pain in her low back that persisted and worsened. Dr. DePhillips did not have her MRI scan and noted that if there was evidence of annular tearing or exacerbation of degenerative disc disease, he would consider discography assuming her pain was intolerable and she was disabled. (PX6 at 5). She did not exhibit any weakness or sensory loss and there is no mention about her range of motion.

Dr. DePhillips reviewed her medical records and reexamined her on December 15, 2011. (PX 6 at 6). The MRI studies showed disc dehydration with a midline disc protrusion or herniation at L4-5 as well as a high intensity zone in the posterior angulus consistent with an annular tear. Her EMG studies were negative for radiculopathy. He referred her to Dr. Jain for lumbar discogram at L4-5 with a control level. (PX6 at 6).

On January 10, 2012, Dr. Jain performed a discography at L2-3, L3-4, L4-5 and L5-S1. He stated she had discogenic pain at L4-5 with controlled discs at L2-3, L3-4, L4-5 and L5-1. (PX5 at 106). She returned to Dr. Morgan on February 7, 2012. He noted Dr. DePhillips had recommended surgery.

On March 21, 2012, Ms. Magistro underwent a posterior lumbar interbody fusion at L4-5 and was admitted to Morris Hospital. (PX 9 at 82). During surgery, Dr. DePhillips removed one-half of the L5 spinous process and anterior one-half of the L4 spinous process. He placed PEEK cages and performed foraminotomies along the L4 nerve root and decompressed the L5 nerve roots bilaterally. Ms. Magistro returned to Morris Hospital on March 28, 2012 with complaints of nausea and vomiting. She was instructed to follow-up with Dr. DePhillips.

On April 19, 2012, Dr. DePhillips evaluated her. Since her last visit, she developed pain in the right lateral thigh and right buttock with hypersensitivity to touch. (PX 6 at 10). Dr. DePhillips suspected L4 neuropraxia from intraoperative nerve root retraction. She declined Neurontin. He refilled Percocet and instructed her to follow-up in one month. (PX6 at 10). She returned on May 17, 2012 and Dr. DePhillips planned to start physical therapy in one month. She still had low back pain and discomfort which was gradually improving slowly. (PX6 at 11). On June 21, 2012, her radicular symptoms had resolved. He recommended therapy three times a week for four weeks.

Ms. Magistro presented for an initial physical therapy evaluation at ATI Physical Therapy on June 26, 2012. (PX7 at 22) She stated the onset of her pain occurred on March 18, 2011 and she had symptoms previously. She denied numbness and tingling down both legs since having surgery. She still had weakness in her back and legs with activities of daily living. On July 19, 2012, Ms. Magistro was discharged from therapy after attending six sessions. She had increased symptoms, swelling and numbness in bilateral lower extremities. Physical therapy was placed on hold for one month. (PX7) Dr. DePhillips recommended she undergo a CT scan at a visit on July 19, 2012.

On July 14, 2012, Ms. Magistro presented to Elmhurst Memorial Hospital complaining of low back pain. MRI studies revealed postoperative fluid collection, a resolved herniated disc at L4-5, and vague lucencies in the vertebrae inferiorly. There was some evidence of discitis or osteomyelitis. On July 19, 2012, Dr. DePhillips noted the MRI scan revealed irregularities and lucencies but he was not concerned. He ordered blood work and recommended a CT scan.

On July 25, 2012, Ms. Magistro presented at Elmhurst Memorial Hospital for a CT scan. There was evidence of mild disc degeneration with a small right lateral ossific complex at L2-3 with minimal disc degeneration at L1-2. Dr. Morgan saw her at Chicago Pain & Orthopedics on August 7, 2012. Her blood test reportedly confirmed an infection. Dr. DePhillips reviewed her CT scan on August 23, 2012 which showed interbody bone growth, but no consolidation at the end plates. If the fusion failed to solidify, she may require additional surgery in 3-6 months.

Dr. Paul Marsiglia examined her at Chicago Pain & Orthopedic Institute on October 1, 2012. She had pain in her low back and right leg. Her pain was 6 out of 10. She related a history of immediate vomiting, dizziness, and extreme pain during an 80-minute therapeutic massage. At a follow-up visit on October 26, 2012, Dr. DePhillips noted that she was clinically well improved since surgery with her pain a 5 to 6 on a scale of 10.

Ms. Magistro was sent to Dr. Kern Singh for a Section 12 examination on November 19, 2012. She stated that she volunteered to be recipient of a therapeutic

massage on March 18, 2011 and had remained off work since that time due to back pain. Dr. Singh noted 5/5 positive Waddell's signs with extreme symptom magnification including the inability to forward flex, extend, or axial rotate with severe facial grimacing and discomfort, episodic crying, and tearfulness. Dr. Singh reviewed her MRI films from 2006, 2011, and 2012. He diagnosed her with a preexisting lumbar spondylosis, a lumbar muscular strain not causally related to the work injury, and he opined she could work full duty. He noted there was no significant change in MRI studies from 2006 to 2011 and there was no EMG evidence of radiculopathy. Dr. Singh also commented that she had back pain in 2011 right before her claimed work accident. Dr. Singh stated that she was not a surgical fusion candidate and a CT scan was needed to rule out a true lumbar pseudoarthrosis. He recommended a FCE unrelated to the work injury to determine her restrictions.

On November 25, 2012, Ms. Magistro presented to Elmhurst Memorial Hospital due to loss of consciousness. She was dizzy the past few days, took a shower, passed out and fell. She underwent lumbar x-rays to check her hardware. On December 6, 2012, Ms. Magistro stated her pain increased over the past week and she fainted twice, resulting in two falls. She was admitted into Elmhurst for three days with a negative workup and seen in the emergency room at GlenOaks Hospital following the second fall. On December 26, 2012, she returned to Dr. Lussky. He diagnosed her with radiculopathy of the lumbosacral region and thoracic region as well as syncope and collapse.

As of January 3, 2013, Ms. Magistro presented to Chicago Pain and Orthopedic Institute with severe right-sided low back pain with paresthesias in the right lower thigh. Her straight leg raising was negative bilaterally and she had limited range of motion of her spine. She was authorized off of work.

Ms. Magistro underwent CT studies of her lumbar spine on January 23, 2013 at Elmhurst Memorial Hospital. There is a possible focal herniation at L5-S1 with evidence of a disc bulge at L3-4, mild degenerative changes at L1-2 and L2-3.

Dr. DePhillips reevaluated her on March 27, 2013. He reviewed her CT scan which showed no complete consolidation but no lucency around the pedicle screws to suggest loosening. He recommended potential trial of the spinal cord stimulator and x-rays. If there was three degrees of movement on dynamic x-rays, he would proceed with a revision fusion rather than spinal cord stimulator.

Ms. Magistro continued to follow-up at Chicago Pain & Orthopedic Institute. There was a recommendation for a trial spinal cord stimulator. (PX5) As of June 20, 2013, she walked with a limp favoring her left side and her pain was 9/10.

On December 5, 2013, Ms. Magistro underwent a FCE at ATI Physical Therapy. The FCE revealed she was capable of working in the light to medium physical demand level with occasional lifting of 36.8 pounds floor to chair, 52.8 pounds chair to desk, and 32.4 pounds above shoulders. Dictionary of Occupational Titles revealed hairstylists work at the light-to-medium physical demand level and the FCE was a valid representation of her capabilities.

She saw Dr. Vargas at Chicago Pain and Orthopedic Institute on December 19, 2013 who recommended spinal cord stimulator and noted she could return to work with restrictions pursuant to the FCE.

She continued seeking treatment at Chicago Pain & Orthopedic with Dr. Patel, Dr. Vargas, and Dr. Saldanha. She underwent multiple epidural steroid injections and continued taking medications. As of January 5, 2016, she presented at Chicago Pain & Orthopedic Institute she was recently diagnosed with a cardiac arrhythmia with implanted monitor. She was weaned off opioid medications.

Ms. Magistro underwent another CT scan of her lumbar spine on June 14, 2016. The radiologist described a L4-5 central herniation, a L3-4 disc bulge, as well as an L2-3 disc bulge. On June 22, 2016, Dr. Sharma reviewed her CT scan and pronounced her at maximum medical improvement. He instructed her to continue medication management with her primary care physician and follow-up as needed.

On June 12, 2017, Dr. Kern Singh authored an addendum report following his review of updated medical records detailing her ongoing treatment. Upon review of the updated records, Dr. Singh noted that her fusion was solid and she reached maximum medical improvement six months post-operative. He opined that her symptoms and surgery were still not related to the original alleged work injury.

Dr. George DePhillips Deposition Testimony:

On February 19, 2016, the parties took Dr. George DePhillips' deposition. (PX12) Dr. DePhillips admitted that Ms. Magistro's neurological examination was unremarkable at her first visit. (PX12 at 12) Dr. DePhillips was unable to state exactly how she was injured during the massage, but he said she told him she felt pain. Ultimately Dr. DePhillips concluded that based on the patient's history and her symptoms, it was his opinion that the massage contributed to her symptoms.

The parties proceeded with Dr. Singh's evidence deposition on June 29, 2017. (RX1) Dr. Singh testified that he is a Board Certified orthopedic surgeon and about 25% of his practice involves treating patients with workers' compensation injuries. He also performs Section 12 examinations. At the time of his evaluation on November 19, 2012, Ms. Magistro claimed that she had pain which she rated as an eight out of ten. Upon

examination, she exhibited full strength in her legs with normal reflexes. She had no evidence of sensory loss, but she exhibited severe histrionic episodes including severe facial grimacing, episodic crying and tearfulness. Dr. Singh testified that all five of her Waddell's signs were positive and he concluded Ms. Magistro perceives her pain to be greater than that which can be objectified based on her physical exam. Dr. Singh did not find any structural change between the 2006 pre-injury MRI studies and the post-injury MRI studies in April of 2011. He also noted that her EMG studies prior to the alleged accident and after the alleged accident were both normal. He concluded the abdominal pain she felt following her massage would not be caused by low back pathology. Dr. Singh also testified that a discogram would not be a good test for Ms. Magistro as she is an individual who exhibited nonanatomic pain complaints and discograms have a high rate of false positivity. (RX1 at 23). Dr. Singh did not find that her current condition was causally related to her alleged massage. When asked about her evaluation, Dr. Singh noted that during his exam of Ms. Magistro, she was able to rise from sitting to standing, but she was unable to perform the maneuver when he asked her to do it. (RX1 at 48-49). Dr. Singh also testified that she had lumbar axial pain complaints that were not discogenic in nature. When questioned about why she was not a candidate for surgery, Dr. Singh stated she did not have a pain complaint which correlated to an anatomic nerve distribution or any motor reflex sensory loss in an anatomic distribution.

FINDINGS/ANALYSIS

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

Petitioner, Ms. Magistro, alleges that she sustained an injury to her low back on March 18, 2011 as a result of undergoing a massage at Mario Tricoci. While employed as a hair stylist for Mario Tricoci, she participated as a model for a massage therapist in training and underwent a therapeutic massage on that date. Petitioner claims that she sustained an injury due to the massage and that her injury arose out of and occurred in the course of her employment on March 18, 2011.

The phrase "in the course of" one's employment refers to the time, place, and circumstances surrounding the injury. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Injuries sustained by a claimant on an employer's premises, or at a place where claimant might reasonably have been while performing his duties, and while claimant is at work, are generally deemed to have occurred in the course of the employment. *Metro. Water Reclamation Dist. of Greater Chi. v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-1014 (2011). There was no dispute that the massage occurred while Ms. Magistro was at her place of employment. The parties also agreed she received her normal hourly pay on March 18, 2011. Ms. Magistro had a gap between her scheduled clients, so she had some free time when she had the massage. Upon review of these

facts, the Arbitrator finds that Ms. Magistro apparently was in the course of her employment at the time she allegedly was injured on March 18, 2011. However, Ms. Magistro still must demonstrate that her alleged injuries arose out of her employment.

In order for an injury to "arise out of" one's employment, it must have its origin in some risk connected with, or incidental to, the employment. *Caterpillar Tractor Company v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Fisher Body Division, General Motors Corp. v. Industrial Comm'n*, 40 Ill.2d 514, 516 (1968). There are three types of risks: employment risks, personal risks, and neutral risks. *Illinois Consolidated Telephone Company v. Industrial Commission*, 314 Ill. App. 3d 347, 352 (2000). Employment risks are risks which arise from acts a Claimant is instructed to perform by his employer, acts the Claimant had a common law or statutory duty to perform, or acts which the Claimant might reasonably be expected to perform incidental to his assigned duties. *Caterpillar*, 129 Ill.2d at 58 (1989). Injuries which result from personal risks usually occur due to medical conditions that are purely personal to the employee. Accidental injuries resulting from personal risks are typically not compensable. *Illinois Consolidated Telephone Company v. Industrial Commission*, 314 Ill. App. 3d at 352. Neutral risks result from actions that are not necessarily employment-related nor are the risks personal in nature. Examples of neutral risks include acts that are performed as part of our daily living activities, such as bending or walking, or risks arising from actions to which the general public is equally exposed, regardless of employment, such as bad weather or random acts of violence. Accidental injuries resulting from neutral risks may be deemed compensable only if the employment duties increased the risk of injury to the employee beyond that to which the general public is exposed.

The Arbitrator finds that Ms. Magistro's testimony that injury occurred due to the massage is not credible. The Arbitrator finds her testimony lacking for multiple reasons. The Arbitrator finds that she was not exposed to a risk incidental to her employment.

- **Petitioner was suffering for a multitude of severe medical problems, including back pain that were unrelated to her work and that were pre-existing.**

  Just prior to alleges work accident, the Petitioner was already suffering from non-work related back pain along with many other medical ailments. Specifically, she admitted she had abdominal pain, back pain, nausea, and a fever for which she sought treatment at Elmhurst Hospital Emergency room on February 14, 2011. Her husband took her to the

emergency room on that date. On February 17, 2011, Ms. Magistro testified she followed up with her primary care doctor, Dr. Emmanuel Linchangco, at Elmhurst Primary Care Associates due to diarrhea and mild to moderate back pain. A more detailed look at her medical history shows the Petitioner to be suffering from a myriad of medical problems:

July 20, 2000-Dr. Joseph Lagattuta- complaints of nausea and vomiting. (PX 2 at 11).
July 26, 2002- Dr. Andrew Schubkegal- three-year history of persistent lightheaded feeling with nausea. (PX 2 at 17).
September 18, 2006-Elmhurst - back pain, vomiting, diarrhea, a history of depression and diabetes. (PX 1). Her back pain was located in her right low back. (PX 1).
October 4, 2006 - Dr. Linchangco – nausea, low back pain, MetLife Disability paperwork for her. (PX 2 at 125). (PX 2 at 104-106).
October 30, 2006- Dr. Frank at the Chicago Institute of Neurosurgery and Neuroresearch- sharp pain in her back that started in September, 2006. (PX 2 at 23-24). Radiated pain down her right buttock as well as her right leg, anterior and posterior thigh, down to her knee, and occasionally past the knee to her ankle. Tenderness of the right low back at L4-5, Sensation was decreased to light touch on the right at L2, L3, L4, L5 and S1. Unremarkable CT scan except for a mild disc bulge at L3-4 and osteophytes at that level. Noted signs and symptoms of disc herniation at L3-4 and possibly L2-3. He recommended MRI studies of her lumbar spine. (PX 2 at 23-24).
November 6, 2006- Lumbar MRI studies at Elmhurst Memorial Hospital. (PX 1). Small right lateral disc protrusion at L2-L3, minimum bulging of the L3-4 disc, and disc degeneration at L4-5 with small central/right paracentral disc protrusion.
March 28, 2007, she underwent EMG/NCS studies of her bilateral lower extremities (PX 2 at 179-180). Physical therapy with a pelvic floor physical therapist and follow up in four weeks. (PX 2 at 179-180
February 14, 2011, Elmhurst Memorial Hospital-complaints of diarrhea times four days, low back pain, and abdominal pain. She passed out onto the carpet, stood up, and passed out again. (PX 1). She had been off work three days due to chills, fever, and back pain. Her pain was a five on a scale of ten in her low back, starting in her lower abdomen and radiating bilaterally.
February 17, 2011- Dr. Linchangco (PX 2 at 203). Low back pain with the onset eight days earlier. The severity level was mild to moderate, diarrhea, fever.

- **Petitioner testimony that the massage aggravated her existing back issue is not supported by the contemporaneous facts and evidence:**

  Petitioner claims that the massage aggravated her back injury that she told the therapist to stop but the records created in the Petitioner's own words do not support her testimony. In fact, the evidence shows that Petitioner signed up for a long massage (60-90 minutes) and completed an evaluation where she makes no mention that the massage injured or was painful to her back. She also failed to note that she had told the therapist to stop the massage mid-stream but that the therapist had refused Petitioner claims she was so nauseous during the massage and she experienced extreme pain, so she asked the massage therapist to stop. Her own written record shows the opposite. In fact, she rated the massage as "good,"and fact noted that the therapist failed to work on her back. Specifically, Petitioner also wrote in her own words that the massage therapist avoided her right low back, which was her "trouble spot," suggesting there was an area of her back that already bothered her and the therapist did not concentrate enough on that area.

  After the massage, Petitioner starts her work duties and is doing a Keratin blowout on a client before she collapsed. Petitioner's explanation of why she failed to document the injury from the massage weakens her case.

  In light of all of these discrepancies, the contemporaneous evidence does not support that the massage was the cause of Petitioner's subsequent illness.

Additionally, Petitioner's massage was voluntary and not incidental to her employment.

Ms. Magistro claims she was exposed to a risk incidental to her employment as her general manager, Michelle, essentially forced her to participate in the massage on March 18, 2011. The evidence shows that the massage trainees at Respondent's business gave free massages to employee's who signed up. Petitioner acknowledges that she signed up for the massage but claims that her manager required her to do so. On cross-examination, Petitioner acknowledged that there would not have been any consequences if she had refused to participate in the massage. Ms. Magistro admitted she had been a model in the past for hair color and she agreed it was on a voluntary basis. She stated that the process was usually voluntary, but in this situation, she did not volunteer.

Cassandra Stratton, the massage director at Mario Tricoci, testified that participation as a model for the massage trainee program has always been completely voluntary. She stated that no employee is forced to participate as a model and Ms.

Magistro was not forced to be a model for Ms. Vasquez. Ms. Stratton said the massage would have been rescheduled if no volunteers were available for Ms. Vasquez and it would not have been a big deal. Ms. Stratton confirmed this has happened in the past when the salon is busy and the massage is rescheduled. The model program allows the trainees to practice their techniques in the location they will work so they are comfortable with the rooms. The trainees also develop relationships with their co-workers by performing the service for the co-worker for free.

Ms. Stratton also reviewed the massage evaluation completed by Ms. Magistro. She testified she did not see anything out of the ordinary noted on the evaluation. Ms. Stratton agreed Ms. Magistro never wrote that Julia refused to stop the massage when asked, and there was no indication Ms. Magistro was injured according to the form she completed.

Ms. Stratton's credible evidence shows that the massage was voluntary and not related to Ms. Magistro worked as a hairstylist on March 18, 2011. Therefore the Arbitrator finds Ms. Magistro failed to demonstrate that there was an employment related risk associated with the voluntary massage she chose to receive on March 18, 2011. The Arbitrator notes that there may have been an unrelated personal risk involved given Ms. Magistro's vomiting, nausea, and back pain on March 18, 2011, as the medical records reveal an extensive history of similar issues (i.e. she had vomiting, nausea, and back pain with no inciting events or accident just one month prior to her claimed work injury). Finally, the Arbitrator does not find that Ms. Magistro was exposed to a neutral risk to a greater degree than that to which the general public is exposed.

In light of the above, the Arbitrator finds that Ms. Magistro failed to prove that her alleged injury on March 18, 2011 arose out of her employment with Mario Tricoci.

In reaching this conclusion the Arbitrator further notes that the Petitioner, through her testimony, attempted to dilute or hide her prior health issues that are the likely cause of her illness on March 18, 2011. Specifically, on direct examination she stated that her back pain prior to March 18, 2011 was different than her March 18th pack pain. She also tried blamed the same on her menstrual cycle in February. First, she denied having leg pain before March 18, 2011. Hoverer, the records Dr. Linchangco's show otherwise.

The Arbitrator concludes that the above documented medical history clearly shows that Petitioner was in a bad state of health, unrelated to her employment. There is nothing in the entirety of the testimony, medical records or the mechanics of the massage that show that the massage was the cause of Petitioner's illness, back pain and subsequent fusion surgery.

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

The Arbitrator finds that timely notice of Petitioner's accident was given to Respondent.

Section 6(c) of the Act requires that notice of an accident shall be given to the employer as soon as possible, but not later than forty-five days after the accident. In this case, Petitioner testified she advised her manager, Michelle, that she was injured during her massage on the date of injury, March 18, 2011. This satisfies the notice requirement of Section 6(c). Although Petitioner's manager denies that Petitioner told her that her illness was caused by the massage, the Arbitrator finds that the Petitioner gave adequate notice.

Additionally, Respondent's counsel on cross-examination asked Petitioner about her conversation with the workers' compensation insurance adjuster, which occurred two or three weeks after the massage took place. This is further evidence that Respondent was fully aware that Petitioner claimed a work accident on March 18, 2011 as a result of her massage.

For these reasons, the Arbitrator finds that timely notice of Petitioner's accident was given to Respondent.

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

Ms. Magistro failed to prove that she sustained accidental injuries that arose out of her employment and her current condition of ill being is not causally related to her alleged accident on March 18, 2011. Even if she was able to show she sustained a compensable accident, the Arbitrator finds that Dr. Singh's opinions regarding causation are more persuasive than the opinions of Dr. DePhillips. Dr. Singh's opinions were based upon all of the evidence as he considered her prior medical records, MRI films, and he knew about her recent back complaints one month prior to the alleged injury. Just as her testimony at trial did not make sense, Dr. Singh noted that Ms. Magistro's subjective complaints did not make sense in light of his exam. Further, the initial doctors she saw in March, April, and June of 2011 (Dr. Linchangco, Dr. Frank, and Dr. Lussky) noted inconsistencies between her exam and her subjective complaints.

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?

As Ms. Magistro failed to prove she sustained accidental injuries which arose out of her employment on March 18, 2011, the Arbitrator finds that Respondent is not responsible for payment of any medical bills incurred by Ms. Magistro.

K. What temporary benefits are in dispute?

As Ms. Magistro failed to prove she sustained accidental injuries which arose out of her employment on March 18, 2011, the Arbitrator finds that she is not entitled to any temporary total disability benefits.

L. What is the nature and extent of the injury?

As Ms. Magistro failed to prove she sustained accidental injuries which arose out of her employment on March 18, 2011, the Arbitrator finds that she is not entitled to any permanent partial disability benefits.

ENTERED:

KSSteffen 3/2/18

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Behm,

Petitioner,

20IWCC0470

vs.

NO: 16 WC 030736

ADM,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 11, 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.

20IWCC0470

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 1 2020
O071420
MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BEHM, MICHAEL
Employee/Petitioner

Case# **16WC030736**

20IWCC0470

ADM
Employer/Respondent

On 2/11/2019, 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 2.44% 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:

0225 GOLDFINE & BOWLES PC
MATTHEW COMPTON
4242 N KNOXVILLE AVE
PEORIA, IL 61614

0264 HEYL ROYSTER VOELKER & ALLEN
JESSICA BELL
PO BOX 6199
PEORIA, IL 61601-6199

20IWCC0470

FINDINGS

On **9/9/2016**, 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 $**67,960.94**; the average weekly wage was $**1306.94**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0.0** for TTD, $**0.0** for TPD, $**0.0** for maintenance, and $**0.0** for other benefits, for a total credit of $**0.0**.

Respondent is entitled to a credit of $**0.0** under Section 8(j) of the Act.

ORDER

Because Petitioner failed to prove accident and causation for his current condition of ill-being, 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.

D. Glenn McEarth

Signature of Arbitrator

Feb. 6, 2019
Date

FEB 11 2019

20 IWCC0470

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Behm
Employee/Petitioner

v.

ADM
Employer/Respondent

Case # **16** WC **30736**

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 **McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **January 15, 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 **prospective medical**

Statement of Facts

Michael Behm ("Petitioner") filed an application for adjustment of claim alleging a work related injury of September 9, 2016. The case appeared before Arbitrator McCarthy for arbitration on January 15, 2019 in Peoria, Illinois. At the time of hearing, a Request for Hearing was submitted as Arbitrator's Exhibit 1. Arbitrator's Exhibit 1 indicates the issues in dispute were accident, notice, causal connection, medical bills, and prospective medical. The matter was brought for arbitration pursuant to Section 19(b) of the Illinois Workers' Compensation Act.

The parties stipulated that Respondent did provide group health coverage to the Petitioner and that some payments were made on behalf of Petitioner pursuant by that group health policy. The parties stipulated that they would resolve those credits outside of court if benefits were awarded at trial.

At the time of arbitration, Petitioner testified that he worked for Archer Daniels Midland ("ADM"/"Respondent") at their facility in Creve Coeur, Illinois. Petitioner testified he had been employed by ADM for approximately 24 years as a laborer. Prior to working at the Creve Coeur facility, Petitioner worked for ADM at their location in Peoria. He worked at the Creve Coeur facility for approximately 13-14 years. (Trial Transcript, pg. 27).

Petitioner testified his job duties consist primarily of loading barges and unloading rail cars. Petitioner provided further testimony regarding the tasks associated with each of those. Petitioner testified that a barge comes in to the dock and is secured to the dock with cables. Each barge is attached to the dock with two cables

and between two and three barges are loaded per day. Petitioner confirmed a total of between four and six cables are used in a given day. (Trial Transcript, pgs. 13-14, 29).

Once the barge is secured to the dock, a deckhand opens a hole on the barge. The grain spout is then swung around via controls and put in the hole that was opened so that product (grain) can filter down into the hole on the barge. (Trial Transcript, pgs. 13-14). Petitioner testified that all of the activities of loading a barge are done by a team of men and that he does not do all of those activities himself. Petitioner testified the tasks rotate with respect to what each employee/laborer does during any given shift. (Trial Transcript, pgs. 29-30).

Petitioner testified he controls the spout movements, either left or right, in or out, up or down. He testified that the way the spout is controlled varies between the two docks at the Creve Coeur facility. One dock has joysticks to control the spout (Rx. 2-6), and the other dock has cranks and a button. Petitioner testified it takes a "couple of seconds" to use the crank to move the spout. Petitioner testified he had to move the spout to fill the holes on the barge and that the barges had either 16 or 18 holes on them. Petitioner testified all 16 or 18 holes were not filled on each barge, but rather about half of them. (Trial Transcript, pgs. 15-17).

Petitioner testified that the activities of unloading a rail car and loading a barge are done concurrently. He further testified that he would switch between those tasks at any time during a day. (Trial Transcript, pg. 33).

Petitioner testified regarding the tasks associated with unloading a rail car. Petitioner testified that the rail cars are placed/directed "over the pit." A door opener is utilized to open the door of the railcar and a vibrator is attached to the door/hole ("hopper"). The vibrator is turned on, causing the product (grain) to empty from the railcar into the pit below. Petitioner testified that sometimes the vibrator does not adequately empty the railcar and a hammer is used to loosen the product. If the use of a hammer is insufficient, a backhoe is used from the top of the railcar to loosen the product so that it will empty into the pit below. (Trial Transcript, pgs. 17-19). The Petitioner testified that the act of unloading the railcar is also done by a team of employees, with everyone rotating the jobs they are doing. (Trial Transcript, pgs. 47-48).

Petitioner provided further detail regarding the steps involved with unloading a railcar. Regarding the first task of opening the door, the Petitioner testified that a tool is used to open the door. He estimated that the "force" used to utilize the door opener tool is similar to a clutch on a motorcycle. (Trial Transcript, pg. 19).

The second step is to attach a vibrator to the hopper. Petitioner testified Respondent's Exhibit 2-1 is a photo of the vibrator used during this process. Petitioner testified that the vibrator uses an air compressor to vibrate and attaches to a sleeve located at the bottom of the hopper on the railcar. Respondent's Exhibit 2-5 illustrated how the vibrator is attached to the hopper. Petitioner indicated the vibrator has a valve at the end of the hose, the part of the vibrator furthest away from where it attaches to the hopper. The petitioner testified the vibrator weighs about 30 pounds. (Trial Transcript, pgs. 33-34).

The Petitioner testified that, after the vibrator is attached to the hopper, the valve is turned at the end of the hose to turn the vibrator on. The Petitioner would stand by while the vibrator empties the railcar. The vibrator takes about eight – ten minutes to empty one hopper on a railcar. Petitioner testified that each railcar has four hoppers. (Trial Transcript, pgs. 19-21, 35-36).

Petitioner confirmed that the vibrator is not running when it is attached to the railcar. He further testified the he does not hold on to the vibrator while it is emptying the railcar. Petitioner confirmed that the vibrator is turned off before it is removed from the hopper and moved to the next hopper/railcar. Petitioner confirmed he uses no vibratory tools for any part of his job, other than the vibrator to empty the hopper. (Trial Transcript, pgs. 35-37).

Petitioner testified that, occasionally the vibrator is unable to empty all the grain and a sledgehammer is used. No testimony was provided regarding the size or weight of the sledgehammer used, or the duration of how long it would be used in any instance. No testimony was provided that the sledgehammer produced any vibration when it was used in any manner. Petitioner testified that the need for a sledgehammer varied from day to day and with every car. He was unable to provide any testimony regarding how often he used a sledgehammer

on any given railcar, on any given day, for any given period of time prior to his alleged accident date, or for the duration of his employment at ADM. (Trial Transcript, pgs. 21, 38-40).

Petitioner further testified that sometimes a "come-along" or pry bar is used to empty the hopper. No testimony was presented regarding the frequency with which either tool may be used, the size of the tool, the duration of the use of the tool, or the weight of the tool. (Trial Transcript, pg. 21).

Petitioner testified that a backhoe is sometimes used to loosen the product if the other tools are unsuccessful. No testimony was provided regarding the frequency with which that occurs, the tasks involved with using the backhoe, or whether the petitioner does that task at all.

Petitioner further testified he also loads and unloads trucks as part of his job duties, but no testimony was provided regarding how often he loads/unloads trucks, what he is loading/unloading, or the size or weight of anything he is moving in that capacity. Petitioner also testified that he also does general housekeeping as part of his job for ADM, which varies from day to day in terms of what he does and how often he does it. (Trial Transcript, pgs. 21-22, 44-45).

Petitioner testified he first noticed issues with his hands in September 2016. He testified that he noticed his hands were numb and falling asleep all the time both at home and at work. No testimony was provided indicating that any activity at work elicited symptoms more than any other or any activity outside of work. (Trial Transcript, pg. 22).

Petitioner further testified about hobbies he participates in outside of work. Petitioner testified he hunts and fishes. Petitioner testified he uses a standard, conventional fishing rod that he casts out and turns the crank (reel) to bring back in. He testified he does that locally, as well as taking an annual trip. Petitioner testified he fished in this manner for years before his alleged accident date. Petitioner further testified that he hunts deer as a hobby. Petitioner testified that he uses both a gun and a bow and arrow for deer hunting, using a conventional bow and arrow that uses his hands to stabilize the bow and pull back the arrow and release. Petitioner testified he was doing that for several years before his alleged accident date. (Trial Transcript, pgs. 40-42).

Arbitrator's Findings

C/F. Is Petitioner's current condition of ill-being causally related to the injury and did the Petitioner have an accident arising out of his employment?

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). In a repetitive trauma claim, the issues of causation and accident are analyzed together. Petitioner must prove that some aspect of his employment was a cause of his injuries. Medical testimony, though not required, is usually relied upon by the Commission in reaching its decision.

Petitioner testified regarding the details of the job he did for ADM in Creve Coeur, Illinois. That testimony painted a picture of the petitioner's job that, while busy and physical in nature, varied not just from day to day, but from railcar to railcar or barge to barge. The Petitioner himself admitted that every barge was different with respect to how much product was filled and how long it took. He admitted that the jobs involved with loading a barge were done by a team of employees, with the tasks rotating within the team. He admitted that every railcar was different in terms of how the product was emptied and how long that process took.

Like loading a barge, the work of emptying railcars is done by a team consisting of four to six workers, with the employees rotating regarding what tasks they are doing. Beyond the day to day tasks varying, Petitioner testified that every day was different in terms of the number of barges or railcars that would be worked on.

It follows then that the use of various tools involved with the tasks of Petitioner's job varies. Although Petitioner testified to using various tools to perform various aspects of his job, he could not provide testimony regarding the frequency with which any given tool was used, other than to admit it constantly fluctuated. There was no testimony to suggest any one tool was used on a regular basis for any sustained period of time.

For example, although Petitioner testified that a pry bar was "sometimes" used to unload a railcar, zero evidence was presented indicating how often it was used. Likewise, Petitioner testified he "sometimes" uses a

sledgehammer, but without more detail regarding how often. Petitioner testified he used a joystick or hand crank to move the spout over the hole on the barge, but provided no testimony of how long it took to move the spout in any given instance. There was no testimony of the Petitioner using a joystick or hand crank for any sustained period of time and certainly not for any more than "a couple of seconds." (Trial Transcript, pg. 17).

Petitioner sought treatment primarily with Dr. Rashid, though the arbitrator notes Dr. Rashid has only seen the Petitioner on two occasions. In her deposition, Dr. Rashid admitted she did not review any medical records regarding Petitioner's prior treatment, did not know when the Petitioner's symptoms started, and was unsure of whether he was left or right hand dominant. (Px.5, pgs. 10-11). Dr. Rashid, nonetheless, testified that Petitioner's job duties with ADM caused or contributed to his development of carpal tunnel syndrome. In support of this opinion, Dr. Rashid cited the Petitioner's task of "opening railcars," gripping and lifting, and exposure to vibratory tools as the primary factors.

The arbitrator finds Dr. Rashid to not be credible on the issue of causation in this case. After relating Petitioner's condition to his employment with ADM, Dr. Rashid admitted she was essentially completely unfamiliar with the petitioner's job duties. She did not know anything about the size of the railcars or what the task of "opening railcars" consisted of. She admitted she did not know the force required to "open a railcar." She admitted she never saw photos of the Petitioner's job or any of the tools he worked with. She admitted she had never been to the work site or saw the job being performed otherwise. She was unaware of his job schedule with respect to any given day. Despite testifying that the Petitioner's exposure to vibration contributed to his condition, Dr. Rashid admitted she did not know the size of the vibrator the petitioner was using, or the vibration or force produced by it. She admitted she did not have any specific information regarding any "heavy gripping and lifting" she claimed the Petitioner did. In any event, it is grossly obvious that she had no understanding whatsoever of the Petitioner's job duties to credibly provide any sort of causation opinion.

Further, the arbitrator notes that, even if he found Dr. Rashid credible, her opinion regarding causation is based primarily on the Petitioner's exposure to vibratory tools, ***of which there is none***. Though a tool called a

"vibrator" is used as part of Petitioner's job, Petitioner admitted he does not use the tool while it is actually vibrating. The tool is not vibrating when it is attached to the hopper. It is turned on and Petitioner (assuming he is even the employee doing this task at the time) stands by, not touching the vibrator. The vibrator is then turned off. It is removed from the hopper while is it off – and not vibrating – and moved to the next hopper for the process to restart. There is zero exposure to vibration in this process and Petitioner confirmed there are no other tools used in his job that produce vibration. These facts indicate Dr. Rashid's opinion regarding causation cannot be persuasive.

In addition to the testimony at arbitration, the Arbitrator notes Dr. Carroll's opinion regarding causation for the Petitioner's job duties is clearly more thoughtful and factually based than Dr. Rashid's. Citing the varied nature of the Petitioner's work, and the down time between individual tasks, Dr. Carroll indicated there was not sufficient evidence to relate Petitioner's carpal tunnel syndrome to his employment with ADM. Dr. Carroll went into more specific details regarding what is necessary to establish a link between any activity and carpal tunnel syndrome (Rx. 5, pg. 10) and the Arbitrator notes there is no evidence to support a link based on Dr. Carroll's medical explanation.

The arbitrator finds Dr. Carroll's opinion persuasive as it is consistent with the evidence presented at trial. Petitioner's testimony regarding his job duties made one thing very clear – his job is extremely varied. While some tasks had to be done more than once, there was no evidence that anything was done in a sustained, repetitive fashion. Plus, Petitioner testified to the tasks involved with loading barges and unloading railcars generally – but admitted he would not singlehandedly be doing all of those things as all of the tasks he described were done by a team of guys working together on all of the jobs. At the end of the day, Petitioner testified regarding what work is done at the ADM facility generally, not what he does every single day. The arbitrator cannot even ascertain what specifically the Petitioner does every single day in order to find any link between his condition and those activities.

The arbitrator finds there was simply not enough evidence presented to find accident and causation for the Petitioner's carpal tunnel syndrome. Petitioner did not present evidence of any sustained heavy gripping or lifting, nor any evidence that he held vibrating tools. Those were the factors upon which Dr. Rashid based her opinion. As they were not proven, her opinion has little, if any, weight.

E. Was timely notice of the accident provided to Respondent?

The arbitrator finds Petitioner did advise his supervisor of the pain in his hands when he presented for treatment.

J./O. Has respondent paid all reasonable and necessary medical bills? Is Petitioner entitled to any prospective medical care?

Because the arbitrator finds Petitioner failed to prove an accident that arose out of and in the course of his employment and that his condition of ill-being is causally related to his alleged accident, the issue of prospective medical care is moot. The arbitrator further notes that because Petitioner failed to prove accident and causation, no medical bills are awarded.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sandra Timmons,

Petitioner,

20IWCC0471

vs. NO: 17 WC 004078

Smart Styles,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 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.

20IWCC0471

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $66,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 21 2020

o071420
MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TIMMONS, SANDRA
Employee/Petitioner

Case# **17WC004078**

20IWCC0471

SMART STYLES HAIR SALON
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:

0834 KANOSKI BRESNEY
CHARLE N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

5332 GOLDBERG SEGALLA LLP
JENNIFER Y WELLER
8000 MARYLAND AVE SUITE 640
ST LOUIS, MO 63105

20 IWCC0471

STATE OF ILLINOIS)
)SS.
COUNTY OFSANGAMON)

☐ 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

Sandra Timmons
Employee/Petitioner

v.

SmartStyle Hair Salon
Employer/Respondent

Case # 17 WC 04078

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of Springfield , on **February 27, 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 **November 15, 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 $**8,936.20** ; the average weekly wage was $**171.85**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**1,571.11** for TTD, $ **0** for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $**1,571.11** .

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $171.85/week for 36 5/7 weeks, commencing 11/16/16 through 7/30/17, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $48,966.63, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall first reimburse payments made by Petitioner and Health Alliance, and then pay the balances outstanding pursuant to the medical fee schedules.

Respondent shall pay Petitioner permanent partial disability benefits of $171.85/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

Date 5.13.19

MAY 15 2019

In addressing the disputed issues in this case, the Arbitrator finds the following facts:

Petitioner testified that on November 15, 2016, she was employed as a hair stylist for Smart Styles which is a part of Regis Corporation located within the Wal-Mart store in Jacksonville, Illinois, and had been so employed for about a year. On that date in the course of her duties, she has been in the back room of the salon that was restricted to employees where they mix color and all products are located, and was walking back through the doorway or just before passing through the door into the salon when she slipped on a wet substance on the floor and fell forward, falling "really hard" on her right hand and arm that was straight out to catch herself. Petitioner testified that she fell in the doorway from the backroom and the salon and that there was a sink located right next to the doorway. Petitioner testified that this sink is used constantly throughout the day, and that sometimes water or color ends up on the floor in that location. Petitioner testified that she wasn't sure what she slipped on – whether it was water or color--but thought it was water because she didn't see color there. Petitioner testified that she was wearing boots with rubber soles which were not slick in themselves. Petitioner testified that she felt pain in her right shoulder and told the other girl working there that she was leaving to go to the emergency room to be checked out. Petitioner testified that she called her manager before she left and told her she was going to the emergency room to be checked out.

On cross-examination, Petitioner denied that she was "assuming" that the floor was wet and asserted that she knew a wet substance on the floor had caused her to slip. She denied that she told anyone that she had "tripped". Respondent offered an interview by an investigator done on December 8, 2016, in which Petitioner told the investigator that she "was walking through the, the doorway and slipped on something wet." As she testified in Arbitrator, Petitioner told the investigator that she wasn't certain if it was hair color or water but thought it was water because she didn't see anything on the floor after she fell. Petitioner acknowledged on cross examination that she had had prior osteoarthritis in her hips and had surgery on her hips, including a left hip replacement in the past, but denied having any troubles with balance or falling. Petitioner acknowledged one incident in the past when she had passed out when she had bronchitis from the coughing she was experiencing at that time, but denied having "fainting spells or dizziness" in the past. Petitioner w as confronted with an outpatient questionnaire from Passavant Rehabilitation Services completed on February 20, 2017, in which she had circled yes for "weakness or paralysis" and Petitioner stated she was referring to weakness in her injured arm and shoulder.

Records from Passavant Hospital show that Petitioner was seen in the emergency department that day at 5:26 p.m. with a history of "fell at work pain to right shoulder" according to the initial nurse's note. (PX 3, p. 104) The physician's note at 6:10 p.m. has a history of "tripped at work fell and landed on right shoulder" with complaints of right shoulder pain with movement. (PX 3, p. 106) On cross-examination, Petitioner denied that she told the doctor that she "tripped". On re-direct Petitioner testified that she talked to a nurse about her fall first and did not recall if she discussed the fall directly with the doctor. An x-ray found no fractures (PX 3, p. 110) and Petitioner was diagnosed with a shoulder contusion and was advised to follow up with her PCP. (PX 3, p. 108) Petitioner was provided with an off work slip for two days, which Petitioner testified she provided to her employer. (PX 3, p. 113)

Petitioner testified that she followed up with her PCP, and records document that Petitioner did see her PCP Dr. Griffin on the following Monday, November 21, 2018, reporting that she had slipped on a water spot at work on Tuesday and fell, catching her fall with her right outstretched hand. (PX 1, p. 22-24) Petitioner reported persistent right shoulder pain and on examination as noted to have limited range of motion of her right shoulder and tenderness in the anterior aspect of the shoulder. Petitioner was prescribed Diclofenac Sodium 50 mg and advised to continue current medications and return in a week. Petitioner did return to Dr. Griffin on November 28, 2016, reporting persistent pain and limited motion. (PX 1, pp. 19-21) She reported that she had discontinued the Diclofenac as it made her drowsy and constipated. She was taking Tylenol for pain. On examination, Petitioner continued to show limited movement of her shoulder and had tenderness in the right

deltoid. Dr. Griffin indicated that he was referring her to an orthopedic and provided Petitioner with an off work slip for one week. Petitioner was seen again by Dr. Griffin on January 4, 2017 reporting persistent limited motion of her arm and severe aching/burning muscle pain. (PX 1, pp. 16-18) Use of Tylenol and NSAIDs and ice and heat were not providing relief. Petitioner reported that her limited motion was preventing her from performing her work as a hair stylist. Petitioner had been unable to follow through on a referral to Dr. Werries "due to workmen's compensation". Examination confirmed painful restricted range of motion of the right shoulder. Cyclobenzaprine was prescribed to help her sleep and physical therapy was ordered. Dr. Griffin indicated that he would follow-up on the orthopedic referral and suggested ordering an MRI for possible AC tear in case this was required for the referral. Petitioner testified that Dr. Griffin had given her off work slips throughout this period of treatment, which were turned in to her employer.

A physical therapy evaluation was completed on January 11, 2017 at Physical Therapists Clinic. (PX 3, p. 82) Petitioner was noted to have very limited motion of her shoulder due to severe pain, and reported being unable to sleep at all due to pain. The therapist assessed her with severe adhesive capsulitis and indicated that he was unable to assess her rotator cuff or labrum due to her very limited motion.

An MRI was done on January 16, 2017 at Passavant Area Hospital showing a small non-displaced fracture of the greater tuberosity of the humerus, supraspinatus tendinopathy and shoulder joint effusion with associated synovitis, as well as a possible small tear of the inferior glenoid labrum. (PX 1, pp. 25-26) A handwritten note on the MRI report in Dr. Griffin's records indicates an orthopedic referral with use of a sling and stopping therapy until seen by the orthopedic doctor.

Petitioner was initially seen by Dr. Darr Leutz, an orthopedic surgeon in Jacksonville, on February 8, 2017. (PX 2, pp. 123-125) Petitioner reported that she was walking from a back room and slipped on a wet spot on the floor and fell in the doorway, landing with her arm outstretched. On examination, Petitioner was found to have limited active and passive range of motion. She had tenderness at the supraspinatus insertion and glenohumeral joint and subscapularis tendon. She had a positive Hawkins impingement sign. She had reduced 4/5 strength in her shoulder. Dr. Leutz assessed her with a fracture of the greater tuberosity of the humerus and a labral tear. He ordered physical therapy and pain medications. She was told to not use her right arm until notice (and a work slip was provided with that restriction (PX 2, p. 122)) and return in three weeks.

Records show that Petitioner did restart her therapy at Passavant Rehabilitation Services as of February 20, 2017. (PX 3, pp. 78-80)

Petitioner returned to Dr. Leutz on March 1, 2017 reporting 7/10 pain that was constant. (PX 2, pp. 101-103) Petitioner was experiencing pain, stiffness and popping in her right shoulder. Her examination findings remained the same and Dr. Leutz assessed her with a humerus fracture, right rotator cuff tear and labral tear of the right shoulder. Dr. Leutz recommended continued therapy and directed Petitioner to return in six to eight weeks. She was advised to remain off work until further notice and a work status form to that effect was provided. (PX 2, p. 100)

Petitioner returned to Dr. Leutz on March 22, 2017 reporting no improvement. (PX 2, pp. 96-99) Petitioner demonstrated continued limited motion and moderate crepitation in her shoulder. Abnormal anterior instability was noted and her strength was at 3/5. Petitioner's assessment now included frozen shoulder and shoulder impingement. In injection was recommended and if this did not help, then Dr. Leutz was recommending a scope of the shoulder. The injection was performed and Petitioner was advised to remain off work until further notice. Again, a slip to this effect was provided. (PX 2, p. 95) Petitioner returned again to Dr. Leutz on April 17, 2017 reporting that the injection had helped for only a few days. (PX 2, pp. 92-94) Petitioner continued to complain of constant 7/10 shoulder pain. An arthroscope of the shoulder was therefore recommended. Petitioner returned on April 27, 2017 for a pre-operative visit with the planned procedure to include a

manipulation under anesthesia, acromial clavicle resection, possible labral repair, capsular release, possible biceps tendon release and biceps tendon tenodesis. (PX 2, pp. 88-91) The surgery was performed at Passavant Area Hospital on May 2, 2017 including major debridement and synovectomy, manipulation under anesthesia, capsular release, subacromial decompression, rotator cuff repair using 4.5 HEALIX TI triple-loaded suture anchors and an arthroscopic AC resection. (PX 2, pp. 75-76) In the course of surgery it was noted that the supraspinatus was torn at the insertion site of the supraspinatus tendon where the fracture had been located.

Petitioner returned to Dr. Leutz for a two-week post-op visit on May 15, 2017. (PX 2, pp. 64-66) Petitioner reported no improvement and 10/10 pain. On examination, she no longer had crepitation but continued to have limited motion with pain and 3/5 strength. Therapy was ordered and Tramadol for pain. She was advised to remain off work until further notice and a slip was provided. (PX 2, p. 63) Petitioner returned to Dr. Leutz on May 29, 2017 reporting pain at 2-3/10 but continued to complain of stiffness, popping and pain down her arm. (PX 2, pp. 59-62) She had 90 degrees of flexion and abduction and 30 degrees of external and internal rotation. She had pain with range of motion and light crepitation. She also still had only 3/5 strength. Dr. Leutz recommended continued therapy. Petitioner was next seen for her shoulder injury on July 6, 2017 reporting that her shoulder was 70% better. (PX 2, pp. 13-16) She reported intermittent pain at a 2/10 level. She now had range of motion of 95 degrees in flexion and extension and 35 degrees in internal and external rotation. Moderate crepitation was noted and strength was improved to 4/5. A slip was provided authorizing return to work without restrictions as of July 31, 2017. (PX 2, p. 12) Petitioner was last seen by Dr. Leutz on September 6, 2017 reporting 1/10 pain that comes and goes. (PX 2, pp. 7-10) She reported a lot of improvement since she had been seen last. She was noted to have normal range of motion and stability though she had a positive impingement sign. She was advised to continue her home exercises and return PRN. She was advised to return to full duty work on September 11, 2017. (PX 2, p. 6)

Petitioner testified that currently her shoulder gets sore if she uses it quite ab it. When it is sore, she testified that she can feel the screw in her shoulder. She says that this soreness occurs when she is working of if she lifts something heavy. She testified that the soreness occurs when she uses it a lot through the day and is busy. She testified that she has to work with her arms up in front of her and perform repetitive motions in her work as a hair d dresser, which she continues to do. She testified that after working for several hours her arm feels a little weak. She testified that every now and then when she lifts a gallon of milk or has to lift boxes at work, she has difficulty lifting. She said that sometimes lifting objects over 10 pounds really hurts. Petitioner testified that she had none of these problems prior to her injury. Petitioner testified that she briefly returned to work for Respondent and then went to work as a hair dresser for a different employer. She acknowledged that she had been off work from the date of the accident until released by Dr. Leutz on July 31, 2017.

Respondent offered the evidence deposition of Dr. Nogalski who performed an impairment rating at Respondent's request. (RX 1) He diagnosed Petitioner with right shoulder strain due to her fall with subsequent adhesive capsulitis and rotator cuff tendinitis and tendinopathy with likely aggravation of rotator cuff tendinopathy, which he testified was consistent with her accident as she described it. (RX 1, pp. 13-14) He acknowledged that her treatment had been reasonable, necessary and related to her incident. (RX 1, p. 14) He arrived at an impairment rating of 2% of an arm under the AMA Guides. (RX 1, p. 16-17) On cross-examination, Dr. Nogalski testified that his training in performing AMA impairment ratings was limited to a one-day course attended in the Fall of 2017 and that he had no certification for his ability to perform such examinations. (RX 1, p. 19) On cross-examination, he stated that Petitioner's 160 degrees of forward flexion in the right shoulder was in the "low range of normal". However, he was forced to acknowledge that the Guides include an option to assess impairment based upon range of motion losses and that the tables addressing range of motion of the shoulder would result in a 3 percent impairment for a range of motion of 160 degrees. (RX 1, pp. 25-26) Dr. Nogalski acknowledged that the

tables assessing rotator cuff tears, which he used in reaching his conclusion, has two different scales to apply, the difference being that the higher level refers to "residual loss". (RX 1, p. 20) He acknowledged that "residual loss" is not defined in the Guides to his knowledge. (RX 1, p. 20-21) Dr. Nogalski acknowledged that he did not utilize a Quick Dash score to assess Petitioner's Functional History Modifier as is contemplated in the Guides. (RX 1, pp. 21-22) He testified that the Guides allow discretion in using the Quick Dash and testified that he does not use that scale unless specifically asked to do so. (RX 1, p. 22) Dr. Nogalski acknowledged that he applied a grade 1 modifier to Petitioner's Functional History. He acknowledged that a grade 2 modifier would be applied with "pain and symptoms with normal activity", but denied that Petitioner's complain of pain when holding her arms up over head for long periods of time and difficulty lifting heavy objects fell within that definition, stating that a lot of people have such pains, but then denied that those were normal activities. (RX 1, pp. 23-24) In assessing Petitioner's physical examination modifier, Dr. Nogalski assigned a zero rating, denying that her limitation of 160 degrees of flexion represented a "mild decrease from normal" as set forth in the Guides. (RX 1, pp. 24-25) Again, Dr. Nogalski was forced to acknowledge that the Guides include an option to assess impairment based upon range of motion losses and that the tables addressing range of motion of the shoulder would result in a 3 percent impairment for a range of motion of 160 degrees. (RX 1, pp. 25-26) He therefore acknowledge that this range of motion rating would indicate that the Guides consider 160 degrees of flexion to be less than normal. (RX 1, p. 26) Dr. Nagolski also indicated that Petitioner had a zero adjustment for "clinical studies". (RX 1, p. 26) He acknowledged that a higher adjustment would be required by an MRI showing symptomatic diagnoses of rotator cuff tear, SLAP or other labral lesion or biceps tendon pathology, and that Petitioner's MRI showed not only rotator cuff tear but a fracture in her shoulder and a small labral tear. (RX 1, pp. 26-27) However, Dr. Nogalski testified that those conditions were gone after surgery and that the adjustment was based upon her condition now and not at the time of her injury. (RX 1, p. 27) He also disputed whether the MRI done of the Petitioner established any of those conditions, noting that it referred to a "possible" labral tear. (RX 1, p. 27) Dr. Nogalski testified that "Impairment" is not the same as "disability". (RX 1, p. 28)

Based upon the foregoing facts, the Arbitrator makes the following findings on the disputed issues:

1. **Accident:** Petitioner testified to slipping on a wet floor next to a sink regularly used in the work performed at the location of the work. A single reference by an emergency room doctor to "tripping" rather than "slipping" does not refute the Petitioner's otherwise consistent description of her work accident. The Arbitrator finds that the preponderance of the evidence establishes that the Petitioner fell as a result of a wet substance on the floor, a hazardous condition in the workplace that establishes that her injury arose out of her employment. Respondent's references to other medical conditions as possible explanations for her fall have no support in the record and do not rebut the Petitioner's testimony and repeated description of her accident to medical providers. No other witnesses were called to rebut the Petitioner's testimony. Accordingly, the Arbitrator finds that the Petitioner's fall at work establishes an injury arising out of and in the course of her employment by Respondent.
2. **Causation:** Petitioner testified to an immediate onset of right shoulder pain at the time of her fall at work, and sought immediate medical care which documented those complaints. She followed a consistent course of treatment thereafter leading to her surgery by Dr. Leutz on May 2, 2017, with follow up and release from care on September 6, 2017. The "chain of events" support for causation is bolstered by the testimony of Dr. Nagolski, Respondent's AMA examiner, who testified that the Petitioner's right shoulder injuries that he diagnosed and the appropriate treatment that she had received was causally related to the work accident. The Arbitrator therefore finds that the

Petitioner's current condition of ill-being in her right shoulder is casually relater to her work related accident.

3. **TTD:** Petitioner testified that her doctors kept her off work from the date of accident through her release to return to work by Dr. Leutz as of July 31, 2017. The medical records of treatment by Petitioner's PCP do not contain the off work slips provided, though Petitioner testified that they were provided to the Respondent when issued. Her continued off work status is corroborated by the immediate restrictions imposed by Dr. Leutz at his first appointment, by her complaints of pain and limited motion by her PCP, Dr. Griffin, and by the nature of her work that required holding her arms out in front of herself while performing repetitive activities to work on customers' hair. The Arbitrator therefore awards TTD benefits from November 16, 2016 through July 30, 2016, a period of 36 5/7 weeks, with credit for $1,571.11 paid by Respondent.
4. **Medical bills:** The medical bills offered by Petitioner are shown by the Petitioner's testimony and medical records submitted into evidence, as well as the testimony of Dr. Nagolski, to be reasonable and necessary and causally related to the work related injury. Respondent is ordered to reimburse amounts paid by Petitioner and Health Alliance, and pay the outstanding balances pursuant to the medical fee schedules.
5. **Nature and extent:** In addressing the assessment of permanent partial disability in this case, the Arbitrator must address the five factors contained in Section 8.1b of the Act:
   1. The reported level of impairment under the AMA Guides to the Evaluation of Permanent Impairment: The Respondent provided the deposition of Dr. Nogalski who provided a 2% of an arm impairment rating under the AMA Guides. However, it is clear from his cross examination that his evaluation is suspect in failing to have an adequate explanationf or using the lower rather than the higher classification of rating under rotator cuff tears, in failing to acknowledge a decreased range of motion consistent with the range of motion ratings in the Guides, in failing to use the Quick Dash analysis typically utilized in assessment of functional history modifier, in failing to acknowledge the findings on the MRI in assessing the clinical studies modifier and in failing to utilize range of motion analysis which would have produced a somewhat higher impairment rating. In light of these deficiencies, the impairment rating provided by Dr. Nogalski merits little or not weight.
   2. The occupation of the injured employee: The Petitioner continues to work as a hair dresser requiring that she hold her arms out in front of her body and perform repetitive motions throughout her work day, resulting continual exacerbation of soreness in her shoulder. The Petitioner's occupation is a significant factor.
   3. The age of the injured employee: Petitioner was 51 years old at the time of her injury and is now 54 years old. She has a significant period of time to continue to suffer the impact of this injury during her continued work activities. Petitioner's age is considered a significant factor.
   4. The Petitioner's earnings capacity. No evidence was presented that Petitioner's earnings have declined since her injury and she continues to be employed as a hair dresser for another employer. Petitioner's earning capacity is not a significant factor.
   5. Evidence of disability corroborated in the treating medical records: As a result of her injury, the Petitioner suffered a torn rotator cuff requiring repair with an anchor and screw, as well as a small labral tear, a non-displaced fracture in the greater tuberosity of her humerus and a frozen shoulder which required surgical treatment. Petitioner credibly testified to continued soreness in her shoulder with her work activities and lifting, which is corroborated by the extent of the injury that she suffered and the retained hardware in her shoulder. She was also found to have some limited motion by the Respondent's examining doctor. The Arbitrator considers this a significant factor.

Based upon the foregoing factors, the Arbitrator finds that the Petitioner has suffered permanent partial disability to the extent of 15% of a body as a whole.

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

Leslie Colon,

Petitioner,

20IWCC0472

vs. NO: 15 WC 004084

Southwest Airlines,

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 benefit rates, medical expenses, temporary total disability, penalties and fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 February 6, 2019 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.

20IWCC0472

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 $13,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 1 2020

Maria Elena Portela
Maria E. Portela

Kathryn A. Doerries
Kathryn A. Doerries

o063020
MEP/ypv
049

DISSENT

I believe Petitioner proved by a preponderance of the credible evidence that her current condition of ill-being is causally related to the undisputed accident on 6/1/14. More to the point, I believe the Arbitrator's reliance on the opinion of Dr. Lami was misplaced and not supported by the record taken as a whole.

Dr. Lami originally opined on 2/26/15 that the 6/30/14 lumbar MRI report suggested a disc herniation and that said condition and the treatment she subsequently received was related to the 6/1/14 work accident. In his addendum report dated 7/9/16, after reviewing the actual films, he agreed with the radiologist's finding of an extrusion at L5-S1 which was central and slightly to the right. He then recommended a second MRI, given the low quality and age of the first one. The subsequent delay in obtaining this diagnostic study can at least partially be explained by the fact that Petitioner was pregnant during this time and eventually gave birth to twins on 3/28/17. Thereafter, Ms. Colon was on maternity leave through September of 2017, during which time there is absolutely no evidence to suggest she sustained any intervening injuries or that her condition significantly worsened. In fact, when the second MRI was finally performed on 11/3/17, Dr. Lami noted that it showed the same central disc herniation at L5-S1 as evidenced in the first MRI, only he did not see compressive pathology on the right S1 nerve root. (RX1, p.41). In spite of these

20IWCC0472

similar findings, and the total lack of any intervening accidents, Dr. Lami decided to opine, following his re-examination on 3/12/18, that Petitioner's low back condition was no longer related to the 6/1/14 accident but that her degenerative disc disease and pregnancy were somehow to blame, noting that "[h]aving back problems during pregnancy is very common, especially if you have degenerative changes." (RX1, p.43). More to the point, it appears that Dr. Lami believes Petitioner was treated appropriately, returned to her prior job and then experienced a recurrence of her symptoms four years after the incident - a chronology of events that ignores the fact that Petitioner had returned to work with light duty restrictions and with a recommendation for surgery hanging over her head. Needless to say, I found Dr. Lami's about-face on the question of causation to be unsupported by the record and wholly unpersuasive.

As a result, I would modify the decision of the Arbitrator to find – based on the medical records, Petitioner's credible testimony and a chain of events theory of recovery – that Petitioner's current condition of ill-being relative to her low back is causally related to the undisputed accident on 6/1/14, and that as a result Ms. Colon was entitled to additional temporary total disability benefits from 12/14/17, when her light duty work expired, through the date of hearing, 1/16/19, as well as prospective medical treatment as recommended by Dr. Fisher. However, since it cannot be said that Respondent's reliance on the opinion of Dr. Lami was unreasonable and/or vexatious under the circumstances, I would deny Petitioner's request for penalties and attorneys' fees.

Thomas J. Tyrrell

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

COLON, LESLIE
Employee/Petitioner

Case# **15WC004084**

20IWCC0472

SOUTHWEST AIRLINES
Employer/Respondent

On 2/6/2019, 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 2.44% 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:

4084 LAW OFFICE OF TIMOTHY J DEFFET
5875 N LINCOLN AVE
SUITE 231
CHICAGO, IL 60659

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

20 IWCC0472

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)

Leslie Colon
Employee/Petitioner
v.
Southwest Airlines
Employer/Respondent

Case # **15** WC **04084**

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **1/16/2019**. 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

20IWCC0472

FINDINGS

On the date of accident, **6/1/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$43,929.60**; the average weekly wage was **$844.80**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of **$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 **$10,011.28** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $0.00 to Petitioner as provided in Section 8(a) of the Act pursuant to the Arbitrator's conclusions of law in this decision.

Respondent shall pay Petitioner temporary total disability benefits of $563.20 per week for a period of 29 5/7 weeks from June 15, 2014 to August 24, 2014, September 27, 2014 to October 31, 2014 (15 1/7 weeks) and from January 25, 2015 through May 3, 2015 (14 4/7 weeks). The parties have stipulated that there was a weekly TTD underpayment of $117.79 per week therefore Respondent owes Petitioner an additional $3,499.54 ($117.79 x 29.710 weeks = $3,499.54).

Respondent paid Petitioner 35 weeks of advancements under Section 8(d-2). The parties have stipulated that there was a weekly PPD underpayment of $102.16, therefore Respondent owes Petitioner an additional $3,575.60 ($102.16 x 35 weeks = $3,575.60).

Respondent shall pay Petitioner penalties under Sections 19(k) and (l) and attorney's fees under Section 16 in the amount of $0.00 pursuant to the Arbitrator's conclusions of law in this decision.

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.

David A. Kane
Signature of Arbitrator

February 6, 2019
Date

FEB 6 - 2019

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

20IWCC0472

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leslie Colon,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 15 WC 04084
	)	
Southwest Airlines,	)	
	)	
Respondent.	)	

MEMORANDUM DECISION OF ARBITRATOR

FACTS

Petitioner testified that she was employed as a customer service agent for Respondent, Southwest Airlines. She testified that her job duties included checking in passengers wherein she had to lift luggage of an approximate weight from 50 to 100 pounds and that she moved approximately 300 bags per day.

Petitioner testified that on June 1, 2014 at approximately 9 or 10 AM she was removing bags from a carousel when she felt a pinch or a throbbing pain in her right lower back. She testified on the same date she reported the incident to her supervisor and was seen at Concentra where she was examined and an MRI of the low back was recommended.

Petitioner had the MRI on June 30, 2014 at Advantage MRI in Logan Square. (RX #6).

After undergoing conservative care at Concentra on September 5, 2014, Dr. Barbara Heller diagnosed a right L5-S1 radiculitis and recommended a lumbar epidural steroid injection. On September 25, 2014, Dr. Alzoobe saw Petitioner and performed an injection. (RX #6). Petitioner testified that during this period of time up through the injection she continued to experience low back pain, was off work since June 2, 2014, and was receiving benefits. However, the parties stipulated that Petitioner began to lose time from work on June 15, 2014.

Petitioner returned to see Dr. Alzoobe on October 30, 2014. She was diagnosed with discogenic disease and herniation at L5-S1 and herniation at L4-5 and complained of low back pain and right lower extremity pain. Dr. Alzoobe noted Petitioner was working her light duty job and that she could continue with a 20 pound lifting restriction. (RX #6).

Petitioner returned to see Dr. Alzoobe on December 18, 2014 where it was indicated that she was doing fairly well. Dr. Alzoobe's assessment was a herniated disc at L5-S1, discogenic disease at L4-5 and L5-S1 and back pain. He recommended repeating an epidural steroid injection with work hardening over the next four weeks and she was to continue on light duty with a 20 pound lifting restriction.

On January 29, 2015, Petitioner sees Dr. Alzoobe for the last time. At that time, Petitioner stated that there was not much improvement since the

last injection. She stated she had significant pain in the low back going down both lower extremities but mainly on the right side. Petitioner testified that she was off work from November 1, 2014 through May 31, 2015. This assertion is contraindicated by the records of Dr. Alzoobe rather it would appear as though Petitioner went off work on January 26, 2015 right before the phone consultation with Dr. Alzoobe on January 29, 2015. In addition, this time period that she is off work is agreed to by the parties.

Petitioner testified that on February 19, 2015, she saw Dr. Fisher at Illinois Bone & Joint and that she was referred to him by a friend. Petitioner testified that at that time she had back pain and a little bit of numbness in her right leg. Petitioner testified and records would indicate that on February 19, 2015, Dr. Fisher recommended a micro-discectomy surgery and placed Petitioner on a light duty restriction with no lifting over 25 pounds and no repetitive bending, twisting or lifting. (RX #6).

As a result of the surgical recommendation by Dr. Fisher, at the request of Respondent, Petitioner was seen by Dr. Lami on February 26, 2015. (RX #1). In conjunction with his examination of Petitioner, Dr. Lami took a history from Petitioner as to how the accident occurred, had records at his disposal which predated his evaluation of which included the MRI report dated June 30, 2014. In addition to his initial evaluation report of February 26, 2015, Dr. Lami produced a records review report of July 9, 2016 and another independent medical evaluation and records review report of March 12, 2018. Dr. Lami was deposed on May 1, 2018 in relation to his examinations and review of the records in this case.

Dr. Lami's Deposition Testimony

Dr. Lami testified that Petitioner told him on June 1, 2014 she lifted a bag and her back started to hurt. (RX #1, Page 15). Dr. Lami noted the treatment at Concentra Clinic and the pain that she had been having in her back radiating down her right leg wherein the doctor indicated that he had an opportunity to examine her.

Dr. Lami testified that after examining Petitioner and reviewing the records, the doctor indicated that the MRI suggested a disc herniation with a component of right leg radiculopathy or radiculitis. (RX #1, Page 20). He believed at the time that the diagnosis was related to the June 1, 2014 accident and that the treatment up to date was appropriate and related to the incident in question. (RX #1, Page 21). Dr. Lami indicated that he did not have an opportunity to review the MRI films, but that he did review the MRI report.

As for the surgery, Dr. Lami testified that if the MRI showed a disc herniation involving an S1 nerve root that surgery could be an option. He indicated that microdiscectomy surgery is really for sciatic pain that goes down your leg and that if you have that pain with corresponding MRI findings then you are a candidate for microdiscectomy surgery. (RX #1, Page 24). He went on to testify that the surgery being recommended was really not a surgery for back pain. (RX #1, Page 25)

Dr. Lami testified that the next time he provided an opinion in this case was on July 9, 2016. He testified that he did not see Petitioner on this

date, but instead reviewed MRI images and some additional records. Specifically, he reviewed records from Dr. Alzoobe and some records from Dr. Fisher to include the actual MRI films of 2014. (RX #1, Page 27). The radiologist report from Advantage MRI Logan Square dated June 30, 2014 provided an impression of a posterior central disc herniation at L4-5 with associated posterior central canal narrowing and a posterior central disc herniation at L5-S1 extended inferiory with associated posterior central canal narrowing. In his review of the films, Dr. Lami testified that he agreed that there was an extrusion at L5-S1 which was central and slightly to the right. He agreed with the radiologist noting also that there were degenerative changes at L4-5 with a bulge, which was not significant. Dr. Lami went on to testify that he felt that the MRI films were of a lower quality. He further stated that he felt that the surgery being recommended should not be undertaken for back pain as discussed earlier and that he could not recommend surgery based on the old MRI. Rather, Dr. Lami recommended that Petitioner get a new MRI. (RX #1, Pages 28, 29).

Dr. Lami testified that in his review of the records Petitioner was complaining of a lot of leg pain at some point. He indicated that if she still had a lot of leg pain and if the nerve is compressed then surgery would be an option. However, while she still may have leg pain if there is nothing compressed on the nerves, then microdiscectomy surgery will not help. (RX #1, Page 30).

Dr. Lami testified that he saw Petitioner for a final time on March 12, 2018. The doctor testified that at that time Petitioner stated to him that since she was last examined by the doctor in February 2015 she continued

to work her same job full time. Specifically, she worked up until December 12, 2017 when she was taken off work as there was no light duty available. The doctor testified that Petitioner also told him that starting from August 2016 and going through into 2017 that she was pregnant. (RX #1, Page 34). The doctor testified that at the time of his evaluation on March 12, 2018, he had an opportunity to review a series of records from Dr. Fisher and ATI Physical Therapy. (RX #1, Page 35).

Dr. Lami testified that he reviewed a more recent MRI from November 2017 which was the actual MRI film as opposed to the report. Specifically, the MRI was taken at Advocate Christ Medical Center on November 3, 2017. In a report of that MRI, the radiologist's impression was a moderate degenerative disc disease at L5-S1 level and mild disc disease at the L4-L5 level with decreased height, desiccation, posterior bulging, and annular fissures. No significant central spinal canal stenosis. Moderate bilateral neural foraminal stenosis at the L5-S1 level. Incidental fatty filum terminale. (RX #7)

Dr. Lami testified that after reviewing the films of the MRI taken on November 3, 2017 his opinion was that it showed degenerative changes at the L5-S1 with desiccation. At L4-5, there was an annular tear and central bulging. The facet joints were also arthritic and at L5-S1 there was a disc herniation which was central. Dr. Lami indicated when he looked at the axial views on the T2 images, which is a specific cross-sectional view, he did not see a compressive pathology on the right S1 nerve root. (RX #1, Page 41). After reviewing the additional records and examining Petitioner,

Dr. Lami diagnosed degenerative changes at L4-5 and L5-S1. (RX #1, Page 42).

Dr. Lami testified that Petitioner did not give a history of any subsequent injuries but that she did tell him that she was pregnant. Other than providing an opinion that a lot of patients during pregnancy can have back pain and sciatica pain there was not much more that Dr. Lami testified to about the pregnancy. Rather, while he did believe that the treatment since his last evaluation of Petitioner on February 26, 2015 was reasonable he did not believe that it was related to the injury of June 1, 2014. (RX #1, Page 43).

Dr. Lami testified that Petitioner's state of ill being when he saw her on March 12, 2018 was not related to the 2014 accident. Dr. Lami testified that Petitioner did have an injury in 2014, approximately four years prior to his recent examination on March 12, 2018, and that she was treated and returned to work. He testified in the meantime, she has had degenerative changes, she becomes pregnant, and her symptoms recur and she has a lot of pain and she can no longer work. This is maybe four years later. Her most recent MRI shows only degenerative changes, and I cannot support her symptoms four years after the incident to still be related to the injury in question. (RX #1, Page 45).

Dr. Lami testified that the natural history of a disc herniation whether you get treatment or not is for people to get better. He stated that from the time of the injury four years later she had degenerative changes, and during pregnancy your symptoms can increase and you can exacerbate

your back significantly. He further indicated that she has gotten worse without any particular injury and that she was actually off work for some time during her pregnancy. The doctor stated that her symptoms in 2018 when he saw her are now worse off according to her. So there was progression without a particular new event or injury making this more consistent with a degeneration or progression of her pre-existing condition than anything else. The doctor noted that in both the MRI that was done in 2014 and in 2017 that there had been degenerative changes and that the first MRI although of poor quality showed a disc protrusion slightly to the right side where the most recent MRI showed more of a central disc protrusion deferring to the November 2017 lumbar MRI. (RX #1, Pages 45 – 48 and RX #7).

Finally, Dr. Lami indicated that he did have an opportunity to review the MRI films from the diagnostic test that was taken in November 2017. He was asked if the MRI showed any compressive pathology and he answered as follows, "I saw a disc herniation at L5-S1, the middle. I looked at it, and I looked at it for a long time. I really did not see any nerve compromise of the right S1 nerve root." The doctor stated that the reason for the microdisectomy surgery is to take compression off the nerve and if there is no compression there is really nothing to be taken off. Based on there being no compression of the S1 nerve root he would not recommend the surgery because the whole purpose of the surgery is to take the pressure off the nerve to get rid of the pain of that nerve. (RX #1, Page 52 – 53). According to Dr. Lami petitioner had reached MMI at the time of her initial epidural injection and the doctor could not support any restriction as a result of the June 1, 2014 injury. He stated that she had an injury she was

treated appropriately and she returned to work. She then had a recurrence of her symptoms later which according to Dr. Lami was related to her personal health and not the incident. (RX #1, Pages 53 – 55).

Petitioner testified that on March 19 and April 30, 2015 that she followed up with Dr. Fisher. She continued to have pain in her back and the surgery had not been approved. Records from Illinois Bone and Joint show that on April 30, 2015 Petitioner stated and believed that she would be able to return to work in a full duty capacity if she were able to work "the gate" checking in customers as it required no lifting. Dr. Fisher released her to return to work in that capacity and indicated that surgery would be scheduled as soon as it was approved. (RX #6).

When Dr. Lami reviewed additional records on July 9, 2016, he had requested that Petitioner undergo a second MRI as the original one that she had was on June 30, 2014 and the doctor felt it to be of a lower quality. (RX #1, Pages 28 – 29). He stated that he could not recommend surgery based on the old MRI. At trial counsel for petitioner stipulated that Petitioner knew that Dr. Lami had recommended the second MRI. Yet a second MRI was not obtained until November 3, 2017 after Dr. Fisher had seen Petitioner on October 18, 2017 and prescribed the repeat MRI. In fact the last time that Dr. Fisher saw Petitioner prior to the visit on October 18, 2017 was 2 ½ years earlier on April 30, 2015. (RX #6).

On cross-examination Petitioner testified that she had seen Dr. Fisher and Physician's Assistant Anderson for a total of three times in early 2015 before returning to work with Southwest Airlines as a customer service

agent on May 4, 2015. She stated that from May 4, 2015 to December 14, 2016 she was working full duty and that she transferred over to light duty effective December 15, 2016 to February 9, 2017.

On cross-examination Petitioner testified that during the 20 month period that she was working as a customer service agent from May 4, 2015 to February 9, 2017 that she did not have any further treatment on her back for the injury that occurred on June 1, 2014. In fact when she went off work on February 10, 2017 Petitioner testified that it was not because of her back but for maternity leave. She testified that she had twins on March 28, 2017 and on or about June 26, 2017 her medical leave of absence expired. She testified that she then took a personal leave of absence and returned back to work with Southwest Airlines on September 24, 2017.

Petitioner testified that she worked for Southwest Airlines from September 24, 2017 up until December 14, 2017 and that pursuant to company policy the time period for the light duty had expired so she was no longer working in a light duty position. Prior to the light duty expiring Petitioner testified that she returned to see Dr. Fisher on October 18, 2017 and that up to this point she had never gotten a repeat MRI of the lumbar spine subsequent to the prior MRI that was done on June 30, 2014. After seeing Dr. Fisher on October 18, 2017 she had a second MRI on November 3, 2017 at Advocate Christ Hospital. (RX #7).

Petitioner acknowledged in her testimony that when she saw Dr. Fisher on October 18, 2017 that she had told him that she was very busy with family life after the twins were born. Petitioner's testimony reflects that

she continued to follow up with Dr. Fisher and Physician's Assistant Anderson.

Petitioner testified that on January 22, 2018 she saw Dr. Patel for an injection and at that time was complaining that pain in the back and leg was worse rating the pain as an 8 on a scale of 10. After seeing Dr. Patel Petitioner testified that she continued to follow up with Dr. Fisher and on February 8, 2018 she advised Dr. Fisher that the pain was getting worse.

Petitioner testified that she saw Dr. Fisher on March 7, 2018. Dr. Fisher's records indicate that on that visit back pain was increasing with correlated leg pain. Petitioner advised the doctor that bending, twisting and lifting activities make pain worse and that when she is trying to position her kids in the car seats she will also experience increased pain in her lower back.

Petitioner acknowledged that at the request of the respondent she saw Dr. Lami again for an independent medical evaluation on March 12, 2018. She testified that on the following day on March 13, 2018 Dr. Fisher performed a microdiscectomy of her low back.

Petitioner testified that postoperatively she followed up with Dr. Fisher and that on a visit of March 22, 2018 back pain was completely resolved and her right lower extremity was better. On April 19, 2018 she testified reporting to Dr. Fisher that the pain continued to resolve in the low back and right leg and that she was happy with the results.

Petitioner testified and acknowledged that when she saw Dr. Fisher on June 7, 2018 she was reporting increased back pain over the last two weeks as high as a 10 on a scale of 10. She acknowledged taking ibuprofen three times a day during the period of time which lessened the pain to a 5 to 6 on a scale of 10. Petitioner acknowledged that she advised Dr. Fisher that the back pain was more noticeable than the initial period after she had the surgery and that Dr. Fisher recommended a period of physical therapy with possible work hardening.

Petitioner testified and acknowledged that she saw Dr. Fisher again on August 2, 2018 complaining of continuing to have low back pain with tingling in the right lateral foot and left thigh. She acknowledged rating the pain as a five to a 6 on a scale of 10 and that Dr. Fisher ordered another MRI.

Petitioner acknowledged seeing Dr. Fisher again on September 13, 2018 wherein she indicated that her low back pain continued with the right lateral hip and lateral thigh pain down to the knee. She acknowledged that she told the doctor that her low back felt “out of alignment". Finally, she acknowledged that on the September 13, 2018 visit with Dr. Fisher discussed the possibility of a fusion surgery was discussed, Shortly after the September 13, 2018 exam with Dr. Fisher petitioner acknowledged that she sent a resignation letter to the respondent on September 27, 2018 resigning her employment with the respondent effective October 11, 2018. (RX #3).

Petitioner testified that the next time she saw Dr. Fisher was on November 29, 2018 and at that time she acknowledged reporting that she had a lumbar steroid injection two weeks ago and reported a 50% improvement. She also acknowledged that she continued to experience significant pain in the back and that she was at home caring for the two children under age two. Dr. Fisher indicated that she was only capable of light duty work and lifting no more than 20 pounds.

Petitioner testified that the last visit that she had with Dr. Fisher prior to trial was on January 3, 2019. She acknowledged that she reported to Dr. Fisher at the visit on January 3, 2019 that her back pain had improved after a recent injection three weeks ago but that she was now experiencing increased right leg pain. Further, she acknowledged that she was experiencing some new numbness and tingling in the fourth and fifth toes and lateral calf to the right leg. She further acknowledged that Dr. Fisher continued to keep her on light duty restrictions and prescribed acupuncture of which she had one session.

Finally, Petitioner acknowledged that as of the date of her testimony that she continued to have significant low back pain and pain in the right leg and that she was considering the fusion surgery. Further, it was apparent that she was in pain as at a point in her testimony she requested to stand and walk around.

CONCLUSIONS OF LAW

(F) In support of the arbitrator's decision relating to whether Petitioner's current condition of ill being is causally connected to a work accident, the Arbitrator finds the following facts:

The Arbitrator finds that Petitioner's current condition of ill being is not related to the accident of June 1, 2014. The Arbitrator relies on the subpoenaed records from Illinois Bone & Joint containing the treating records of Dr. Fisher (RX #6), the deposition testimony of Dr. Lami (RX #1), the MRI report from Advocate Christ Hospital dated 11/3/17 (RX #7) and the testimony of Petitioner.

Petitioner testified how the injury occurred on June 1, 2014 when she was removing bags from a carousel and felt a pain in her right lower back. Records indicate that she was initially seen at Concentra where she was treated conservatively land remained off work until returning to light duty on August 25. She worked light duty until being seen by Dr. Alzoobe on September 25, 2014 at the request of Dr. Heller from Concentra. The petitioner saw Dr. Alzoobe for injections up through January 29, 2015 where Dr. Alzoobe in a phone consultation noted Petitioner was not experiencing much improvement with the injections and that she went off work on January 26, 2015. (RX #6).

At the request of a friend, Petitioner testified that she saw Dr. Fisher at Illinois Bone & Joint on February 19, 2015. After taking a history from

Petitioner as to how the injury occurred, reviewing medical records, and performing a physical examination of Petitioner Dr. Fisher diagnosed an L5-S1 herniated disc and right sciatica. The doctor recommended surgical intervention in the form of an L5-S1 right-sided microdiscectomy. (RX #6). Petitioner was off work and being paid benefits at the time she saw Dr. Fisher.

As a result of the surgical recommendation, Petitioner was seen for an independent medical evaluation at Respondent's request by Dr. Lami on February 26, 2015. After examining Petitioner and reviewing records, Dr. Lami suggested that the MRI showed a disc herniation which he believed at the time was related to the June 1, 2014 accident and that treatment up to date had been related. He indicated that he only had an opportunity to review the report of the MRI as opposed to reviewing the MRI films. (RX #1, Page 21). Dr. Lami further testified that if the MRI showed a disc herniation involving an S1 nerve root that surgery could be an option. (RX #1, Page 24).

After the examination with Dr. Lami, records show that Petitioner returned to see Dr. Fisher on March 19 and April 30, 2015. She was not working at the time but on April 30, 2015 advised Dr. Fisher that she could return to full duty if there was no lifting required. Dr. Fisher released her to return to work in that capacity. (RX #6). It is clear from Petitioner's testimony and the records that petitioner was working for Respondent for a 20 month period as a customer service agent from May 4, 2015 to February 9, 2017 and that during that period of time she did not have any further treatment relating to the injury of June 1, 2014. It is also clear that

Petitioner testified that when she went off work on February 10 of 2017 that it was for maternity leave as she had twins on March 28, 2017. Finally, it is clear from Petitioner's testimony that on June 26, 2017 Petitioner's maternity leave had expired and that she took a personal leave of absence thereafter returning back to work in a light duty capacity for Southwest Airlines on September 24, 2017. She continued to work until December 14, 2017 when pursuant to company policy her light duty had expired.

During the period of time that Petitioner was working and thereafter out on maternity leave Dr. Lami testified that he reviewed additional records on July 9, 2016. This included the films of the original MRI that was taken on June 30, 2014. While he agreed with the radiologist for the most part in relation to a herniation at L5-S1 and degenerative changes he requested that Petitioner undergo a second MRI as the original one that she had on June 30, 2014 was of a lower quality (RX #1, Pages 28 – 29).

Petitioner returned to see Dr. Fisher on October 18, 2017 and up to this point she had never gotten the repeat MRI of the lumbar spine that was suggested by Dr. Lami back in July 2016. On October 18, 2017, Dr. Fisher recommended the second MRI which she had on November 3, 2017 at Advocate Christ Hospital. (RX #7). A history taken by Dr. Fisher on October 18, 2017 notes that Petitioner told him that she was very busy with family life after the twins were born. (RX #6).

In his report of December 6, 2017, Dr. Fisher through PA Anderson notes the MRI findings showed disc herniations at L4-5 and L5-S1 with a larger L5-S1 parasagittal to the right and encroaching on the right S1 nerve

root. (RX #6). The Arbitrator's notes the MRI report dated November 3, 2017 from Advocate Christ Hospital. (RX #7). It is noted that in that report at the L4-5 level the radiologist finds a mild disc bulge with no significant central canal stenosis and no facet osteoarthritis with no neural foraminal stenosis. In addition. at the L5-S1 level the radiologists finds a mild disc bulge with a small central protrusion. There is no central canal stenosis and no facet osteoarthritis. There was a moderate bilateral neural foraminal stenosis. Finally, the radiologist's impression of the diagnostic finding to the lumbar spine on November 3, 2017 is a moderate degenerative disc disease at the L5-S1 level and mild disc disease at the L4-5 level with decreased height, desiccation, posterior bulging, and annular fissures. No significant central spinal canal stenosis. Moderate bilateral neural formal stenosis at the L5-S1 level. There is no indication anywhere in the report of an L5-S1 disc encroaching on the right S1 nerve root.

In support of the radiologist findings, the Arbitrator turns to the deposition testimony of Dr. Lami. After having an opportunity to review the films of the MRI taken on November 3, 2017, Dr. Lami indicated that the test showed degenerative changes at the L5-S1 level with desiccation and at L4-5 there was an annular tear and central bulging. The L5-S1 disc herniation was central in nature and he indicated that when he looked at the axial views on the T2 images, which was a specific cross-sectional view, he did not see a compressive pathology on the right S1 nerve root. (RX 1, Page 41).

Dr. Lami testified that he saw Petitioner for a final time on March 12, 2018 wherein she advised him of her work history and her pregnancy

starting from August 2016 and going through into 2017. Dr. Lami believed that the treatment that Petitioner had received since he last saw her on February 26, 2015 was reasonable however it was not related to the injury of June 1, 2014 (RX #1, Page 43).

Dr. Lami went on to testify that Petitioner's state of ill being when he saw her on March 12, 2018 was not related to the 2014 accident. He stated that the petitioner had degenerative changes and that during pregnancy your symptoms can increase and you can exacerbate your back significantly. He further indicated that she had gotten worse without any particular injury and that she was actually off work for some time during her pregnancy. He stated that there was progression without a particular new event which makes it more consistent with a degeneration or progression of her pre-existing condition than anything else. The doctor noted that in both MRIs done in 2014 and in 2017 that there had been degenerative changes and that the first MRI although of poor quality show the disc protrusion slightly to the right side where the most recent MRI showed more of a central disc protrusion referring to the 2017 lumbar MRI. (RX #1, Pages 45 – 48 and RX #7). According to Dr. Lami, Petitioner had reached MMI at the time of her initial epidural steroid injection and he could not support any restriction as a result of the June 1, 2014 injury.

Petitioner testified and records indicate that she had a microdiscectomy surgery performed by Dr. Fisher on March 13, 2018. Postoperatively she followed up with Dr. Fisher and initially in March and April 2018 she reported good results both with back and leg pain.

In June 2018 in following with Dr. Fisher, she began to experience increased back pain as high as a 10 on a scale of 10 which would lessen to a 5 or 6 on a scale of 10. In August 2018 she continued to complain of low back pain with tingling in the right lateral foot and left thigh. In September 2018 she had continued low back pain with right lateral hip and lateral thigh pain down to the knee. Dr. Fisher's report of September 13, 2018 indicates she reported as though her back "felt out of alignment". In November 2018, she advised that she continued to experience pain and that she was home caring for two children under the age of two. Dr. Fisher kept her on light duty restrictions of no more than lifting 20 pounds. Finally, on January 3, 2019, two weeks before trial Petitioner acknowledged that she reported to Dr. Fisher that her back pain had improved after a recent injection three weeks ago but that she was now experiencing increased right leg pain. She further acknowledged experiencing some new numbness and tingling in the fourth and fifth toes and lateral calf to the right leg. Dr. Fisher continued to keep her on light duty (RX #6).

At trial, Petitioner acknowledged that as of the date of her testimony that she continued to have significant low back pain and pain in the right leg and that she was considering a fusion surgery. Further, it was apparent to the Arbitrator that she was in pain on the date of trial as she had requested to stand and walk around during her testimony.

It is clear from the petitioner's diagnostic findings that she does have degenerative disc disease and in fact in a number of the records aside from the testimony of Dr. Lami it is apparent that the petitioner has degenerative disc disease. Further, it is apparent that the petitioner's symptoms and

complaints of pain from the date of injury on June 1, 2014 were consistent all the way up to the date of her testimony. Further, when she returned to work on May 4, 2015 she worked for 20 months without receiving any treatment. While Dr. Fisher saw her on October 18, 2017 and continued to recommend surgery and in fact performed surgery on March 13, 2018 it is clear that the surgery has had no effect on her symptoms.

Finally, in addition to the above there is no indication anywhere in Dr. Fisher's or PA Anderson's records that they give an opinion with regard to causation in this case. Nowhere in the records is it indicated that the petitioner's current condition of ill being both preoperatively and / or postoperatively was related to the injury of June 1, 2014. Conversely, it is clear from Dr. Lami's testimony that he did not believe that the petitioner's current condition of ill-being was related to the accident of June 1, 2014 nor did he believed that the surgery the petitioner had on March 13, 2018 was reasonable and necessary. The unfortunate postoperative results and ongoing complaints of the petitioner up through the date she testified at trial would seem to support Dr. Lami's position. Based upon Dr. Fisher and PA Anderson's records, the testimony of Dr. Lami and the testimony of Petitioner herself, the Arbitrator finds that Petitioner's current condition of ill being is not causally related to the injury of June 1, 2014.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY WIORSKI,

Petitioner,

20IWCC0473

vs. NO: 13 WC 7408

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's award of 15% loss of use of the person-as-a-whole for the left shoulder, 20% loss of use of the right arm, and 20% loss of use of the left arm. The Commission adopts the Arbitrator's analysis of Section 8.1(b) but disagrees with the weight assigned in subsection (v) for the left shoulder injury and the left and right arm injury. The Commission finds that the evidence supports a reduction in the permanency award due to the nature of the injury.

While the Commission agrees with the Arbitrator's analysis relative to the left shoulder and left and right arm, the Commission assigns lesser weight to subsection (v) for those injuries. The Commission notes that the Petitioner was unable to undergo left shoulder surgery due to issues unrelated to the injury and he has not undergone surgery for his bilateral cubital tunnel syndrome. Therefore, the Commission finds that an award of 7.5% loss of use of the person-as-a-whole for the left shoulder injury, and 10% loss of use of the right arm and 10% loss of use of the left arm is proper and more in line with the evidence in the record. The Commission affirms the award of

20IWCC0473

15% loss of use of the person-as-a-whole for the right shoulder.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed September 6, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 15% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 7.5% loss of use of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 25.3 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 10% loss of use of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 25.3 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 10% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services, pursuant to the medical fee schedule and 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.

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: AUG 25 2020

D. Douglas McCarthy

DDM/tdm
O: 7/8/20
052

L. Elizabeth Coppoletti

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

WIORSKI, ANTHONY
Employee/Petitioner

Case# **13WC007408**

20IWCC0473

CITY OF CHICAGO
Employer/Respondent

On 9/6/2019, 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 1.82% 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:

2221 VRDOLYAK LAW GROUP LLC
MICHAEL P CASEY
741 N DEARBORN ST 3RD FL
CHICAGO, IL 60610

0010 CITY OF CHICAGO DEPT OF LAW
MATTHEW A LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20IWCC0473

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

Anthony Wiorski
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **007408**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **7/22/19 and 8/23/19**. 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. [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. [ ] 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 **2/22/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,000**; the average weekly wage was $**1790.40**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**368,985** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**368, 985**.

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

ORDER SEE ATTACHED ADDENDUM

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in the Attached Addendum and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid.

Respondent shall pay petitioner permanent partial disability benefits of $712.55/week for 150 weeks because the injuries sustained caused 15% loss person as a whole for the right shoulder and 15% loss person as a whole for the left shoulder as provided in section 8(d)2. Respondent shall pay petitioner permanent partial disability of $712.55/week for 101.2 weeks because the injuries sustained to caused 20% loss of the right arm and 20% loss of the left arm as provided in section 8(e). See Attached Addendum

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.

David A. Kane
Signature of Arbitrator

September 5, 2019
Date

SEP 6 - 2019

Anthony Wiorski v City of Chicago 13 WC 007408

Anthony Wiorski v City of Chicago 13 WC 007408

FINDINGS OF FACT

Petitioner testified in open hearing before the arbitrator who had opportunity to view his demeanor under direct examination and cross-examination.

Petitioner at hearing was 5 feet 8 inches tall and weighed 210 pounds. On the accident date he weighed 240 pounds. Before the accident date February 22, 2013 he had no problem with his right shoulder, right arm right elbow, right hand and right hand digits that required him to seek medical treatment. T7-8. Prior to February 22, 2013 he had no problem with his left shoulder left arm, left elbow, left hand, left hand digits that caused him to seek any medical treatment. T8. He worked as an operating engineer for respondent for 23 years prior to the date of the accident. His duties were to work with HVAC, heating and ventilation equipment, working with any kind of refrigeration in the buildings and all kinds of maintenance for the buildings. T9. He was required to do overhead work. Overhead work included cleaning filters, going on rooftops, cleaning coils, cleaning belts, adjusting heaters in the ceilings and maintenance. His job required the use of ladders to get on roofs of buildings and clean heaters that are in the ceilings. He was required to carry and lift ladders and required to use screw drivers, nutdrivers, channellocks, pliers, wire cutters, wrenches, and socket wrenches. T 10. Throughout the years that he worked for the respondent prior to the accident date he had no need to seek medical treatment for the right or left shoulder, arm, hand. He is right-hand dominant. He is a member of Local 399 Operating Engineers. T 10-11.

On February 22, 2013 he was on the job and had just finished cleaning heaters that are in the ceilings. He was coming down the stairs with a ladder. The ladder hooked on the railing and he stumbled and fell down. His right arm got pulled

back in the ladder and then he landed on the ground on his left shoulder. He immediately noticed pain in his whole body as he tumbled down the stairs but the main thing was he could not feel is right or left hands. They were numb in both arms all the way to his elbows, and then he had pain in both shoulders. T 12-13.

He was taken by City of Chicago ambulance from the jobsite to Loyola University Medical Center Emergency Room in Maywood. T 13-14.

Admitted in evidence as Petitioner Exhibit 1 are the records and bill of City of Chicago Fire Department EMS. These records document history of accident consistent with petitioner's description of the accident at hearing. Complaints are documented as: pain of head, neck pain, bilateral shoulder pain with numbness/tingling radiating out to fingertips. PX 1, p 4.

Admitted in evidence as Petitioner Exhibit 2 are the medical records and bill of Loyola University Medical Center.

On 2/22/2013 petitioner was treated in the Emergency Room of Loyola University Medical Center with history: fell downstairs approximately 12 feet while carrying a ladder complaining of pain both shoulders, back of neck on left side and left parietal scalp, hematoma noted to scalp, complaining of tingling in both upper extremities and hands. PX 2, p 12. MRI of the cervical spine was performed. PX 2, p 23-24 Assessment was: status post fall down stairs at work presents with neck pain and bilateral distal upper extremity paresthesias with negative imaging. Petitioner reported bilateral shoulders hurt, mild/moderate, worse with movement. PX 2, p 18. X-rays of the left and right shoulder were performed and interpreted to show no acute osseous abnormality. PX 2, p 22-23. He was provided a cervical collar to wear at all times until follow-up in 2 weeks. PX 2, p 17. Petitioner was ordered off work. PX 3, p 43.

Petitioner followed up at US Health Works Medical Group where he was sent by respondent. T 14.

The medical records and bill of US Health Works medical group were admitted in evidence as Petitioner Exhibit 3.

On 2/25/13 US Health Works Medical Group records document history of the accident consistent with petitioner's testimony at hearing. PX 3, p 51. He was complaining of neck pain and bilateral shoulder pain, left more than right that

radiates into upper arms. Pain was reported as 8/10. PX 3, p 51. After examination and review of diagnostic testing impression was: 1. Blunt head trauma; 2. Cervical contusion/strain; 3. Bilateral shoulder contusion/strain; 4. Bilateral extremity paresthesias; 5. Lumbar contusion. PX 3, p 22. Orders were: modified work sitting work only; medication; return to clinic. PX 3, p 22.

On 3/4/13 US Health Works Medical Group records document: petitioner complaining pain is worse than ever; throbbing of shoulders/arms; right shoulder worse than left today 9/10 pain; back pain extends into right calf; Naprosyn is not helping. Diagnosis was: shoulder strain/possible rotator cuff tear. MRI was ordered. Off work was ordered. PX 3, p 31.

On 3/7/13 MR of the left shoulder was performed at Athletic Imaging. Impression was: 1. Superior labral foramen versus small developing tear; 2. Strain or partial tear of the humeral insertion of the inferior glenohumeral ligament; 3. Small focus of bone contusion posterioinferior humeral articular surface consistent with bony contusion or bony reaction. PX 3, p 12.

On 3/7/13 MR of the right shoulder was performed at Athletic Imaging. Impression was: 1. Focal tear of superior labral; 2. Severe bicipital tendinitis; 3. Strain or low-grade partial tear of the humeral insertion of the inferior glenohumeral ligament. PX 3, p 10.

On 3/11/13 US Health Works Medical Group records document: reviewed shoulder MRI findings with patient; referring to ortho for evaluation. Diagnosis was: bilateral glenoid labral tears; cervical strain; lumbar contusion. PX 3, p 15. Petitioner was referred to orthopedic surgeon. PX 3, p 9.

Petitioner chose to follow up with orthopedic surgeon Dr. Scott Rubenstein. T 16.

The medical records of Illinois Bone & Joint Institute/Dr. Scott Rubenstein were admitted in evidence as Petitioner Exhibit 4.

On 3/11/13 Illinois Bone & Joint Institute/Dr. Scott Rubenstein records document: carrying a ladder down stairs because it did not fit in the elevator; fell down the stairs carrying a ladder catching his arm in the railing landing at the bottom; MRI of the cervical spine CT of the head and shoulder films; no significant acute findings or disc herniations were noted; since then he has had complaints of a lot of stiffness in his neck some headaches; problems with motion and pain in his

shoulders bilaterally and numbness in his 4th and 5th digits, but this seems to be settling down and has gone away today. Physical examination was documented to reveal: limited range of motion in the shoulders and positive apprehension bilaterally in the shoulders. After review of diagnostic studies, Plan was: MRI arthrogram of both shoulders as labral tears are not easily seen reliably on a plane MRI; if indeed this continued to show labral pathology, the shoulder arthroscopy would be indicated on both sides. Ordered off work, physical therapy for his neck and MRI arthrogram for both shoulders; mentions a little bit of pain in his lower back; this has not radiated down his legs; exam-wise there is a little tenderness of the paraspinal muscles of the right just above their pelvic attachment; probably more about lumbar sprain. PX 4, p 9-10.

On 3/14/13 MR arthrogram of the right shoulder was performed at Golf Imaging Center. PX 6, p 5-6.

On 3/21/13 MR arthrogram of the left shoulder was performed at Golf Imaging Center. PX 6, p 7-8.

On 4/10/13 Illinois Bone & Joint Institute/Dr. Scott Rubenstein records document: MR arthrogram of both shoulders show a more significant finding on the right shoulder where there is a SLAP tear at the 12 o'clock position in the Buford complex anteriorly; also had some findings of some partial thickness rotator cuff tearing of the supraspinatus in his left shoulder MRI arthrogram; hopefully we might be able to get that one to settle down on its own with some physical therapy. After examination, plan was: suggest arthroscopic evaluation of the right shoulder, repair or resection of the SLAP lesion as is appropriate and subacromial decompression; as far as his left shoulder is concerned, this may ultimately need some intervention as well, but for now we are going to go with physical therapy and see how it progresses. PX 4, p 7-8.

Petitioner chose to have the surgery and follow-up with Dr. Benjamin Domb and Hinsdale Orthopedics. T 17.

The medical records and bill of Hinsdale Orthopedics/Dr. Benjamin Domb were admitted in evidence as Petitioner Exhibit 5.

On 6/3/13 Hinsdale Orthopedic Associates/Dr. Benjamin Domb document: injured bilateral shoulders at work; carrying a ladder downstairs; ladder got caught fell

down injuring bilateral shoulders; physical therapy for almost 3 months for the pain; pain is still very severe with any kind of motion; has lost ROM; had bilateral shoulder arthrograms and not had any injections as of yet; pain is sharp and severe and constant; has been on anti-inflammatories in the past with no relief. After examination and review of diagnostic testing plan was: intra-articular glenohumeral cortisone injections of the left shoulder followed by the right shoulder about 10 days later. This should not be done on the same day because of his diabetes; monitor symptoms closely after the injection; will send him for another 3 months of physical therapy; come back in 3 months; if after 3 months he is making improvement continue physical therapy; no improvement at all then we will consider proceeding with arthroscopic capsular release and manipulation under anesthesia; unable to return to work at this time; his normal work is as an engineer for the City which is a physical job. PX 5, p2-6.

On 6/11/13 Hinsdale Orthopedic Associates records note: injection into the gleno-humeral joint of the right shoulder was performed. PX 5, p7-8.

On 6/12/13 through 12/23/13 physical therapy was performed at Advanced Physicians, SC. PX 7.

On 6/25/13 Hinsdale Orthopedic Associates records document: injection into the gleno-humeral joint of the left shoulder was performed. PX 5, p9-10.

On 10/3/13 Hinsdale Orthopedic Associates records document: patient is a diabetic who presents today for routine follow-up for bilateral shoulder adhesive capsulitis; he has received bilateral cortisone injections with minimal relief; has been in PT and has noticed mild improvement in bilateral shoulders recently; currently in PT; not working due to inability to accommodate his light work restriction. Plan was: diabetic who we have been following for bilateral shoulder adhesive capsulitis; explained to him that his disease process may be slightly more complicated and prolonged due to his underlying diabetes; would like to continue physical therapy; if after 2 months he has not shown any improvement and has plateaued; consider surgical intervention. PX 5, p 11-14.

On 12/12/13 Hinsdale Orthopedic Associates records document: here for recheck; has seen some improvement with his ROM and strength since beginning PT; reiterated to him his disease process may be slightly more complicated and prolonged due to his underlying diabetes; has shown very small gains with

physical therapy; would like to continue physical therapy; see him in 4 months. PX 5, p 15-17.

On 1/31/14 through 2/1/16 petitioner received physical therapy at ATI Physical Therapy for adhesive capsulitis left and right. PX 8.

On 4/17/14 Hinsdale Orthopedic Associates records document: has been in PT working on range of motion; pain is still the same, although he has improved significantly with ROM; injury February 22 of bilateral shoulders resulting in a SLAP tear on the right and partial thickness supraspinatus on the left; secondarily he developed adhesive capsulitis both shoulders; insulin-dependent diabetic; has been in physical therapy since June 2013; range of motion is much better now and most of the adhesive capsulitis has resolved; still has pain due to underlying SLAP tear on the left; still has a little bit of restrictions of range of motion as well but very minimal with about 160° of forward flexion on both sides; also had intra-articular cortisone injections of both shoulders. Plan was: given it has been more than a year since his original injury, would be appropriately indicated for surgical treatment; I would do the right shoulder first with the subacromial decompression, labral repair and perhaps minimal capsular release and manipulation depending on his exam under anesthesia; I think we could do the left shoulder 8-10 weeks later; left shoulder would involve subacromial decompression rotator cuff repair. Next appointment after approval for surgery. PX 5, p 18-19.

On 9/22/14 Hinsdale Orthopedic Associates records document: bilateral shoulder pain; has been recommended surgery in the past but they have not approve surgical options; has had pain and weakness for over a year; he has had PT for over year along with injections to bilateral shoulders which have not improved his pain, stiffness or weakness. Plan we will try to get the surgery approved. PX 5, p 24-26.

1/15/15 Hinsdale Orthopedic Associates records document: continued bilateral shoulder pain and stiffness; he will let us know how he wishes to proceed. PX 5, p 28-29.

On 10/29/15 Hinsdale Orthopedic Associates records document: continues to have bilateral shoulder pain; no improvement since he was last seen; pain is increased with laying on his shoulders; failed to improve with injections, rest and

physical therapy. He remains a candidate for surgery both right and left shoulder. PX 5, p 30-32.

On 4/12/16 Hinsdale Orthopedic Associates records document: patient is unable to have surgery due to diabetes; his endocrinologist has not cleared him for surgery due to high blood sugar. PX 5, p 35.

On 10/21/16 Hinsdale Orthopedic Associates records document: he continues to have pain and problems with bilateral shoulders; he is still awaiting surgical clearance from his endocrinologist. PX 5, p 36.

On 2/7/17 Hinsdale Orthopedic Associates records document: continues to have severe pain to the shoulder following work-related injury 2/22/13; patient advised to stop all NSAIDs/ASA products 7-10 days prior to surgery; issued shoulder immobilizer for post-op stability. PX 5, p 38-39.

On 2/13/17 Dr. Benjamin Domb performed surgery on petitioner's right shoulder described as: arthroscopic subacromial decompression, labral debridement, capsular release, manipulation under anesthesia. The postoperative diagnosis was: right shoulder 1. Subacromial impingement; 2. Superior labrum anterior posterior tear, type I; 3. Adhesive capsulitis. PX 5, p 41-44.

On 2/15/17 through 8/28/17 petitioner received physical therapy at ATI Physical Therapy with diagnosis capsular release right shoulder. PX 9.

On 2/28/17 Hinsdale Orthopedic Associates records document: first post operative appointment following right shoulder arthroscopy; right shoulder feels good; no complaints of numbness or tingling in the involved upper extremity. Plan was: discharge sling at 2 weeks PO; continue physical therapy 5 days per week times 12 weeks; follow-up 6 weeks. PX 5, p 45-46.

On 4/26/17, 6/14/17, and 8/3/17 petitioner followed with Hinsdale orthopedics noting 60% improvement after the surgery; continues to have ongoing pain status post right shoulder arthroscopy; ongoing left shoulder pain, locking following work-related injury. PX 5, p 48-50, 51-52, 53-55.

On 8/22/17 Hinsdale Orthopedic Associates records document: patient is here for recheck of the right shoulder; pain is anterior and deep; had pain for 2 months

with no changes. Diagnostic injection of the left shoulder was performed. Physical therapy was ordered. PX 5, p 56-58.

On 8/24/17 through 10/18/17 petitioner received physical therapy at ATI Physical Therapy to the right arm/right shoulder. PX 10.

On 10/19/17 Hinsdale Orthopedic Associates records document: overall doing well with his right shoulder; has some minor pain and clicking but overall is improved; his left shoulder continues to give him ongoing pain, catching and locking; he feels the left shoulder is weak. Assessment was: 1. Eight-month status post right shoulder arthroscopy, overall doing well; ROM has increased significantly, though continues to experience painful symptoms; 2. Left shoulder pain in the setting of rotator cuff tear. Plan was: patient would be a candidate for left shoulder arthroscopy; rotator cuff repair, subacromial decompression, possible acromioclavical decompression, labral repair, mini open biceps tenodesis. PX 5, p 59-62.

On 2/27/18 Hinsdale Orthopedic Associates records document: continues to experience ongoing moderate to severe left shoulder pain; symptoms are global with progressive worsening recently; pain is worsened with increased activity, overhead activity, and sleeping; improved modestly with rest; patient recently developed sudden cardiac symptoms of palpitations, diaphoresis, anxiety; presented to an emergency department due to his symptoms; subsequently saw his cardiologist at Loyola; is currently not optimized for surgical intervention given his recent cardiac history; additionally insulin regimen has changed several times resulting in ongoing hyperglycemia and poor glycemic control. Assessment was: left shoulder pain in the setting of supraspinatus tear causally related to a work related injury in February 2013. Plan was: given recent cardiac events and poor glycemic control, he is not optimized to proceed with surgery at this time. PX 5, p 63-66.

On 4/10/18 Hinsdale Orthopedic Associates records document: patient was having cardiac/uncontrolled diabetes and therefore he was not medically cleared to proceed with left shoulder arthroscopy as previously recommended by Dr. Domb; recently completed a new MRI of the left shoulder, results are not available at this time; patient states that his left shoulder has continued to be problematic; pain has worsened with reaching and with activity in the morning;

associated with stiffness and locking; notes that overhead activities he does feel weak; denies extremity paresthesias in the arm; reports significant improvement in his range of motion in the right arm since the surgery but does continue to experience ongoing pain throughout the joint; symptoms of pain are especially notable during throwing activities; notes intermittent clicking, though this is not painful; biggest complaint regarding his right shoulder is an extensive amount of paresthesias/burning experiences with prolonged overhead or over 90° of flexion of the shoulder; denies overt weakness of his hand or digits. Assessment was: one year 2 months status post right shoulder arthroscopy, still having some pain; cervical radiculopathy versus thoracic outlet syndrome-right arm numbness and paresthesias above shoulder height; left shoulder pain in the setting of supraspinatus tear causally related to a work related injury. Plan was: right shoulder begin a course of physical therapy for the shoulder and cervical spine recommend MRI of the cervical spine rule out source of the patient's pain/paresthesias; regarding the left shoulder begin course of physical therapy for the shoulder until medically optimized for surgery. PX 5, p 67-70.

On 4/18/18 MRI cervical spine performed at Golf Imaging Center. PX 6, p 9-10. Impression was: multilevel broad-based herniations impinging the ventral thecal sac from C4-7. PX 6, p 10.

On 5/1/18 through 5/29/18 petitioner received physical at ATI Physical Therapy with diagnosis: tear rotator cuff left shoulder. PX 11.

On 5/1/18 through 5/29/18 petitioner received physical therapy at ATI Physical Therapy with diagnosis: Cervical radiculopathy right; thoracic outlet syndrome right. PX 12.

On 5/1/18 through 5/29/18 petitioner received physical therapy at ATI Physical Therapy with diagnosis: pain right shoulder; sprain/strain right shoulder. PX 13.

Petitioner testified Dr. Domb referred him to Dr. Ashraf Darwish at Hinsdale Orthopedics. T 26.

On 6/8/18 Hinsdale Orthopedic Associates Dr. Asharif Darwish records document: on 2/22/13 coming down flight of stairs with the ladder when the ladder got caught causing patient to fall approximately 15-20 feet; transported to Loyola via ambulance, completed CT scan of brain; states he initially had tingling and pain throughout bilateral arms; has been treating with Dr. Domb for bilateral shoulder; completed right shoulder surgery February 2017; reports neck pain; reports weakness in the right arm; reports constant burning and right arm and right hand; numbness/tingling in the left arm and hand when he wakes up; completed 6 weeks of physical therapy with increase in pain; no history of previous neck pain or surgery; not working at this time; completed cervical MRI on 4/18/18; the injury occurred on 2/22/13; patient works as operating engineer. After review of the cervical MRI and examination the diagnosis was: cubital tunnel syndrome, shoulder pain. There is no evidence of central or foraminal narrowing the cervical spine; refer to hand specialist for evaluation and treatment of possible cubital tunnel syndrome on the left side. PX 5, p 71-73.

Petitioner testified he was referred by Dr. Darwish to Dr. Biswas. T 28.

On 6/27/18 Hinsdale Orthopedic Associates Dr. Debut Biswas records document: presents today with bilateral arm numbness and tingling into his ring and small fingers; reports he was involved in a work related injury on February 22, 2013 when he fell during work while carrying a ladder down stairs; experienced a shoulder and neck injury with bilateral upper extremity numbness and tingling following injury which was not present prior to his injury; ultimately underwent surgical intervention for shoulder by Dr. Domb and later underwent evaluation of the cervical spine by Dr. Darwish including an MRI of the cervical spine; reports numbness and tingling primarily in the ulnar nerve distribution bilaterally and is here today for the treatment and evaluation; location of pain is bilateral elbow. After examination and review of diagnostic imaging the order was to undergo nerve conduction studies bilaterally to determine if there is compression neuropathy of the ulnar nerves. PX 5, p 74-76.

On 8/1/18 Hinsdale Orthopedic Associates Dr. Biswas records document: patient underwent EMG bilateral upper extremities. The EMG nerve conduction study were interpreted to reveal evidence for irritation of the ulnar nerves most

probably occurring about the elbows slightly worse on the left. There is no focal conduction block noted. There is also evidence for very mild carpal tunnel syndrome affecting sensory fibers only. PX 5, p 77.

On 8/8/18 Hinsdale Orthopedic Associates Dr. Biswas records document: here for EMG results. Assessment was: bilateral cubital tunnel syndrome. Plan was: recommend course of nonoperative management to include use of occupational therapy for nerve gliding exercises; if he remains symptomatic at that point I would offer decompression of the ulnar nerves at the level of the cubital tunnel. PX 5, p 78-79.

On 8/27/18 through 10/12/18 petitioner underwent physical therapy at ATI Physical Therapy for thoracic outlet syndrome, cubital tunnel syndrome bilateral. PX 14.

On 9/13/18 Hinsdale Orthopedic Associates records document: chief complaint left shoulder pain; he has had a full workup of cervical spine including EMG and follow-up with Dr. Darwish and Dr. Biswas; he was found to have bilateral cubital tunnel syndrome and is working with therapy for that; no changes with the left shoulder. After examination and review of testing Assessment was: left shoulder pain in the setting of supraspinatus tear causally related to a work-related injury. Plan was: recommend left shoulder arthroscopy with rotator cuff repair following treatment for the bilateral cubital tunnel syndrome. Unable to return to work. PX 5, p 80-81.

On 10/24/18 petitioner was examined by respondent Section 12 examining physician, Dr. Edward Goldberg. Report of Dr. Goldberg dated 10/24/18 was admitted in evidence as Respondent Exhibit 5. Dr. Goldberg noted Mr. Wiorski was seen in the office today as an independent medical evaluation regarding his cervical spine. Respondent Exhibit 5, p 1. Dr. Goldberg documented Physical examination: male in no acute distress; he had full cervical flexion, extension, and bilateral rotation all without pain; motor was 5/5 C5-T1, L3-S1; biceps, triceps, Achilles and patellar reflexes were 2+; no atrophy or long tract findings; he had positive Tinel's in both cubital tunnels reproducing this upper extremity numbness and tingling. Respondent Exhibit 5, p 3. After review of records Dr. Goldberg opined: at present time, the patient complains of kinking without pain in the cervical spine; he complains of paresthesias in both upper extremities from

the elbow into the 4th and 5th digits; this does not correlate with any findings on the MRI of the cervical spine; he has no disability regarding his cervical spine; the injury on 2013 likely resulted in cervical strain; he has no neck pain at this time; his upper extremity complaints appear to be due to cubital tunnel and not cervical in etiology; there is no disability regarding the cervical spine; no pre-existing condition regarding the cervical spine from the accident; I do believe regarding the cervical spine, he has had some therapy that is very appropriate; no additional treatment is required for the cervical spine; I will not be commenting upon the shoulders or cubital tunnel; at the present time he is taking medication but does not know the name-this is for his shoulders; regarding his cervical spine he is at MMI from the accident-again this only referable to the cervical spine; I anticipate no permanent disability from the cervical spine; the patient can return to work full duty from the cervical spine alone-I defer to his other physicians regarding his shoulders; I do not anticipate permanent work restrictions for the cervical spine. Respondent Exhibit 5, p 4.

On 10/29/18 Hinsdale Orthopedic Associates records document: returned today for treatment of bilateral cubital tunnel syndrome, left greater than right; no improvement in symptoms after OT; also tried elbow extension splinting at night which does relieve symptoms, but states they are uncomfortable. After examination the plan was: given lack of responses to nonoperative management offered patient an ulnar nerve decompression at the level of the left elbow; after careful consideration of the options the patient wished to proceed with surgical intervention; this will occur on outpatient basis in the upcoming future. Unable to return to work. PX 5, p 82-83.

Petitioner testified he agreed to undergo and wanted the surgery ordered by Dr. Biswas. T 31.

On 11/1/18 petitioner underwent examination by respondent Section 12 examining physician, Dr. Brian Forsythe. The report of Dr. Forsyth dated November 1, 2018 was admitted in evidence as Respondent Exhibit 3. Dr. Forsyth

noted: presents today on 11/01/2018 for an independent medical exam of his left shoulder. Dr. Forsyth's physical examination documented: he is alert and oriented x3, well-developed, well-nourished, in no acute distress; he stands 5'6" tall and weighs 207 pounds; he has full painless cervical and elbow range of motion; negative Sperling's and Lhermitte exams; sensation is intact and symmetric from C5-T1; there is no tenderness to palpation of bilateral shoulders; demonstrates 5/5 supraspinatus, infraspinatus, subspinatus, biceps, triceps and deltoid strength is symmetrically; 1+Neer and Hawkins impingement; trace discomfort with Speed's exam; positive valgus shear exam; equivocal O'Briens exam; negative Yeargason's exam; negative crossover adoption exam; negative belly press; negative lift off exam; special testing for the right shoulder is grossly negative; claimant put forth good effort during physical examination. Respondent's Exhibit 3, p 3. Dr. Forsyth opined: the claimant is currently mildly impaired as it relates to the left shoulder and the work injury; the claimant is currently temporarily impaired as it relates to the left shoulder and the reported work injury; the claimant is a diabetic which predisposes him to capsulitis; to date, treatment provided appears to be appropriate and necessary; at this time I recommend the claimant undergo left shoulder arthroscopy with subacromial decompression and capsular release; postoperatively I recommend that physical therapy begin postoperative day 1; recommend physical therapy 3 times per week for 10-12 weeks; the claimant notes that he takes occasional naproxen for pain and inflammation which I consider appropriate and necessary; the claimant has yet to reach end of healing for the original work injury; I anticipate reaching end of healing for the original work injury 10-12 weeks postoperatively; I do not anticipate any permanent disability relating to the claimant's left shoulder and reported work injury; at this time I recommend that the claimant return to work with restrictions to no repetitive use of the left arm, no overhead activity and no lifting greater than 20 pounds; I do not anticipate the claimant requiring permanent work restrictions. Respondent Exhibit 3, p3-4.

On 12/7/18 petitioner underwent examination by respondent Section 12 examining physician, Dr. Mark Cohen. The report of Dr. Cohen dated December 7, 2018 was admitted in evidence as Respondent Exhibit 4. Dr. Cohen states: unfortunately, the abundant amount of medical records that we received in this

case only came several days ago; they were thus not able to be reviewed in preparation for today's independent medical examination. Respondent's Exhibit 4, p 1. Dr. Cohen noted: on the left side he reports that his ring and small fingers are completely numb every morning that he wakes up; better when he sleeps in his nighttime extension splint; reports minimal numbness and tingling on the left side during the day; if he does not use his brace at night or if he holds his left elbow in a constantly flexed position, his symptoms become more pronounced; that leads to tingling and numbness in his left ring and small fingers; describes talking for a long time on his phone with the phone held in his left hand as such an event. Respondent Exhibit 4, p 1. Dr. Cohen noted: on the right side he only has symptoms on the right side when he raises his hand above his shoulder; this leads to warmth in the hand; hand becomes hot he then notices numbness involving the entire right hand; states that his left side is clearly worse than his right; states that he needs to raise his arm up approximately 30 seconds at that time his hand becomes warm and he begins to have numbness in his entire right hand. Respondent Exhibit 4, p1-2. Dr. Cohen opined: Anthony Wiorski is a 47 year old male who by report has positive electrical studies consistent with bilateral cubital tunnel syndrome; on the left side he reported very classic; symptoms of the right side are highly atypical-it would be very unusual for this to be secondary to ulnar neuropathy at the elbow; this I presume could be seen in association with irritation of the nerve by the brachial plexus or in the cervical spine region; on the left side has classic symptoms and findings of cubital tunnel syndrome; at this point if Mr. Wiorski's symptoms warrant, I believe a simple left cubital tunnel release would be reasonable; this is fortunately a curative condition with surgical intervention; cubital tunnel syndrome is a chronic compressive neuropathy of the ulnar nerve at the elbow; it is typically not posttraumatic in nature; condition is seen in association with certain medical conditions including obesity and diabetes mellitus; my opinions in this case are a bit limited; I have not had the opportunity to review any of the previous medical records; I would only state that without documentation of ulnar nerves symptoms after the trauma dating back to February 2013, it is very difficult now over 5 years from the original event to directly associate the development of cubital tunnel syndrome to this trauma; unless there are acute symptoms that are documented with respect to the ulnar nerve initially after the trauma, there is again no way to directly associate chronic compressive neuropathy to this fall. Respondent Exhibit 4, p2.

On 1/25/19 Hinsdale Orthopedic Associates records document: chief complaint left shoulder pain; Worker's Comp. has denied surgery and he would like a note returning him without restrictions. Assessment was: left shoulder pain in the setting of supraspinatus tear causally related to work related injury. Plan was: recommend left shoulder arthroscopy with rotator cuff repair following treatment for the bilateral cubital syndrome; as surgery has been denied, he will follow-up as needed; he has been released to return to work without restrictions as of 1/28/19. PX 5, p 84.

Petitioner testified that on 1/25/19 he had requested Hinsdale Orthopedic Associates to be released to return to full duty without restrictions and was released to work full duty without restrictions as of January 28, 2019. T 32. Petitioner testified the reason he requested to return to work full duty was because he was not getting paid TTD. T 37. He didn't know what happened because he was planning on getting his surgeries done on his shoulder and his 2 elbows. T 37. Petitioner testified he did not recall if he was instructed that TTD was going to stop but thought he had a letter at home. T 38. When he returned to work he returned in the same job that he had at the time of the accident. He has worked in that same job from the return to work up to the date of hearing. He continues to work for the respondent in that same job. As of the date of hearing he has not injured his right shoulder, left shoulder, right elbow, left elbow, right arm, left arm, or neck and any other accidents other than the work accident of February 22, 2013. T 39. At hearing petitioner testified that with regard to his shoulders, he now performs his job different from the way it was done before February 22, 2013. He still has pain in both shoulders and it takes him a little more time to do his job but he managed to get through it. He does it to the best of his ability. Now when he is overhead reaching, that is the worst part when his hand is overhead; within 15 to 30 seconds his hand gets completely numb; it gets hot; it is a hot sensation that goes all the way down and it feels dead like he can't move it ; he then has to shake it out. That is with regard to the right hand. T 40-41. He has numbness in his little in ring finger that is constant on the right hand. He does things differently; when he grips the ladder he can't stride and he pulls

himself at a slower pace. When he is on the job and starts to feel pain and burning down his hand and numbness he shakes his hand out to give it a couple of seconds and then within a minute it will return for a little while until he starts to work overhead again. At home it is different because he has to do certain things and he compensates so he does not aggravate his right shoulder. T 42. He does not do home activities the same after the accident as he did before the accident because of the sensations in his right elbow hand and arm. It alters everything both work and home. T 42-43 he takes Advil or something for pain if the pain is created from doing activities. T 43. The numbness in his right hand little and ring fingers is constant. When he is with his hand above his head or when he leans on something or is in a position for longer than 15 seconds, it is a hot sensation that travels. He has tingling when he wakes up in both arms and has pins and needles every day. Laying on his shoulders when he sleeps causes the pins and needles. He has braces to sleep with hard plastic but is difficult for him to sleep with the braces. T 44. That is the reason why he wanted the surgery. T 44. When he leans with his right hand pressed against something that's when the hot sensation starts. When he uses his hand overhead after certain amount of time that's when the hot sensation starts. T 44. Regarding his left shoulder and left hand after the accident the differences now is that it is basically the same as what he experienced with the right shoulder, elbow, hand and fingers. He does things different with the right but he manages. He does have pain. He gets locking and stiffness. He is right-hand dominant. T 45. He has not been back to see any doctor for any of these complaints since he last saw Dr. Domb on January 25, 2019. T 45. When he looks in the mirror he notices that his right shoulder droops now and it did not before February 22, 2013. T 45-40. It is not level with his other shoulder. T 47.

On cross-examination petitioner testified that at one point he was cleared for surgery but then because of diabetes and blood pressure he was told he shouldn't have it. T 49. Petitioner testified that the doctors treating him for diabetes and high blood pressure have not said to go ahead and have the surgery. T 49. Petitioner had a prior left thumb injury in 2005 which he believed was a broken thumb or sprained thumb. T 51-52. His salary at the time of hearing was higher than his salary at the time of the injury in 2013. From return to work on January 25, 2019 up until the hearing date of July 22, 2019 he was able to perform all of

the duties required by a hoisting engineer for the City of Chicago fleet facilities management. At hearing he had similar symptoms in his right shoulder and left shoulder. T 53. The surgery on his right shoulder gave him a little bit of range of motion and it has gotten better but pain still comes and goes. He takes Advil over the counter as needed. T 54. Petitioner testified that the prior injury to his left thumb in 1997 was a bruised bone or chip of the bone at the tip. T 57. In the 2nd accident to his left hand he sprained his thumb but could not remember. T 57-58. After he returned to work after those two injuries, they did not affect the function of his hand or his little finger or his ring finger. T 58.

Admitted in evidence as Petitioner Exhibit 15 is a list of unpaid bills with the unpaid bill attached.

Petitioner stipulated on the record that respondent is given credit for all medical bills paid to date.

Respondent called no witnesses.

Admitted in evidence as Respondent Exhibit 1 is the TTD payment listing.

Admitted in evidence as Respondent Exhibit 2 is respondent medical bill payment listing.

Admitted in evidence as Respondent Exhibit 6 is work status report from Hinsdale Orthopedics dated January 25, 2019 indicating work status: return to regular work/activity no restrictions as of 1/28/19.

Respondent Exhibit 7 was withdrawn.

CONCLUSIONS OF LAW

20IWCC0473

F. Is Petitioner's Current Condition of Ill Being Causally Related to the Injury?

Petitioner credibly testified he had no problems with his right shoulder, right arm, right elbow, right hand and right hand fingers, his left shoulder, left arm, left elbow, left hand and left hand fingers prior to the accident date of February 22, 2013. He described an immediate onset of pain in his left and right shoulders, arms and elbows and hands with the fall down the stairs while descending the stairs carrying a ladder. The City of Chicago Fire Department EMS ambulance records for transport from the scene of the accident to the emergency room at Loyola University Medical Center document complaints of pain in the head, neck, bilateral shoulder with numbness and tingling radiating out to the fingertips. PX 1, p4. The emergency room record for day of accident treatment from Loyola University Medical Center document complaints of pain in both shoulders, back of neck on the left side, hematoma to the scalp, tingling in both upper extremities and hands. PX 2, p 12. First medical follow-up at US health Works Medical Group document complaints of neck pain, bilateral shoulder pain left more than right that radiates into upper arms. PX 3, p 51. Records of all medical providers document complaints of both left and right shoulder, left and right arm and left and right hand pain, numbness and tingling that are consistent and continuing through conservative management of physical therapy and injections and then surgery. The arbitrator finds the weight of credible evidence of record under a chain of events analysis demonstrates that petitioner's current condition of ill-being regarding the bilateral shoulders, bilateral arms, bilateral hands and fingers is causally related to the work accident of February 22, 2013 and the arbitrator so finds. Additionally, the medical records of Hinsdale Orthopedics Associates/Dr. Benjamin Domb document: on 2/7/17 continues to have severe pain to the shoulder following work related injury 2/22/13. PX 5, p 38-39; on 4/26/17, 6/14/17 and 8/3/17 continues to have ongoing pain status post right shoulder arthroscopy, ongoing left shoulder pain, locking following work-related injury, PX 5, p 48-50, 50-52, 53-55; on 2/7/17 continues to have severe pain to the shoulder following work-related injury 2/22/13 PX 5, p 38-39; on 2/27/18 left shoulder pain

in the setting of supraspinatus tear causally related to a work related injury in February 2013 PX 5, p 63-66; on 4/10/18 one year 2 months status post right shoulder arthroscopy, still having some pain cervical radiculopathy versus thoracic outlet syndrome-right arm numbness and paresthesia above shoulder height, left shoulder pain in setting of supraspinatus tear causally related to a work related injury PX 5, p 67-70; on 9/13/18 left shoulder pain in the setting of supraspinatus tear causally related to work related injury recommend left shoulder arthroscopy with rotator cuff repair following treatment for bilateral cubital syndrome PX 5, p 80-81; on 1/25/19 chief complaint left shoulder pain Worker's Comp. has denied surgery and he would like a note returning him without restrictions, left shoulder pain in the setting of supraspinatus tear causally related to work related injury, recommend left shoulder arthroscopy with rotator cuff repair following treatment for the bilateral cubital tunnel syndrome, and surgery has been denied, he will follow-up as needed he has been released to return to work without restrictions as of 1/28/19. PX 5, p 84. Respondent IME Dr. Brian Forsyth opined that the petitioner's left shoulder complaints for which he recommended left shoulder arthroscopy with subacromial decompression and capsular release is causally related to the work accident. Respondent Exhibit 3. Respondent's section 12 examining physician, Dr. Mark Cohen, opined that petitioner does have classical symptoms of cubital tunnel syndrome of the left side and atypical symptoms on the right side opining that the left cubital tunnel release would be reasonable. He opines that cubital tunnel syndrome is a chronic compressive neuropathy of the ulnar nerve at the elbow and is not typically posttraumatic in nature. He states that his opinions are limited because he has not had opportunity to review previous medical records and without documentation of ulnar nerves symptoms after the trauma dating back to February 2013 it is very difficult for him over 5 years from the original accident to directly associate development of cubital tunnel syndrome to this trauma and states that unless there are acute symptoms that are documented with respect to the ulnar nerve initially after the trauma, there is again no way to directly associate chronic compressive neuropathy to this fall. Respondent Exhibit 4, p 2. The arbitrator has reviewed all the records in evidence which Dr. Cohen states he was not able to review. The arbitrator finds that the records in evidence document from the day of the accident up to and including the date of the last medical treatment consistent, continuous and ongoing complaints of left and right arm symptoms (for example, on 2/22/13

bilateral shoulder pain with numbness and tingling radiating out to fingertips, PX 1, p 4; on 2/22/13 complains of tingling in both upper extremities and hands PX 2, p 12; on 2/25/13 bilateral extremity paresthesias PX 3, p 22; on 6/27/18 reports numbness and tingling primarily in the ulnar nerve distribution bilaterally and is here today for treatment and evaluation, location of pain is bilateral elbow PX 5, p 74-76; on 8/8/18 here for EMG results bilateral cubital tunnel syndrome, PX 5, p 78-79) which Dr.Cohen identified as cubital tunnel syndrome in his examination performed on 12/7/18. Petitioner credibly testified that after he fell down the stairs he immediately noticed pain in his whole body but the main thing was he couldn't feel his right and left hands, they were numb in both his arms all the way to his elbows. T 13. The arbitrator finds based upon the opinions of the treating doctors and the respondent Section 12 examining doctors that petitioner's current condition of the being with regard to both the right and left shoulders, right and left arms and right and left hands are causally related to the work accident of February 22, 2013. Those conditions of ill-being have been diagnosed by the treating physicians as follows. Regarding the right shoulder condition is described as 1. Subacromial impingement; 2. Superior labrum anterior posterior tear (SLAP) type 1; 3. Adhesive capsulitis. Regarding the left shoulder the condition is described as rotator cuff tear. Regarding the right arm the condition is described as cubital tunnel syndrome. Regarding the left arm the condition is described as cubital tunnel syndrome.

J. Were the Medical Services That Were Provided to Petitioner Reasonable and Necessary? Has Respondent Paid All Appropriate Charges for All Reasonable and Necessary Medical Services?

Respondent IME Dr. Edward Goldberg opined on 10/24/18 that petitioner has no disability regarding his cervical spine; the injury on 2013 likely result in a cervical strain; he has no neck pain at this time; his upper extremity complaints appear to be due to cubital tunnel and not cervical in etiology: there is no disability regarding the cervical spine; no pre-existing conditions regarding the cervical spine from the accident; I do believe regarding the cervical spine, he has had some therapy that is very appropriate; no additional treatment is required for the cervical spine; I will not be commenting upon the shoulders or cubital tunnel;

regarding his cervical spine he is at MMI from the accident-again this is only referable to the cervical spine. Respondent Exhibit 5, p 4. The arbitrator has found that the conditions of the bilateral shoulders and bilateral arms are causally related to the work accident of February 22, 2013.

The medical bill of Mid West Advanced Radiology Center in the amount of $3641 is for MR arthrogram of right shoulder performed on 3/14/13 at the order of Dr. Scott Rubenstein. PX 4, p9-10. The arbitrator finds that this is reasonable and necessary medical treatment causally related to the work injury and respondent is ordered to pay that bill subject to the fee schedule. The medical bill of Mid West Advanced Radiology Center in the amount of $4108 is for MR arthrogram of the left shoulder performed on 3/21/13 at the order of Dr. Scott Rubenstein. PX 4, p9-10. The arbitrator finds that this is reasonable and necessary medical treatment causally related to the work injury and respondent is ordered to pay that bill subject to the fee schedule. Respondent is given credit for all payments made to date.

The medical bill of Adventist Hinsdale Hospital in the amount of $19,403.01 is for right shoulder surgery performed by Dr. Benjamin Domb on 2/13/17. PX 5, p 41-44. The arbitrator finds that this is reasonable and necessary medical treatment causally related to the work injury and respondent is ordered to pay that bill subject to the fee schedule. Respondent is given credit for all payments made to date.

The medical bill of Loyola University Medical Center in the amount of $8646.79 appears to be for cardiac evaluation. There is no documentation that this bill is part of presurgical medical clearance or directly related to the work injury and therefore the arbitrator finds that this bill is not reasonable and necessary or causally related to the work injury of 2/22/2013. The bill is denied.

The bill of City of Chicago EMS in the amount of $1211 is for transportation of petitioner from the scene of the accident to Loyola University Medical Center on the day of the accident 2/22/13. The arbitrator finds this is reasonable and necessary medical treatment causally related to the work accident and respondent is ordered to pay that bill subject to the fee schedule. Respondent is given credit for all payments made to date.

The bill of ATI Physical Therapy in the amount of $9913.06 is for physical therapy ordered by Dr. Biswas to treat bilateral cubital tunnel syndrome. PX 5, p 78-79. The arbitrator finds this is reasonable and necessary medical treatment causally related to the work accident and respondent is ordered to pay that bill subject to the fee schedule. Respondent is given credit for all payments made to date.

The bill of Advanced Physicians, SC, in the amount of $15,155 is for physical therapy from 6/12/13 through 11/13/13 directed to bilateral shoulders ordered by Dr. Domb. PX 7, p 9. The arbitrator finds this is reasonable and necessary medical treatment causally related to the work accident and respondent is ordered to pay that bill subject to the fee schedule. Respondent is given credit for all payments made to date.

L. What Is the Nature and Extent of the Injury?

Section 8.1(b) provides that permanent partial disability shall be established using the criteria provided therein.

(i). Reported Level of Impairment. Neither party submitted an AMA impairment rating and therefore the arbitrator gives this factor no weight.

(ii). Petitioner's Occupation. Petitioner testified that he is an operating engineer for respondent working with heating and ventilation equipment requiring that he perform overhead work including cleaning filters, going on rooftops, cleaning coils, cleaning belts, adjusting heaters in the ceiling and maintenance. His job requires him to lift and carry ladders, use screwdrivers, nutdrivers, cello, pliers, wire cutters, wrenches and socket wrenches. The arbitrator finds that the nature of petitioner's work involving lifting carrying and overhead work in light of the injuries to his bilateral shoulders and arms increases his level of permanent partial disability and the arbitrator gives this factor more weight.

(iii). The Age of the Employee at the Time of the Injury. Petitioner was 41 years old at the time of the injury. He has returned to his same job full duty. Petitioner's young age and therefore longer remaining worklife imposed upon the demands of his job make his younger age a factor that increases the level of permanent partial disability. The arbitrator gives this factor some weight.

(iv). The Employer's Future Earnings Capacity. There is no evidence of record that the work injury impaired petitioner's future earnings capacity. The arbitrator finds that this tends to lower the level of permanent partial disability and gives this factor some weight.

(v). Evidence of Disability Corroborated by the Treating Medical Records. As result of the injury of 2/22/13 petitioner underwent a right shoulder surgery performed by Dr. Domb on 2/13/17 described as: arthroscopic subacromial decompression, labral debridement, capsular release, manipulation under anesthesia. The postoperative diagnosis was: 1. Right shoulder subacromial impingement; 2. Superior labrum anterior posterior tear (SLAP), type I; 3. Adhesive capsulitis. PX 5, p 41-44. The records of Dr. Domb document left shoulder pain, catching and locking weakness and an assessment of left shoulder pain in the setting of rotator cuff tear. Petitioner was ordered to undergo left shoulder arthroscopy rotator cuff repair, subacromial decompression with possible acromioclavicular decompression, labral repair, mini open biceps tenodesis. PX 5, p 59-62. The records document that petitioner developed sudden cardiac symptoms and as result of that and petitioner's pre-existing condition of diabetes with changes in his insulin regimen, he was not as of 2/27/18 optimized to proceed with surgery. PX 5, p 63-66. Medical records document that petitioner had continuing complaints of numbness and tingling in both his right and left arm radiating to his hands diagnosed by Dr. Biswas as bilateral cubital tunnel syndrome for which bilateral surgery was ordered. PX 5, p 78-79. The surgery was not authorized by respondent. Petitioner testified that after his TTD stopped he requested his treating physician to return him to work full duty. At hearing petitioner testified that with regard to his shoulders he now performs his job different from the way it was done before the accident. He has pain in both shoulders and it takes him more time to do his job but he does to his job. When he is working overhead reaching he testified that is the worst part when his hand is overhead. Within 10 to 15 seconds his hands become numb and hot. He has numbness in his little and ring finger that is constant on the right hand. He is right-hand dominant so when he grasps a ladder to ascend he does not stride but pulls himself up at a slower pace. On the job when he feels pain and burning down his hand and numbness he shakes his hand out but it starts again when he does overhead work. He does not do home activities the same as he did before the accident because of the

sensations in his elbow and arm. It alters everything both work and home. He takes Advil if the pain is created from doing activities. He has tingling when he wakes up in both arms and pins and needles every day. Laying on his shoulder when he sleeps causes the pins and needles. He sleeps with braces but it is difficult to sleep with the braces on. The right and left shoulders and arms are basically the same with the same sensations in the hand and fingers. He has returned to work full duty. He has not seen Dr. Domb since January 25, 2019. His range of motion improved after the surgery but the pain comes and goes. The arbitrator finds that the medical records corroborate the evidence of disability and finds that this increases the level of permanent partial disability and gives this factor more weight.

Considering all of the factors pursuant to section 8.1(b) in conjunction with section 8(d)2 and section 8(e), the arbitrator concludes that the work accident of 2/22/2013 caused injury: to petitioner's right shoulder resulting in permanent partial disability of 15% man as a whole; to petitioner's left shoulder resulting in permanent partial disability of 15% man as a whole; to petitioner's right arm resulting in permanent partial disability of 20% of the right arm and 20% of the left arm under section 8(e) of the Act.

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

CHARLES CROWDER,

Petitioner,

20IWCC0474

vs.

NO: 16 WC 020857

PREMIER INSULATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice provided to all parties, the Commission, after considering the issues of accident, causal relationship, temporary total disability benefits, medical expenses, prospective medical care, penalties and fees, and evidentiary issues, being advised of the facts and the law, provides supplemental analysis but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Evidentiary Rulings

Petitioner takes issue with four rulings made by the Arbitrator: 1) Mr. Hederman's potential testimony as to Petitioner feigning injury; 2) Mr. Bryant's potential testimony regarding the demonstrative hard hat videos; 3) Mr. Polster's potential testimony regarding demonstrative evidence (remodeled scaffolding); and 4) Ms. Weber's potential testimony as to the accident investigation.

Regarding the testimony of Mr. Hederman, on cross-examination, Petitioner's counsel inquired as to Mr. Hederman's opinion regarding Petitioner's motive concerning the injury specifically Mr. Hederman's belief as whether Petitioner faked his injury. The Arbitrator sustained the objection. We agree with the ruling. Mr. Hederman's testimony call for speculation as well as an unqualified opinion testimony. CITE

Regarding the demonstrative evidence, case law is well established. In general, physical evidence falls into two categories: 1) real evidence (physical evidence directly connected to issue in controversy); and 2) demonstrative evidence (not directly connected to issue but used to assist witness in explaining testimony to the trier of fact). Demonstrative evidence has no probative value. To be admissible it must be relevant and fair. Moreover, an appropriate foundation must be established. See *Sharbono v. Hillborn, 2014 IL App (3d) 120597.*

As to the hard hat videos which Petitioner's counsel attempted to use during the cross-examination of Mr. Bryant, the Arbitrator sustained the objection. We agree with the ruling. No foundation was laid. Moreover, Petitioner was attempting to utilize the videos as substantive evidence as opposed to demonstrative evidence- its sole purpose being to aid the testimony of the witness. The same is true regarding the remodeled scaffolding. The Arbitrator sustained the objection when Petitioner attempted to introduce the evidence during Petitioner's rebuttal testimony. We agree with this ruling as well.

Regarding the testimony of Ms. Weber and a potential attorney/client privilege, we disagree with the Arbitrator's ruling but find such was harmless error. Ms. Weber was an appropriately designated representative for Respondent, but the indemnification agreement between Respondent and Phillip 66 does not create an automatic attorney/client privilege. On cross-examination, Petitioner's counsel attempted to inquiry as to Ms. Weber's knowledge regarding the specifications of the scaffolding, the Arbitrator sustained the objection. Ms. Weber, though, testified on re-direct examination that she had no personal knowledge regarding the specifications of the scaffold.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 26, 2019, as modified above, is hereby affirmed and adopted.

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: AUG 25 2020

L. Elizabeth Coppoletti

LEC/cak

D:

43

Stephen Mathis

D. Douglas McCarthy

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

CROWDER, CHARLES B
Employee/Petitioner

Case# **16WC020857**

20IWCC0474

PREMIER INSULATION
Employer/Respondent

On 6/26/2019, 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 2.03% 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:

0384 NELSON & NELSON
DAVID NELSON
420 N HIGH ST PO BOX Y
BELLEVILLE, IL 62222

0734 HEYL ROYSTER VOELKER & ALLEN
TONEY J TOMASO
301 N NEIL ST SUITE 505
CHAMPAIGN, IL 61824-1190

20IWCC0474

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)

Charles B. Crowder
Employee/Petitioner

Case # 16 WC 20857

v.

Consolidated cases: n/a

Premier Insulation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on May 17, 2018, February 20, 2019, and May 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, June 16, 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 $n/a; the average weekly wage was $n/a.

On the date of accident, Petitioner was 53 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $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

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

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

June 21, 2019
Date

JUN 26 2019

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 June 16, 2016. According to the Application, Petitioner sustained an accident "While in scope and course of employment" and sustained injuries to his "back, neck, left hip, bilateral shoulders and left arm" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits, as well as prospective medical treatment. There was also a dispute regarding the computation of Petitioner's average weekly wage, specifically, whether overtime was mandatory or not. Finally, Petitioner also filed a petition claiming he was entitled to Section 19(k) and 19(l) penalties as well as Section 16 attorneys' fees. Respondent denied liability on the basis of accident (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as an insulator. Petitioner alleged he sustained the work-related accident on June 16, 2016, when he fell approximately five feet from scaffolding where he was working. Specifically, Petitioner alleged he fell through a hole in the scaffolding to the ground below it. The primary basis of Respondent denying accident was that, given the dimensions of the hole and the size of Petitioner, it would have been physically impossible for Petitioner to have fallen through the hole.

On June 16, 2016, Petitioner was working at the Phillips 66 refinery in Wood River. Petitioner was working with another employee, Brandon Singleton. Petitioner was on a scaffolding approximately five feet above the ground and was performing insulation work on a pipe. The scaffolding surrounded a rectangular shaped open area which had a rectangular shaped pipe support column close to the middle of the open area. A 2 x 10 board was placed across the open area which was used by workers to walk over the open area. Petitioner tendered into evidence a schematic drawing of the scaffolding. The rectangular shaped object running west to east was the 2 x 10 board (Petitioner's Exhibit 19).

Respondent tendered into evidence four photographs of the accident scene. One of the photos showed a man standing in the hole and the upper portion of his body from about the mid chest was visible. The 2 x 10 board was laying across the hole in a diagonal configuration. At trial, Petitioner stated the board as it appeared in the exhibit was not in that configuration at the time of the accident, but was directly across the hole where the man in the photograph was standing (Respondent's Exhibit 8A).

One of the other photographs tendered by Respondent was of the scene of the accident and it showed the 2 x 10 board laying directly across the hole where the man was previously standing (Respondent's Exhibit 8C) Petitioner testified the photographs accurately depicted the scene of the accident.

The schematic drawing also included measurements of the hole. The hole measured 30 1/4 inches wide. The area between the scaffold and pipe support was 12 1/2 inches. The distance between the pipe support and the west side of the scaffolding was 16 1/4 inches. The distance between the pipe support and the east side of the scaffolding was 11 inches (Petitioner's Exhibit

19). Petitioner agreed that the measurements depicted in the exhibit were reasonably close to the actual measurements, although they were not his.

Petitioner testified that he was in the process of walking west to east and, when he stepped on the 2 x 10 board, it gave way. This caused both the board and Petitioner to fall through the hole to the ground below. Petitioner testified that when he fell, he did not fall straight down, but at an angle. While falling, Petitioner stated he struck his left hip on something and possibly other areas of his anatomy as well, but could not recall any specifics.

Petitioner's counsel tendered a demonstrative exhibit which was a scale model of the scaffolding made out of wood and built by Petitioner. Over the objection of Respondent's counsel, Petitioner's counsel made a record of the various measurements of the hole in the model of the scaffolding. Petitioner then proceeded to get inside the hole in the scaffolding so as to demonstrate how it would have been possible for him to sustain a fall through it.

Petitioner testified he was wearing a hard hat at the time of the accident. The hard hat had a mechanism in the back of it to secure it in place. When Petitioner sustained the fall, the hard hat remained in place. When various individuals responded to the scene of the accident, Petitioner was wearing the hard hat when he was lying on the ground.

Subsequent to the accident, Petitioner was transported by ambulance to St. Anthony's Medical Center in Alton. Petitioner has received extensive medical treatment and undergone various diagnostic tests. Petitioner did inform the various medical providers who treated/examined him that he had sustained injuries when he fell from scaffolding on June 16, 2016.

The only medical record the Arbitrator will abstract herein is one which directly pertains to the issue of accident. In that regard, Petitioner was seen at Midwest Occupational Medicine by Dr. George Dirkers on June 17, 2016. When seen by Dr. Dirkers, Petitioner informed him that he fell from a "scaffold board about five-foot up in the air." Dr. Dirkers noted Petitioner had undergone disc surgery in the low back approximately 22 years prior. Further, Dr. Dirkers noted "Interesting is the fact that there are no real body abrasions following a five-foot fall in a very narrow space. Also, his symptoms are symmetrical, when his fall, as he reported, caused him to fall to one side." (Petitioner's Exhibit 7). At trial, Petitioner explained the lack of abrasions on his body because he was wearing both clothes and coveralls which, according to him, provided him with a double layer of protection.

Brandon Singleton testified on the half of Petitioner at trial. Singleton was working with Petitioner at the time of the accident and was present when Petitioner sustained the fall. However, Singleton did not see Petitioner fall, but he observed Petitioner lying on the ground afterward. Singleton also stated the 2 x 10 board was lying on the ground next to Petitioner at that time.

As part of the investigation of the accident, Singleton spoke to various individuals including Sean Walsh, Respondent's owner. Respondent's counsel tendered into evidence an incident investigation report dated June 21, 2016, prepared by Sean Walsh. In that report, Walsh noted he had spoken to Singleton regarding the accident and "Brandon stated after the fact he could not

visualize a man of that size falling through that hole." (Respondent's Exhibit 14). At trial, Singleton stated he had no recollection of making such a statement and he believed Petitioner had fallen from the scaffolding through the hole.

Roderick Bryant testified at trial and was called as a witness by both counsel for Petitioner and Respondent. Bryant worked for GNP Mechanical and was present at the scene of the accident for approximately three hours. He noted Petitioner still had on his hard hat when Petitioner was on the ground. Bryant estimated the size of the hole to be about 12" x 30", but he did not obtain any precise measurements. Bryant opined Petitioner could not have fallen through the hole and based this opinion on several things, namely, the relative size of Petitioner and the hole, the number of obstacles between the scaffolding that Petitioner would have come in contact with when he fell, the fact that he observed no visible signs of trauma on the exposed areas of Petitioner's body and the fact that Petitioner's hard hat remained in place. Bryant agreed he had no specific training in accident investigation and he conducted no testing of the scaffolding.

Patrick Hederman testified on behalf of Petitioner at trial. Hederman was initially contacted by Singleton shortly after the accident occurred. When he arrived on the scene, he observed Petitioner lying on the ground. Hederman prepared the reports which noted Petitioner had fallen through a hole in the scaffolding after stepping on a 2 x 10 (Respondent's Exhibits 11, 12 and 13). Hederman testified he believed Petitioner had, in fact, fallen through the hole in the scaffolding. However, Hederman did not obtain any measurements of either Petitioner or the hole and could not say whether Petitioner could have fit through the hole in the scaffolding or not.

Angie Weber, a Health and Safety Specialist, employed by the refinery, testified on behalf of both Petitioner and Respondent. She participated in the investigation of the accident and opined that based upon Petitioner's size, it would have been "unlikely" for him to have fallen through the hole in the scaffolding. However, Weber stated she had no specific knowledge of the measurements of either Petitioner or the hole in the scaffolding.

Jeffrey Polster, a mechanical engineer obtained by Respondent as an expert witness, testified on behalf of Respondent at trial. Polster was a mechanical engineer for 12 years and had experience in accident reconstruction. Polster testified he visited the accident site on August 10, 2016. At that time, Polster obtained measurements and photographs of the site of the accident.

Polster prepared a report dated December 5, 2016, which was received into evidence at trial. In that report, Polster noted Petitioner was 68 inches tall, had a belly thickness of 13.5 inches and his shoulders were 20 inches wide. Polster opined that Petitioner's size would have required an area of 13.5" x 20" if he felt vertically; however, Petitioner stated he was moving laterally when he fell which would have required a larger opening. Polster opined Petitioner could not have fallen through the opening without impacting the steel and wooden boundaries of the opening with more than one part of his body (Respondent's Exhibit 17). Attached to the report was a schematic drawing of the scaffolding (similar to Petitioner's Exhibit 19) which included a representation of an individual the same size as Petitioner (Respondent's Exhibit 18).

When Polster testified, he was informed of Petitioner's prior testimony regarding the circumstances of fall. Polster opined the fall could not have occurred in the manner described by Petitioner because physics and gravity dictated otherwise. Specifically, Polster testified Petitioner stating that he fell sideways did not make any sense. If Petitioner had, in fact, fallen when he stepped on the board, he and the board would have both fallen straight down.

Conclusion of Law

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

The Arbitrator concludes Petitioner did not sustain an accidental injury arising out of and in the course of his employment by Respondent on June 16, 2016.

In support of this conclusion the Arbitrator notes the following:

The fact Petitioner did not sustain any abrasions as a result of the fall is highly suspicious. The Arbitrator is not persuaded by Petitioner's explanation of having a double layer of protection because of the clothing he was wearing.

Singleton was present when the accident occurred, but did not witness it. While he stated he believed Petitioner sustained the fall through the hole, the Arbitrator notes in the accident investigation report prepared by Sean Walsh, Singleton could not "visualize" someone of Petitioner's size falling through the hole in the scaffolding.

While not, in and of itself, determinative of the issue of accident, the fact Petitioner's hard hat remained in place also raises doubts about the accident.

The Arbitrator was not persuaded by the scale model built by Petitioner. Simply because Petitioner could fit inside the model that he constructed does not mandate the conclusion that he sustained the fall through the hole in the scaffolding.

While Hederman testified he believed Petitioner had fallen through the hole, he did not have any measurements of either the hole or Petitioner and could not state whether Petitioner could have fallen through the whole.

Bryant testified that he did not believe Petitioner had fallen through the hole and gave several reasons for his opinion, but agreed he did not have exact measurements of either Petitioner or the hole.

Weber testified it was "unlikely" Petitioner could have fallen through the hole, but likewise did not have specific measurements of either Petitioner or the hole in the scaffolding.

The Arbitrator notes the various opinions of Hederman, Bryant and Weber were all lay, not expert opinions but does believe they are entitled to some weight.

Jeffrey Polster was the only expert witness to examine the accident site, obtain measurements of the hole in the scaffolding and was informed of Petitioner's size. Based upon the preceding, Polster opined Petitioner could not have fallen through the hole in the scaffolding in the manner in which he described.

Based upon all of the preceding, the Arbitrator concludes Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment by Respondent on June 16, 2016.

In regard to disputed issues (G), (J), (K), (L) and (M) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (F).

William R. Gallagher, Arbitrator

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

DEBORAH MIETHE,

Petitioner,

20IWCC0475

vs.

NO: 17 WC 5336

UNITED AIRLINES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, and 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, 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).

In Section III on page 3 of the decision, the Arbitrator awarded 81-3/7 weeks of temporary total disability (TTD) benefits for the periods from August 14, 2016 through September 12, 2016 and January 30, 2017 through July 24, 2018. However, although he also awarded 81-3/7 weeks of TTD in the Order section, he wrote "commencing January 30th, 2017, through July 24, 2018," instead of specifying the two separate time periods. We clarify the Order section to reflect these two time periods.

All else is affirmed and adopted.

20IWCC0475

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2019, is hereby affirmed and adopted with the clarification noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 25 2020

Maria E. Portela

Deborah L. Simpson

Thomas J. Tyrrell

SE/
O: 6/30/20
49

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

MIETHE, DEBORAH
Employee/Petitioner

Case# **17WC005336**

20IWCC0475

UNITED AIRLINES INC
Employer/Respondent

On 2/4/2019, 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:

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
RAFAL DOBEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

20IWCC0475

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DEBORAH MIETHE,
Employee/Petitioner

v.

UNITED AIRLINES, INC.,
Employer/Respondent

Case # 17 WC 05336

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago**, on **October 2, 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. [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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [ ] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **August 11, 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 $**61,976.38**; the average weekly wage was $**1,190.02**.

On the date of accident, Petitioner was **63** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**21,834.62** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**6,691.81** for other benefits, for a total credit of $**28,526.43**.

Respondent is entitled to a credit of $**31,331.56** under Section 8(j) of the Act.

ORDER

Credits

Respondent shall be given a credit of $**21,834.62** for TTD, $**N/A** for TPD, and $**N/A** for maintenance benefits.

Respondent shall be given a credit of $31,331.56 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 be given credit for $6,691.81 for medical benefits paid under Section 8(j) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services not already paid per Petitioner's Exhibit 7, as provided in Section 8(a) of the Act and pursuant to the fee schedule. Respondent is entitled to credit of $6,691.81 for medical benefits paid under the Act and a $31,331.56 credit under section 8(j) of the Act.

Respondent shall hold the petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 793.27 per week for 81 3/7 weeks, commencing January 30th, 2017, through July 24th, 2018, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $21,834.62 for temporary total disability benefits that have been paid.

Penalties

20IWCC0475

Penalties and attorneys fees are denied.

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

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

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

Signature of Arbitrator

January 25, 2018
Date

FEB 4 - 2019

STATEMENT OF FACTS

The petitioner has worked for the respondent as a flight attendant since 1973. (TA 12) She had low back issues in the past and underwent low back surgery in 2010. (TA 12) Her surgery in 2010 was performed by her current orthopedic surgeon, Dr. Melamed. (TA 13) He performed microdiscectomy at L4-5.

The petitioner also saw Dr. Melamed for low back pain in 2015. (TA 13) Approximately four and a half months before the August 11, 2016, incident, she saw Dr. Melamed for thoracic pain. (TA 14) Four months prior to August 2016, the petitioner also had pain beneath her breast, and it was thought to be shingles. (TA 14)

On August 11, 2016, the petitioner slipped on a blanket that was covering a passenger's vomit causing her to twist her low back. She felt pain in her low back. (TA 16)

The next day she went to Concentra, the company clinic, in Los Angeles. (TA 16) She treated there between August 12, 2016, and February 13, 2017. (TA 16) The petitioner was off work pursuant to Concentra's orders from August 14th – September 12th, 2016. (TA 17) She worked from September 13th, 2016 – January 30th, 2017, during which time she experienced increased back pain. (TA 7) Concentra took her off work January 30, 2017 (TA 17)

The petitioner saw Dr. Melamed February 7, 2017. (TA 18) He treated her until June 19, 2018. (TA 18) She was experiencing left-sided radicular pain with symptoms of left foot drop. (TA 18) She stated that these symptoms began during her return to work September 13th, 2016. (TA 19)

The respondent scheduled examination of the petitioner under section 12 of the Act with Dr. Mather July 24, 2017. (TA 17; RX4) On July 30th, 2017, the petitioner's weekly TTD compensation benefits ceased. Dr. Melamed performed surgery on the petitioner on August 15, 2017. (TA 19)

The petitioner testified that the surgery alleviated her low back pain. (TA 22-23) Pushing and pulling beverage carts while at work presently causes her back pain. (TA 24) She takes over the counter pain relievers when she experiences this pain. (TA 25)

CONCLUSIONS OF LAW

I. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (F) WHETHER THE PETITIONER'S CONDITION OF ILL-BEING IS CAUSALLY RELATED TO HER ACCIDENT THE ARBITRATOR FINDS AS FOLLOWS:

Dr. Melamed testified at his deposition, and his records indicate, that the petitioner suffered radicular low back pain and weakness throughout her treatment from February 2017, through August 2017. (PX8) He testified that the petitioner's symptoms of left-sided radicular low back pain correlated with her diagnostic testing. (PX8) He testified that attempts at conservative treatment failed and that the surgery he performed was reasonable, necessary, and related, and that it alleviated the petitioner's complaints. The petitioner did have complaints and treatment prior to August 11th, 2016. But, she continued to work, losing no time from work, and Dr. Melamed opined that her work accident precipitated his surgical intervention.

The Arbitrator finds the treating surgeon and his opinions persuasive and finds the petitioner's condition of ill-being causally related.

II. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (J) MEDICAL EXPENSES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator awards the petitioner medical bills as provided in Petitioner's Exhibit 7, if not already paid, and pursuant to the fee schedule – less $6,691.81 paid by the respondent (AX1), and less the respondent's $31,331.56 credit under section 8(j) of the Act, which issues the parties stipulated to in their Request for Hearing stipulation sheet. (AX1)

III. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (M) TTD THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator awards the petitioner 81 3/7 weeks TTD compensation benefits for the time periods of August 14th – September 12th, 2016; and, again from January 30th, 2017, through July 24th, 2018, at the applicable weekly TTD compensation rate of $793.27, less the respondent's $21,834.62 TTD credit to which the parties stipulated in their Request for Hearing stipulation sheet. (AX1)

IV. IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (M) PENALITIES & ATTORNEYS FEES THE ARBITRATOR FINDS AS FOLLOWS:

Although, based on the entirety of the evidence of record, the Arbitrator finds as above regarding the issues of causation, medical, and TTD; the Arbitrator denies penalties and fees. The Arbitrator finds the petitioner's treating surgeon, Dr. Melamed, more persuasive than the respondent's section 12 examiner; however, the respondent was not unreasonable, vexatious, or dilatory in relying on its expert's opinions.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RAMON ARELLANO,

Petitioner,

20IWCC0476

vs.

NO: 18 WC 14107

CITY OF CHICAGO –
DEPARTMENT OF WATER,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision regarding two of the five permanency factors in §8.1b(b) of the Act. We find that factor (iii) is given no weight because there was no evidence presented regarding how Petitioner's age affects his disability. Regarding factor (iv), we also give this significant weight but make the following additional findings.

Petitioner testified regarding his current symptoms and how they are aggravated by his job as a laborer, which involves digging, and when the ground is sandy he has to keep lifting up his legs. When he does this, he gets "pains for like two or three more days after that." He also gets "little sharp pains" sometimes when he bends down or puts on his plastic boots. *T.18-20.* Although Petitioner complained about these continued symptoms, he has not returned to his doctors so there are no medical records to corroborate those complaints.

Petitioner testified that he takes ibuprofen that had been prescribed by Dr. Garcia at his

20IWCC0476

last visit, which was on July 18, 2018. *T.23*. However, that medical record does not mention a prescription for ibuprofen. Rather, the first record of Dr. Garcia, on April 25, 2018, indicates that Petitioner was taking ibuprofen *prior to* that visit. Therefore, there is no medical evidence that Petitioner's continued use of ibuprofen was prescribed in relation to his work injury.

Based on all of the evidence and our consideration of all of the factors in §8.1b(b) of the Act, we find Petitioner is entitled to a permanent partial disability award of 3% of the person as a whole under §8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 3% 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.

Pursuant to §19(f)(2) of the Act, Respondent is not required to file an appeal bond in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 25 2020

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 8/4/20
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARELLANO, RAMON
Employee/Petitioner

Case# **18WC014107**

CITY OF CHICAGO - DEPT OF WATER
Employer/Respondent

20IWCC0476

On 1/9/2020, 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.

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

4564 ARGIONIS & ASSOCIATES LLC
MICHAEL YOUKHANA
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0010 CITY OF CHICAGO CORP COUNSEL
MATTHEW A LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20 IWCC0476

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

RAMON ARELLANO
Employee/Petitioner

v.

CITY OF CHICAGO – DEPARTMENT OF WATER
Employer/Respondent

Case # **18** WC **14107**

Consolidated cases: **n/a**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **DECEMBER 20, 2019**. By stipulation, the parties agree:

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

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**85,262.90**, and the average weekly wage was $**1,635.18**.

At the time of injury, Petitioner was **44** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**20,401.76** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**20,401.76**.

After reviewing all the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury:

FINDINGS

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

(a) A physician licensed to practice medicine in all its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
- (i) The reported level of impairment from (a) above;
- (ii) The occupation of the injured employee;
- (iii) The age of the employee at the time of injury;
- (iv) The employee's future earning capacity; and
- (v) Evidence of disability corroborated by medical records.

(See 820 ILCS 305/8.1b)

With regards to factor (i) of Section 8.1b of the Act:

i. The Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence by either party. As such, the Arbitrator gives ***no weight*** to this factor.

With regards to factor (ii) of Section 8.1b of the Act:

ii. The Arbitrator finds the Petitioner was employed by the Respondent as a Laborer at the time of his April 25, 2018, accident, and he testified he returned to work in his prior capacity after said injury. The Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iii) of Section 8.1b of the Act:

iii. The Arbitrator notes that the Petitioner was 44-years-old at the time of the accident. (*AX* 1). The Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iv) of Section 8.1b of the Act: 20IWCC0476

iv. The Arbitrator notes that the Petitioner has returned to work for the Respondent in his previous position as a Laborer for the Respondent and the record lacks testimony and/or evidence as to his future earnings capacity. As such, the Arbitrator therefore gives ***no weight*** to this factor.

With regards to factor (v) of Section 8.1b of the Act:

v. Evidence of disability corroborated by the treating medical records finds that the Petitioner suffered an incarcerated umbilical hernia to his abdomen that required medical care, including a June 20, 2018, surgical procedure. (*PX* 2). He then was authorized to return to full-duty work on September 11, 2018. (*PX* 2). Furthermore, the Petitioner testified he continues to experience occasional abdomen pain while working and takes ibuprofen for any such pain symptoms. Due to the Petitioner's medically documented injuries and other physical complaints, the Arbitrator therefore gives ***significant weight*** to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of an **4.5% loss of use of the person-as-a-whole** pursuant to Section 8(d)2 and Section 8.1b of the Act.

ORDER

Respondent shall pay Petitioner the sum of **$790.64**/week for a further period of **22.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **4.5% loss of use of the person-as-a-whole**.

Respondent shall pay Petitioner compensation that has accrued from **September 11, 2018** through **December 20, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

JANUARY 9, 2020
Date

JAN 9 - 2020

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

ERIC PASQUINO,

Petitioner,

20IWCC0477

vs. NO: 18 WC 8743

STATE OF ILLINOIS /
MENARD C.C.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2019, 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.

20IWCC0477

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

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

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

DATED: AUG 2 5 2020

Maria E. Portela

Kathryn A. Doerries

Thomas J. Tyrrell

SE/
O: 7/14/20
49

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

PASQUINO, ERIC
Employee/Petitioner

Case# **18WC008743**

18WC008744

STATE OF IL/MENARD C C
Employer/Respondent

20IWCC0477

On 10/8/2019, 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 1.69% 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:

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK AMANGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

OCT - 8 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20IWCC0477

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)

Eric Pasquino
Employee/Petitioner

v.

State of IL/Menard C.C.
Employer/Respondent

Case # 18 WC 08743

Consolidated cases: 18 WC 08744

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 27, 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 21, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $71,868.00; the average weekly wage was $1,382.07.

On the date of accident, Petitioner was 51 years of age, married with 3 dependent child(ren).

Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services. The parties stipulated that all medical incurred to date had or would be paid. (Medical bills prior to February 1, 2018, have been paid.)

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 amounts paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, compensation benefits are awarded in case number 18 WC 08744.

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)

October 6, 2019
Date

OCT 8 - 2019

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment by Respondent. In case 18 WC 08743, the Application alleged that on January 21, 2018, Petitioner sustained an injury to "Bilateral Knees/Back/Body as a whole" when Petitioner "Slipped through the gap in the stairs" (Arbitrator's Exhibit 2). In case 18 WC 08744, the Application alleged Petitioner sustained an injury to "Bilateral Knees/left elbow/back/head/body as a whole" when his "Knee gave out going downstairs and fell" (Arbitrator's Exhibit 3).

The cases were consolidated and tried in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of causal relationship. However, Respondent's causality dispute and denial of medical benefits was limited to Petitioner's low back condition. Respondent did not dispute causality in regard to Petitioner's knee injury (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Correctional Sergeant On January 21, 2018, Petitioner was working a light duty capacity because of some foot issues and was assigned to a tower. As Petitioner was in the process of walking up a spiral staircase, he slipped and grabbed a handrail to catch himself. This caused most of Petitioner's weight to shift to his right knee which caused it to buckle and his back to twist.

Petitioner initially sought medical treatment from Dr. Nathan Mall, an orthopedic surgeon, who evaluated Petitioner on January 26, 2018. At that time, Petitioner advised Dr. Mall of the accident of January 21, 2018, and complained of bilateral knee pain, right greater than left. Dr. Mall ordered MRI scans of both knees (Petitioner's Exhibit 3).

The MRIs were performed on January 26, 2018. According to the radiologist, the MRI of Petitioner's left knee did not reveal a meniscal or ligamentous tear, but did reveal a partial thickness tear of the proximal patellar tendon and a chondral defect of the lateral femoral condyle. According to the radiologist, the MRI of Petitioner's right knee did not reveal a meniscal or ligamentous tear, but revealed patellar insertional tendinopathy, and osteochondral lesion in the lateral femoral trochlear articulation and a chondral defect in the femoral trochlear articular cartilage (Petitioner's Exhibit 4).

Dr. Mall reviewed the MRI scans and, in regard to the MRI of Petitioner's right knee, opined that there might be a meniscal tear. Because of the fluid surrounding the MCL, Dr. Mall opined Petitioner had a right knee MCL Grade I tear. In regard to Petitioner's left knee, Dr. Mall opined Petitioner had sustained a left knee strain and possible patella tendon injury. Dr. Mall administered a cortisone injection in Petitioner's right knee and ordered physical therapy (Petitioner's Exhibit 3).

On February 1, 2018, Petitioner was walking down a flight of stairs when his right knee gave out on him. Following this accident, Petitioner went to the ER of Pinckneyville Community Hospital. At that time, Petitioner's primary complaint was pain referable to the thoracic and low back. X-rays of the thoracic and lumbar spine were taken which were negative for fracture. Petitioner was diagnosed with acute thoracic and lumbar spine strains as well as an acute exacerbation of right knee pain (Petitioner's Exhibit 5).

Dr. Mall saw Petitioner on February 12, 2018, and Petitioner advised Dr. Mall of the accident of February 1, 2018. Dr. Mall diagnosed Petitioner as having sustained a lumbar strain in addition to Petitioner's prior injury to his right knee. Dr. Mall ordered physical therapy for both the low back and right knee and noted he was going to refer Petitioner to Dr. Matthew Gornet, an orthopedic surgeon, in regard to Petitioner's low back condition (Petitioner's Exhibit 3).

Dr. Gornet evaluated Petitioner on March 5, 2018. At that time, Petitioner complained of neck and low back pain, but the primary complaint was the low back with pain on both sides, more on the right than left. Petitioner informed Dr. Gornet of the accidents of January 27, 2018, and February 1, 2018, and the medical treatment he received thereafter. On examination, straight leg raising was positive on the right. Dr. Gornet authorized Petitioner to be off work, prescribed medication and ordered MRI scans of the neck and low back (Petitioner's Exhibit 6).

The MRI of Petitioner's cervical spine was performed on May 7, 2018. According to the radiologist, the MRI revealed disc protrusions at C3-C4, C4-C5 and C6-C7 as well as a disc bulge at C5-C6. The MRI of Petitioner's lumbar spine was performed on May 7, 2018. According to the radiologist, the MRI revealed a left paracentral annular tear and protrusion at L5-S1, a right paracentral annular tear and protrusion at L4-L5 and a central protrusion with probable annular tear at L3-L4 (Petitioner's Exhibit 4).

Dr. Gornet saw Petitioner on May 7, 2018, and reviewed the MRI scans. His reading of the MRI scans was consistent with that of the radiologist. Dr. Gornet recommended Petitioner received a single steroid injection at L5-S1 and injections at C4-C5 and C5-C6. He also directed Petitioner to lose weight (Petitioner's Exhibit 6).

Petitioner was seen by Dr. Helen Blake on May 22, 2018. At that time, Dr. Blake administered an epidural steroid injection at L5-S1 (Petitioner's Exhibit 8).

Dr. Gornet subsequently saw Petitioner on July 16, 2018, and noted Petitioner had lost some weight. He noted the MRI revealed disc pathology at L5-S1 and probably also at L4-L5. He opined Petitioner would require a CT discogram at those levels as well as an MRI spectroscopy (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on August 16, 2018. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. In regard to Petitioner's neck, Dr. Chabot diagnosed Petitioner with a neck contusion/strain, but noted his examination of the cervical spine was benign. He opined Petitioner was at MMI in regard to his cervical spine injury (Respondent's Exhibit 3).

In regard to Petitioner's low back injury, Dr. Chabot opined Petitioner had sustained a lumbosacral strain. He opined the MRI of the lumbar spine revealed increased desiccation at L5-S1 and a mild disc bulge at L4-L5. He also opined further diagnostic studies were not indicated, specifically, the CT discogram and MRI spectroscopy, but that Petitioner should receive some additional physical therapy. Dr. Chabot also indicated Petitioner could return to work without restrictions (Respondent's Exhibit 3).

Dr. Gornet subsequently saw Petitioner on October 29, 2018. At that time, Dr. Gornet reviewed Dr. Chabot's medical report of August 16, 2018. Dr. Gornet noted he was putting further treatment in regard to Petitioner's neck on hold, but renewed his recommendation Petitioner undergo a CT discogram at L4-L5 and L5-S1 and an MRI spectroscopy after Petitioner lost more weight (Petitioner's Exhibit 6).

Dr. Gornet saw Petitioner on January 10, 2019, and March 28, 2019. He noted Petitioner had continued to lose weight, renewed his recommendation Petitioner undergo further diagnostic studies and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 6).

At the direction of Respondent, Dr. Chabot reviewed additional medical records and diagnostic studies and prepared a supplemental report dated April 4, 2019. Dr. Chabot simply reaffirmed the conclusions he previously made in his prior report (Respondent's Exhibit 4).

The CT discogram at L4-L5 and L5-S1 was performed on June 4, 2019. According to the radiologist, it was minimally provocative at L4-L5 and provocative at L5-S1 (Petitioner's Exhibit 9). The MRI spectroscopy was not performed.

Dr. Gornet saw Petitioner on July 1, 2019, and reviewed Dr. Chabot's report of April 4, 2019. Among other things, Dr. Gornet noted Dr. Chabot did not provide an explanation as to why Petitioner did not have symptoms prior to the accident of January 21, 2018. Dr. Gornet opined Petitioner should either undergo fusion surgery at L5-S1 or disc replacement surgery at L5-S1, but recommended disc replacement surgery as being the better option (Petitioner's Exhibit 6).

Dr. Gornet was deposed on March 7, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. When questioned about the etiology of Petitioner's low back condition, Dr. Gornet testified it was related to both accidents. When questioned about the etiology of Petitioner's neck condition, Dr. Gornet testified it was related to the second accident (Petitioner's Exhibit 13; pp 13-14).

Dr. Gornet testified that if the diagnostic tests (the CT discogram and MRI spectroscopy) revealed a single level problem, he would recommend Petitioner undergo a single level disc replacement or single level fusion (Petitioner's Exhibit 13; pp 22-23). Obviously, it should be noted Dr. Gornet was deposed prior to Petitioner undergoing the CT discogram.

Dr. Chabot was deposed on May 10, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Dr. Chabot stated Petitioner could return to work without restrictions, but Petitioner should obtain some further treatment for his lumbosacral condition (Respondent's Exhibit 5; p 16).

On cross-examination, Dr. Chabot agreed that the accident of January 21, 2018, could cause a disc injury and could aggravate a pre-existing problem in somebody's lumbar spine. He also agreed Petitioner did not have a history of any prior back or neck injuries (Respondent's Exhibit 5; pp 29-30).

Dr. Chabot also agreed that most sprain/strain injuries will resolved within six to eight weeks post injury, but that Petitioner continued to still have low back symptoms. In response to questioning, Dr. Chabot stated Petitioner's complaints were subjective and not supported by findings on physical examination (Respondent's Exhibit 3; pp 36-37).

At trial, Petitioner testified he continues to experience low back pain all of the time. He stated that pain now goes down both legs. Petitioner has lost weight, he approximates it to be about 70 pounds. He wants to proceed with the surgery as recommended by Dr. Gornet.

Conclusion of Law

In regard to disputed issues (F), (J), (K) and (L) the Arbitrator makes no conclusions of law because these issues are addressed in case 18 WC 08744.

William R. Gallagher, Arbitrator

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

ERIC PASQUINO,

Petitioner,

20IWCC0478

vs.

NO: 18 WC 8744

STATE OF ILLINOIS /
MENARD C.C.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, and 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, but corrects a clerical error 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 last sentence at the bottom of page 4 reads, "However, when he was deposed, Dr. Chabot agreed Petitioner did not have a prior history of back or neck injuries *in the accident* of January 21, 2018, could cause a disc injury and aggravate a pre-existing problem in the lumbar spine." (*Italics added.*) We hereby modify this sentence to replace the italicized portion above with "and the accident."

All else is affirmed and adopted.

20IWCC0478

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2019, is hereby affirmed and adopted with the correction noted above.

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

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

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

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

DATED: AUG 2 5 2020

Maria E. Portela

Kathryn A. Doerries

Thomas J. Tyrrell

SE/
O: 7/14/20
49

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

PASQUINO, ERIC
Employee/Petitioner

Case# **18WC008744**

18WC008743

STATE OF IL/MENARD C C
Employer/Respondent

20IWCC0478

On 10/8/2019, 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 1.69% 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:

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

OCT - 8 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0478

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)

Eric Pasquino
Employee/Petitioner

Case # 18 WC 08744

v.

Consolidated cases: 18 WC 08743

State of IL/Menard C.C.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 27, 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, February 1, 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 $71,868.00; the average weekly wage was $1,382.07.

On the date of accident, Petitioner was 51 years of age, married with 3 dependent child(ren).

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services. The parties stipulated that all medical incurred to date had or would be paid.

Respondent shall be given a credit of $50,238.61 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $50,238.61.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the fusion and/or disc replacement surgery recommended by Dr. Matthew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $921.38 per week for 81 3/7 weeks commencing February 2, 2018, through August 27, 2019, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

October 6, 2019
Date

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment by Respondent. In case 18 WC 08743, the Application alleged that on January 21, 2018, Petitioner sustained an injury to "Bilateral Knees/Back/Body as a whole" when Petitioner "Slipped through the gap in the stairs" (Arbitrator's Exhibit 2). In case 18 WC 08744, the Application alleged Petitioner sustained an injury to "Bilateral Knees/left elbow/back/head/body as a whole" when his "Knee gave out going downstairs and fell" (Arbitrator's Exhibit 3).

The cases were consolidated and tried in a 19(b) proceeding in which Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of causal relationship. However, Respondent's causality dispute and denial of medical benefits was limited to Petitioner's low back condition. Respondent did not dispute causality in regard to Petitioner's knee injury (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Correctional Sergeant On January 21, 2018, Petitioner was working a light duty capacity because of some foot issues and was assigned to a tower. As Petitioner was in the process of walking up a spiral staircase, he slipped and grabbed a handrail to catch himself. This caused most of Petitioner's weight to shift to his right knee which caused it to buckle and his back to twist.

Petitioner initially sought medical treatment from Dr. Nathan Mall, an orthopedic surgeon, who evaluated Petitioner on January 26, 2018. At that time, Petitioner advised Dr. Mall of the accident of January 21, 2018, and complained of bilateral knee pain, right greater than left. Dr. Mall ordered MRI scans of both knees (Petitioner's Exhibit 3).

The MRIs were performed on January 26, 2018. According to the radiologist, the MRI of Petitioner's left knee did not reveal a meniscal or ligamentous tear, but did reveal a partial thickness tear of the proximal patellar tendon and a chondral defect of the lateral femoral condyle. According to the radiologist, the MRI of Petitioner's right knee did not reveal a meniscal or ligamentous tear, but revealed patellar insertional tendinopathy, and osteochondral lesion in the lateral femoral trochlear articulation and a chondral defect in the femoral trochlear articular cartilage (Petitioner's Exhibit 4).

Dr. Mall reviewed the MRI scans and, in regard to the MRI of Petitioner's right knee, opined that there might be a meniscal tear. Because of the fluid surrounding the MCL, Dr. Mall opined Petitioner had a right knee MCL Grade I tear. In regard to Petitioner's left knee, Dr. Mall opined Petitioner had sustained a left knee strain and possible patella tendon injury. Dr. Mall administered a cortisone injection in Petitioner's right knee and ordered physical therapy (Petitioner's Exhibit 3).

On February 1, 2018, Petitioner was walking down a flight of stairs when his right knee gave out on him. Following this accident, Petitioner went to the ER of Pinckneyville Community Hospital. At that time, Petitioner's primary complaint was pain referable to the thoracic and low back. X-rays of the thoracic and lumbar spine were taken which were negative for fracture. Petitioner was diagnosed with acute thoracic and lumbar spine strains as well as an acute exacerbation of right knee pain (Petitioner's Exhibit 5).

Dr. Mall saw Petitioner on February 12, 2018, and Petitioner advised Dr. Mall of the accident of February 1, 2018. Dr. Mall diagnosed Petitioner as having sustained a lumbar strain in addition to Petitioner's prior injury to his right knee. Dr. Mall ordered physical therapy for both the low back and right knee and noted he was going to refer Petitioner to Dr. Matthew Gornet, an orthopedic surgeon, in regard to Petitioner's low back condition (Petitioner's Exhibit 3).

Dr. Gornet evaluated Petitioner on March 5, 2018. At that time, Petitioner complained of neck and low back pain, but the primary complaint was the low back with pain on both sides, more on the right than left. Petitioner informed Dr. Gornet of the accidents of January 27, 2018, and February 1, 2018, and the medical treatment he received thereafter. On examination, straight leg raising was positive on the right. Dr. Gornet authorized Petitioner to be off work, prescribed medication and ordered MRI scans of the neck and low back (Petitioner's Exhibit 6).

The MRI of Petitioner's cervical spine was performed on May 7, 2018. According to the radiologist, the MRI revealed disc protrusions at C3-C4, C4-C5 and C6-C7 as well as a disc bulge at C5-C6. The MRI of Petitioner's lumbar spine was performed on May 7, 2018. According to the radiologist, the MRI revealed a left paracentral annular tear and protrusion at L5-S1, a right paracentral annular tear and protrusion at L4-L5 and a central protrusion with probable annular tear at L3-L4 (Petitioner's Exhibit 4).

Dr. Gornet saw Petitioner on May 7, 2018, and reviewed the MRI scans. His reading of the MRI scans was consistent with that of the radiologist. Dr. Gornet recommended Petitioner received a single steroid injection at L5-S1 and injections at C4-C5 and C5-C6. He also directed Petitioner to lose weight (Petitioner's Exhibit 6).

Petitioner was seen by Dr. Helen Blake on May 22, 2018. At that time, Dr. Blake administered an epidural steroid injection at L5-S1 (Petitioner's Exhibit 8).

Dr. Gornet subsequently saw Petitioner on July 16, 2018, and noted Petitioner had lost some weight. He noted the MRI revealed disc pathology at L5-S1 and probably also at L4-L5. He opined Petitioner would require a CT discogram at those levels as well as an MRI spectroscopy (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on August 16, 2018. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent. In regard to Petitioner's neck, Dr. Chabot diagnosed Petitioner with a neck contusion/strain, but noted his examination of the cervical spine was benign. He opined Petitioner was at MMI in regard to his cervical spine injury (Respondent's Exhibit 3).

In regard to Petitioner's low back injury, Dr. Chabot opined Petitioner had sustained a lumbosacral strain. He opined the MRI of the lumbar spine revealed increased desiccation at L5-S1 and a mild disc bulge at L4-L5. He also opined further diagnostic studies were not indicated, specifically, the CT discogram and MRI spectroscopy, but that Petitioner should receive some additional physical therapy. Dr. Chabot also indicated Petitioner could return to work without restrictions (Respondent's Exhibit 3).

Dr. Gornet subsequently saw Petitioner on October 29, 2018. At that time, Dr. Gornet reviewed Dr. Chabot's medical report of August 16, 2018. Dr. Gornet noted he was putting further treatment in regard to Petitioner's neck on hold, but renewed his recommendation Petitioner undergo a CT discogram at L4-L5 and L5-S1 and an MRI spectroscopy after Petitioner lost more weight (Petitioner's Exhibit 6).

Dr. Gornet saw Petitioner on January 10, 2019, and March 28, 2019. He noted Petitioner had continued to lose weight, renewed his recommendation Petitioner undergo further diagnostic studies and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 6).

At the direction of Respondent, Dr. Chabot reviewed additional medical records and diagnostic studies and prepared a supplemental report dated April 4, 2019. Dr. Chabot simply reaffirmed the conclusions he previously made in his prior report (Respondent's Exhibit 4).

The CT discogram at L4-L5 and L5-S1 was performed on June 4, 2019. According to the radiologist, it was minimally provocative at L4-L5 and provocative at L5-S1 (Petitioner's Exhibit 9). The MRI spectroscopy was not performed.

Dr. Gornet saw Petitioner on July 1, 2019, and reviewed Dr. Chabot's report of April 4, 2019. Among other things, Dr. Gornet noted Dr. Chabot did not provide an explanation as to why Petitioner did not have symptoms prior to the accident of January 21, 2018. Dr. Gornet opined Petitioner should either undergo fusion surgery at L5-S1 or disc replacement surgery at L5-S1, but recommended disc replacement surgery as being the better option (Petitioner's Exhibit 6).

Dr. Gornet was deposed on March 7, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. When questioned about the etiology of Petitioner's low back condition, Dr. Gornet testified it was related to both accidents. When questioned about the etiology of Petitioner's neck condition, Dr. Gornet testified it was related to the second accident (Petitioner's Exhibit 13; pp 13-14).

Dr. Gornet testified that if the diagnostic tests (the CT discogram and MRI spectroscopy) revealed a single level problem, he would recommend Petitioner undergo a single level disc replacement or single level fusion (Petitioner's Exhibit 13; pp 22-23). Obviously, it should be noted Dr. Gornet was deposed prior to Petitioner undergoing the CT discogram.

Dr. Chabot was deposed on May 10, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Dr. Chabot stated Petitioner could return to work without restrictions, but Petitioner should obtain some further treatment for his lumbosacral condition (Respondent's Exhibit 5; p 16).

On cross-examination, Dr. Chabot agreed that the accident of January 21, 2018, could cause a disc injury and could aggravate a pre-existing problem in somebody's lumbar spine. He also agreed Petitioner did not have a history of any prior back or neck injuries (Respondent's Exhibit 5; pp 29-30).

Dr. Chabot also agreed that most sprain/strain injuries will resolved within six to eight weeks post injury, but that Petitioner continued to still have low back symptoms. In response to questioning, Dr. Chabot stated Petitioner's complaints were subjective and not supported by findings on physical examination (Respondent's Exhibit 3; pp 36-37).

At trial, Petitioner testified he continues to experience low back pain all of the time. He stated that pain now goes down both legs. Petitioner has lost weight, he approximates it to be about 70 pounds. He wants to proceed with the surgery as recommended by Dr. Gornet.

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 February 1, 2018.

In support of this conclusion the Arbitrator notes the following:

As noted herein, Respondent did not dispute causality in regard Petitioner's right knee condition, which he injured as a result of the injury of January 21, 2018.

Petitioner's primary treating physician for his neck and low back condition, Dr. Gornet, opined Petitioner's low back condition was related to both the accident of January 21, 2018, and the accident of February 1, 2018; however, virtually all of the medical treatment Petitioner received for his low back condition was received subsequent to the accident of February 1, 2018. Dr. Gornet also opined Petitioner's neck condition was related to the accident of February 1, 2018.

Dr. Gornet ordered MRI scans of Petitioner's cervical and lumbar spine and opined they revealed disc pathology. The CT discogram of Petitioner's low back confirmed Dr. Gornet's diagnosis of disc pathology. Respondent's Section 12 examiner, Dr. Chabot, opined that, in regard to his low back, Petitioner had sustained a lumbosacral strain. However, when he was deposed, Dr. Chabot agreed Petitioner did not have a prior history of back or neck injuries in the accident of January 21, 2018, could cause a disc injury and aggravate a pre-existing problem in the lumbar spine.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Chabot in regard to causality.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, fusion and/or disc replacement surgery as recommended by Dr. Matthew Gornet.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 81 3/7 weeks commencing February 2, 2018, through August 27, 2019.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been under active medical treatment and authorized to be off work during the aforestated period of time.

William R. Gallagher, Arbitrator

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)
X Correction of scrivener's errors	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY FLYNN,

Petitioner,

vs.

NO: 16 WC 34390

20IWCC0479

DUTCH FARMS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, and prospective medical care, and being advised of the facts and law, herein, corrects an apparent scrivener's error in the Memorandum of Arbitrator's Decision, specifically on pages 6 and 7, to reflect the stipulated date of accident to October 25, 2016, and otherwise, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 6 2020
o-7/28/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

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

FLYNN, JEFFREY
Employee/Petitioner

Case# **16WC034390**

DUTCH FARMS
Employer/Respondent

20IWCC0479

On 2/4/2019, 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:

1315 DWORKIN AND MACIARIELLO
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
ANDREW MAKAUSKAS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

20 IWCC0479

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JEFFREY FLYNN,
Employee/Petitioner,

v.

DUTCH FARMS,
Employer/Respondent

Case # 16 WC 34390

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago,** on **October 1, 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] 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. [x] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **10/25/2016**, 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 **$24,960.00**; the average weekly wage was **$480.00**.

On the date of accident, Petitioner was ***35*** years of age, ***single*** with ***2*** dependent children.

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

Respondent shall be given a credit of **$N/A** for TTD, **$ N/A** for TPD, **$ N/A** for maintenance, and $1,075.25 (medical) for other credits or other benefits, for a total credit of $1,075.25.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for treatment at Concentra for dates of service 10/27/16 – 11/4/16 and for up to seven physical therapy visits from AMCI, and $1,200.00 MRI bill, if not already paid, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $1,075.25 for medical benefits that have been paid.

Respondent shall pay Petitioner temporary total disability benefits of $365.71 for 1 and 1/7^{ths} weeks, commencing October 27, 2016, through November 3, 2016, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

January 31, 2019
Date

FEB 4 – 2019

ICArbDec19(b)

In support of the Arbitrator's Decision related to:

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

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

(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 total disability benefits are in dispute?

The Arbitrator finds as follows:

FINDINGS OF FACT

The petitioner testified that at the time of his injury he had been employed by the respondent for a month. (TA 13) He testified to good health prior to the date of accident. The respondent introduced the records of St. Catherine Hospital dated August 25, 2014, showing that the petitioner was seen for dental pain and chronic back pain.

The petitioner testified that on the date of accident he was operating a pallet jack when he turned the machine, lost control, and was pinned by the counterweight on the pallet jack with his right leg and right side of his back pinned against a rack. He felt immediate pain and described it as a level of 9 or 10 out of 10.

On October 27, 2016, the petitioner was seen at Occupational Health Centers of Illinois for treatment. Their records show his chief complaint – "The patient presents today with lower back right knee. Self-reported." Review of systems notes, "Musculoskeletal: right knee and back pain." He gave a history of having been pinned by a pallet jack against a metal rack while at work.

Symptoms were reported in the right knee with a severity of 8/10. He was returned to work with a restriction of sitting work only, and he was to follow up October 31, 2016. (PX1)

On October 31, 2016, the petitioner returned for a recheck of his right knee. He reported joint pain, muscle pain, limping, as well as pain at night. He was continued on a restriction of sitting work only. (PX1)

The petitioner was seen by Dr. Sharma at Concentra on November 4, 2016. Records show that his symptoms had resolved (RX5, pg. 27, 31) No complaints of lower back pain were noted. He was released to return to work full duty and found to be at maximum medical improvement. (RX5, pg. 27-32)

The petitioner returned to work on November 4, 2016, and he worked an eight-hour shift. His day off was Saturday. He worked another full shift on Sunday, November 6, 2016.

On this second day back at work, he was instructed to drive a co-worker to the co-worker's residence in Porter County, Indiana. The petitioner testified that he was told that he did not need to return to work that day. The petitioner claimed that the following day he was called and instructed to report to the office of his supervisor, Cesar, where the respondent fired him.

Beginning November 15, 2016, the petitioner received treatment from AMCI-South Holland Medical Center. He gave a history of being pinned by a pallet jack against a metal rack, striking his back against the rack. He reported back pain rated a 5 out of 10 and right knee pain also rated a 5 out of 10. He was found to have grade 2 edema and tenderness; and positive varus, valgus, and posterior and anterior drawer tests for the right knee. He had tenderness and painful flexion. The petitioner was ordered to have imaging studies done and follow up for more treatment. (PX2)

The petitioner received ongoing care from ACMI-South Holland Medical Center through August 2017. He reported ongoing but improving knee pain and back pain through January 3, 2017, when he was ordered to undergo FCE. The January 4, 2017, FCE indicated that the petitioner would be able to return to work at a medium level – below his reported job duties at a heavy level. He continued to report back pain. (PX2)

On January 24, 2017, the petitioner underwent EMG study which showed no evidence of lumbar radiculopathy. (PX2) On February 27, 2017, Dr. Mather examined the petitioner on behalf of the respondent under Section 12 of the Act. On March 23, 2017, the petitioner was seen by Dr. Lawrence Lieber for a Section 12 examination. He gave a history of being pinned by a pallet jack on October 26, 2016, having resolved his knee treatment, but being currently off work. Dr. Lieber makes reference to MRI of December 15, 2016, which found evidence of small joint effusion, and ACL sprain. (RX2) Dr. Lieber's impression was that the petitioner had suffered a contusion of the right knee which had resolved as of November 4, 2016. (RX2)

Treatment at AMCI-South Holland Medical Center continued through February 7, 2017, when the petitioner was discharged with limitations pending the approval of L4-5 and L5-S1 transforaminal epidural steroid injections and pending the results of a section 12 examination scheduled for February 27, 2017. The opinion of Dr. Agrawal, the petitioner's treating physician, was that the petitioner had a history of positive straight leg raise tests, MRI images of disc protrusions, and functional deficits in his FCE. Dr. Agrawal continued to recommend additional treatment. (PX2)

On June 6, 2017, the petitioner was seen by Dr. Cary Templin at Hinsdale Orthopedics. The petitioner gave a history of being pinned between metal racks and a pallet jack and developing pain in his lower back and also his knee. (PX2) He reported ongoing pain in his lower back and

into his leg, which pain was 90% in his back and 10% into his leg. Dr. Templin reviewed the MRI scan of December 15, 2016, and he found foraminal stenosis greater on the right than the left at L4-5. He concluded that the petitioner's symptoms stemmed from his work injury, and he thought that he was a candidate for L4-5 fusion. The petitioner was to remain off work. (PX3)

June 13, 2017, CT scan of the petitioner's lumbar spine ordered by Dr. Templin indicated possible broad-based bulge or protrusion at L4-5. (PX4)

On August 18, 2017, the petitioner underwent L4-L5 medial branch blocks at Preferred Surgicenter. (PX2) The petitioner treated with AMCI-South Holland Medical Center through September 19, 2017. At that time, he was discharged to the care of Dr. Templin. (PX2)

The petitioner testified that since his injury he has not had any intervening accidents or events, and he has not achieved complete relief from his pain. He testified that he was taking Norco, but that he got off of Norco, and he currently is taking Aleve three times per day, as well as Naproxen and Neurontin. He testified that he has looked for work since his accident, specifically noting that he had sought a job at Chicago Steel, and he interviewed there. He testified that he would seek further treatment from Dr. Templin if approved.

Cesar Villacana testified for the respondent. He works for the respondent overseeing warehouse operations where the petitioner was injured. He testified that he did not witness the alleged accident – but, he had called the petitioner regarding his injury.

Mr. Villacana testified he was informed that on the second work day after the alleged injury the petitioner volunteered to take another employee home. This co-worker had fallen asleep in the breakroom. Mr. Villacana testified that this was to be done during the petitioner's 35-minute break. The petitioner did not return to work after driving the other employee home. Mr. Villacana testified that the petitioner claimed that he was detained by the police for having an open warrant

out for his arrest, and he could not return. Mr. Villacana testified that he called the petitioner to return to work the next day, and the petitioner stated that he felt like they didn't want him to be there any longer, and the petitioner drove to the respondent and voluntarily resigned that morning.

On cross examination, Mr. Villacana admitted that he had prepared a report regarding the termination of the petitioner's employment. He did not bring the report and the respondent did not present it.

Mr. Villacana also admitted that it would take over two hours for the petitioner to travel to the other employee's home in Porter County, Indiana, and back. The petitioner could not accomplish this round trip within his 35-minute break.

On redirect examination, after hearing the testimony of Mr. Villacana, the petitioner testified that it never was the plan for him to return to the respondent after driving his co-worker home, and that he was not detained by the police, and he did not have any open warrants at the time of the accident. The petitioner also testified that the co-worker was intoxicated, not just sleeping.

The petitioner testified that he did not receive TTD prior to his return to work, and he was off work one week. Because of this, he was short of money and would not have driven to the respondent if it had been his intention to resign. The petitioner testified that at the time of his termination he had no other sources of income and no plan to leave the respondent.

The respondent's examiner under section 12 of the Act, Dr. Mather, diagnosed a resolved lumbar contusion. He noted that the petitioner had a pre-existing lumbar L4-5 spondylosis which was not caused or aggravated by the work incident. (RX1)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The petitioner met his burden of proof by a preponderance of the credible evidence that an injury occurred on October 26, 2017, which arose out of and in the course of his employment with the respondent. His testimony that he was pinned by a pallet jack is unrebutted and corroborated by his histories in his medical records.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The petitioner met his burden of proof by a preponderance of the evidence that the current conditions of his leg and back are causally related to the injury. The claimant bears the burden of establishing that alleged accident was the cause, or at least a 'causative factor' in the injury. *All Steel, Inc. v. Industrial Comm'n*, 221 Ill.App.3d 501 (2d Dist. 1991). The petitioner presented credible testimony and documentary evidence that he had no ongoing complaints of knee or back pain prior to his injury.

His contemporaneous medical records include evidence that he was pinned by a pallet jack on October 26, 2016. (PX1) The petitioner testified that he reported leg and back pain to the physicians at Occupational Health Centers of Illinois, which is supported by the medical records.

He testified that his early treatment was focused on his leg injury, but that he had been experiencing back pain since the date of injury, as noted in the records of October 27, 2016.

Concerning the medical records of St. Catherine Hospital, this prior treatment does not appear to have been significant in duration or severity.

The Arbitrator weighs the opinions of the petitioner's treating physicians, Dr. Sharma, Dr. Foreman, Dr. Agrawal, Dr. Templin, and those of the respondent's section 12 examiner, Dr. Mather. Based on the entirety of the record, the petitioner's testimony, records and histories, the Arbitrator finds that the work-related slip and fall of October 26, 2016, caused the current condition of the petitioner's back. The preponderance of the evidence, taken in its entirety, proves that the petitioner's current condition of ill-being is causally related to his injury of October 26, 2016.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (J), WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY, AND WHETHER RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The petitioner met his burden of proof by a preponderance of credible evidence that some of the medical services provided were reasonable and necessary. Here, the Arbitrator relies on the opinions of Dr. Mather.

Regarding the payment for medical services, the Arbitrator finds that the below bill introduced by the petitioner was reasonable, related, and necessary in the following amount:

Preferred Open MRI: $1200.00

Further, the respondent shall pay for seven (7) physical therapy visits for the petitioner.

The rest of the petitioner's medical after November 4, 2016, is not reasonable or necessary. The respondent is ordered to pay unpaid medical for the above MRI, and seven (7) physical therapy visits, pursuant to section 8(a) of the Act and the fee schedule.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

In this matter, the petitioner failed to meet his burden of proof by a preponderance of the credible evidence that prospective medical care is necessary for his injury. The Arbitrator finds that the injury to the petitioner's leg has resolved and requires no further care. Likewise, the injury to his lumbar spine requires no additional treatment per his treating records after November 4, 2016.

The Arbitrator denies further prospective medical.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (L) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE IN DISPUTE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator finds that the petitioner proved by the preponderance of the credible evidence that he is owed 1 1/7ths weeks temporary total disability compensation benefits from October 27th – November 3rd, 2016, when he was released to unrestricted, full duty work and declared at MMI.

The Arbitrator finds that the issue of the respondent's witness, Cesar Villacarna, and any report prepared regarding the termination of the petitioner's employment, is irrelevant. Whether the respondent terminated the petitioner's employment, or the petitioner resigned, the Arbitrator finds that the petitioner was released from care unrestricted, full duty. He could have found work elsewhere.

Even if, *arguendo*, the petitioner's claim that he was restricted is found credible, the evidence that he had no treatment for a year and a half and testified to attempting to find work with only one employer during that same time period does not support an award of further weekly TTD compensation benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TARAS BUSKO,

Petitioner,

vs.

20IWCC0480

NO: 17 WC 25620

YANNI'S DESIGN STUDIO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent partial disability, penalties and fees, and credit, 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 parties stipulated that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on August 15, 2017 when he jumped from the back of a truck that was not equipped with a ladder and fell down to the ground, landing on his hands. Petitioner was treated in the emergency department at Northwest Community Hospital and was placed in bilateral post molds and instructed to follow up with an orthopedic surgeon. On August 18, 2017 Petitioner was diagnosed by Dr. Grear with an un-displaced right radial head fracture and a minimally displaced left radial head fracture.

Dr. Grear placed a long arm cast on the left upper extremity and a sling for the right upper extremity. He recommended follow up in 2 weeks for repeat x-rays at which time consideration would be given for removal of the left long arm cast. Dr. Grear failed to include any documentation regarding Petitioner's work status at this visit.

20IWCC0480

Petitioner returned to Dr. Grear on September 1, 2017. On this date Dr. Grear removed the long arm cast from Petitioner's left arm and advised starting early range of motion exercises with the left upper extremity. Dr. Grear recommended passive and active range of motion exercises for the right upper extremity and return in one month's time for repeat x-rays. No work status order was documented for September 1, 2017 either.

The Arbitrator ordered the payment of temporary total disability benefits only through September 1, 2017. The Commission having reviewed the evidence in its totality, including Petitioner's job duties as a helper/loader in conjunction with Dr. Grear's medical directive on September 1, 2017 that Petitioner engage in early range of motion exercises, finds that the termination of temporary total disability benefits was premature. The Commission further notes that on this date Dr. Grear's documentation states that Petitioner "could look for work with no heavy lifting involved". The Commission hereby finds that payment of temporary total disability benefits to Petitioner should continue to September 19, 2017.

Permanent Disability

The Commission views the evidence differently with respect to Section 8.1b(b) factor (v).

(v) evidence of disability corroborated by the treating medical records

In analyzing the evidence of disability as corroborated by the medical records, the Arbitrator documented that the treating physician placed no permanent restriction on Petitioner and Petitioner has not returned for any medical care after his discharge at maximum medical improvement on February 16, 2018. The Commission notes that on November 11, 2017 Dr. Grear documented that Petitioner lacked full extension in his left elbow.

On February16, 2018, the date that Petitioner was determined to have achieved maximum medical improvement by Dr. Grear it was noted on x-ray that the alignment of Petitioner's left elbow was described as "acceptable". The left elbow alignment is not described as "excellent" as is the right elbow, or even "good". Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds that Petitioner sustained the loss of use of 15% of the left elbow under Section 8(e) of the Act.

The Commission finds that the Arbitrator erred in finding that Petitioner's out-of-pocket payments were not reflected on the bill and therefore failed to award to Petitioner the reimbursement of $800.00 in out-of-pocket medical payments to We Care Orthopedics. The Commission hereby awards the reimbursement to Petitioner of $800.00 in medical expenses paid by Petitioner out-of-pocket.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $353.13 per week for a period of 4 6/7 weeks, commencing August 16, 2017 through September 19, 2017, that being the period of temporary total incapacity for work

20IWCC0480

under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $317.82 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the right arm and 15% of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $883.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for $500.00 for benefits paid under Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for penalties and fees under Sections 19(k), 19(l), and 16 of the Act is hereby denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $23,000.00. 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: AUG 26 2020
SJM/msb
O: 7/8/20
44

Stephen J. Mathis
Stephen Mathis

D. Douglas McCarthy
Douglas McCarthy

L. Elizabeth Coppoletti
L.Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUSKO, TARAS
Employee/Petitioner

Case# **17WC025620**

YANNI DESIGN STUDIO
Employer/Respondent

20IWCC0480

On 9/16/2019, 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 1.82% 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:

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

0210 GANAN & SHAPIRO PC
AMY L TURNBAUGH
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

T. Busco v. Yanni Design Studio, 17 WC 25620 **20IWCC0480**

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

Taras Busko
Employee/Petitioner

v.

Yanni Design Studio
Employer/Respondent

Case # **17** WC **25620**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **04/15/019**. 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 **Amount of Credit**

T. Busco v. Yanni Design Studio, 17 WC 025620

FINDINGS

On **August 15, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$1,059.40**; the average weekly wage was **$529.70**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$500.00** for other benefits, for a total credit of **$500.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, the bill of Northwest Radiology in the amount of $83.00 (PX 4).

Respondent shall pay Petitioner temporary total disability benefits of $353.13/week for 2-3/7 weeks commencing August 16, 2017 through September 1, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $317.82/week for 50.6 weeks because of the injuries sustained caused the 10% loss of use of the right arm and the 10% loss of use of the left arm, as provided in Section 8(e) of the Act.

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

Respondent shall pay Petitioner all awarded compensation that has accrued from 8/15/2017 to 4/15/2019 in a lump sum and shall pay the remainder of the award, if any, in weekly benefits.

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

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

Signature of Arbitrator

September 16, 2019
Date

ICArbDec p. 2

SEP 16 2019

FINDINGS OF FACT

Taras Busko ("Petitioner") was employed as a helper/loader for Yanni Design Studio ("Respondent"), a wedding design business. Petitioner testified he was hired in July of 2017. His job included making, organizing and building sets and displays for weddings and receptions. Petitioner is right hand dominant.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on August 15, 2017. He was instructed by a supervisor, Alexander, to unload a truck. He was in the performance of that activity and had just completed unloading whatever freight was on the truck and he to jumped from the truck. Petitioner testified that there was no ladder available, so he tried to jump but his left foot got caught on something. He then fell down to the ground, landing on his hands.

Petitioner testified he felt immediate pain in his bilateral forearms. Alex and Petitioner's father, who also worked for Respondent, helped him up and brought him inside a building. They applied first aid. Because he was not feeling better, he went home and the next day sought treatment.

The medical records reflect Petitioner first sought treatment at the emergency room at Northwest Community Hospital. X-rays taken in the hospital document Petitioner had a mildly impacted radial neck fracture on the left and questionable elbow joint effusion with no acute fracture indicated or identified on the right. The final reading of the right elbow film by the physician indicated an intra--articular fracture of the right radial head with elbow joint effusion. Petitioner was placed in bilateral post molds and told to follow-up with an orthopedic physician. He was provided some recommendations for that referral. There is no documentation regarding work status. (PX 1)

Petitioner chose to seek follow-up care with Dr. Grear at We Care Orthopedics, LTD, his first visit being on August 18, 2017. Dr. Grear diagnosed Petitioner with an un-displaced right radial head fracture and a minimally displaced left radial neck fracture. Dr. Grear noted Petitioner had been placed in bilateral long arm splints with slings in the emergency room. Dr. Grear placed a long arm cast on the left upper extremity and provided a sling with early range of motion exercises for the right upper extremity and recommended a follow-up in two weeks. He recommended repeat x-rays of the bilateral elbows and consideration of removal of the long arm cast at the next visit. There is no work status documentation regarding this visit. (PX 2)

Petitioner returned to Dr. Grear on September 1, 2017. At that visit, Petitioner had mild tenderness over the right radial head with 3 to 95° of flexion of the elbow. For the left upper extremity, Petitioner had active extension of the fingers without difficulty and no significant swelling. Dr. Grear removed the long arm cast and advised Petitioner to start early range of motion with the left upper extremity. He recommended passive and active range of motion regarding the right upper extremity, with the patient to return in one month for repeat x-ray and evaluation. Again, no work status orders are documented. (PX 2)

Petitioner returned on September 19, 2017 (CC: bilateral radial head fractures, DOI 8/16/17 ?). With respect to the right elbow, Dr. Grear noted that Petitioner only lacked 4 to 5° of full extension and flexion, supination and pronation was within normal limits. Regarding the left elbow, Petitioner lacked 45° of full extension. Intrinsic motor function was within normal limits. Follow-up x-rays were said to show excellent position of the right elbow radial neck fracture without displacement and that the left elbow showed minimal displacement of the radial head with an intra-articular component in the lateral aspect of the radial head. It will be assumed that this is a typo and the correct injury was a right radial head fracture and a left radial neck fracture. There was

acceptable overall anatomic alignment. Dr. Grear recommended Petitioner continue active home exercise program for extension of his left and right elbows. He indicated Petitioner could "look for work with no heavy lifting involved" and return in one month for follow-up repeat x-rays. No off-work slip was issued for this visit. (PX2)

Petitioner returned to Dr. Grear on October 17, 2017. Petitioner was complaining of local discomfort in the left elbow as well as the right and stated he had been working on his range of motion and activity. Petitioner asked Dr. Grear whether he could begin looking for a job. Dr. Grear noted on examination the right elbow had full extension, flexion, supination and pronation with was within normal limits. The left elbow only lacked 2° of full extension. Dr. Grear instructed Petitioner to continue active home exercise program. Dr. Grear noted Petitioner found a security job which he could begin working at and the patient was told to return in one month for likely discharge. (PX2)

Petitioner returned on November 17, 2017. Dr. Grear charted Petitioner had completely healed for his bilateral radial head fractures (?). Petitioner apparently told Dr. Grear he was currently looking for a job, but had not secured any new employment. On examination the right elbow had full, unrestricted range of motion with full extension, flexion, supination and pronation. The left elbow lacked 2° of full extension. Dr. Grear recommended Petitioner continue with passive stretching including 20 to 40 pounds weights frequently throughout the day for the left elbow He was told to return in three months for repeat x-rays. (PX2)

The final Dr. Grear chart note is for Petitioner's presentation on February 16, 2018. Dr. Grear noted Petitioner had returned to work as a security guard. On examination, Dr. Grear noted unrestricted range of motion with full extension supination and pronation regarding the bilateral elbows. Petitioner had excellent grip strength bilaterally. Dr. Grear discharged him from care at that point to return as needed and final x-rays showed the right elbow had excellent position of the radial head with complete consolidation. The left elbow showed moderate tilting but excellent consolidation of the left radial head in acceptable anatomic alignment. (PX2)

Petitioner testified his mother received $400.00 from Respondent to pay medical bills. He testified that he called Viktor at Respondent, asking for some easy type of job with sweeping or anything easy that he could do. According to Petitioner, Viktor said they had nothing for him and could not accommodate any type of light duty restriction. Petitioner admitted at some point in October 2017 he began applying for jobs and applied for a job at Metro Security. He testified that his first day of work at Metro Security was November 17, 2017. He testified he still works at Metro Security, where he watches trailers in a truck yard. With respect to his day-to-day activities, he indicated that his elbows tend to hurt when the weather changes. When he works "with heavy stuff, his arms hurt a lot." He testified that he lifts heavy boxes if his new employer needs help. Petitioner claims to have paid $800 out of pocket to We Care Orthopedics.

Petitioner's Exhibit 5 show a credit card receipt documenting $400 has been paid to We Care Orthopedics. The document shows that an unknown credit card paid $400 on August 18, 2017 on behalf of Taras Busko.

Petitioner testified that he never received any off work slips from Dr. Grear at the five visits that he had in 2017.

Viktor Goisan testified on behalf of Respondent. He has worked for Respondent for eight years. He is currently the production manager. He briefly described the Respondent business is an event production company that designs facilities for banquets and wedding events mainly. He has been the production manager five of the eight years he's worked at Respondent's location. He creates schedules and supervises the crew members, including Petitioner. He knows Petitioner and remembered Petitioner was hired as a helper/loader/unloader in July 2017. After the accident, Petitioner never brought any medical records, work status notes or medical bills to

Respondent. Viktor testified he attempted to check on Petitioner and even asked Petitioner's father, who also worked for Respondent, how Petitioner was doing. Viktor testified Petitioner's job was considered seasonal nature and loaders and unloaders work mainly during the "wedding season", which typically ran from May through October. In the wintertime, jobs were slow and most employees hired for the type of position Petitioner had been let go as they were hired on a seasonal basis only.

Viktor testified that, at Yanni's direction, when Petitioner's mother appeared at Respondent's location the day after Petitioner's accident, he provided her with an envelope containing $500 cash for Petitioner to utilize in helping with medical bills. Viktor further testified that at no time did Petitioner ask for light duty for any type of return to work after the accident in August 2017. Viktor confirmed that he never received any documentation advising what Petitioner's medical or work status was.

Petitioner's Exhibit 10 is the records of Petitioner's subsequent employment at Metro Security. Of note is the fact Petitioner claims to have applied there to become a new employee; however, the documents contained in the exhibit show that Petitioner's W-4 withholding documents were completed in 2004, indicating Petitioner had been potentially a long-term employee for that company.

Petitioner also submitted into evidence as Exhibit 7 a letter from a former Petitioner's counsel dated September 7, 2017 to Respondent regarding filing an Application for Benefits regarding the work injury. Petitioner's Exhibit 8 is a letter dated October 16, 2017, also from that prior attorney, advising that Respondent needed to submit the injury to its worker's compensation carrier. Petitioner's Exhibit 9 is a letter from Erie Insurance acknowledging the claim was submitted. The Arbitrator notes the Petition for Penalties was filed January 8, 2019, a year and a half after Petitioner's injury and fourteen months after Petitioner returned to work for a different employer. In response to Petitioner's Petition, Respondent filed a Response on January 15, 2019. In Respondent's Response, Respondent stated Petitioner never provided any type of medical documentation or work status note to Respondent to support any work restrictions and any claimed liability for lost time benefits. As exhibits attached to the Response, Respondent attached letters from the former Petitioner's attorney of various dates which document Petitioner's attorney could not come to a finality with respect to the timeframe for which he was alleging his client was entitled to lost time benefits. Furthermore, Respondent attached a prior trial stipulation sheet sent by Petitioner's attorney for a potential trial date on January 15, 2019, at which point Petitioner alleged entitlement to TTD benefits through what arguably would have been the trial date of January 8, 2019. On a subsequent Request for Hearing submitted on the date of trial, Petitioner amended his allegation of entitlement to TTD benefits, claiming an entitlement for TTD to the day before he began working at Metro Security, which was said to be November 17, 2017.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law that follow.

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980), including that there is some causal relationship between his employment and the injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

With respect to (F), whether Petitioner's current condition of ill being is causally related to the injury, the Arbitrator finds:

Petitioner's current condition of ill-being regarding his right and left arms (to wit: healed nondisplaced fracture of the right radial head and healed mildly displaced fracture of the left radial neck) is causally related to the injury. This finding is based upon the testimony of Petitioner and the medical records.

With respect to (J) whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds:

Respondent acknowledged liability for an unpaid medical bill to Northwest Radiology Associates in the amount of $83.00. Accordingly, the Arbitrator awards that medical bill to Petitioner, subject to fee schedule analysis.

With respect to the charges of We Care Orthopedics (PX 3), Petitioner is alleging an entitlement to $800 for those services. This is a claim for what amounts to be alleged self-payment or out-of-pocket. Respondent submitted an explanation of benefit from HRAMS medical cost containment as Respondent's Exhibit 2. The bill for We Care Orthopedics submitted to fee schedule analysis stated the allowable charges after bill reduction in review totaled $1,372.77. A review of Respondent's Exhibit 3 documents We Care Orthopedics received payment, pursuant to the fee schedule, of $1,372.77. The only amount Respondent is responsible under the fee schedule for the services rendered is the exact amount that Respondent paid directly to We Care. The Arbitrator further notes the credit for that amount paid is not reflected on Petitioner's Exhibit. The submitted bill does not support Petitioner's claim for the $800.00 and the $400.00 credit card payment is not shown. Interestingly, there is no balance due shown on PX 3. As such, the only award for medical in this claim is the acknowledged radiology bill in the amount of $83.00, which is subject to fee schedule analysis.

With respect to (K), what temporary benefits are in dispute, the Arbitrator finds:

It is well settled Petitioner must prove all elements of his or her claim. In this case,with respect to TTD benefits, it is Petitioner's responsibility to submit documentation which substantiates Petitioner's entitlement to the benefits that he claims. He has claimed an entitlement to TTD benefits from August 16, 2017 through November 16, 2017, a period of 13-2/7 weeks. The Arbitrator first find that with respect to Petitioner's presentation at Northwest Community Hospital, there is no work status discussed. As a practical matter Petitioner was placed in bilateral molds (which are not casts) upon his discharge after examination. When Petitioner appeared for his first evaluation with Dr. Grear on August 18, Dr. Grear placed Petitioner in one long arm cast with respect to the left upper extremity and told Petitioner to begin range of motion exercises with respect to the right upper extremity. Again, the Arbitrator notes Petitioner had no work status report and there was no work status discussed in the medical record.

Upon Petitioner's presentation on September 1, 2017, the cast on the left upper extremity was removed and Petitioner was told to begin range of motion exercises which is the equivalent of physical therapy at that time. Again, no work status was discussed. In fact, the only time work status was discussed was when Petitioner subjectively wondered whether he could start looking for a job on September 19, 2017. Within the medical record itself, Dr. Grear simply stated that Petitioner could begin looking for work where no heavy lifting was

involved. Petitioner admitted that he never advised Respondent of any type of work restriction, nor did he provide it with any documentation or a work status note from Dr. Grear which discussed any type of specific limitations or work restrictions. The Arbitrator further notes that none of the follow-up notes including Petitioner's discharge contained any discussion of work restriction or work status.

From a practical standpoint, given that Petitioner was in bilateral post molds after his presentation to the emergency room and was given a long arm cast for the left upper extremity at the first visit to Dr. Grear, it is reasonable to find Petitioner would and should be entitled to lost time benefits effectively during that timeframe as he was in fact immobile with respect to his bilateral arms. However, after September 1, 2017, Petitioner was taken out of any molds and actually told to begin range of motion exercises. There is no documentation to substantiate Petitioner had a complete work restriction during that timeframe. Petitioner alleges he contacted Respondent at some point asking for any type of light duty. In contradiction, Viktor testified that Petitioner never reached out to him to discuss any type of return to work whatsoever, let alone with any type of non-existent work restriction or light duty discussion, as there is nothing medically to substantiate what potential light duty that may have entailed.

Of course, to be entitled to TTD benefits, the employee must establish not only that he did not work, but also that he is unable to work and the duration of that inability to work. Pietrzak v. Industrial Comm'n, 329 Ill. App. 3d 828, 832 (2002) Here, Petitioner has failed to provide documentation that he was medically authorized off work. Based on the totality of the Record, the Arbitrator finds a logical inference that Petitioner would be entitled to lost time benefits based on a complete inability to work from August 16, 2017 through September 1, 2017, a period of 2-3/7 weeks. This is the time period that Respondent stipulated to. (ArbX 1)

Therefore, Respondent shall pay Petitioner TTD benefits of $317.82/week for 2-3/7 weeks.

With respect to (L), the nature and extent of the injury, the Arbitrator finds:

The Arbitrator must consider the five factors contained in §8.1b(b) of the Act in order to determine an award of permanent partial disability for the injuries sustained.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a helper/loader/unloader at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. Petitioner chose to seek alternative employment, but his treating physician placed no permanent restrictions on Petitioner. Petitioner admitted at trial he does perform heavy lifting activities when needed. The Arbitrator notes Petitioner's entire treatment from the date of accident to his discharge at MMI was just at six months. No surgery was performed and Petitioner effectively performed a home exercise program only. Because of the above, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 33 years old at the time of the accident. Petitioner has not alleged and there is no medical documentation to suggest Petitioner has any lasting effects or impediments from the injury. The Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no documentation was submitted nor did Petitioner allege his future earning capacity would be or is impacted by

this injury. Petitioner has suffered no impact on his future earning capacity. Because of a lack of any documentation, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the treating physician placed no permanent restriction on Petitioner and Petitioner has not returned for any medical care after his discharge at MMI on February 16, 2018. Petitioner did suffer a nondisplaced intraarticular fracture of the right radial head and mildly displaced fracture of the left radial neck, which healed very well. Because of a lack of documentation to support any ongoing disability, the Arbitrator therefore gives appropriate weight to this factor.

Based on the above factors, and the Record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the right arm and 10% loss of use of the left arm, pursuant to §8(e)10 of the Act.

With respect to (M), whether penalties should be imposed upon Respondent, the Arbitrator finds:

Petitioner filed a penalties petition in January 2019, a year and a half after Petitioner's injury and 14 months after Petitioner was discharged from care by his treating physician. (PX 11) Petitioner alleges entitlement to penalties do to Respondent's failure to pay TTD benefits. Respondent submitted a detailed response. (RX 1)

The Arbitrator finds that prior to Petitioner filing an Application for Benefits with the Illinois Worker's Compensation Commission on August 31, 2017, Petitioner failed to provide Respondent with any medical documentation to support his injury and/or his work status or documentation that he was unable to work. A letter from Petitioner's attorney of October 27, 2017 asked Respondent for copies of medical records relating to Petitioner's injury. This is documentation that neither Petitioner nor his attorney had made the effort to obtain medical records to submit to Respondent in an effort to substantiate what Petitioner's injury was and what potential entitlement to benefits he may have. Respondent also submitted a letter from Petitioner's attorney to the carrier dated May 1, 2018. In that letter, Petitioner's attorney claimed his client found a light duty job as a security guard on November 17, 2017 and then demanded TTD benefits from August 15, 2017 through October 15, 2017 only.

Petitioner has a Facebook page which Respondent submitted as part of its exhibit whereby Petitioner claimed he became a security officer at Metro Security as of December 16, 2017. In January 2019, when this matter was first set to potentially proceed to trial, Petitioner submitted to Respondent a trial stipulation sheet wherein Petitioner was alleging entitlement to TTD benefits from August 16, 2017 through January 8, 2018, despite the fact that prior correspondence alleged that Petitioner had obtained a job on November 17, 2017 and Petitioner's attorney was only seeking benefits (in the May 2018 letter) through October 15, 2017. Respondent further alleged in its response that prior to the submission of a compromised settlement demand to Respondent back in May 2018 there was never any demand by Petitioner nor Petitioner's attorney for payment of TTD benefits, nor was any documentation provided to Respondent to determine what period of TTD benefits Petitioner may be entitled to.

Considering the above, the Arbitrator declines to award penalties or attorney's fees.

With respect to (N), whether Respondent is entitled to credit and (O), Other, Amount of Credit, the Arbitrator finds:

Petitioner alleges Respondent gave him $400.00 to help with medical bills. In contradiction, Viktor Goisan testified that, under Respondent's owner's direction and from the accountant, Viktor obtained $500.00 in cash, put it in an envelope and gave it to Petitioner's mother. Petitioner did not submit any testimony from his mother to dispute Victor's testimony. There is no documentation to contradict Victor's testimony. Petitioner alleges the $400.00 was paid to a medical provider as the proof of only receiving that amount only from Respondent. (PX 5) The Arbitrator is not persuaded. Accordingly, Respondent is entitled to a credit of $500.00 applied to this award.

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

Tabita Flores,

Petitioner,

vs. NO. 15WC 24847

Joliet Public Schools – District #86,

20IWCC0481

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of accident, wage calculations, medical expenses, causal connection, penalties and fees, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 8, 2018 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 the removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 26 2020
SJM/sj
o-8/5/2020
44

Stephen J. Mathis

Douglas D. McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FLORES, TABITA
Employee/Petitioner

Case# **15WC024847**

JOLIET PUBLIC SCHOOLS-DISTRICT #86
Employer/Respondent

20IWCC0481

On 11/8/2018, 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 2.45% 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:

0000 - BRISKMAN BRISKMAN & GREENBERG
SUSAN E FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

1109 - GAROFALO SCHREIBER STORM
LAURA HRUBEC
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
) ss.
COUNTY OF WILL)

20IWCC0481

☐ 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

Tabita Flores
Employee/Petitioner

Case # **15** WC **24847**

v.

Joliet Public Schools - District # 86
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 **September 19, 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 **May 22, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**15,366.53**; the average weekly wage was $**374.79**.

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

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

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

0

Respondent shall be given a credit of $**3,180.56** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,180.56**.

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

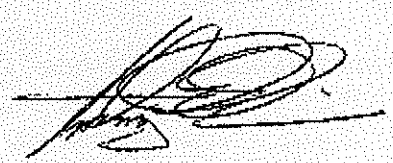
ORDER

The petitioner failed to meet its burden of proof regarding the issues of accident and causal connection.

No benefits are awarded herein.

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

November 2, 2018
Date

NOV 8 - 2018

FACTS:

On May 22, 2015 the petitioner was employed by the respondent as kitchen cook, having been so employed for ten years. The Petitioner testified that prior to that date, she had never had any problems or treatment to her hands, arms or her neck. The petitioner testified that she earned $14.00 an hour until the end of 2014, when she received a raise to $14.53 an hour. The petitioner testified that the school year was the same every year and ended the last week in May or the first week in June, depending on how many snow days there were, and started between the 16th-18th of August.

The petitioner testified that her job as a cook required her to prepare the food, serve the food and then send it to the schools. She testified that she rotated jobs on a weekly basis, working one week at the "steamers", one week at the "ovens", and one week "packing". The petitioner described that when she worked at the "steamers" she would lift cases containing six, six-pound cans and then empty the cans into pans, each of which held three cans. She described that at the "ovens", she would cook hamburgers, hot dogs, corn dogs, chicken, potatoes, and French fries by placing about 30 items or servings on the trays, and then lifting into the oven. She described "packing" as placing two racks of 18 plates of food into "totes" which were used to transport food to the various schools throughout the district. The petitioner testified that when she began working for the respondent, she was working 8 hours a day, 5 days a week, but for the last three years, she was working only 6 hours a day, 5 days a week.

The petitioner testified that, during the week of May 18, 2015, she was "packing" and, on Friday, she started to feel a lot of pain in her arms. She testified that while she had felt pain before this day/week, this time her arms literally had no strength in them. She called her supervisor, Michelle, told her this happened while packing, and she was sent to Meridian Medical Associates.

On May 22, 2015 the petitioner presented to Meridian Medical Associates and was seen by Dr. Hickombottom. She reported that she was employed as a food handler and she complained of pain in both her wrists and elbows. She reported that she had been having pain on and off for the last month but the past two days she had increased pain in both wrists, right greater than left, extending to the right elbow with occasional paresthesias primarily in the right hand involving the third and fourth digits as well as the thumb. She reported that her job required her to stack food trays into a rack on a regular basis, approximately thirty-six food trays per rack for approximately three to four hours a day. Her primary complaints of pain were localized to the palmar surface of the wrist, right greater than left. The pain extended from the wrist and radiated to both elbows, right greater than left. She denied prior history of injury to the affected areas. She reported pain at 5-6/10 in the wrists and 3-4/10 in the elbow regions. The petitioner was diagnosed with bilateral tenosynovitis and bilateral mild epicondylitis, right greater than left. She was placed under restrictions, prescribed Mobic and referred for x-rays. Her restrictions were no highly repetitive motion of the wrists.

On May 29, 2015 the petitioner returned to Meridian Medical reporting no overall improvement. She was wearing a right wrist brace that relieved some of the symptoms. She was prescribed therapy and her restrictions were continued.

On June 25, 2015 the petitioner returned to Meridian Medical and reported minimal overall improvement. She was noted to have had six sessions of therapy and was wearing a thumb Spica wrist brace on the right with regular D-hole wrist brace on the left. She complained of an overall

decrease in grip strength bilaterally, left greater than right. The diagnosis was continued and she was referred to Dr. Cohen, a hand specialist. Therapy was going to be suspended.

On June 26, 2015 the petitioner presented to Dr. Cohen at Meridian Medical for bilateral wrist pain. Her history was reviewed. She was not diabetic. She had morning stiffness in both hands. X-rays previously obtained showed some early degenerative arthritis as well as what appeared to be cysts in the lunate consistent with ulnar abutment syndrome although she did not have symptoms on examination consistent with that. It appeared there may be some systemic issues as well as fibromyalgia. Blood work and a Cortisone injection into the first dorsal compartment bilaterally were prescribed. She would continue the thumb Spica splint, therapy and five-pound weight restriction.

On July 10, 2015 the petitioner presented to Dr. Cohen in follow up. Her blood work looked normal other than suggestions of possible early diabetes. She reported no improvement with the injection, however, it was noted that petitioner's Finkelstein's test was minimally positive bilaterally as opposed to the excruciating pain she had last time. She was still complaining of circumferential pain from the elbow down to the hands and wrists bilaterally. She had no other positive provocative maneuvers. She was referred to her primary care doctor as she may have diabetes and it must be worked up and treated. They would get her going in hand therapy. She would continue the splints and restrictions.

On August 24, 2015 the petitioner returned to Dr. Cohen in follow up. It was noted that the petitioner had no improvement with therapy and no improvement even though she had been off of work for three months. Inconsistent examination findings were also noted including positive Finkelstein's with no distraction and negative Finkelstein's with distraction. Her symptoms were noted to be very dramatic and she had no radicular symptomology and no provocative signs for cervical radiculopathy. It was noted that there were no objective findings and that the physical findings were inconsistent, and her subjective symptoms exceeded her objective findings. The doctor believed an FCE or IME would be appropriate, and he would see her in follow up. She was prescribed an FCE or IME.

On September 18, 2015 the petitioner presented to Dr. Nacke at Hinsdale Orthopedics. This was a doctor of her choice. She was complaining of bilateral upper extremity pain and reported an onset of symptoms during the week of May 22, 2015 while working in the kitchen lifting and carrying heavy trays. She reported progressive worsening of the bilateral upper extremity pain and fatigue. The pain was diffuse throughout the arms but seemed to be worse at the wrists. She also reported numbness in the bilateral hands that involved the index, long and ring fingers and pain in the bilateral small fingers along the ulnar border of the hand. Her exam was limited due to pain and diffuse tenderness in the bilateral arms. Given her hyperreflexia and numbness a cervical MRI and EMG were ordered.

On October 8, 2015 the petitioner underwent a cervical MRI at Hinsdale Orthopedics that revealed mild degenerative changes in the cervical spine at C4-5, C5-6 and C6-7 without high grade central canal or neural foraminal stenosis.

On October 23, 2015 the petitioner returned to Dr. Nacke in follow up of bilateral upper extremity pain. She reported no numbness or tingling. She reported aching pain on the volar and dorsal aspects of the wrist and forearm. The right was worse than the left. She also complained of pain in the right deltoid. The EMG testing was normal. Her exam findings were normal with no

positive provocative maneuvers. She was referred for occupational therapy. She was continued under a five-pound lifting restriction.

On November 6, 2015 the petitioner was examined by Dr. Brian Murphy at the request of the respondent. Dr. Murphy reviewed the records of the petitioner's treatment with Dr. Cohen and Dr. Nacke and he noted the petitioner's complaints of pain in both of her hands, wrists, arms and shoulders, as well as her neck. Dr. Murphy noted that the petitioner's EMG results did not show any evidence of median or ulnar neuropathy and the MRI showed mild degenerative changes but no evidence of central or foraminal stenosis. Dr. Murphy's impression was bilateral forearm tendinitis and bilateral rotator cuff tendinitis. Dr. Murphy noted symptom magnification and opined that the petitioner's symptoms would have occurred irrespective of her job duties.

On December 4, 2015 the petitioner returned to Hinsdale Orthopedics for evaluation. She was recommended to undergo pain management for bilateral arm pain. She was under a five-pound lifting restriction. The petitioner reported that her pain was improving and she noted better range of motion. She reported that her pain was still in the bilateral hands and she rated the pain at 7/10. All provocative testing was noted to be normal, and the petitioner was diagnosed with bilateral forearm flexor and extensor tenosynovitis. She was to continue on Mobic for pain control and a referral to physical medicine for evaluation for alternative pan modalities was discussed and prescribed. She would continue occupational therapy. She was prescribed Gabapentin and Mobic and Versapro cream.

On December 7, 2015 Dr. Murphy prepared an addendum report at Respondent's request. He opined that the petitioner's shoulder complaints were not due to her job activities as they arose long after she had been off of work. As far as the forearm and elbow complaints he opined that they had worsened with her being off of work. Additionally, the near normal exam for the forearms and elbows led him to the concern of symptom amplification; thus, the restrictions he recommended would not be related to any work injury. The restrictions would be in place for four weeks. Dr. Murpy opined that the petitioner was at MMI for the forearms and would be at MMI for the shoulders after therapy.

On January 29, 2016 the petitioner presented to Dr. Kirincic on referral from Dr. Nacke. She presented with a chief complaint of neck and bilateral arm pain and weakness and she reported constant pain in the neck and bilateral arms. It was noted that she had not been working since May of 2015 and that she had initially presented to Dr. Nacke on September 18, 2015 for bilateral extremity pain. She reported that her symptoms began during the week of May 22, 2015 while she was working in the kitchen lifting and carrying heavy trays. She reported progressive worsening of bilateral upper extremity pain and fatigue that was diffuse throughout the extremities but seemed to be worse at the wrists bilaterally. Her symptoms were worse on the right than the left. She also had complaints of numbness in the bilateral hands that involved the index, long and ring fingers with pain in the bilateral small fingers and along the ulnar border of the hand. She was being followed by Dr. Cohen and was referred for therapy. She underwent wrist injections and reported no relief. She was diagnosed with workers' compensation repetitive upper extremity overuse since May of 2015. She also was diagnosed with other cervical disc degeneration, mid cervical region, chronic pain syndrome, sematic dysfunction, scoliosis, and muscle contracture of the bilateral shoulders, other synovitis and tenosynovitis bilateral forearms, bilateral wrist pain and paresthesias of the skin. Acupuncture was administered along with trigger points. A comprehensive therapy note was provided. She would continue Mobic for pain control. A discussion with the petitioner was had regarding a referral to

physical medicine for evaluation for alternative pain modalities. She would follow up in three months. She was continued off of work.

On March 4, 2016 the petitioner followed up with Dr. Nacke with complaints of constant pain in her wrists that was localized over the radial, volar and ulnar aspects of her wrists. She reported pain at 6/10 and was diagnosed with bilateral upper extremity pain. She had multiple upper extremity pain complaints that were symmetric bilaterally. The doctor advised the petitioner that there was no surgical intervention indicated and she was encouraged to follow up with Dr. Kirincic for continued treatment.

On March 11, 2016 the petitioner followed up with Dr. Kirincic and reported that the acupuncture and trigger point injections helped only slightly for a couple of days. She stated she was not better. She had constant wrist pain; her arm pain as okay when she was not moving but she had pain with movement. The neck and shoulders felt tired and numb. Therapy was not helping. She was taking Gabapentin nightly and stated that it helped her sleep but then she was groggy in the morning. She was taking Meloxicam daily. An FCE was ordered and petitioner was released to light duty per Dr. Nacke and "us" in about 1 to 2 months. She was diagnosed with workers' compensation repetitive upper extremity overuse since May of 2015.

On June 15, 2016 a work status note from Dr. Kirincic diagnosed the petitioner with multiple diagnoses. Home exercises, medication and a TENS unit were recommended. She was able to return to modified work on June 16, 2016 with no lifting greater than fifteen pounds occasionally and eleven pounds overhead per an FCE on April 28, 2016. She had achieved maximum medical improvement as of that date, June 15, 2016.

On December 1, 2016 the petitioner returned to Dr. Kirincic in follow up of chronic neck and upper extremity pain. She reported "she has been bad ever since FCE." Pain was constant 8/10 bilateral arms, elbows and wrists. She was okay when resting with elbows bent but felt a pull with straightening. She reported she was worse. She was not working. She was prescribed ultracet. She was diagnosed with repetitive upper extremity overuse and it was noted that, unless her FCE restrictions were accommodated, she could not work.

On May 30, 2017 the petitioner returned to Dr. Kirincic in follow up of her chronic neck and upper extremity pain. She reported her neck was popping and she had 8/10 bilateral arm, elbow and wrist pain. She was wearing gloves all of the time. Acupuncture and trigger points were administered. She could return to work per the FCE.

The petitioner testified that she presently continues to have problems with her arms, hands, and shoulders. She testified that she cannot lift her arms above shoulder level without feeling like she is lifting weights and the her arms feel very heavy. She testified that she has limited problems with her bilateral wrists as long as she does not lift anything heavy or do any repetitive motion. She testified that she can no longer vacuum or cook like she was able to do before as she has very little strength in her hands.

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, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner has alleged a repetitive trauma type injury which occurred "on or about 5-18 to 5-22, 2015". The Petitioner testified that during that week, she was doing "packing" which required her to place racks of plates into totes. She testified that on Friday of that week she began to feel a lot of pain as well as loss of strength in her arms. She reported her problem and was sent for medical care that day. The medical records indicate that the symptoms occurred on May 22, 2015, and that would be consistent with the petitioner's testimony that her problems began on a Friday. The medical records also indicate that the petitioner had pain for the week or so leading up to May 22, 2015 and that she first sought medical attention for her complaints on May 22, 2015. The petitioner did not testify to a single specific incident as a cause or trigger of her symptoms but, rather, testified to her symptoms occurring over the course of performing her "packing" duties on Friday.

It is axiomatic that the petitioner bears the burden of proving all of the elements of her claim, including the occurrence of an injury related to the employment as well as a causal relationship between the injury and the petitioner's condition of ill-being. In the case of a repetitive trauma injury, proving the fact of an injury; a relationship between the injury and the work activities; and the causal relationship between the injury and the condition of ill-being, is almost entirely dependent upon the introduction of competent and persuasive medical evidence and testimony. The mere onset of symptoms while one is working is not, in itself, sufficient to prove a work accident or a causal relationship between the work activities and a condition of ill-being. There must necessarily be a competent, persuasive medical opinion that the condition of ill-being is causally related to the work activities. In the instant matter, the Arbitrator finds that the petitioner failed to meet her burden of proof.

The petitioner developed symptoms in her hands wrists and elbows during a one week period of performing the job of "packing". The petitioner was a ten-year employee of the respondent and, throughout the period of her employment rotated on a weekly basis between jobs working at the "steamers", the "ovens" and "packing". When she initially sought medical treatment, she was seen by Dr. Hickombottom and she reported increased pain in her hands, wrists, and elbows, while performing the "packing" job. She was diagnosed with bilateral tenosynovitis and bilateral mild epicondylitis and was prescribed physical therapy which reportedly did not help. The Arbitrator notes that no opinion of causation was offered by Dr. Hickombottom.

The petitioner was then seen by Dr. Cohen who noted an onset of pain throughout her upper extremities bilaterally with no specific injury or event surrounding the onset. Dr. Cohen suspected some systemic issues as well as fibromyalgia, and he ordered blood work and administered a cortisone injection bilaterally into the first dorsal compartment. Dr. Cohen diagnosed the petitioner with bilateral wrist tenosynovitis. When Dr. Cohen saw the petitioner again two months later, he noted that the petitioner had inconsistent examination findings and subjective complaints which exceeded her objective findings. Dr. Cohen then ordered a Functional Capacity Evaluation. The Arbitrator notes that no causation opinion was offered by Dr. Cohen.

The Petitioner next saw Dr. Nacke who noted that the petitioner "helped work in a kitchen, especially lifting and carrying heavy trays". An EMG was noted to be normal and a cervical MRI was noted to demonstrate mild multilevel degenerative changes. Dr. Nacke diagnosed the petitioner as having bilateral forearm flexor and extensor tenosynovitis which he indicated could be caused by overuse, in addition to other things. Dr. Nacke ultimately diagnosed the petitioner as having "bilateral upper extremity pain" and he opined that "her tendinopathies in general terms of her forearm tenderness and her wrist complaints, when you could actually isolate them, were likely related to a repetitive overuse." Dr. Nacke further opined that the petitioner's tendinopathy should not be permanent and should eventually resolve. The Arbitrator notes that Dr. Nacke's understanding of the petitioner's job duties appears to be inaccurate and incomplete.

The petitioner then came under the care of Dr. Kirincic, for pain management. Dr. Kirincic noted that the petitioner noticed a worsening of her bilateral upper extremity pain and fatigue while "she was lifting and carrying heavy trays" while she was working in the kitchen. Dr. Kirincic indicated Petitioner had workers' compensation upper extremity overuse, chronic pain syndrome, somatic dysfunction, scoliosis, muscle spasms, synovitis and tenosynovitis over the bilateral forearms, pain in the bilateral wrists and paresthesis of the skin. Dr. Kirincic opined that it was "more probable than not" that the petitioner's overuse of her upper extremity at work caused her to have her chronic pain. The Arbitrator notes that Dr. Kirincic's understanding of the petitioner's job duties appears to be inaccurate and incomplete and based upon what the doctor imagined would be involved in working in a kitchen.

The Arbitrator notes that the only opinions relating the petitioner's condition to her work activities in the instant matter are those of Dr. Nacke and Dr. Krincic, neither of whom had a complete, accurate, or realistic understanding of the petitioner's actual job activities. Dr. Nacke understood only that the petitioner "helped work in a kitchen, especially lifting and carrying heavy trays". Additionally, Dr. Nacke's opinions were vague and somewhat speculative. Dr. Kirincic understood that the petitioner "was always lifting heavy pans, pots, bending, twisting, you know, tray carrying" and she testified that "I can just imagine probably if I were in the kitchen there would always be heavy lifting." Additionally, Dr. Kirincic's testimony was confusing and at times, contradictory.

The Arbitrator also notes that Dr. Murphy, the respondent's examining doctor, noted that the petitioner's symptoms did not appear to have any specific inciting incident and that they actually got worse after she had been off of work. Based on that reasoning, he felt that the petitioner's symptoms and their worsening nature would have happened regardless of her activity level and that her job duties caused no injury to the petitioner.

Having reviewed and considered the totality of the credible evidence admitted into the record, the Arbitrator finds the opinions of Dr. Nacke and Dr. Kirincic to be unpersuasive and unreliable in the instant matter.

For the foregoing reasons, the Arbitrator finds that the petitioner failed to prove that an accident occurred which arose out of anf in the course of her employment with the respondent and failed to prove that her current condition of ill-being is causally related to the alleged injury.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

The petitioner works for the school system. She worked full time. The appropriate way to calculate her wages is by using a divisor of the weeks worked in the school year. The petitioner testified she starts the school year on August 16 or 18. The school year ends on the last week of May or first week of June depending the snow days. August 18 through May 31 is a period of 41 weeks, thus, the appropriate divisor should be approximately 41 weeks.

The petitioner's total earnings were $15,366.53. Dividing those earnings by 41 weeks results in an average weekly wage of $374.79. The petitioner chose to have her paychecks sent to her over the school year. The wage statement denotes regular earnings through June 6t. She then received nominal earnings in June and August and resumed regular wages on August 29th. No matter how her wages were divided, she is entitled to have her total earnings divided by the weeks of the school year, in this case, 41. Thus, the Arbitrator finds her correct average weekly wage to be $374.79.

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:

Based on the Arbitrator's findings and conclusions with respect to the issues of accident and causal connection, no medical bills or benefits are awarded herein.

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

Based on the Arbitrator's findings and conclusions with respect to the issues of accident and causal connection, no temporary benefits and no permanent benefits are awarded herein.

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:

The Arbitrator denies the petitioner's application for penalties and fees. The Respondent secured an IME with Dr. Murphy indicating the petitioner's condition was not work related, and that she was able to return to full duty work for her tendonitis. The respondent's reliance on that report was not objectively unreasonable and respondent's denial of benefits was not unreasonable or vexatious.

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 HANKISON,

Petitioner,

20IWCC0482

vs.

NO: 14 WC 024096

PEPSI CO.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 11, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $671.73 per week for a period of 50.10 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused a 30% loss of use of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner TTD benefits for the period of July 10, 2014 to July 13, 2014, and July 24, 2014 to December 24, 2014, representing 22.57 weeks at a rate of $746.37, which equals $16,845.50. Respondent shall have credit for TTD benefits previously paid totaling $32,262.02.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is not liable for medical, surgical, and hospital services rendered outside the chain of referrals from Midwest Orthopedics at RUSH and Neurology Consultants/EMG Centers of Chicagoland (Dr. Scott E.

Lipson). Additionally, the Respondent is not liable for medical surgical, and hospital services rendered outside the chain of referrals from Dr. Bajwa, Elmhurst Hospital, and Edward Hospital

IT IS FURTHER ORDERED BY THE COMMISSION that any properly filed petition for attorney's fees by a former attorney shall remain entered and continued to disposition of this claim via payment of the award or settlement.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay those benefits that have accrued in a lump sum, and shall pay the remainder, if any, in weekly payments.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,400.00. 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: AUG 3 1 2020

L. Elizabeth Coppoletti

LEC/cak

D: 8/5/2020

Stephen Mathis

43

DISSENT

I respectfully dissent from the Majority. I believe the evidence establishes that Petitioner also sustained a cervical strain and developed post-concussion syndrome and migraines as a result of his undisputed, work-related accident on July 9, 2014 when he slipped and fell and hit his head on a pipe. Following the accident, Petitioner presented to University of Chicago Medicine for a right distal fibula fracture, a headache, and a head laceration requiring 11 stitches. He ultimately underwent open reduction and internal fixation of the lateral malleolus fracture.

Petitioner was seen by Dr. Kern Singh on July 24, 2014 for neck pain. An MRI of the cervical spine was performed and reviewed by Dr. Singh on August 18, 2014. Dr. Singh diagnosed Petitioner with a cervical strain and placed him at MMI for the strain. Dr. Singh referred Petitioner to Rush Neurology for further evaluation of his headaches and vision changes.

Petitioner subsequently came under the care of Dr. Scott Lipson on October 8, 2014 for headaches and possible seizures. An MRI of the brain was normal. Dr. Lipson diagnosed Petitioner with post-concussion syndrome, epilepsy and migraines. Dr. Lipson noted that Petitioner's history was consistent with a mild concussion and noted that the migraines and epilepsy were likely post-traumatic. Petitioner followed-up with Dr. Lipson on January 19, 2015. Dr. Lipson noted that the post-concussion syndrome appeared to have resolved. He also noted that the headaches appeared to have abated and that he was hopeful the headaches would remain infrequent despite discontinuation of Topiramate. Petitioner contacted Dr. Lipson on February 12, 2015 and expressed a desire to return to work. Dr. Lipson released Petitioner back to work.

Petitioner presented to EDW Edward Hospital on July 15, 2015 complaining of headaches since his injury. He reported having recurrent bouts of headaches. Petitioner then presented to Elmhurst Memorial Hospital on January 31, 2016 again complaining of headaches.

Petitioner testified that he still experiences headaches a couple times a month and that he takes over-the-counter Excedrin.

I agree with the Majority that Petitioner failed to establish causal connection between his seizures and the accident. However, I believe the evidence establishes causal connection between the accident and the cervical strain, the post-concussion syndrome and the migraines.

Based upon the record, I would award TTD benefits through February 12, 2015, the date Dr. Lipson released Petitioner back to work.

I would award Petitioner 5% MAW for the cervical strain, the post-concussion syndrome, and migraines, in addition to the 30% loss of use of the right foot. I would adopt the Arbitrator's analysis of Section 8.1b and the weight assigned to subsections (i-iv). While I agree that significant weight should be assigned to subsection (v), I note that Petitioner also sustained a cervical strain and developed post-concussion syndrome and migraines as the result of his accident. The medical records corroborate Petitioner testimony that he still experiences headaches a couple times a month and takes over-the-counter Excedrin.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HANKISON, WILLIAM Case# **14WC024096**

Employee/Petitioner

PEPSI CO

Employer/Respondent

20IWCC0482

On 7/11/2018, 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 2.10% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

5001 GAIDO & FINTZEN
JASON ALLAIN
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

20 IWCC0482

☐ 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 HANKISON
Employee/Petitioner

v.

PEPSI CO.
Employer/Respondent

Case # **14** WC **24096**

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 **FEBRUARY 23, 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: **REFERRAL CHAIN and ATTORNEY'S FEES**

FINDINGS 20IWCC0482

On **JULY9, 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 $**58,216.60**; the average weekly wage was $**1,119.55**.

On the date of accident, Petitioner was **45** 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 $**32,262.02** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**32,262.02**.

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

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

- The Arbitrator finds the Petitioner is entitled to TTD benefits for the period of **July 10, 2014, to July 13, 2014,** and **July 24, 2014, to December 24, 2014**, representing **22.57 weeks**, at a rate of **$746.37**, which equals **$16,845.50**. The Respondent shall have a credit for TTD benefits previously paid totaling **$32,262.02**;

- The Arbitrator finds the Respondent shall pay Petitioner the sum of **$671.73** per week for a further period of **50.10 weeks**, as provided in **Section 8(e)11** of the Act, because the injury to the Petitioner caused a **30.0% loss of use of the right foot**;

- The Arbitrator finds the Respondent is not liable for medical, surgical, and hospital services rendered outside the chain of referrals from Midwest Orthopedics at RUSH and Neurology Consultants/EMG Centers of Chicagoland (Dr. Scott E. Lipson). Additionally, the Respondent is not liable for medical, surgical, and hospital services rendered outside the chain of referrals from Dr. Bajwa, Elmhurst Hospital, and Edward Hospital.;

- The Arbitrator finds any properly filed petition for attorney's fees by a former attorney shall remain entered and continued to disposition of this claim via payment of this award or settlement.; and,

- The Respondent shall pay those benefits that have accrued in a lump sum, and shall pay the remainder, if any, in weekly payments.

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

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

Signature of Arbitrator

JULY 11, 2018
Date

JUL 11 2018

WILLIAM HANKISON v. PEPSI CO.

14 WC 24096

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried before Arbitrator Steffenson on February 23, 2018. The issues in dispute were causal connection, TTD, nature and extent of the injury, and referral chain of physicians. (*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). (*Arbitrator's Exhibit* (hereinafter, *AX*) 1).

FINDINGS OF FACT

Petitioner, William Hankison, testified that he was working for Respondent on July 9, 2014. (*Transcript* 11). He testified that his job title for Respondent was as the chief engineer. (*Transcript* (hereinafter, *Tr.*) 11). He testified that his duties with Respondent included: nitrogen water purification, co2, and essentially anything that keeps the plant running as far as building and maintenance is concerned. (*Tr.* 11). On the date of the trial, he testified that he had been working for Respondent for approximately five (5) years. (*Tr.* 11).

On July 9, 2014, Petitioner testified that he slipped on some oil on the floor and hit his head on a pipe and his right leg popped. (*Tr.* 12). He testified that he felt pain in his ankle and that he was bleeding from his head. (*Tr.* 12).

Thereafter, he testified that he was taken by ambulance to the University of Chicago Medical Center. (*Tr.* 12). Per the records, Petitioner presented with chief complaints of a head and ankle injury. (*Petitioner's Exhibit* #1). Petitioner advised that he could not bear weight on his right ankle and denied loss of consciousness and vision problems. (*Petitioner's Exhibit* (hereinafter, *PX*) #1).

A CT scan of the head was taken revealing no acute intracranial abnormality with stable left frontal scalp swelling and irregularity consistent with recent trauma. (*PX* #1). Petitioner was diagnosed with a non-penetrating head laceration and given sutures. (*PX* #1). The records indicate no intracranial bleeding or fractures. (*PX* #1).

X-rays of the right ankle were taken revealing a distal fibula fracture. (*PX* #1). A post mold splint was applied and he was discharged after an overnight stay. (*PX* #1).

Petitioner testified that then he transferred care to Midwest Orthopedics Physicians at RUSH ("RUSH"), per his own choice of physicians. (*Tr.* 13).

On July 24, 2014, Petitioner was examined by Dr. Verma at RUSH. (*PX* #5). Petitioner presented with complaints of right lower extremity pain. (*PX* #5). Petitioner advised that he had "brain bleed". (*PX* #5). Dr. Verma diagnosed Petitioner with a right distal fibular fracture, nondisplaced. (*PX* #5). He was placed in a posterior mold to his right lower extremity and advised to follow-up with Dr. Lin. (*PX* #5).

Petitioner first presented to Dr. Lin at RUSH on July 25, 2014. (*PX* #5). Petitioner advised that on July 9, 2014, he slipped on oil at work and had an inversion injury of his right ankle. (*PX* #5). He also reported a family history of high blood pressure with his mother. (*PX* #5). Dr. Lin's assessment was a right unstable malleolar fracture with syndesmotic injury. (*PX* #5). The plan was for surgical fixation and stabilization of the right ankle fracture. (*PX* #5).

The record also indicates that Petitioner's blood pressure measurement was not in the normal range. (*PX* #5). It was recommended that he see a primary care physician for an evaluation. (*PX* #5).

On July 29, 2014, Dr. Lin performed surgery on Petitioner's right ankle. (*Tr.* 13; *PX* #5).

On August 5, 2014, Petitioner presented for his initial post-operative evaluation on August 5, 2014. (*PX* #5). He reported doing well and was able to ambulate without placing weight on the surgical site. (*PX* #5). It was recommended that he go back into a post-mold sugar-tong splint and to remain non-weightbearing. (*PX* #5). He was given an off-work restriction. (*PX* #5).

Petitioner presented to Dr. Lin for a two (2) week post-surgical follow-up. (*PX* #5). He reported doing well with complaints of some pain. (*PX* #5). The recommendation was for Petitioner to transition to a short-leg non-weightbearing cast and to begin a course of therapy. (*PX* #5).

On August 27, 2014, Petitioner presented to Dr. Lin for a four (4) week post-surgical follow-up. (*PX* #5). He reported overall doing well with no incidents putting weight on his foot and that his pain was well controlled. (*PX* #5). Petitioner was advised to transition into wearing a boot with weightbearing as tolerated. (*PX* #5).

On September 12, 2014, Petitioner presented to Dr. Lin for a six (6) week post-surgical follow-up. (*PX* #5). He reported doing well overall with some pain and swelling throughout the

ankle joint. (*PX* #5). The plan was for Petitioner to continue with the Cam boot for two more weeks and weightbearing as tolerated. (*PX* #5).

Petitioner presented to Dr. Lin for an eight (8) week post-surgical follow-up on September 26, 2014. (*PX* #5). He reported doing well with some sharp pains and aches, and noted that his ankle was still swollen but significantly improving. (*PX* #5). Petitioner was advised to continue with therapy and weightbearing as tolerated. (*PX* #5).

The records also indicated that Petitioner's blood pressure measurement was elevated and it was recommended that he be evaluated in the emergency room. (*PX* #5).

On October 24, 2014, Petitioner presented for a follow-up with Dr. Lin. (*PX* #5). He reported that he was doing well with improvement of his symptoms. (*PX* #5). The plan was for the Petitioner to continue therapy with an increase from two (2) to three (3) times per week and to start incorporating strength training. (*PX* #5).

On November 21, 2014, Petitioner presented to Dr. Lin for a follow-up. (*PX* #5). He noted his pain at 5/10 and that he felt like he was being worked too hard in therapy. (*PX* #5). He was advised to continue therapy for two (2) weeks, then begin work conditioning for two (2) weeks and to return for a follow-up in four (4) weeks for a MMI release. (*PX* #5).

Petitioner was discharged from therapy on December 5, 2014, and began a course of work conditioning on December 12, 2014. (*PX* #5).

On December 23, 2014, Petitioner presented to Dr. Lin for a follow-up. (*PX* #5). Overall, Petitioner reported doing much better with therapy increasing his range of motion and decreasing his pain level. (*PX* #5). There was improvement with swelling noted and he was doing work conditioning. (*PX* #5). Petitioner was released to full duty and advised to continue doing therapy at home with no need for continued formal therapy. (*PX* #5).

Petitioner was discharged from therapy/work conditioning on January 6, 2015. (*PX* #5). Petitioner testified that his last appointment was December 24, 2014. (*Tr.* 29-30). The records indicated that Petitioner did not appear at the December 24, 2014 appointment. (*PX* #5). Petitioner also had an appointment scheduled for December 26, 2014, but was a no-call, no-show. (*PX* #5).

Petitioner testified and the records reflect that he last presented to Dr. Lin in August 14, 2015 for a follow-up. (*Tr.* 32, *PX* #5). Petitioner testified and the records reflect that he advised Dr. Lin that his only complaint at the time regarding his right ankle was some stiffness and swelling. (*Tr.* 32, *PX* #5). Therapy was recommended at a rate of 2 times per week for 6 weeks. (*PX* #5). Petitioner testified that he did not attend the formal therapy recommended by Dr. Lin.

(*Tr.* 33). Dr. Lin offered a possible future hardware removal which he indicated Petitioner may benefit from. (*PX* #5). Petitioner testified that Dr. Lin did not tell him that he would benefit from the removal of the plate and screws. (*Tr.* 46).

The records also reflect that Petitioner's blood pressure measurement was not in the normal range. (*PX* #5). It was recommended that he discuss the elevated blood pressure with his primary care physician. (*PX* #5).

On July 24, 2014, Petitioner initially presented to Dr. Singh for an evaluation. (*PX* #5). He advised that he had questionable bleeding seen on the brain. (*PX* #5). He reported to Dr. Singh with severe neck pain. (*PX* #5). The initial diagnosis was of a cervical strain and lumbar strain with the recommendation for an MRI of the cervical spine. (*PX* #5).

On August 16, 2014, Petitioner underwent an MRI of the cervical spine. (*Tr.* 14).

Petitioner returned to Dr. Singh on August 18, 2014 with complaints of right-sided axial neck pain as well as increased headaches and some vision changes. (*PX* #5). The MRI was reviewed with Dr. Singh commenting that it displayed a normal study without any evidence of spinal stenosis nor disk herniation. (*PX* #5). Petitioner was diagnosed with a cervical muscular strain and considered to be at MMI. He was referred to RUSH Neurology for further evaluation of his headaches and vision changes. (*PX* #5).

Petitioner testified and the records reflect that he was not prescribed any medication for his neck nor was he prescribed any therapy. (*Tr.* 31). Petitioner also testified that he has not presented to medical care or received any treatment on his neck since August 2014. (*Tr.* 31-32).

Petitioner testified that he had several seizures and migraine headaches, with the seizures occurring three (3) to five (5) months after the incident. Though he also testified that the first seizure occurred in approximately August 2014. (*Tr.* 14-15). He testified that he had approximately five (5) to six (6) seizures. (*Tr.* 15). Petitioner testified and the records reflect that his knowledge of the seizures were based upon what his wife observed. (*Tr.* 30). The Arbitrator notes that Petitioner's wife did not testify at trial.

Petitioner testified that when he presented to Dr. Singh in August 2014 and that he mentioned the August seizure to him. (*Tr.* 27). The record does not mention the August 2014 seizure. (*PX* #5). He also testified that he saw Dr. Lin on August 28, 2014, but that he did not mention the seizure to him because he was only treating him for the right ankle. (*Tr.* 28). Petitioner testified that he advised Dr. Glantz, who was examining him for neurological issues pursuant to an Independent Medical Examination, of his right ankle injury. (*Tr.* 26, 29; *Respondent's Exhibit* #2).

He testified, that he treated with Dr. Lipson, a neurologist, per his own choice, regarding the headaches and seizures beginning on October 8, 2014. (*Tr.* 15-16). He informed Dr. Lipson that he slipped and fell at work on July 9, 2014, hitting his left forehead and sustaining a laceration. (*PX* #3). He did not lose consciousness but reported feeling dazed. (*PX* #3). He further advised that he was found to have "blood on the brain" but did not know the specifics. (*PX* #3).

Petitioner reported that he had three (3) seizure episodes out of sleep which were witnessed by his wife. (*Tr.* 25, *PX* #3). He advised having no memory of these events. (PX #3). He also reported having headaches (*PX* #3). Dr. Lipson assessed Petitioner with having post-concussion syndrome, unspecified epilepsy, and migraine headahces. (*PX* #3). Dr. Lipson recommended a routine EEG and MRI of the brain. (*PX* #3).

Petitioner testified that he was prescribed medication by Dr. Lipson which helped with the seizures and the migraines. (*Tr.* 16). He was also advised not to drive or operate machinery for at least three (3) months of seizure-freedom. (*PX* #3). Dr. Lipson did not feel that it was safe for Petitioner to return to work until he was seizure free for three (3) months. (*PX* #3).

Regarding the work restrictions, Petitioner testified that he was told not to drive until he knew what the effects of the medication would be. (*Tr.* 39).

On November 14, 2014, Petitioner underwent an MRI of the brain which was normal, unremarkable. (*PX* #4A; *Respondent's Exhibit* (hereinafter, *RX*) #1, p. 4).

Petitioner returned to Dr. Lipson on January 19, 2015. (*Tr.* 34, *PX* #3). The headaches had mostly resolved at this time, with the only noted headache consistent with a migraine occurring a month prior. (*PX* #3). Regarding the seizures, Dr. Lipson noted that the MRI of the brain was normal and that Petitioner had not obtained the EEG that was ordered. (*PX* #3). The record indicates that he had no seizures since October, despite not taking the topirmate. (*PX* #3). He advised that he continued to drive to attend physical therapy. (*PX* #3). It was recommended that he start seizure medication and if he remains seizure-free for another three weeks, then he could return to work without restrictions and resume driving. (*PX* #3). It was estimated that his returned to work date would be February 9, 2015. (*PX* #3).

Petitioner testified that he advised Dr. Lipson of the January seizure. (*Tr.* 34). The record does not mention the January seizure. (*Tr.* 34, *PX* #3). The records do not reference the January seizure until the note of February 12, 2015. (*PX* #3). Dr. Lipson indicated that "in contrast to what [Petitioner] reported at the time of our last visit, he did have a seizure mid-January, before I saw him, while off his anticonvulsant". (*PX* #3). Dr. Lipson advised that as long as Petitioner remained seizure free for two months, he could safely return to work. (*PX* #3).

Petitioner also testified and the records reflect that he advised Dr. Lipson that he was driving in a limited fashion to attend therapy. (*Tr.* 35, *PX* #3).

On May 27, 2015, Petitioner was reported as not showing for his scheduled appointment, being the third time, he had done so. (*PX* #3). He was terminated from care with Dr. Lipson. (*PX* #3).

On June 3, 2015, a letter was requested of Dr. Lipson detailing why Petitioner was released from care, four (4) no-shows and three (3) rescheduled appointments. (*PX* #3).

On October 14, 2015, the records indicated that Petitioner called requesting that Dr. Lipson write him a letter indicating that he kept him from going to work because he was terminated from care and because he was terminated from care, he did not have a neurologist and therefore could not obtain a release to return to work. (*PX* #3). Petitioner also advised that he obtained the EEG test after he received the termination letter. (*PX* #3). The ambulatory EEG results were normal. (*PX* #1).

Petitioner testified that he did not miss multiple appointments with Dr. Lipson. (*Tr.* 36). Furthermore, he testified that he and Dr. Lipson had a disagreement regarding his treatment, when asked whether he was discharged from care with Dr. Lipson for not following Dr. Lipson's treatment recommendations and attending his medical appointments. (*Tr.* 36-37).

Petitioner testified and the records reflect that he presented to Dr. Glantz, at the direction of Respondent, for an independent medical examination on February 11, 2015. (*Tr.* 26, *RX* #1, p. 1). Petitioner testified and the record reflects that he drove to the examination. (*Tr.* 35, *RX* #1, p. 1). Regarding his complaints, Petitioner advised that he had headaches, approximately two (2) per week with the most recent headache occurring two (2) weeks prior to the examination. (*RX* #1, p. 1). He advised that he felt pressure, sore eyes, and blurry vision. (*RX* #1, p. 1). Petitioner advised that prior to the incident, he would get occasional headaches, every 2-3 months. (*RX* #1, p. 1).

Physical examination revealed normal speech, cognition, and strength. (*RX* #1, p. 2). Dr. Glantz noted a scar over the left hairline in the front. (*RX* #1, p. 2). Petitioner testified and the record reflects that he advised Dr. Glantz that he told him of three (3) seizure events in August, October, and January. (*Tr.* 26). Dr. Glantz indicated that Petitioner's wife was not present at the examination and therefore he could not ask her what she observed during the alleged seizures. (*RX* #1, p. 1).

Dr. Glantz opined that the spells of jerking and jumping witnessed by Petitioner's wife, could be seizures, but that since Petitioner's wife was not present, Dr. Glantz could not ask her about the specifics of what she saw. (*RX* #1, p. 3). Dr. Glantz indicated that the diagnosis of

seizures, is made by the history of someone witnessing a seizure as the patient is generally unaware of the precise nature of what has occurred. (*RX* #1, p. 4). Dr. Glantz noted that the description of the spells described by Petitioner, are consistent with seizure phenomenon, but that his was relying upon the veracity of what he was told by Petitioner and what his wife was telling him. (*RX* #1, p. 5). He further noted that there was no objective evidence on his examination other than this history. (*RX* #1, p. 5). He recommended that Petitioner obtain an EEG. (*RX* #1, p. 5).

As to the headaches, Dr. Glantz opined that based upon the description given to him by Petitioner, they are not migraine headaches. (*RX* #1, p. 3). Further, that there was nothing specifically diagnostic about the headaches and that there were no particular characteristics of the description of the headaches which would enable a precise diagnosis as to their cause. (*RX* #1, p. 3-4).

Lastly, Dr. Glantz noted that if Petitioner has had seizures and continues to have seizures, then he should not drive or operate machinery. (*RX* #1, p. 6). Further, that Petitioner needs to be on medication and seizure free for at least 3 months before he should drive an automobile, and that he should not be driving until all the criteria regarding tests and treatment has been reasonably satisfied. (*RX* #1, p. 6).

Despite the report of Dr. Glantz, Petitioner testified that he had more seizures, but that he potentially only told him about the three. (*Tr.* 26). Despite the report of Dr. Glantz, Petitioner also testified that he did not tell Dr. Glantz that he was not complaining of any symptoms involving the right ankle. (*Tr.* 29). Dr. Glantz noted that despite Petitioner's repeated description to several treating physicians, he did not have any bleeding in or on top of the brain when he presented to University of Chicago ER. (*RX* # 1, p. 4).

Petitioner presented to Edward Hospital on July 16, 2015 with complaints of migraines. (*Tr.* 42, *PX* 2). He advised that he was diagnosed with migraines by a neurologist and prescribed Topamax but ran out of the medication a few months ago. (*PX* #2). He reported mild pain in the right side of the head and mildly weak and unsteady. (*PX* #2).

It was noted that the Petitioner's blood pressure was elevated. (*PX* #2). Petitioner reported a history of high blood pressure measurements in the past but no formal diagnosis of hypertension. (*PX* #2).

The records indicated that Petitioner was "significantly hypertensive" and that he may have "undiagnosed hypertension based on previous elevated readings". (*PX* #2). Attending physician, Dr. Sims, indicated that Petitioner's possible undiagnosed hypertension may contribute to his headache. (PX #2). The clinical impression was essentially hypertension. (*PX* #2).

Petitioner was treated with catapres, an anti-hypertensive drug, and his blood pressure significantly improved and headache got better. (*PX* #2). Petitioner was advised to start Norvasc, blood pressure medication, and to restart Topamax. (*PX* #2). He was also advised to check his blood pressure daily and record the results and follow-up with a primary care doctor was recommended. (*PX* #2).

Petitioner testified that he was not advised by the physicians at Edward Hospital that part of the reason for his headaches may be due to his high blood pressure. (*Tr.* 40).

Petitioner testified that he also saw another neurologist, Dr. Bajwa, per his own choice. (*Tr.* 16). Petitioner presented to Dr. Bajwa on August 27, 2015 with a complaint of seizures. (*PX* #4A). The record indicates that Petitioner had a skull fracture and bleeding inside the brain. (*PX* #4A). There were also complaints of migraines a few times per month but resolved with Topamax. (*PX* #4A). Physical examination was essentially normal. (*PX* #4A). Dr. Bajwa's impression was that Petitioner had been seizure free for close to a year with a normal EEG and therefore could return to full duty work. (*PX* #4A). He also indicated that the alleged migraines were well treated with the Topamax. (*PX* #4A).

On January 31, 2016, Petitioner testified that he presented to Elmhurst Memorial Hospital emergency room with complaints of severe headaches. (*Tr.* 17). He reported with a history of hypertension and indicated that his blood pressure was high again. (*PX* #6). He advised that he had not taken blood pressure medication in two (2) months. (*PX* #6). Petitioner advised regarding the headaches that he often feels like this when his blood pressure is elevated. (*PX* #6). The differential diagnosis, after history and physical exam, was of chronic benign essential hypertension. (*PX* #6).

Petitioner also complained of right ankle pain. (*PX* #6). An x-ray of the right ankle was undertaken which revealed no effusion or soft tissue swelling with findings of a healed distal fracture status post open reduction internal fixation procedure. (*PX* #6).

Petitioner testified that in February 2015, he was given a partial light duty release and spoke with the maintenance manager, Manfred Gazy (sic) about returning to work. (*Tr.* 18-19). Petitioner also testified that he did not know what the light duty restrictions were. (*Tr.* 37). He testified that he told Mr. Gazy (sic) that he felt that if he was partnered with someone, with him starting off slow, on light duty, that he would be fine to make a transition back into full duty. (*Tr.* 21).

Petitioner testified that in September 2015, he returned to full duty work after being cleared by Dr. Bajwa. (*Tr.* 21).

On the date of the trial, Petitioner testified that plate and screws were still in his ankle. (*Tr.* 22). Petitioner testified that he did not wish to have the screws and plates removed because he did not want to undergo another surgery. (*Tr.* 45). He further testified that he would rather deal with the pain than have them removed. (*Tr.* 45).

He testified that when it was cold or raining outside that his right ankle bothered him. (*Tr.* 22). He also testified that when he is one his feet "too long" that his right ankle starts to swell and that he experiences problems with walking due to the swelling. (*Tr.* 22-23). He testified that he takes no prescription medication for his right ankle. (*Tr.* 24).

Regarding the head injury, he testified that he had not had a seizure since January 2015 but that he still experiences migraine headaches. (*Tr.* 23). He testified that he treats the headaches with over-the-counter medication. (*Tr.* 23).

He testified that he had no other symptoms associated with the work incident. (*Tr.* 24).

On cross-examination Petitioner testified that he had been entirely truthful with the various treating physicians and never had any reason to not tell them the truth. (*Tr.* 25).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

RIGHT ANKLE

The Arbitrator finds that Petitioner has proven a causal connection exists between the work-incident of July 9, 2014 and Petitioner's complaints regarding the right ankle. Petitioner was diagnosed with a right distal fibular fracture and would eventually undergo an open-reduction internal fixation surgery on the right ankle. Objective evidence of the fracture in the form of multiple x-rays are contained within the medical records. Respondent has presented no evidence disputing the causal connection between the work accident and the right ankle fracture.

SEIZURES AND MIGRAINE HEADACHES

The Arbitrator finds that Petitioner failed to prove a causal connection exists between the work-incident of July 9, 2014 and Petitioner's complaints of seizures and migraine headaches.

Petitioner carries the burden of proving his case by a preponderance of the evidence. Petitioner's recounting of the subjective complaints is inconsistent with the objective medical records and completely unreliable. Furthermore, Petitioner has failed to provide objective evidence that the seizures occurred. Additionally, the Arbitrator finds, based upon the medical records, that Petitioner's headaches are more likely the result of Petitioner's non-work-related hypertension.

In Shell Oil v. Industrial Commission, the Illinois Supreme Court noted that "declarations of an injured person to a treating physician as to his physical condition, and the cause thereof, are admitted into evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid." 2 Ill. 2d 590 (1954) *citing,* Shaughnessy v. Holt, 236 Ill. 485 (1908).

Similar language was cited by the Supreme Court in Jensen v. Elgin, Joliet and Eastern Railway Company for the proposition that the desire for proper treatment outweighs any motive to falsify. 24 Ill. 2d 383 (1962). Greater weight is ordinarily afforded to contemporaneous medical records and histories, instead of later, less reliable and self-serving histories by those who have had time to formulate statements.

Applying the applicable case law to the above-captioned matter, based on the totality of the circumstances and weighing the credibility of the witness; the Arbitrator concludes that the Petitioner failed to sustain his burden of proof by a preponderance of evidence that a causal connection exists between the accidental injury and Petitioner's complaints of ill-being regarding seizures and migraine headaches.

The Arbitrator finds that Petitioner is not credible here and has presented no objective evidence to support a causal connection between the work-incident and Petitioner's complaints of seizures and migraine headaches.

Regarding the seizures, the Arbitrator finds Petitioner's testimony of the number of seizures and reporting of the seizures is in opposite to the medical records. Petitioner testified that he had approximately five (5) to six (6) seizures following the work incident with the first occurring three (3) to (5) months following the work incident. He testified that the first seizure occurred in August, one month after the work incident. He reported to Dr. Lipson that three (3) of these had occurred prior to his first appointment on October 8, 2014. However, he later

advised Dr. Glantz, and testified to same, that he told him of three (3) seizure events August, October, and January.

Regarding the August seizure, Petitioner testified that he advised Dr. Singh of the August seizure when he presented to him on August 18, 2014. However, the records make no mention of the August seizure. The Arbitrator also notes that the August seizure was not mentioned in the August 28, 2014 record of Dr. Lin.

Additionally, Petitioner testified that he advised Dr. Lipson of the January 2015 seizure at the January appointment. However, Dr. Lipson's record indicates that Petitioner did not advise Dr. Lipson of the January event until February 2015, with Dr. Lipson indicating in the February note that "in contrast to what [Petitioner] reported at the time of our last visit, he did have a seizure mid-January, before I saw him".

The Arbitrator notes that per the January 19, 2015, record of Dr. Lipson, it was anticipated that Petitioner would be released to full-duty on February 9, 2015. The Arbitrator finds it curious that the February note of Dr. Lipson was dated February 12, 2015, a day after the February 11, 2015 IME of Dr. Glantz, where Petitioner first advised of the January seizure and around the approximate time that Petitioner was to receive a full-duty release.

Additionally, the Arbitrator notes that the results of the multiple diagnostic tests were all normal. The initial CT scan of the head taken at University of Chicago revealed no acute intercranial abnormality. Additionally, the MRI of the brain taken from November 2014 was normal and unremarkable. The ambulatory EEG results were also normal.

Lastly, the Arbitrator notes that Petitioner's wife was the only person to have allegedly witnessed the seizures here. Petitioner's wife did not testify at trial and was not present at the appointment with Dr. Glantz. The Arbitrator finds Dr. Glantz's report instructive here as Dr. Glantz makes several references to the absence of Petitioner's wife and the necessity for discussing with her what she observed, as the diagnosis of seizures is made by the history of someone witnessing a seizure as the patient is generally unaware of what occurred. Furthermore, Petitioner advised Dr. Lipson that he had no memory of the seizure events.

As to the migraines, the Arbitrator finds the report of Dr. Glantz as well as the repeated documentation in the medical records regarding Petitioner's hypertension and its contribution to his complaints of headaches to be most persuasive here. Dr. Glantz stated that the description of the headaches given to him by Petitioner did not describe migraine headaches. Additionally, the Arbitrator finds the opinion of Dr. Sims with Edward Hospital to be instructive wherein he opined that Petitioner's possible undiagnosed hypertension may be contributing to his headaches. This especially in conjunction with Petitioner experiencing relief from the headache when being treating with anti-hypertensive medication. Furthermore, the Arbitrator

notes that when Petitioner presented to Elmhurst Hospital with complaints of headaches, the record indicates that he had a history of hypertension and reported having high blood pressure as he had not taken his blood pressure medicine in two (2) months. The Arbitrator also notes several instances in the RUSH records of Petitioner presenting with high blood pressure.

Accordingly, the Arbitrator concludes that Petitioner did not prove that a causal connection exists between the accidental injury and Petitioner's complaints of ill-being regarding seizures and migraine headaches. As such, the claim, as it relates to the seizures and migraine headaches, is denied, and all other issues are moot.

Issue K: *TTD*

The Arbitrator finds that temporary total disability benefits are owed for 22 4/7 weeks, from July 10, 2014 to July 13, 2014; July 24, 2014 to December 24, 2014, in the amount of $16,846.09. The Arbitrator has rendered a Decision, separately, on the issue of causal connection as it relates to Petitioner's right ankle, finding the condition of ill-being present in the right ankle to be causally related to the work accident of July 9, 2014. Petitioner was restricted from work by his treating physicians until December 23, 2014, when he was released to full duty by Dr. Lin.

Furthermore, as noted above, due to the lack of causal connection between the Petitioner's July 9, 2014, injury and his current condition of ill-being regarding seizures and migraine headaches, the Petitioner's claim for additional TTD benefits is moot.

Issue L: *Nature and extent of injury*

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

(a) A physician licensed to practice medicine in all its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

(i) The reported level of impairment from (a) above;

20 I W C C 0 4 8 2

(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by medical records.

(See 820 ILCS 305/8.1b)

RIGHT ANKLE

With regards to factor (i) of Section 8.1b of the Act:

i. The Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence by either party. As such, the Arbitrator gives **no weight** to this factor.

With regards to factor (ii) of Section 8.1b of the Act:

ii. The Arbitrator finds the Petitioner was employed by the Respondent as a chief engineer at the time of his July 9, 2014, accident. Petitioner testified he presently is working for Respondent as a chief engineer and the record lacks any evidence or testimony showing the Petitioner's condition has impeded his ability to perform his job duties. The Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iii) of Section 8.1b of the Act:

iii. The Arbitrator notes that the Petitioner was 45 years old at the time of the accident. (*AX* 1A). As such, the Arbitrator therefore gives ***some weight*** to this factor.

With regards to factor (iv) of Section 8.1b of the Act:

iv. The Arbitrator notes that the Petitioner has returned to work for the Respondent in his previous position as a chief engineer, and the record lacks testimony and/or evidence as to his future earnings capacity. As such, the Arbitrator therefore gives ***no weight*** to this factor.

With regards to factor (v) of Section 8.1b of the Act:

v. Evidence of disability corroborated by the treating medical records finds that the Petitioner suffered an injury to his right ankle that necessitated a surgery

consisting of the insertion of plates and screws in his right ankle by Dr. Lin. He returned to full duty work on December 23, 2014, when he was released from medical care by Dr. Lin. Furthermore, the Petitioner testified he continues to experience stiffness and swelling in his right ankle. He also testified he did not wish to remove the surgically implanted hardware despite Dr. Lin's suggestion such a step might be helpful. Petitioner also admitted he continues to work for Respondent in the same capacity as prior to his July 9, 2014, accident, and neither is prescribed nor is he taking any medications for his right ankle. Due to the Petitioner's medically documented injuries and other physical complaints, the Arbitrator therefore gives ***significant weight*** to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of an **30% loss of use of the right foot** pursuant to Section 8(e)11 and Section 8.1b of the Act.

SEIZURES AND MIGRAINE HEADACHES

Furthermore, as noted above, due to the lack of causal connection between the Petitioner's July 9, 2014, injury and his current condition of ill-being regarding seizures and migraine headaches, the nature and extent of this particular injury is moot.

Issue O: *Referral chain and Attorney's Fees*

Under Section 8(a) of the Illinois Worker's Compensation Act, in the case of a compensable work injury, the employer shall pay for the medical charges of the employee's first two choices of physicians and the referrals therefrom.

Petitioner failed to prove Respondent is liable for medical, surgical and hospital services rendered outside of the chain of referrals from Midwest Orthopedics at RUSH and Neurology Consultations/EMG Centers of Chicagoland (Dr. Scott E. Lipson). Petitioner produced no evidence showing he was referred to Dr. Bajwa, Edward Hospital or Elmhurst Hospital. He testified presented to these providers of his own choice. Therefore, services provided by Dr. Bajwa, Edward Hospital and Elmhurst Hospital were rendered outside the chain or permissible referrals under the Act, and are denied under the Act.

The parties also stipulated a petition for attorney's fees by a former attorney for the Petitioner was pending at the time of this hearing and the former attorney had been notified of the date of the hearing. (*AX* 1 and Tr. 5). The former attorney did not appear at the hearing, any

20 IWCC0482

such petition for attorney's fees was not entered into evidence at trial, and no such petition for attorneys' fees was found in the IWCC case file.

However, Petitioner's current attorney, while also recognizing personal knowledge of the attorney's fee petition, noted on the record: "I'll resolve (the petition for attorney's fees) when the case is ready for dispersement." (Tr. at 5). Based upon this representation by the Petitioner's current attorney before the Arbitrator on the record at the time of this hearing, any properly filed petition for attorney's fees by a former attorney shall remain entered and continued to disposition of this claim via payment of this award or settlement.

Signature of Arbitrator

JULY 11, 2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BROOKE HOOTS,

Petitioner,

20IWCC0483

vs.

NO: 18 WC 21983

DOLLAR GENERAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability (TTD), and permanent partial disability (PPD), 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 agrees with the Arbitrator's finding that Petitioner failed to prove an accident arising out of and in the course of her employment. Furthermore, the Commission finds that Petitioner's injury is not compensable pursuant to *Walker Bros. v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 181519WC.

In her Statement of Exceptions, Petitioner argued that the fall was compensable pursuant to *DeHoyos v. Industrial Comm'n*, 26 Ill. 2d 110 (1962). In D*eHoyos*, the court held that as long as an employer provides parking which is customarily used by its employees, the employer is responsible for the maintenance and control of the lot. Petitioner contends that her fall was compensable as she was attending a mandatory training and the employer provided the lot in question and permitted her to park in the lot. She fell on black ice which represented a hazardous

20IWCC0483

condition on the employer's premises and she was exposed to a greater risk of injury than the general public. The Respondent argued that *DeHoyos* is distinguishable as the lot in *DeHoyos* was provided by the employer for the employees. In this case, however, the lot was neither owned or maintained by the Respondent and Petitioner was not directed where to park.

The Commission finds that this case is factually similar to *Walker Bros. v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 181519WC. In that case, Petitioner parked in the Ace Hardware lot near the employer's restaurant. The Petitioner explained that he parked at the Ace parking lot because "[t]hat's where they give us permission to park." The Petitioner slipped and fell on Ace's snowy and icy parking lot surface.

In *Walker Bros.*, the court noted that:

> *DeHoyos* stood for the proposition, that if an employer provides a lot to its employees, and an employee is injured on that lot, the employee is entitled to recover under the Act. *Id.* However, this parking lot exception has been narrowed since its inception. Just four years after *DeHoyos*, our supreme court stated, "[t]he decisive issue in parking lot cases usually is whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer." *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604, 221 N.E.2d 281 (1966). The employer's control or dominion over the parking lot is a significant factor in the analysis. *Joiner v. Industrial Comm'n*, 337 Ill. App. 3d 812, 815 (2003). Our supreme court has also recognized that "[r]ecovery has been permitted for injuries sustained by an employee in a parking lot provided by *and* under the control of an employer. (Emphasis added.) *Illinois Bell*, 131 Ill. 2d at 484.

In *Walker Bros.*, the court stated that in determining whether the parking lot exception applies, it is clear that we must determine whether the employer "provided" the parking lot in question to its employees. We make this determination by considering: (1) whether the parking lot was owned by the employer, (2) whether the employer exercised control or dominion over the parking lot, and (3) whether the parking lot was a route required by the employer.

In the present case, the Petitioner fell in a parking lot that was neither owned nor controlled by the Respondent. Petitioner confirmed that the Respondent did not direct her to park in the lot and she stated that there were other lots available as well. There is also no evidence that the parking lot was a route required by the employer. Further, the lots were open to the general public including the customers of the nearby stores. Based upon the analysis in *Walker*, the Commission finds that Petitioner failed to prove an accident arising out of and in the course of her employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 20, 2019 is hereby affirmed and adopted.

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

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

The 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: AUG 31 2020

D. Douglas McCarthy

DDM/tdm
O: 8/26/20
052

L. Elizabeth Coppoletti

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOOTS, BROOKE
Employee/Petitioner

Case# **18WC021983**

DOLLAR GENERAL
Employer/Respondent

20IWCC0483

On 11/20/2019, 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:

2333 WOODRUFF JOHNSON & EVANS
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1886 LEAHY EISENBERG & FRAENKEL
NICK C NAVARRO
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

20IWCC0483

☐ 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

BROOKE HOOTS,
Employee/Petitioner

v.

DOLLAR GENERAL,
Employer/Respondent

Case # **18** WC **21983**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **10/30/19**. 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 _____

FINDINGS

On **11/19/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**20,800.00**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

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

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her left foot/ankle that arose out of and in the course of her employment by respondent on 11/19/17. The 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.

Kaureen A. Pulia

Signature of Arbitrator

11/13/19
Date

ICArbDec p. 2

NOV 20 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, 37 year old sales associate trainee, alleges she sustained an accident injury to her left foot/ankle that arose out of and in the course of her employment by respondent on 11/19/17.

Petitioner was hired to work in the Woodson, IL location, that was not yet open. As such, petitioner was sent for training at the South Jacksonville location. This training was mandatory, and other people that were hired for the Woodson store were also sent for training at the South Jacksonville location. The training began on 11/17/17. The training involved stocking shelves, running a cash register, and customer service.

The South Jacksonville location is located next to a strip mall. There is some parking adjacent to the Dollar General. There is also parking in the adjacent strip mall. Petitioner testified that she was not told that she had to park in the Dollar General lot or any specific spot. She could park anywhere she wanted. She testified that anyone can park in any lot. Petitioner testified that she was unaware who owned or maintained the Dollar General Parking lot. She testified that she believed it was an investment company, but found out they no longer owned it. She testified that she was trying to find out who owned and maintained the lot when she fell. She testified that she never saw anyone from Dollar General maintaining the lot. She stated that the general public can park anywhere in the Dollar General lot.

Petitioner testified that on 11/19/17 she was scheduled to start at 8 am. She stated that she arrived about 7:50 am, and it was cold, wet, and misty out. Petitioner pulled into the lot and parked in a parking spot in the row across from the parking spots adjacent to the store. She got out of her car and started walking towards the store. She was carrying her purse, a drink and a folder for training. As she was walking she slipped on some black ice and fell, landing on her left knee and left leg. She could not get up on her own. She had immediate pain in her left ankle. Someone saw her on the ground, and an ambulance was called.

Petitioner was taken to the emergency room at Passavant Area Hospital. X-rays of the left ankle revealed trimalleolar fracture of the left ankle with minimal displacement. She was examined by Dr. Cappecci and given a posterior splint with side bars. She was referred to Dr. Stevens for repair.

On 11/21/17 petitioner presented to Dr. Benjamin Stevens at Springfield Clinic. She gave a consistent history of slipping and falling in the parking lot at work on 11/19/17. She described her pain as constant and throbbing in nature. She rated her pain at an 8/10 at its best and 10/10 at its worst. Dr. Stevens reviewed the emergency room records, and performed an examination. His assessment was left trimalleolar ankle fracture. Treatment options were discussed and surgery was decided on.

On 11/19/17 petitioner underwent a left lateral malleolus open reduction internal fixation, left medial malleolus open reduction internal fixation, and left posterior malleolus open reduction internal fixation. The procedure was performed by Dr. Stevens. Petitioner followed-up post-operatively with Dr. Stevens.

On 12/14/17 petitioner followed-up with physician's assistant David Purves. She stated her pain was well controlled, but she had numbness and swelling in her left foot. She was examined, and continued non-weightbearing. On 1/11/18 petitioner was again examined by Purves. It was determined that she would start physical therapy for range of motion, strengthening, and progressing weightbearing. On 1/19/18 petitioner underwent a physical therapy initial evaluation at Passavant Rehabilitation Services.

On 2/22/18 petitioner was seen by Dr. Stevens. She was doing well. She reported that most of her pain was located on the medial aspect of her ankle. Following an examination and x-rays, Dr. Stevens encouraged petitioner to finish her physical therapy, and progress with low impact activities as tolerated. She was also instructed to begin wearing compression stockings to decrease the swelling in her foot and ankle.

On 3/29/18 petitioner was discharged from physical therapy, after undergoing 20 visits. She reported on that date that she had not had any pain lately in her left ankle. She did report some trouble with climbing stairs. She stated that treadmill walking had improved, but she still has some slight pain and difficulty with inclines. She stated that she could not run. Her left ankle range of motion was decreased, as compared to the right. Petitioner was discharged with home exercises.

On 4/19/18 petitioner returned to Dr. Stevens. She reported that she was doing well with regards to pain, but noted some swelling. An examination revealed some edema about the left ankle. Her left extremity was neurovascularly intact. Her strength was 5/5, capillary refill was brisk, and her sensations were intact. X-rays were taken. Dr. Stevens was of the opinion that petitioner could continue with physical activities as tolerated.

On 6/14/18 petitioner last followed up with Dr. Stevens. An examination revealed that petitioner's left extremity was neurovascularly intact. Her strength was 5/5, capillary refill was brisk, and her sensation was intact. Her range of motion was as expected. Moderate edema was noted. She had no pain. X-rays were taken, and there was no concern. Dr. Stevens told her that her symptomatic treatment would be to ice, elevate, take anti-inflammatories, and shoe modification. He discussed with her ACE wrapping from her ankle up her leg at night to help with swelling. He told her to stick to low impact activities. He noted that in the future she may need additional bracing, orthotics, physical therapy, surgery, or activity restriction.

Petitioner testified that if the Woodson location was not opened by the time her 3-4 weeks of training ended, she would continue to work as an employee at the South Jacksonville location until the Woodson location opened.

Respondent offered into evidence the job description for Sales Associate. After petitioner fell she never returned to work for respondent. Petitioner testified she currently works for Jacksonville High School making $11.53 an hour. She stated that she makes more money at Jacksonville High School than she was making at Dollar General.

Petitioner testified that currently her left ankle is still stiff and numb throughout her lower left ankle on both sides. This occurs between 3-5 times a week. For this condition she takes ibuprofen. She reported pain in her ankle too. She testified that as the weather gets colder it gets achy, and is still stiff and tight. She experiences these problems three times a week. Petitioner testified that she has difficulty jogging and running. She testified that she can't do things like she used to be able to do. Petitioner denied any problems with her left ankle prior to the injury.

B. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner alleges that she sustained an accidental injury to her left foot/ankle, that arose out of and in the course of her employment by respondent on 11/19/17, when she slipped and fell in the parking lot outside of the Dollar General in South Jacksonville, IL. Respondent claims that petitioner was at no greater risk than the general public. The slip and fall itself is not in dispute. The petitioner provided unrebutted testimony that she slipped and fell on black ice in the Dollar General parking lot while walking from her car to the store for training. Petitioner testified that she was carrying her purse, a drink, and a folder for training. The question of whether or not petitioner was a travelling employee, or at any greater risk than the general public is in dispute.

Petitioner testified that she was hired to work for respondent in the Woodson, IL location. However, when training started, the Woodson, IL location was not opened and the training took place at the South Jacksonville, IL location. Petitioner began training on 11/17/17. Petitioner testified that when the 3-4 week training program ended, if the Woodson, IL store was not yet open, she would continue working as an employee at the Jacksonville, IL store. Petitioner stated that training started at 8:00 am each morning. Petitioner did not provide any evidence that she was paid for her travel time, or for any travel expenses.

Petitioner stated that she was not directed where to park by respondent, and in fact stated that she could park anywhere she wanted. That could be in the parking spaces in the Dollar General lot, or in the spots in the adjoining strip mall parking lot. Petitioner testified that the general public was also allowed to park in the

Dollar General parking lot or in the adjoining strip mall parking lot. Petitioner stated that she was unaware of who owned or maintained the Dollar General parking lot. She testified that she thought it was an investment company, but found out they no longer owned it. She further testified that she was trying to find out who owned and maintained the lot. Petitioner stated that she never saw anyone from Dollar General maintaining the lot.

First, with respect to whether or not petitioner was at a greater risk than the general public, the arbitrator finds that the parking lot where petitioner fell was open equally to both the general public and respondent's employees. Additionally, petitioner stated that she could park wherever she wanted, be it in the Dollar General lot or the parking lot of the adjacent strip mall. She also stated that Dollar General did not direct employees to park in any specific spaces. The arbitrator further finds that petitioner offered no credible evidence to support a finding that respondent either owned or maintained the Dollar General parking lot. The arbitrator also notes that there was no damage or defect noted in the lot, given that the petitioner testified that her fall was caused by some black ice present on the parking lot that morning. The arbitrator finds black ice on the parking lot would present the same risk to the general public that it would to petitioner, given that petitioner provided no credible evidence that she entered and exited the store any more frequently each day of training than any customer who came into the store would. Although, the petitioner testified that she was carrying a folder for training, in addition to her purse and drink when she fell, she did not provide any details regarding the size of the folder, or what if any impact this had on her fall. The arbitrator notes that the petitioner simply stated that she was carrying these things when she fell.

The petitioner also claims that she should be considered a travelling employee. However, the arbitrator finds the petitioner provided no credible evidence to support a finding that she was a travelling employee. Petitioner did not state what the distance to the South Jacksonville, IL store was, as compared to the Woodson, IL store; the petitioner did not provide any evidence that she was paid for her travel time, or her travel expenses; and, petitioner even testified that if the Woodson, IL store was not opened by the time training was completed, she would have continued to work as an amployeeout of the South Jacksonville, IL store until the Woodson, IL store opened.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her left foot/ankle that arose out of and in the course of her employment by respondent on 11/19/17.

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

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her left foot/ankle that arose out of and in the course of her employment by respondent on 11/19/17, the arbitrator finds these remaining issues moot.

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

FRANCIS CHAPLIN,
Petitioner,

vs.

20IWCC0484

NO: 18 WC 19954

UNIVERSITY OF ILLINOIS AT SPRINGFIELD,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical benefits, and temporary total disability (TTD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed November 12, 2019, is hereby affirmed and adopted.

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

DATED: AUG 3 1 2020

D. Douglas McCarthy

DDM/pm
O: 8/26/2020
052

Stephen J. Mathis

L. Elizabeth Coppoletti

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

CHAPLIN, FRANCIS
Employee/Petitioner

Case# **18WC019954**

UNIVERISTY OF ILLINOIS AT SPRINGFIELD
Employer/Respondent

20 IWCC0484

On 11/12/2019, 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 1.53% 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:

0352 LaMARCA LAW OFFICE PC
WILLIAM LaMARCA
1118 S 6TH ST
SPRINGFIELD, IL 62703

0522 THOMAS MAMER & HAUGHEY LLP
KENNETH REIFSTECK
PO BOX 560
CHAMPAIGN, IL 61824

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794

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

NOV 12 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

20 IWCC0484

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Francis Chaplin
Employee/Petitioner

v.

University of Illinois at Springfield
Employer/Respondent

Case # 18 WC 19954

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 William R. Gallagher, Arbitrator of the Commission, in the city of Urbana, on September 26, 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 _____

20IWCC0484

FINDINGS

On the date of accident, June 26, 2018, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $29,000.00; the average weekly wage was $557.69.

On the date of accident, Petitioner was 60 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $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

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

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

November 7, 2019
Date

NOV 12 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment by Respondent. The Application alleged a date of accident (manifestation) of June 26, 2018, and that Petitioner sustained an injury to her "right/left hand, right/left arm, right ring finger" as a result of "Repetitive work activities" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent for 26 years. Petitioner was a kitchen worker for the first five years and a janitor for the remaining 21 years. Petitioner testified at length regarding her job duties. During a typical day, Petitioner would clean bathrooms, empty trash, mop floors, clean windows, vacuum floors and clean stairwells.

Petitioner performed other tasks on a weekly basis. These included cleaning doorframes and cleaning large windows which required the use of an extension pole.

Petitioner was also required to strip and wax floors and shampoo carpets. These tasks were usually performed about once a year. Petitioner said that when she removed the wax, she would generally use a snow shovel because of the thickness of the wax that was accumulated on the floor.

Petitioner testified that all of her work activities required the active and repetitive use of both of her hands and arms. There was no dispute in regard to Petitioner's job duties. She was not cross-examined and Respondent tendered no testimony in regard to Petitioner's job duties.

Petitioner testified she started experiencing tingling and numbness in both of her hands/arms approximately three years ago. Petitioner stated the symptoms were more intense on the right than left. Over time, the symptoms got progressively worse. Petitioner also began to experience triggering in her right ring finger.

Petitioner initially sought medical treatment from Dr. Christina Scheibler-Ventress who initially evaluated her on June 7, 2018. At that time, Petitioner complained of triggering of the right ring finger and pain, tingling, numbness and weakness referable to both hands. Dr. Scheibler-Ventress prescribed wrist splints and ordered EMG/nerve conduction studies (Petitioner's Exhibit 1).

Petitioner was seen by Dr. Cecile Becker, on June 26, 2018. Dr. Becker performed EMG/nerve conduction studies on Petitioner's upper extremities at that time. The diagnostic studies were positive for moderate neuropathy and moderate/severe neuropathy on the right and left hands, respectively. The diagnostic studies were positive for moderate neuropathy and mild neuropathy on the right and left elbows, respectively (Petitioner's Exhibit 2).

Petitioner was subsequently evaluated by Dr. Jianjun Ma, a physician with the Springfield Clinic, on July 20, 2018. Dr. Ma reviewed the EMG/nerve conduction studies and noted they revealed abnormalities in both upper extremities. However, Dr. Ma's assessment was right trigger ring

finger and right carpal tunnel and cubital tunnel syndrome. He recommended Petitioner undergo corrective surgery on the right ring finger as well as right carpal tunnel and right cubital tunnel release procedures. He did not make surgical recommendation in regard to the left hand/elbow (Petitioner's Exhibit 3).

Dr. Ma noted Petitioner denied having sustained an injury, but advised her symptoms were aggravated while at work, especially when moving furniture, cleaning windows and mopping. However, Dr. Ma did not opine as to whether these work activities caused or aggravated Petitioner's upper extremity conditions (Petitioner's Exhibit 3).

Petitioner's counsel wrote Kathleen Sigle, a Nurse Practitioner associated with Dr. Scheibler-Ventress, on February 28, 2019, provided a description of Petitioner's job duties and asked NP Sigle to opine as to causality. NP Sigle prepared a report dated May 20, 2019, in which she noted "It is reasonable to say that Ms. Chaplin's repetitive work activity has caused and continue to aggravate her symptoms." NP Sigle also opined Petitioner would benefit from the surgery recommended by Dr. Ma (Petitioner's Exhibit 4). Other than the fact NP Sigle was a Nurse Practitioner, no other information was provided in regard to her qualifications.

At the direction of Respondent, Petitioner was examined by Dr. Nash Naam, a hand surgeon, on August 1, 2019. In connection with his examination of Petitioner, Dr. Naam reviewed Petitioner's medical records which included the report of NP Sigle which addressed causality. Dr. Naam agreed surgery for Petitioner's right carpal tunnel and cubital tunnel syndrome conditions was appropriate; however, he opined surgery was not necessary for Petitioner's right ring finger condition (Respondent's Exhibit 2).

In regard to causality, Dr. Naam opined Petitioner's work activities did not cause or aggravate her upper extremity conditions. This was based on Petitioner's description of her work activities and information regarding same contained in the medical records (Respondent's Exhibit 2).

Respondent also tendered into evidence Dr. Naam's CV. The CV indicated Dr. Naam is a Board Certified hand surgeon (Respondent's Exhibit 1).

At trial, Petitioner testified she still has complaints referable to both arms/hands, more on the right than left. She wants to proceed with the surgeries recommended by Dr. Ma.

Conclusion of Law

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

The Arbitrator concludes Petitioner did not sustain a repetitive trauma injury arising out of and in the course of her employment by Respondent which manifested itself on June 26, 2018, and her current condition of ill-being is not causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding her work activities was unrebutted.

Petitioner's expert in regard to causality is Kathleen Sigle, a Nurse Practitioner, associated with Dr. Scheibler-Ventress. Other than the fact NP Sigle is a Nurse Practitioner, her qualifications to provide a medical report as to whether there was a causal relationship between work activities and medical conditions is unknown.

Respondent's Section 12 examiner, Dr. Naam, is a Board Certified hand surgeon who has opined Petitioner's work activities did not cause or aggravate Petitioner's upper extremity conditions.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Naam to be more persuasive than that of NP Sigle in regard to causality.

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

William R. Gallagher, Arbitrator

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Crystal Beal,

Petitioner,

20IWCC0485

vs. No. 19 WC 2119

Aisin Manufacturing, Illinois, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent, 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 underlying facts of this claim were well laid out in the Arbitrator's Decision which is incorporated herein, and the Arbitrator's findings of fact are adopted. As relevant to the permanent partial disability award, the Commission notes that, while working on August 23, 2018, Petitioner injured her neck and was diagnosed with a C5-6 central disc protrusion and spinal cord compression. On March 8, 2019, Petitioner underwent a C5-6 anterior cervical discectomy, bilateral foraminotomies and a total disc arthroplasty.

In reviewing permanent partial disability, the Commission must consider the five factors enumerated in §8.1b(b) of the Act. The Commission reviews and weighs the factors somewhat differently than the Arbitrator.

With regard to factor (i), disability impairment rating, neither party offered an AMA impairment rating into evidence, Thus the Commission assigns no weight to this factor.

20 IWCC0485

With regard to factor (ii), the employee's occupation, the Commission finds that Petitioner testified that she no longer works for Respondent, and is now employed by Securitas. However, Petitioner presented no evidence as to what her current job duties entail, or that she has any difficulty performing any of those duties. The Commission assigns little weight to this factor.

With regard to factor (iii), the employee's age, the Commission finds that Petitioner was 33 years old at the time of her accident. Following her release from care, Petitioner still experiences pain and symptoms, which she will likely have for the rest of her life. The Commission assigns significant weight to this factor.

With regard to factor (iv), future earning capacity, the Commission finds that no evidence was presented that would show Petitioner's injuries had any effect on her future earning capacity. The Commission assigns no weight to this factor.

With regard to factor (v), evidence of disability corroborated by the treating records, the Commission finds that since Petitioner still experiences headaches which start at the base of her skull. Those headaches cause her eyes to throb and develop swelling around them. She also experiences tingling in her right arm, and feels a lot of pain when she turns her head to the right. Petitioner is hindered when playing with her young children, and has lost 50 pounds since her accident as a result of the stress it caused. At Petitioner's last office visit with Dr. Rutz on July 23, 2019, he documented her ongoing problems, and reported that if her symptoms worsen, she would be a candidate for another MRI and diagnostic nerve root blocks. The Commission assigns significant weight to this factor.

In light of the above, the Commission finds an award of 22.5% loss of body as a whole to be more in line with the extent of the injuries Petitioner sustained, and modifies the Arbitrator's award accordingly. The Arbitrator's other findings are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 18, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's §8(d)2 award is modified, and Respondent shall pay to Petitioner the sum of $312.80 per week for a period of 112.5 weeks, as provided in §8(d)2 of the Act, for the reason that the Petitioner's injuries caused the 22.5% loss of use of the body as a whole.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 1 2020
o-08/06/2020
MP/mcp
68

Marc Parker

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BEAL, CRYSAL
Employee/Petitioner

Case# **19WC002119**

AISIN MFG ILLINOIS LLC
Employer/Respondent

20IWCC0485

On 2/18/2020, 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 1.51% 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:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0299 KEEFE & DePAULI PC
PAT KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS 20IWCC0485
)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
NATURE AND EXTENT ONLY

Crystal Beal
Employee/Petitioner

v.

Aisin Mfg. Illinois, LLC
Employer/Respondent

Case # 19 WC 02119

Consolidated cases: n/a

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 14, 2020. By stipulation, the parties agree:

On the date of accident, August 23, 2018, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $31,200.00; the average weekly wage was $521.34.

At the time of injury, Petitioner was 33 years of age, single, with 2 dependent child(ren).

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

Respondent shall be given a credit of $2,631.52 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,631.52.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $312.80 per week for 87.5 weeks because the injuries sustained caused 17 1/2% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from April 30, 2019, through January 14, 2020, 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.

William R. Gallagher, Arbitrator

February 14, 2020
Date

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on August 23, 2018. The Application alleged Petitioner sustained an injury to her "Neck/right shoulder/head/body as a whole" as a result of "Repetitive lifting of sunroofs and sudden snapping of neck when yelled at by a co-worker" (Arbitrator's Exhibit 2). At trial, the only disputed issue was the nature and extent of disability (Arbitrator's Exhibit 1).

Petitioner worked for Respondent, a car parts manufacturer. On August 23, 2018, Petitioner was pulling sunroof shades off of a rack. A co-worker called her name and Petitioner reacted by quickly turning her head to one side. When she did so, Petitioner felt something "snap" in her neck.

Petitioner subsequently sought treatment from Dr. Christa Pestka, her family physician, who evaluated her on September 14, 2018. At that time, Petitioner complained of a burning sensation in her right shoulder and numbness in the fourth and fifth fingers of her right hand. Dr. Pestka, diagnosed Petitioner with parasthesias of the right upper extremity and ordered EMG/nerve conduction studies (Petitioner's Exhibit 3).

EMG/nerve conduction studies were performed on October 22, 2018. The test results were normal (Petitioner's Exhibit 4).

When Dr. Pestka saw Petitioner on November 5, 2018, Petitioner complained of headaches. Dr. Pestka ordered an MRI of Petitioner's head and referred Petitioner to Dr. John Davis, an orthopedic surgeon (Petitioner's Exhibit 3).

The MRI of Petitioner's head was performed on November 25, 2018. The MRI results were normal (Petitioner's Exhibit 5).

Dr. Davis saw Petitioner on November 28, 2018. At that time, Petitioner complained of pain in the right lateral neck which went into the right trapezium/scapula as well as numbness/tingling in the right hand. Dr. Davis opined Petitioner had right sided neck pain with radiculopathy and shoulder pain. He ordered an MRI of the cervical spine (Petitioner's Exhibit 6).

The MRI was performed on December 27, 2018. According to the radiologist, there was a diffuse disc bulge with central protrusion causing cord compression at C5-C6 (Petitioner's Exhibit 6).

Petitioner was subsequently evaluated and treated by Dr. Kevin Rutz, an orthopedic surgeon. Dr. Rutz initially evaluated Petitioner on January 2, 2019. On examination, Dr. Rutz noted there was tenderness of the right cervical paraspinal muscles and a decreased range of motion. He noted an MRI was previously performed, but was not available for him to review. Dr. Rutz ordered a new MRI (Petitioner's Exhibit 7).

The MRI was performed on January 8, 2019. According to the radiologist, the MRI revealed a broad base protrusion with spinal cord contact at C5-C6 and a disc bulge with paracentral disc protrusion at C6-C7 (Petitioner's Exhibit 8).

Dr. Rutz subsequently ordered a selective nerve root block procedure at C6 on the right. This was performed on January 15, 2019, but did not relieve Petitioner's symptoms (Petitioner's Exhibits 7 and 8).

Dr. Rutz subsequently performed neck surgery on March 8, 2019. The procedure consisted of a C5-C6 anterior cervical discectomy and bilateral foraminotomies and total disc arthroplasty (Petitioner's Exhibit 9).

Dr. Rutz saw Petitioner following surgery on March 25, and April 30, 2019. When seen on April 30, 2019, Petitioner still had some headaches, a little numbness in her right hand but rarely had pain in her right arm. Dr. Rutz opined Petitioner was progressing as expected (Petitioner's Exhibit 7).

Dr. Rutz last saw Petitioner on July 23, 2019. At that time, Petitioner complained of headaches on the right side which, on occasion, would cause throbbing and swelling around her right eye. Petitioner had some soreness in her neck, pain in her neck with radiation to the right arm and numbness/tingling in her right hand. Dr. Rutz opined Petitioner's symptoms were not severe enough to warrant any further surgery, but if Petitioner's complaints worsened, he would obtain a new MRI and possible nerve root blocks for diagnostic reasons (Petitioner's Exhibit 7).

Petitioner testified she no longer works for Respondent, but presently works for Securitas at a coal mine. Petitioner did not testify regarding either her current job duties or income.

Petitioner testified she continues to have neck pain, headaches at the base of the skull and tingling in her right arm. Petitioner stated her ability to play with her children has been adversely impacted by the injury. Petitioner has also lost approximately 50 pounds which she attributes to increased stress because of the injury.

Conclusion of Law

The Arbitrator concludes Petitioner had sustained permanent partial disability to the extent of 17 1/2% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked for Respondent, a car parts manufacturer, at the time she sustained the accident. Petitioner was no longer working for Respondent at the time of trial, but was working for Securitas at a coal mine. There was no testimony regarding Petitioner's current job duties. The Arbitrator gives this factor moderate weight.

Petitioner was 33 years old at the time she sustained the accident. She will have to live with the effects of the injury for the remainder of her working and natural life. The Arbitrator gives this factor moderate weight.

There was no evidence the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner sustained an injury to her neck/cervical spine which caused disc pathology at C5-C6. Petitioner had surgery which consisted of C5-C6 anterior discectomy, bilateral foraminotomies and total disc arthroplasty. Petitioner recovered from surgery and was able to return to work. At trial, Petitioner complained of neck pain, headaches at the base of the skull and tingling in her right arm. These complaints were consistent with those she had when last examined by Dr. Rutz on July 23, 2019. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

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

Eydie Olson,

Petitioner,

20IWCC0486

vs.

No. 15 WC 13143

McKesson Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, temporary disability, permanent disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the Arbitrator that the work injuries caused Petitioner to become permanently and totally disabled. However, the Commission believes the date of maximum medical improvement was March 30, 2016, when Petitioner's treating neurologist, Dr. Cacioppo, declared her at maximum medical improvement and stated she was "unable to return to work due to having a post-concussive syndrome." Thereafter, Petitioner's neurological condition never improved. The Commission modifies the end date of temporary total disability benefits and the beginning date of permanent total disability benefits accordingly.

On the issue of penalties and attorney fees, the Commission agrees with the Arbitrator that the petition for penalties and attorney fees made general allegations unsupported by the evidence.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 26, 2017 is hereby modified as stated herein and otherwise affirmed and adopted.

20IWCC0486

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $605.65 per week for a period of 52 weeks, from April 2, 2015 through March 30, 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 reasonable and necessary medical expenses of $4,469.90 pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent total disability benefits of $605.65 per week for life, commencing March 31, 2016, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry to this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 1 2020
o-08/05/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OLSON, EYDIE
Employee/Petitioner

Case# **15WC013143**

McKESSON CORP
Employer/Respondent

20IWCC0486

On 6/26/2017, 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 1.12% 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:

0154 KROL BONGIORNO & GIVEN LTD
MIKE BRANDENBERG
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602

1139 NOBLE & ASSOCIATES PC
JONATHAN SVITAK
387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563

20IWCC0486

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] 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

Case # 15 WC 013143

Eydie Olson
Employee/Petitioner

v.

McKesson Corp.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **May 8, 2017 and May 17, 2017**. 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. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS OF FACT

Petitioner was employed by Respondent as a Senior Operations Supervisor since 2008.

The Parties stipulated that Petitioner sustained accidental injuries, arising out of and in the course of her employment by Respondent on April 1, 2015. Petitioner slipped on a puddle of standing water while entering the bathroom at work that she used every day. She hit her head on a wall and landed on her right side, including her head, shoulder, hip and knee. Immediately following the accident, she experienced dizziness, nausea, and headaches. She also had right shoulder pain. She had to be helped up by EMTs, who took her to Northwest Community Hospital in an ambulance. The records of Northwest Community Hospital were not submitted into evidence.

On April 6, 2015, Petitioner followed up with her PCP, Dr. Stuart Ferber, at Northwest Community Healthcare. He diagnosed her with a concussion without loss of consciousness and contusions of the right shoulder, hip, and knee. He recommended that she remain off of work and that she begin taking Tramadol. On April 10 and April 20 of 2015, Dr. Ferber's diagnoses and treatment recommendations remained the same, as Petitioner reported no improvement in symptoms. On May 22, 2015, Petitioner saw Dr. Ferber, still reporting headaches, light sensitivity, and decreased concentration. Her right shoulder exhibited decreased range of motion and tenderness. Dr. Ferber recommended that Petitioner begin taking Nortriptyline with Tramadol, and that she start physical therapy on her right shoulder. On May 26, 2015, Petitioner began a course of physical therapy on her right shoulder at Illinois Bone and Joint Institute. On June 22, 2015, Dr. Ferber recommended that Petitioner discontinue Nortriptyline due to increased dizziness and headaches. He referred her to see a neurologist. (Px 1)

On July 9, 2015, Petitioner was evaluated by Dr. Daniel Cacioppo, a neurologist with Northwest Community Healthcare. Petitioner reported continued dizziness, decreased concentration, blurry vision, insomnia, short-term memory loss, light sensitivity, and headaches that increase when looking at a computer. Dr. Cacioppo diagnosed Petitioner with a mild concussion without loss of consciousness, first occurrence, and post-concussive syndrome. He stated that full recovery is not certain and estimated a 90-95% chance of recovery. He prescribed Meclizine and recommended that Petitioner remain off work. (Px 1)

On July 22, 2015, Dr. Ferber recommended that Petitioner continue physical therapy for her right shoulder and to remain off of work. (Px 1)

On August 4, 2015, Petitioner was examined by Dr. Russell Glantz, a neurologist at Parkview Orthopedics, acting as a §12 examiner hired by Respondent. Dr. Glantz opined that Petitioner suffered a minor head injury and that there is no causal relationship between the accident and her symptoms. He did not find any abnormality on the CT brain scan or neurological exam. He opined that Petitioner reached Maximum Medical Improvement two weeks after the accident and that she should not have been referred to a neurologist. (Rx 1)

Petitioner saw Dr. Ferber again on September 2, 2015 and he recommended that Petitioner take Meloxicam and continue to remain off work. (Px 1)

On September 9, 2015, Dr. Cacioppo reviewed Dr. Glantz's report and opined that Petitioner had not reached MMI and could take up to a year to do so. He prescribed Meclizine and B2 vitamins for headaches, and he recommended that Petitioner remain off work. (Px 1)

On October 1, 2015, Petitioner was examined by an orthopedist, Dr. Jeffrey Visotsky at Illinois Bone and Joint Institute, regarding her right shoulder. Her right shoulder exhibited pain at the AC joint and pain with cross-body adduction. Dr. Visotsky recommended that Petitioner start taking Mobic and undergo an MRI of the right shoulder. (Px 2)

On November 11, 2015, Dr. Cacioppo opined that Petitioner was recovering from her concussion symptoms slowly and estimated that she would reach MMI around April of 2016. He recommended that she continue to remain off of work and take the B2 supplement. (Px 1)

On November 24, 2015, Petitioner was examined by orthopedist Dr. Guido Marra with Northwestern Medicine, acting as a Section 12 examiner hired by Respondent, regarding her right shoulder. Dr. Marra opined that Petitioner had right shoulder impingement syndrome with a possible rotator cuff tear. He stated that there was a causal connection between her right shoulder symptoms and the accident on April 1, 2015. He recommended that Petitioner undergo an MRI or ultrasound of her right shoulder, and he recommended a five-pound lifting restriction with no overhead lifting. (Px 4)

On December 9, 2015, Petitioner underwent an Ultrasound of her right shoulder at 3T Imaging that revealed right supraspinatus tendinosis with no acute or chronic gross defects; limited passage of the right greater tuberosity beneath the acromion process during active abduction of the humerus; and symmetrical supraspinatus, infraspinatus, and deltoid musculature bilaterally with no sonographic evidence of atrophy.(Px 3)

On January 20, 2016, Dr. Cacioppo recommended that Petitioner begin taking Gabapentin for her headaches and that she remain off of work.(Px 1)

On February 4, 2016, Dr. Visotksy reviewed the ultrasound with Petitioner and recommended that she continue physical therapy for the right shoulder. (Px 2)

On February 24, 2016, Petitioner was seen by Dr. Ferber, who recommended that she continue to take Gabapentin and remain off of work. (Px 1)

On March 10, 2016, Petitioner was discharged from physical therapy for her right shoulder after 62 visits. (Px 2)

On March 30, 2016, Petitioner saw Dr. Cacioppo, who opined that Petitioner had reached MMI and was unable to return to work due to post-concussive syndrome. He recommended that she take an increased dose of Gabapentin. (Px 1)

On March 31, 2016, Petitioner saw Dr. Visotsky again. Upon examination, her right shoulder exhibited improved range of motion, with some tightness on internal rotation. Dr. Visotsky discharged Petitioner for the right shoulder and recommended that she continue with home exercise. (Px 2)

On April 14, 2016, Petitioner saw Dr. Cacioppo again, reporting increased nausea and dizziness with the Gabapentin. Dr. Cacioppo recommended that she decrease the dosage. He again opined that Petitioner had reached MMI and that she is not able to perform any type of work due to post-concussive symptoms she is still experiencing, including headaches that require her to lay down for pain relief during the day. (Px 1)

On April 27, 2016, Petitioner saw Dr. Ferber again who agreed that she had reached MMI and was unable to perform any type of work. (Px 1)

On July 11, 2016, Petitioner was examined by neurologist Dr. Gene Neri, another Section 12 examiner hired by Respondent. On examination, Dr. Neri noted reduced range of motion in Petitioner's neck because of moderate spasm in the upper trapezius and posterior and stemomastoid muscles bilaterally. Dr. Neri diagnosed Petitioner with cerebral concussion, clearing; severe flexion-extension injury to the cervical spine with severe cervical strain, cervical vertigo, and muscle contraction headaches; and sleep disturbance secondary to both other diagnoses. Dr. Neri opined that he agreed with Dr. Glantz that Petitioner's neurologic exam was normal with the exception of the severe spasms in the neck, which he felt correlated to Petitioner's ongoing problems. Dr. Neri "completely disagreed" with Dr. Glantz's opinion on causal connection and opined that Petitioner's symptoms, including insomnia, headaches, and lack of concentration, correlated perfectly with the type of injury described as occurring on April 1, 2015. He further opined that she is currently disabled from working and that she should continue treatment with a neurologist. Dr. Neri recommended that Petitioner undergo twelve visits of physical therapy for her cervical spine and that she begin taking Clonazepam. (Px 5)

On July 20, 2016, Petitioner was reexamined by Dr. Ferber, who prescribed the use of a cane and recommended an increase in Gabapentin. (Px 1, Px6)

On August 25, 2016, Petitioner saw Dr. Cacioppo again, reporting no improvement in her symptoms. His diagnosis was neck pain, headaches, and concussion, at MMI. He agreed to refer Petitioner for physical therapy on her cervical spine, but recommended that she stop if her symptoms worsen. (Px 1)

On September 9, 2016, Petitioner began a course of physical therapy on her cervical spine at Illinois Bone and Joint Institute. (Px 2)

On October 28, 2016, Petitioner was discharged from physical therapy after twelve visits. She reported no significant change in symptoms. She obtained temporary relief with manual therapy, but the pain would return later each day. She experienced severe pain with changes in the weather. Her therapist described her prognosis as poor to fair. (Px 2)

On November 23, 2016, Petitioner was reexamined by Dr. Ferber, who prescribed a trial of Xanax. He again opined that Petitioner had reached MMI for her concussion and headaches, and that she is unable to perform any type of work. (Px 1)

On December 14, 2016, Petitioner was reexamined by Dr. Cacioppo, reporting continued issues with concentration and balance, tiredness, and headaches and that physical therapy was not helpful. The diagnosis was concussion with post-concussion syndrome and non-intractable headaches of unspecified chronicity pattern and type. Dr. Cacioppo recommended that Petitioner continue with Gabapentin. (Px 1)

On January 9, 2017, Petitioner was again examined by Respondent's Section 12 examiner, Dr. Neri. Upon examination, Petitioner exhibited spasms in the upper trapezius, posterior stemomastoid, cervical paraspinal, and thoracic paraspinal muscles bilaterally. Dr. Neri stated that there had been no significant changes in her neurological exam and her diagnoses remained mild concussion, cleared; flexion/extension injury of the cervical spine with ongoing cervical vertigo and muscle contraction headaches; and sleep deprivation related to the other diagnoses. Dr. Neri again recommended that Petitioner begin Clonazepam and another course of physical therapy for her cervical spine. He opined that her current neurological condition is related to the accident on April 1, 2015. Dr. Neri further opined that Petitioner could perform sedentary work if she was able to perform through her pain level, but, due to chronic pain and sleep deprivation, her ability to function on an intellectual basis would be affected substantially. Dr. Neri found no evidence of malingering or symptom magnification. (Px 5)

On March 1, 2017, Petitioner followed up with Dr. Ferber, who maintained that Petitioner is unable to perform any type of work due to her post-concussive symptoms. (Px 1) Dr. Ferber also prescribed a trial of Clonazepam. (Px 8)

On March 2, 2017, Dr. Cacioppo reexamined Petitioner and opined that formal physical therapy would not help, as Petitioner was almost two years removed from her injury. He again opined that Petitioner is not able to perform any type of work due to post-concussive symptoms she is still experiencing. He recommended that she continue Gabapentin. (Px 1) Petitioner testified that Dr. Cacioppo told her that he did not believe her symptoms would show any improvement.

Petitioner testified that, immediately prior to the accident on April 1, 2015, she was not having any problems with her right shoulder and she was not having any issues with headaches, dizziness, or confusion. She was not having any problems with her neck. She does not have a history of previous concussions. Petitioner testified that she missed some time from work in January of 2015 but that it was related to her diabetes – not headache related. The records from Northwest Community Healthcare do reveal complaints of anxiety and sleep problems in August of 2013, right shoulder pain and decreased range of motion in August of 2014 and a pounding headache for 6 hours, associated with dizziness and nausea in January of 2015. Petitioner had been taken off work by Dr. Ferber from February 9, 2015 to March 2, 2015 for nausea and vomiting. It is also noted that Petitioner's pre-injury health was not the best (insulin dependent diabetic, hypertension, cardiac issues and morbid obesity along with other co-morbidities). (Px 1)

Petitioner testified that she constantly has headaches, which get worse at times. She has difficulty concentrating and can only read or look at a computer or television screen for ten to fifteen minutes before her symptoms get worse. Her vision blurs when her headaches get bad. She experiences unsteadiness on her feet at times, which feels like she is walking on foam. She uses her cane to walk except when she has something else to hold onto. She only gets up to two hours of sleep per night. Before the accident, she usually got seven to eight hours per night. She no longer drives a vehicle for distances greater than five miles because she is afraid that she will get severe headaches when driving. When she uses the stairs, she usually slides down them or crawls up them because she is afraid of falling. She does not try to use the stairs upright when her headaches are increased. Her headaches and dizziness increase when the weather changes from cold to hot. Her dizziness increases when she tries to sit up and she sometimes has difficulty getting out of bed. When she goes grocery shopping, she currently uses a motorized scooter. She only uses email a couple times per week. She does not have a Facebook. She might have a Linkedin account, but does not really use it. She has an old cell phone that does not have internet capabilities, and she does not text often. She has not taken any vacations in the last two years. She owns a car, but took a cab to get to the Commission at the time of hearing. During the hearing, Petitioner testified that she currently had headaches. When her headaches get bad, Petitioner has to lie down and take Tramadol or Gabapentin. If she does not lie down, she gets increased nausea and dizziness. She sometimes has to lie down for up to six hours at a time. Petitioner testified that her symptoms did not improve after undergoing physical therapy on her neck or after taking the Clonazepam. The medication did not improve her ability to sleep at night, and it exacerbated her headaches at times. She took it for two weeks and then stopped because she did feel some increased dizziness and nausea. Petitioner used a pharmacy card from workers' compensation to purchase her medications prescribed for this injury. She testified that she was taking Lasix, Albuterol, Xanax, Hydroclorothiazide, Prinivil for years prior to the accident without any side effects. She did not experience any side effects from Mobic or Dulera. Petitioner testified that she still has pain in her right shoulder. She feels that her range of motion is only 80-85% since the accident, but the shoulder becomes very painful when she reaches behind her back.

Respondent called Maria Rodriguez as a witness. She works for Change Healthcare, formally McKesson Corporation. She began working there nine years ago and has been an Operations manager for the last six years. As of April 1, 2015, she was overseeing two supervisors, one of whom was Petitioner. Rodriguez testified that Petitioner began reporting directly to her in 2013. She testified that Petitioner's attendance record was not what it should be due to medical reasons. She could not say how many absences Petitioner had and agreed that she was speculating as to the number without having attendance records with her. Respondent did not submit any attendance records into evidence at the time of hearing. Rodriguez did not know what medical issues were causing any of Petitioner's absences. She said that Petitioner did not take vacations because she was using her PTO for FMLA absences. Rodriguez reported the absence issues to HR department. She has not spoken with Petitioner since the accident on April 1, 2015.

Respondent also called Lizet Salgado as a witness. Salgado testified that she works for Change Healthcare, formally McKesson Corp. She is a senior AR representative and handles medical billing. She testified that Petitioner supervised her for two years. Salgado was working on April 1, 2015. Salgado testified that Petitioner has been off work since the accident date and she has not communicated with Petitioner since then. Salgado testified that she witnessed Petitioner at a grocery store the weekend before July 4, 2015. She testified that Petitioner and a man were pushing carts full of groceries to the checkout line in the store. She testified that she made eye contact with Petitioner, who then walked out of the store and got into her car. Salgado says she recognized Petitioner's car from work. She could not recall if Petitioner was in the passenger or the driver's seat of the car. She did not know if Petitioner was driving. Salgado testified that Petitioner did not have a cane and "seemed fine." Salgado did not talk to Petitioner at that time. She only saw Petitioner for a total of three minutes. Salgado could not say whether Petitioner was having headaches, nausea, or dizziness at that time. She has not seen or spoken to Petitioner since then.

Petitioner's Bills Exhibit was Px 6. The claimed bills were from Northwest Community Healthcare (Drs. Ferber and Cacioppo) and for reimbursement for the purchase of a cane.

Petitioner's employment with Respondent was terminated, as of April 21, 2016, as she had exhausted FMLA time and Respondent needed to fill her position. (Px 7)

CONCLUSIONS OF LAW

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

Petitioner's testimony is found to be credible.

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989) Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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

Petitioner's current condition of ill-being (to wit: status post fall with residual post concussive symptoms, per Drs. Ferber and Cacioppo, residuals from flexion/extension injury to the cervical spine and residuals from a right shoulder strain) is causally related to the injury. The Arbitrator bases this finding on the testimony of Petitioner, the medical records of Drs. Ferber, Cacioppo and Visotsky and the opinions of Drs. Neri and Marra.

Dr. Glantz's opinions are not persuasive in this case. They were refuted by Dr. Neri and are not supported by the records from Northwest Community Healthcare. The Arbitrator does not believe that Petitioner is a faker. If she was, Dr. Neri would have said that she was a manipulator. DR. Ferber and Dr. Cacioppo would have charted inconsistencies if they were present. They did not. Petitioner is, unfortunately, in the 5% category with bad results from concussions.

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 finds all of the medical treatment to be reasonable and necessary.

Petitioner presented medical bills as part of Exhibit 6. Based on the Arbitrator's findings in Section "F", the bills are awarded as follows:

1. NCHS (Dr. Ferber)– DOS 4/20/15-7/20/16: $1,902.00
2. NCHS (Dr. Cacioppo) –DOS 7/9/15-8/25/16: $2,520.00
3. Hurry-Cane –$47.90

Respondent shall pay to Petitioner $47.90 as reimbursement from the sum of the awarded bills for out-of-pocket payment for medical treatment related to this accident.

This award is made in accordance with §§8(a) and 8.2 of the Act and Respondent is entitled to a credit for all bills that it has paid.

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

Based upon the evidence adduced, the Arbitrator finds that because of the injuries sustained, Petitioner is permanently and totally disabled, in accordance with §8(f) of the Act.

In finding that Petitioner is permanently and totally disabled, the Arbitrator relies on the persuasive and credible opinions and records of Petitioner's treating physicians, Dr. Ferber and Dr. Cacioppo, as well as Respondent's Section12 examiner, Dr. Gene Neri. Both Dr. Ferber and Dr. Cacioppo have opined that Petitioner has reached maximum medical improvement and that she is unable to return to work in any capacity. (Px 1) On July 11,

2016, Dr. Neri agreed that Petitioner was currently disabled, but felt that her condition may improve with a course of physical therapy for the cervical spine and a course of Clonazepam. (Px 5) Petitioner subsequently underwent that recommended treatment and did not experience any lasting, significant improvement of her symptoms. On January 9, 2017, Dr. Neri again recommended that Petitioner undergo the same course of treatment. Maybe Petitioner could work at a sedentary job, but she would have difficulty functioning on an intellectual basis due to the chronic pain and sleep deprivation. Dr. Neri indicated that Petitioner would need improvement of her symptoms before he could recommend a return to work. Finally, Dr. Neri opined that Petitioner exhibited no evidence of symptom magnification or malingering. (Px 5)

Although Dr. Neri stated that Petitioner has yet to reach MMI, the Arbitrator finds the opinions of Dr. Ferber and Dr. Cacioppo to be more persuasive on that issue.. On March 1, 2017 and March 2, 2017 respectively, each doctor reaffirmed his opinion that Petitioner has reached MMI and that she is not able to return to work in any capacity due to her neurological symptoms. On March 2, 2017, Dr. Cacioppo specifically stated that he did not believe further physical therapy would help because Petitioner was already two years out from her injury. Dr. Cacioppo's opinion is persuasive. Petitioner is at MMI as of March 2, 2017. (Px 1) The Arbitrator believes that it is significant that Petitioner did undergo the treatment recommended by Dr. Neri and did not experience any significant improvement. The Arbitrator finds Petitioner's testimony to be credible with regard to her current symptoms.

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

Petitioner's Penalty Petition was filed on March 3, 2017 and makes a general allegation that she is entitled to Penalties and Fees because Respondent wrongfully withheld TTD benefits and intentionally underpaid the benefits, and, also, wrongfully refused to pay medical bills. (Px 9)

Based upon the evidence adduced, Petitioner's claim for Penalties and Fees 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cisco Torres,

Petitioner,

vs. No. 15 WC 21877

Costco Wholesale,

Respondent.

20IWCC0487

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and proper notice given, the Commission, after considering the issues of causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner's application for adjustment of claim alleges that on January 4, 2015, Petitioner sustained a work-related injury to the left foot. Petitioner, a front end customer service assistant, testified that January 4, 2015, was a cold and snowy day. Petitioner noticed a customer driving away with some groceries sticking out of the trunk of the car. Petitioner flagged down the customer and pushed the groceries into the trunk. After Petitioner closed the trunk, the customer began to drive away. Petitioner described the accident as follows: "[M]y foot was in between her car and the curb. So as soon as I tapped [the trunk], I went up. As soon as I went up, I tapped it and she was going. I left, and my foot just twisted on the floor." Petitioner continued that he fell, got up, and fell again. While trying to get up the second time, Petitioner rolled his ankle against the curb. Petitioner clarified he twisted his ankle inward, fell on his foot and ankle, got up, fell again and, while getting up again, rolled his ankle against the curb.

Petitioner reported the accident, and Respondent sent him to a company clinic. The clinic staff diagnosed a sprain. Petitioner followed up at the clinic for three weeks while his symptoms were

worsening. The clinic staff recommended consulting a specialist.[1] In the meantime, Petitioner was promoted to assembler, but was unable to start the new duties.

Petitioner consulted Dr. Scott Rubinstein, who prescribed conservative treatment. However, Petitioner continued to be in a great deal of pain. At Respondent's request, Petitioner was examined by Dr. George Holmes, who ordered additional tests. After a reexamination, Dr. Holmes released Petitioner to return to work in June of 2015.

Petitioner testified he did not return to work because he was still in a lot of pain. Petitioner consulted Dr. Arshad Khan, a podiatrist. Dr. Khan obtained an x-ray, diagnosed *os trigonum*, and recommended surgery. However, the insurance would not cover the surgery. Petitioner then saw Dr. Divya Agrawal, who referred him to Dr. Joel Anderson, a podiatrist. In October of 2015, Dr. Anderson performed surgery to remove the *os trigonum*. Petitioner testified the surgery cured his pain. After the surgery, Petitioner returned to Dr. Rubinstein, who released him to return to work in the summer of 2016.

Petitioner testified that he tried, but did not return to work for Respondent. Petitioner explained that he moved to Texas in the summer of 2016 under the impression he was transferring to the Fort Worth store. However, the job transfer did not happen. Since then, Petitioner held a number of jobs. At the time of the arbitration hearing on June 25, 2019, Petitioner worked as a driver (driving clients to medical appointments), working more hours at a higher hourly wage than he did for Respondent.

The medical records in evidence show that on January 16, 2015, Petitioner sought treatment from Dr. Rubinstein at the Illinois Bone & Joint Institute for persistent pain and discomfort since the work accident. "His pain is primarily in the midfoot on the lateral aspect and down in between his toes." Physical examination of the ankle was unremarkable. Physical examination of the foot was as follows: "[H]e is tender in the mid foot, although on the lateral side at the tarsometatarsal joints and along the metatarsophalangeal joints of the second, third and fourth toes." The rest of the examination was normal. Standing x-rays showed no fractures, dislocations or disruption of the relationships between the bones of the foot. Dr. Rubinstein diagnosed sprain of the ligaments in the foot, gave Petitioner a CAM walker boot, and kept him off work. Dr. Rubinstein thought it would take "a number of months to heal up fully."

On January 30, 2015, Petitioner reported feeling much better, but still having pain. Physical examination was as follows: "He is still very tender over the mid foot midtarsal joints at the lateral aspect of his foot, both on the plantar and dorsal surface, he has discomfort with weightbearing out of the brace and a little bit of swelling, but he is neurologically and vascularly intact." Dr. Rubinstein ordered an MRI. The MRI, performed February 6, 2015, was negative for any abnormalities. On February 13, 2015, Petitioner reported doing better, but still having significant pain. Dr. Rubinstein prescribed anti-inflammatory medication. On March 13, 2015, Petitioner continued to improve. Dr. Rubinstein prescribed physical therapy. On April 17, 2015, Petitioner complained of some pain and discomfort. Dr. Rubinstein reviewed a section 12 report from Dr. Holmes and agreed with his diagnosis of nerve contusion and treatment recommendations (topical medications). On May 22, 2015, Petitioner continued to complain of persistent symptoms. Dr. Rubinstein prescribed gabapentin and ordered electrodiagnostic studies.

[1]The medical records from the clinic are not in evidence.

Physical therapy records show Petitioner underwent physical therapy at Accelerated/Athletico from March 17 through June 18, 2015. The physical therapy focused on treating neurogenic pain. As of the last physical therapy visit, Petitioner complained of persistent pain in the foot and ankle.

The medical records from Dr. Khan, a podiatrist, show only one visit, on May 21, 2015. Petitioner consulted Dr. Khan for a second opinion. "Patient is getting a shocking pain with burning on the outside of Left foot. Patient said the bottom of foot is very painful." Dr. Khan performed x-rays and suspected a fracture of the posterior process of the left talus, as well as CRPS. He recommended consulting a pain physician, electrodiagnostic studies, continuing physical therapy, and following up with the treating physician.

The medical records from Dr. Agrawal, a physiatrist, show Petitioner treated for left ankle and foot pain from June 26 through July 17, 2015. Dr. Agrawal diagnosed CRPS caused by the work accident and took Petitioner off work. Dr. Agrawal obtained a CT scan, which he interpreted as showing "possible non-union of talar fracture vs congenital." The radiologist's impression was as follows: "There is a congenital cleft of the posterior talus likely congenital nonunion of ossicle unless focally tender." Ultimately, Dr. Agrawal referred Petitioner to a podiatrist of his choice.

The medical records from Dr. Anderson, a podiatrist, show that on July 20, 2015, Petitioner presented "with an antalgic gait and crutch assistance with a CAM boot in place." He complained of pain in the left foot and ankle. Dr. Anderson diagnosed, "fracture of astragalus," tenosynovitis of the foot and ankle, and mononeuritus of the lower limb. Dr. Anderson reviewed the CT images, noting a possible nonhealed fracture or *os trigonum*. Dr. Anderson also performed x-rays, which he interpreted as showing "a large loose bone fragment *** at the posterior talus," which could represent a nonhealed fracture or *os trigonum*. Dr. Anderson recommended surgery, opining the condition of ill-being was causally connected to the work accident.

On October 9, 2015, Dr. Anderson performed an excision of the *os trigonum*. On December 23, 2015, Petitioner returned, reporting "he has not recovered from the surgery well." Dr. Anderson acknowledged possible "inadvertent intra-operative trauma to the sural nerve." He recommended physical therapy and orthotics. On January 20, 2016, Dr. Anderson noted: "[The patient] states he fell in the bathroom January 9 and believes he may have fractured his left foot again. He relates he was not able to put weight on his left foot and he fell and tried to hold onto a towel rack but he fell and broke the toilet." X-rays showed no fracture or dislocation. Dr. Anderson's recommendations remained unchanged, and he added Norco.

On January 29, 2016, Petitioner returned to Dr. Rubinstein. "He comes in with some problems related to surgery he had back in October by a podiatrist who excised his os trigonum or some fragments of it. This relieved a lot of his preoperative discomfort, but [has] left him with some numbness on the lateral border of his foot and down across the dorsum of his big toe. He says this makes it very difficult for him to walk and he is still using the CAM walker boot because of feeling of weakness in his foot." Physical examination suggested the nerve at the level of the surgery was stretched, causing the numbness. Dr. Rubinstein noted the previously ordered electrodiagnostic studies were negative and Dr. Holmes diagnosed peroneal neuritis. Dr. Rubinstein recommended physical therapy and instructed Petitioner to follow up with his treating surgeon.

On February 17, 2016, Petitioner presented to Dr. Anderson with a cane. He complained of pain at the front of the left ankle, as well as some tingling and numbness. Dr. Anderson continued to prescribe physical therapy, orthotics and Norco. In March and April of 2016, Petitioner reported slow improvement. Dr. Anderson ordered electrodiagnostic studies. On April 27, 2016, Dr. Anderson noted the electrodiagnostic studies were normal.

On May 6, 2016, Petitioner returned to Dr. Rubinstein, reporting a good range of motion and strength, but still complaining of a little discomfort in the foot "due to the apparent injury to his sural nerve." "The pain in his ankle though is much better, and he is overall getting along better." Petitioner discussed the job he planned to start for Respondent, which Dr. Rubinstein thought he could do without modifications. Dr. Rubinstein gave Petitioner a full-duty release to return to work.

A physical therapy discharge note dated May 28, 2016, states Petitioner reported a 60 to 75 percent improvement.

On August 12, 2016, Petitioner returned to Dr. Rubinstein, reporting doing better. "His leg still has some problems on the left with fatigue after walking for a distance or standing for quite some time, and he did have some difficulty after standing quite a while on July 4, but he was on uneven ground at that time and that has certainly probably made things worse as he was walking on a rocky gravel surface, which caused a lot of unusual motion at his ankle that he is not used to." Physical examination was notable for some tenderness and "some decreased volume in his calf musculature compared to the other leg of approximately 1.5 cm less circumference at the mid calf level." Dr. Rubinstein believed the remaining symptoms would resolve with continued home exercises. He kept Petitioner on full duty.

Dr. Rubinstein, an orthopedic surgeon, testified by evidence deposition on May 3, 2017. Dr. Rubinstein opined the mechanism of injury on January 4, 2015, could have caused an injury to the *os trigonum*. As Petitioner's other complaints settled down over time, the injury to the *os trigonum* became more apparent. "It probably was there all along." On cross-examination, Dr. Rubinstein acknowledged that early in the course of treatment, Petitioner had no complaints relative to the back of his foot area of the *os trigonum*. Dr. Rubinstein reviewed the MRI images during cross-examination, noting a little fluid around the *os trigonum*.

Dr. Holmes, a foot and ankle orthopedic surgeon and Respondent's section 12 examiner, testified by evidence deposition on September 18, 2017. Dr. Holmes initially examined Petitioner on March 18, 2015. Petitioner complained of pain over the top and lateral aspects of the left foot. Objective physical examination findings were unremarkable. X-rays performed in the office were normal. Dr. Holmes reviewed the MRI, also interpreting it as normal. Dr. Holmes diagnosed a contusion of the foot and nerve, but no musculoskeletal injury or trauma. He recommended topical medication. On May 20, 2015, Dr. Holmes reexamined Petitioner, who now complained of a shooting pain that went all the way from the ankle up his leg and on the lateral border of the foot. Dr. Holmes summarized his physical examination findings: "Overall I felt the exam remained benign without any other focality other than the areas of pain on the lateral side of his foot and also now with some new radiation." Dr. Holmes suspected some injury to the sural nerve or the superficial peroneal nerve, and recommended electrodiagnostic studies. On June 20, 2015, Dr. Holmes issued an addendum after reviewing the electrodiagnostic report, which was normal. Dr. Holmes declared Petitioner at maximum medical improvement and opined he could return to work full duty. On November 11, 2015, Dr.

Holmes reexamined Petitioner after the *os trigonum* surgery. Dr. Holmes opined the *os trigonum* was of a longstanding duration, and the accident did not cause an acute process in the *os trigonum*.

Dr. Anderson testified by evidence deposition on July 23, 2018. Dr. Anderson considered the surgery successful and reiterated his opinion that the *os trigonum* condition was causally connected to the work accident. Dr. Anderson initially testified that he did not review Petitioner's outside imaging studies or medical records, except the CT scan and a note from Dr. Agrawal. Dr. Anderson did not know whether early imaging studies showed an acute injury. Upon further questioning, Dr. Anderson believed he had reviewed an MRI disc that showed some joint effusion at the back of the ankle and subtalar joint with a loose bone fragment.

Having carefully considered the medical records, the expert opinions, and the chain of events, we find the accident on January 4, 2015, caused a nerve injury or injuries and, at the very least, also caused the *os trigonum* to become symptomatic. We therefore award the following medical bills pursuant to sections 8(a) and 8.2 of the Act: Illinois Bone & Joint Institute (Dr. Rubinstein) in the amount of $80.01; EQ MD (prescriptions ordered by Dr. Agrawal) in the amount of $811.35; Premium Healthcare Solutions (imaging) in the amount of $766.89; Advanced Foot & Ankle Center (Dr. Anderson) in the amount of $2,464.17; G&U Orthopedic (ordered by Dr. Anderson) in the amount of $3,710.17; ATI in the amount of $11,886.40; out-of-pocket expense (walking cane) in the amount of $21.39; and Illinois Public Aid lien in the amount of $1,536.53.

Turning to the issue of temporary total disability, we agree with Petitioner's request to extend the benefits through December 31, 2015.

We agree with the Arbitrator's award of permanent partial disability to the extent of 15 percent loss of use of the left foot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 27, 2019 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $253.00 per week for a period of 51 4/7 weeks, from January 5, 2015 through December 31, 2015, 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 reasonable and necessary medical expenses of $21,276.91 pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $253.00 per week for a further period of 25.05 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the left foot to the extent of 15 percent thereof.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,400.00. 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: AUG 3 1 2020
o-07/08/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

DISSENT

I respectfully dissent. I agree with the Arbitrator's decision which found Petitioner failed to prove a causal relationship between his accident of January 4, 2015 and his resulting condition of ill-being relative to his *os trigonum*. I would deny medical and temporary total disability benefits following June 12, 2015- the date upon which Petitioner was placed at maximum medical improvement by Dr. Holmes. I would vacate the Arbitrator's award of medical expenses in the amount of $80.01 for Dr. Rubenstein's treatment of August 12, 2016. I would modify the Arbitrator's award of permanent partial disability benefits and reduce the same to 5% loss of use of the left foot pursuant to Section 8(e)11 of the Act.

On January 4, 2015, Petitioner sustained an undisputed accident involving his left ankle. As the Majority noted, Petitioner underwent a significant course of treatment with both Dr. Rubenstein and Dr. Anderson along with several evaluations by Dr. Holmes at Respondent's request pursuant to Section 12 of the Act. All three physicians provided their opinions via evidence depositions (PX17- 05/3/17; PX16- 07/23/18; and RX3- 09/18/17, respectively). Although not directly stated by the Majority, it appears they afford greater weight to the opinions of Dr. Rubenstein and Dr. Anderson over those of Dr. Holmes. I, respectfully, disagree. As did the Arbitrator, I afford greater weight to the opinions of Dr. Holmes.

Dr. Holmes is a board-certified orthopedic physician with a specialty in foot and ankle surgery. RX3, p. 5. Dr. Holmes evaluated Petitioner on March 18, 2015 at which time Petitioner provided a history of his accident along with complaints of pain focused on the top and lateral aspect of his foot. RX3, p. 7. Dr. Holmes testified he asked Petitioner to mark the exact location of his pain which was then photographed. *Id.* Dr. Holmes explained such procedure was undertaken to "to chronicle the extent and location of [Petitioner's] pain." RX3, p. 7-8.

As part of the evaluation, Dr. Holmes reviewed x-rays taken on March 18, 2015 as well as the MRI previously obtained on February 6, 2015 both of which were normal. RX3, p. 9. Dr. Holmes diagnosed a contusion of the foot with a possible contusion of the nerve and recommended ongoing treatment. RX3, p. 10-11. Dr. Holmes specifically stated he found no "underlying musculoskeletal injury or trauma." RX3, p. 10.

Dr. Rubenstein, Petitioner's treating physician at the time, agreed with Dr. Holmes' assessment. Dr. Rubenstein testified when he evaluated Petitioner on May 22, 2015, Petitioner's complaints were consistent with a nerve injury as diagnosed by Dr. Holmes and further, Petitioner's ligament injury had resolved. PX17, p. 11-12. Moreover, Dr. Rubenstein, consistent with Dr. Holmes' diagnosis of a nerve injury and recommendation for an EMG, prescribed the necessary EMG. On June 8, 2015, the EMG was performed with normal results. RX3, p. 17.

Dr. Holmes re-evaluated Petitioner following the surgery performed by Dr. Anderson. Dr. Holmes testified that an *os trigonum* is a small bone located in the back of the ankle which in 90% of people is congenital in nature. RX3, p.19. Dr. Holmes previously identified this bone during Petitioner's May 20, 2015 visit and further noted the *os trigonum* was not in the area of Petitioner's complaints. *Id.* Dr. Holmes testified Petitioner's *os trigonum* was of a long-standing duration. He based this finding on his review of the x-rays explaining "We can look at bones forensically and tell if a bone has been acutely injured or if it has been that way for a long time. So I indicated that the margins of the *os trigonum* were well corticated. That is, it is sharp, hard shell like the outside of shell of an egg. And when that shell is seen to be hard and intact, it means it's an old injury or it's something that has been

there since birth." RX3, p. 20. Moreover, Dr. Holmes re-analyzed the MRI of February 6, 2015 finding "there is no evidence of an acute *os trigonum*. So that there's no bone edema, there is no fluid, there is nothing that suggest this is an acute process that happened as a result of his injury." RX3, p. 21.

The Majority in its opinion disregards Dr. Holmes' unequivocal testimony- testimony which is so clear- Petitioner's attorney waived cross-examination of Dr. Holmes. Instead, the Majority relies on the speculative testimony of Dr. Rubenstein and the unsupported testimony of Dr. Anderson.

As previously discussed, Dr. Rubenstein while actively treating Petitioner concurred with the opinions of Dr. Holmes specifically his diagnosis and treatment recommendations. At the time of his deposition, Dr. Rubenstein testified in retrospect, the *os trigonum* must have been present as the surgery resolved Petitioner's symptoms. PX17, p. 17. Even assuming for purposes of argument, such is true, this merely proves correlation and not causation which is the necessary legal standard. More importantly, Dr. Rubenstein testified that during Petitioner's treatment, he voiced no complaints regarding the back of the foot (area of *os trigonum*), therefore, Dr. Rubenstein focused his treatment on other areas of Petitioner's foot. PX17, p. 24-25. Ultimatley, Dr. Rubenstein testified as follows: "Once the forefoot pain resolved, [Petitioner] still had his right side hindfoot pain that still bothered him. I can only speculate. I can't say with certainty. You have to ask the podiatrist who was treating him during that time frame." PX17, p. 26.

Dr. Anderson, the podiatrist to whom Dr. Rubenstein is referring, evaluated Petitioner initially on July 20, 2015. Dr. Anderson testified when evaluating Petitioner, he had no records available to him specifically the x-rays taken by Drs. Rubenstein and Holmes and Clearing Clinic nor did he have the MRI performed on February 6, 2015. PX16, p. 8. Dr. Anderson like Dr. Holmes described an *os trigonum* stating "[it] is an accessory bone at the back of the talus which is the bone, the foot bone that makes up the ankle joint…It could be something as congenital or it could be a fracture of the talus." PX16, p. 9. Dr. Anderson obtained x-rays which revealed a large loose bone fragment and diagnosed Petitioner with a fractured talus. PX16, p. 6. Dr. Anderson testified as follows: "Q. Within a reasonable degree of medical certainty, Doctor, can you state whether or not the condition that you observed and the condition for which you performed surgery was related to the mechanism of injury described to you by Mr. Torres from back in January where he fell? A. I do believe that, yes." PX16, p. 7. The

condition to which Dr. Anderson is referring is a fracture of the talus bone, an acute process not an aggravation of some underlying congenital condition.

This distinction seems to be lost on the Majority which specifically finds the injury "at the very least, also caused the *os trigonum* to become symptomatic." *Infra.*, p. 5. Such finding is simply not supported by the record.

As detailed above, Dr. Holmes provided uncontested testimony that Petitioner's *os trigonum* was a congenital condition neither caused nor aggravated by his injury of January 4, 2015. The x-rays obtained by Dr. Rubenstein, Dr. Holmes and Clearing Clinic as well as the MRI of February 6, 2015 and the CT scan of July 6, 2015 support this finding. The x-rays obtained by Dr. Anderson on July 20, 2015 and testified to by him evidence a new condition- a fracture of the talus not present following Petitioner's injury. Dr. Rubenstein speculates he may have missed such acute finding, and Dr. Anderson provides no support of his general causation opinion.

As such, I find Petitioner failed to prove a causal relationship between his accident of January 4, 2015 and his need for surgery. I would deny temporary total disability benefits and medical expenses after June 12, 2015, the date of maximum medical improvement. As such, I would vacate the bill awarded in the amount of $80.01 for Dr. Rubenstein's treatment.

As for the permanent partial disability benefits, pursuant to Section 8.1b of the Act, I weigh the following five factors accordingly (*820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101):

Section 8.1b(b)(i) – level of impairment

Neither party obtained an impairment rating; as such, I assign no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

At the time of the January 4, 2015 accident, Petitioner was employed as a front end assistant which required him help guests and do whatever duties assigned to him by the managers. T. 9. Such occupation requires walking and standing. I find this factor weighs in favor of an increased permanent disability.

20IWCC0487

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 33 years-old on the date of accident. I observe his youth allows for a quicker recovery from his injury. I find this factor weighs in favor of a decreased permanent disability.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner testified he did not return to work for Respondent. T. 35. Petitioner testified he worked through a temporary agency and then found employment with Sam's Club earning $13.25 per hour working 30 to 70 hours per week. T. 40-41. As such, there is no evidence that his future earning capacity was adversely impacted as a result of his injury. I find this factor weighs in favor of a decreased permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner testified the last medical treatment he received was with Dr. Rubenstein on August 12, 2016. Dr. Rubenstein noted no swelling, good range of motion, and slight tenderness. At trial, Petitioner testified he injured the same foot on February 15, 2017 for which he was obtaining treatment. T. 60-61. I assign no weight to this factor.

Based on the above, I find Petitioner sustained permanent partial disability to the extent of 5% loss of use of the left foot pursuant to Section 8(e)11 of the Act.

For the above stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TORRES, CISCO
Employee/Petitioner

Case# **15WC021877**

COSTCO WHOLESALE
Employer/Respondent

20IWCC0487

On 8/27/2019, 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 1.84% 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:

5181 CANDIANO LAW OFFICE
CHARLES J CANDIANO
53 W JACKSON BLVD SUITE 609
CHICAGO, IL 60604

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
) 20IWCC0487
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

Cisco Torres
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **15** WC **21877**

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **June 25, 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 **January 4, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being, a contusion to his left foot and nerve therein, ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**16,137.16**; the average weekly wage was $**310.33**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **1** dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services, as indicated below.

Respondent shall be given a credit of $**6,397.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,397.28**.

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

ORDER

Medical benefits

Respondent shall pay, pursuant to the medical fee schedule, medical bills of Dr. Scott Rubenstein for medical services provided August 12, 2016 as provided in section 8a of the Act.

Temporary total disability

Respondent shall pay Petitioner temporary total disability benefits of $253.00 per week commencing January 5, 2015 through June 12, 2015 as provided in Section 8(b) of the Act.

Permanent partial disability

Based on the factors in Section 8.1b, as discussed as follows, and the record taken as a whole, this Arbitrator finds the Petitioner sustained permanent partial disability to the extent of 15% of a foot (25.05 weeks) pursuant to the Act.

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

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

Signature of Arbitrator

8/27/19
Date

AUG 27 2019

Preface

The parties proceeded to hearing June 25, 2019, on a Request for Hearing indicating the following disputed issues: whether Petitioners current condition of ill-being is causally connected to the accidental injuries sustained January 4, 2015; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to a period of temporary total disability; and what is the nature and extent of the injury. Cisco Torres v. Costco Wholesale, No. 15 WC 21877 Transcript of Proceedings on Arbitration at 5; Arbitrator's Exhibit 1.

Findings of Fact

Cisco Torres (Petitioner), a 33 year old male, testified he was employed by Costco (Respondent) on January 4, 2015, as a front end assistant. He was assisting a customer in the parking lot during a snow storm. His foot became trapped between a car and a curb, and Petitioner twisted his foot, then rolled his left ankle, loosing his balance. Petitioner got up and, using a shopping cart, returned to the store and reported the accident. Torres at 8-14.

Petitioner testified he sought medical attention at a clinic he was sent to by Respondent. He was told he had a sprain and should see a specialist if he wanted additional treatment. He was taken off work and prescribed medication. His ankle became worse. Petitioner testified he returned to the clinic and was told there was nothing they could do. Petitioner then saw Dr. Scott Rubenstein. Torres at 17-21.

Rubenstein testified via evidence deposition. He saw Petitioner between January 16, 2015, and August 12, 2016. Rubenstein said Petitioner sustained two injuries to his foot. He gave Petitioner a walking boot brace, and thought Petitioner had ligamentus injuries. He kept Petitioner off work and then on restrictions. Time had resolved most of the symptoms for which he treated Petitioner. Petitioner's Exhibit 17.

Petitioner testified he submitted to an independent medical examination by Dr. George Holmes. Holmes testified via evidence deposition. A board certified orthopedic surgeon, he evaluated Petitioner March 18, 2015. He concluded Petitioner had a contusion of the foot and maybe a portion of a nerve was contused. He said it was related to the accident. Holmes testified Petitioner could do a sedentary job with restrictions, prescribed a Lidoderm patch, and said Petitioner was not at MMI. Torres at 24; Respondent's Exhibit 3 at 4-11.

Dr. Holmes further testified he saw Petitioner May 20, 2015, and felt Petitioner may have some nerve injury, but did not need a boot or crutches. He could use a TENS unit and discontinue use if there was no improvement. Holmes recommended an EMG, and if negative, could return to work. Holmes said Petitioner was not at MMI. Respondent's Exhibit 3 at 11-16.

Holmes testified he saw Petitioner November 11, 2015, after he had surgery to remove os trigonum, a small bone in the back of the ankle. He thought it was of long standing duration, an old injury or since birth. He thought it was not related to the injury and the surgery not related.

He testified Petitioner's ability to work or any limitations were not related to the injury. He was not subject to cross examination by Petitioner. Respondent's Exhibit 3 at 18-23.

Petitioner testified he did not return to work in June 2015 because he was in a lot of pain. He said he sought more medical attention. Torres at 25-27. He sought treatment from a podiatrist in Indiana, a pain clinic in Chicago, and had surgery done by Dr. Joel Anderson, with subsequent physical therapy. Petitioner thinks Dr. Rubenstein released him to go to work in the summer of 2016. He said he had not worked since the accident. Torres at 28, 30, 31, 32, 34.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. An injured employee bears the burden of proof to establish the elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and his employment. Navistar International Transportation Corporation v. Industrial Commission (Diaz), 315 Ill. App. 3d 1197, 1202-1205 (2002). A claimant must prove that some act or phase of his employment was a causative factor in the ensuing injury. Whether a causal connection exists is a question of fact. Vogel v. Illinois Worker's Compensation Commission, 354 Ill. App., 3d 780, 786 (2005).

I find as a conclusion of law, as a result of the accident on January 4, 2015, Petitioner suffered a contusion of his left foot and nerve therein and rely on the testimony of Dr. Scott Rubenstein and Dr. George Holmes. Petitioner's Exhibit 17 at 8, 11; Respondent's Exhibit 3 at 10, 15, 21. I do not find the condition of the os trigonum and that subsequent surgery related to the accident. I rely on the testimony of Dr. George Holmes. Respondent's Exhibit 3 at 20, 21.

Disputed issue **J** is, has Respondent paid all appropriate charges for reasonable and necessary medical services. An employer shall pay according to a fee schedule or negotiated rate, all necessary first aid, medical services and hospital services incurred, reasonably required to cure or relieve from the effects of an accidental injury. 820 ILCS 305/8a.

All of the unpaid medical bills claimed by Petitioner, with the exception of Dr. Scott Rubenstein, relate to the os trigonum and subsequent surgery, which is not related to the accidental injury. Those claims are denied. As to the claim for $80.01 to Dr. Rubenstein, this appears to be for an office visit of August 12, 2016, including a physical examination and a release to work without restrictions. Given Rubenstein's longstanding involvement with Petitioner, I find Respondent required to pay for the visit subject to the fee schedule. Petitioner's Exhibit **1**; Petitioner's Exhibit 2.

Disputed issue **K** is whether Petitioner is entitled to temporary total disability benefits from January 5, 2015, through June 5, 2016. To be entitled to a temporary total disability award under the Act, an injured worker must prove not only he did not work, but that he was unable to work. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App. 3d 710 (1993). Such award exists from the time the injury incapacitates him from work until such time as he is recovered or restored as the permanent character of the injury will permit. Mount Olive Coal Company v. Industrial Commission, 295 Ill. 429 (1920).

Petitioner was found at MMI June 12, 2015, by Dr. Holmes, who testified he could return work full duty. Respondent's Exhibit 3 at 18; Respondent's Exhibit 4. Petitioner simply testified he did not return to work in June 2015 because he was in a lot of pain. Torres at 25-26. He then sought treatment for an unrelated condition. I find as a conclusion of law, Petitioner entitled to an award of temporary total disability benefits from January 5, 2015, through June 12, 2015, in the amount of $253.00 per week (minimum TTD with one dependent). I further find Respondent has paid $6,397.28 in such benefits and is entitled to a credit. Respondent's Exhibit 1.

Disputed issue L is, what is the nature and extent of the injury. I find as a conclusion of law, Petitioner sustained a contusion of the left foot and a portion of a nerve. Dr. Rubenstein testified time resolved most of the symptoms for which he was treating Petitioner. Here, any permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, the testimony was that he was a front end assistant with multiple responsibilities. He did not return to work, but that proved to be because of an unrelated condition. Petitioner did lose out on a promotion because of continued medical treatment. Because of this, I give this factor some weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 33 years old at the time of the accident. Petitioner testified a doctor told him it would take time for his nerve to completely heal. I give this factor some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, the accident did affect a promotion, and Respondent's conduct toward returning Petitioner to work, which is unchallenged, could be called shameful. I give this some weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, there was evidence on this by Petitioner and Dr. Rubenstein regarding fatigue problems in Petitioner's leg in 2016. I give this factor some weight in determining the level of disability.

Based on these factors and the record taken as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 15% of a foot (25.05 weeks).

Arbitrator

5/17/19
Date